THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LEV12-001
Order LEV12-01

IN THE MATTER of an appeal by Glen Fisher of two orders issued by the Minister of Environment, Labour and Justice.

BEFORE THE COMMISSION
on Thursday, the 14th day of June, 2012.

Maurice Rodgerson, Chair
Allan Rankin, Vice-Chair

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse
Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by Glen Fisher of two orders issued by the Minister of Environment, Labour and Justice.

Contents

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Appearances

1. For the Appellant Glen Fisher

Counsel:

Robert Tocchet
Paul Bender, Articled Clerk

2. For the Respondent Minister

Counsel:

Ruth M. DeMone

IN THE MATTER of an appeal by Glen Fisher of two orders issued by the Minister of Environment, Labour and Justice.

Reasons for Order

1. Introduction

[1] On February 29, 2012, counsel for Glen Fisher (Mr. Fisher) filed an appeal under the ***Environmental Protection Act*** (the ***Act***), R.S.P.E.I. 1988, Cap.E-9.

[2] Mr. Fisher seeks to appeal a February 9, 2012 order issued by the Honourable Janice Sherry, Minister of Environment, Labour and Justice pertaining to costs pursuant to subsection 34(2) of the ***Act***. Mr. Fisher also seeks to appeal a March 5, 2010 order issued by the Honourable Richard Brown, then Minister of Environment, Energy and Forestry pursuant to section 7 of the ***Act***.

[3] In a letter dated March 5, 2012 addressed to counsel for both parties, the Commission's Appeals Administrator identified two preliminary issues and invited counsel to file written submissions on these issues. On March 19 and 23, 2012 the Commission received written submissions from counsel for the present Minister, Minister Sherry (the Minister). On March 21 and 26, 2012 the Commission received written submissions from counsel for Mr. Fisher.

[4] As noted on the Notice of Appeal form, an appeal to the Commission is a public process and accordingly, all filed documents form part of the Commission's public record.

2. Discussion

Submissions of Counsel

[5] Council for the Minister filed a written submission received on March 19, 2012. The substance of this letter appears below.

This is in response to your letter of March 5, 2012 directed to Jim Young, Director, Department of Environment, Labour and Justice ("Environment") in connection with the above noted matter. Please be advised that I represent Environment in this matter and all future communications should be directed to me.

Environment takes the position that the Island Regulatory and Appeals Commission (the "Commission") does not have jurisdiction to deal with the Notice of Appeal dated February 29, 2012 for the following reasons:

1. *The Notice of Appeal is out of time insofar as the environmental protection order issued March 5, 2010 is concerned; and*

2. *The Minister's Order for Costs dated February 9,2012 is not within the category of orders that can be appealed to the Commission under s. 29.1(2),(3) or (4) of the Environmental Protection Act, R.S.P.E.I. 1988, Cap. E-9 (the "Act").*

Order of March 5, 2010

The Notice of Appeal filed on behalf of Mr. Fisher is dated February 29, 2012. According to the date stamp, it was filed with the Commission the same date. Accordingly, the Notice of Appeal was filed almost two (2) years after service of the Order it seeks to appeal. As a statutory tribunal, the Commission only has the jurisdiction granted to it by statute. Subsection, 29.1 (2) of the Environmental Protection Act, R.S.P.E.1. 1988, Cap. E-9 provides that an appeal from an Environmental Protection Order ("EPO") issued pursuant to s. 7(2) of that Act must be filed within 21 days of service of the EPO. In this case, the EPO was served on March 5, 2010.

As the Notice of Appeal is out of time with respect to the March 5, 2010 order, the Commission does not have jurisdiction to deal with it.

Order for Costs dated February 9, 2012

Pursuant to s. 34(1) of the Act, where the Minister has issued an order under the Act, including an EPO, and the person to whom it is directed has failed to comply with the order, the Minister may take appropriate remedial action to carry out the terms of the order. Thereafter, the Minister may issue an order for the costs of the remedial action against the person to whom the original order was given.

Environment takes the position that the Order for Costs cannot be appealed to the Commission as it does not meet the criteria for an appeal. Orders issued under s. 34(2) of the Act are not included as orders which are appealable pursuant to s. 29.1(2), (3) or (4) of the Act.

For the foregoing reasons, Environment submits that the Commission does not have jurisdiction to deal with either of the two orders set out in the Notice of Appeal, and the Notice of Appeal should be rejected by the Commission.

[6] Council for Mr. Fisher filed a written submission received on March 22, 2012. A major portion of this submission appears below.

1. *We received your letter dated 05 March 2012 in which you requested written submissions on a preliminary matter that goes to the heart of the Island Regulatory and Appeals Commission's (IRAC) jurisdiction to hear Mr. Fisher's appeal. This letter shall function as our position on the jurisdictional matter.*

2. *Mr. Fisher desires to appeal two Ministerial Orders. The first, issued pursuant to s. 7 of the Environmental Protection Act, R.S.P .E.!. 1988, Cap. E-9 (hereinafter "EPA") is dated 05 March 2010. The second was issued pursuant to subsection 34(2) of the EPA and is dated 09 February 2012.*

3. *Subsection 29.1(2) of the EPA reads,*

> *A person to whom an environmental protection order is issued by the Minister or an environment officer under subsection 7(2) or 7.1(2) may, within 21 days from the date the environmental protection order is served on the person, appeal the environmental protection order by serving a notice of appeal on the Commission.*

4. *The EPA is silent regarding to which tribunal or court an appeal of a subsection 34(2) Order shall be made. However, because an Order issued pursuant to subsection 34(2) directly stems from the original s. 7 Order, we maintain that IRAC retains jurisdiction to hear this appeal.*

5. *A section 7 Order compels a person to remediate his contaminated land. If the Minister is dissatisfied with the progress of the clean-up effort, it may directly supervise the remediation by issuing an Order pursuant to subsection 34(2) of the EPA. A subsection 34(2) Order also enables the Minister to recover any costs expended on the clean-up effort from those named in the original s. 7 Order. Simply put, the Orders do not operate independently of one another. A s. 7 Order and a subsection 34(2) Order are two parts of a single process.*

6. *Legislatures are presumed to act in a rational, intentional and purposive manner. In addition, a legislature is presumed to act with full knowledge of existing statutes. Section 3 of the Judicial Review Act, R.S.P.E.1. 1988, Cap. J-3 (hereinafter "JRA") grants judges wide discretion to review tribunals' decisions. Section 3 reads:*

> *(1) An application for judicial review may be made to a judge or, with the consent of all parties and of the Court of Appeal or a judge thereof, to the Appeal Division.*
>
> *(1.1) An application for judicial review shall be brought within thirty days of the date of the exercise of authority complained of but a judge may extend the time for making the application, either before or after the expiration of the time so limited, on such terms as he considers proper, where he is satisfied that there are grounds for relief and that no substantial prejudice or hardship will result to any person by reason of the delay.*

7. *The legislature's silence regarding which tribunal shall hear an appeal of as. 34(2) Order must be interpreted in the context of the EPA as a whole. Since the EPA specifically grants IRAC the jurisdiction to review s. 7 Orders, the legislature would also intend IRAC to review Orders which directly flow from them. A rational legislature would not have intended residents of PEl to appeal to two different panels concerning the same fact situation. A bifurcated appeal process under the EPA and JRA would needlessly complicate the procedure, be difficult for residents to navigate, and increase costs.*

8. IRAC's current "Notice of Appeal" form reflects the reasonable interpretation of the legislation which we propose the Commission adopt in this case. The form states that one may appeal "a decision relating to an environmental protection order issued under subsection 7(2) or 7.1(2) of the Act" to IRAC. The subsection 34(2) Order directly relates to the s. 7 Order.

9. In your letter, you express concern over the 21 day limitation appeal period as it relates to the s. 7 Order. A prima facie examination of the facts suggests that IRAC will not have the jurisdiction to hear the s. 7 Order appeal. However, because the s. 7 Order served as the foundation upon which the current subsection 34(2) Order was built, the Minister resurrected the original Order. Mr. Fisher argues that this process renewed the limitation period on the s. 7 Order.

[7] Counsel for the Minister then filed a further written submission on March 23, 2012. The substance of this letter appears below.

The Environmental Protection Act (the "Act") provides an appeal process for orders issued pursuant to s. 7(2) or 7.1 (2). It does not provide for an appeal of a costs order issued under s. 34(2) of the Act. At that stage, an appeal of the initial order would be moot as, by operation of the Act, the remedial work ordered must already have been completed. The costs order, although it must follow the environmental protection order, is a separate order which would require a separate appeal provision before an appeal could be pursued. The Commission cannot create jurisdiction where none exists.

Mr. Fisher acknowledges that he did not appeal the s. 7 order within 21 days, but claims that he did not know the consequences of not doing so. However, s. 34 of the Act clearly spells out the consequences of failing to carry out the remedial work ordered in an environmental protection order, namely that the Minister will have the work done and may seek to recover the cost of the remedial work from the person to whom the environmental protection order was directed.

Further, the orders in question are not prosecutions under the Act. Accordingly, the defence of due diligence is not applicable in any event. Under the principles of Rylands v. Fletcher, property owners are responsible for any damages caused by the escape of material they have brought onto their property.

For the foregoing reasons, and the reasons set out in our letter of March 16, 2012, we submit that the Commission should decline to hear an appeal in this matter.

[8] Council for Mr. Fisher then filed a further written submission on March 26, 2012. A major portion of this letter appears below.

1. We received the Minister's response (dated 23 March 2012) to our submission concerning lRAC's jurisdiction to hear this appeal.

2. *The Respondent relies on the principles of Ryland v. Fletcher, an English case from 1868 which concerns the escape of water from one property onto a neighboring property. Ryland is not applicable to the case at hand which concerns the release of furnace oil in contemporary Canada. More recent Canadian jurisprudence concerning the escape of pollutants exists and should be applied to the case at hand.*

3. *In R. v. Sault Ste Marie [1978] 2 S.C.R. 1299, the Supreme Court of Canada explored the differences between absolute liability, strict liability and mens rea offenses in the context of the escape of pollutants. The appellant suggests that the principles found in Sault Ste. Marie should be applied to Mr. Fisher's appeal.*

4. *In Sault Ste. Marie, Chief Justice Dickson (writing for the unanimous Court) differentiates the aforementioned types of offenses. Conviction of a true crime requires a mens rea element, whereas a conviction of a strict liability offense need not require proof of mens rea. A due diligence defence exists when dealing with strict liability offences. The Court concludes that a due diligence defence "will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event." Conversely, a due diligence defence is unavailable in absolute liability offences.*

5. *To assist with identifying the various offences, the Supreme Court suggests "[t]he overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used will be primary considerations in determining whether the offence falls into the third category [absolute liability]. "*

   …

7. *The Respondent suggests that the Minister may make an Order compelling a property owner to incur significant expenses without a finding a fault. The Respondent suggests that merely owning the furnace oil which escaped is sufficient justification to ground the subsection 34(2) Order. The Minister is erroneously treating the issuance of a subsection 34(2) Order as a conviction of an absolute liability offence.*

8. *For the reasons set out in our submission dated 21 March 2012 and for the forgoing reasons, we submit that IRAC should hear Mr. Fisher's appeal in this matter.*

3. Findings

[9] The Commission has considered the submissions of counsel for the parties and finds that it does not have the jurisdiction to hear this appeal. The reasons for this decision follow.

The March 5, 2010 Order of the Minister

[10] The time limit for appeals is statutory in nature. The Commission is a creature of statute and, like every Canadian administrative tribunal, has only the powers given to it by the Legislature.

[11] Mr. Fisher submits that the discoverability rule ought to be applied to extend the appeal period. Mr. Fisher acknowledges that he was aware of the order but submits that he was not aware of the potential consequences for failing to satisfy the order. This submission cannot prevail for the following reasons. First, the discoverability rule does not apply to extend a limitation period that is triggered by a specific event that is fixed by the Legislature. In this case, the specific event is the service of the Minister's order on Mr. Fisher. The twenty-one day time period starts with the service of the order and the order identifies the right of appeal and the time limitation for exercising that right. Second, unfamiliarity with the law does not delay or postpone a limitation period. The law is presumed to be known. The discoverability rule applies only to discovery of the facts necessary to sustain a cause of action at law. In this case, the basic fact that an oil spill had occurred was well known to Mr. Fisher and the Minister's order recited the basic facts.

[12] The Commission finds that the Legislature has established the appeal period in the ***Act***, and the Commission is not vested with the authority to extend that period. Accordingly, the Commission does not have the jurisdiction to hear the appeal of the March 5, 2010 Order as the appeal period had expired before the appeal had been filed.

The February 9, 2012 Order of the Minister

[13] As previously noted, the Commission is a creature of statute. It has no inherent authority to hear appeals.

[14] The ***Act*** provides the Minister with the authority to make many types of orders. However, the Legislature has decided to make only some of those orders subject to an appeal to the Commission. The language chosen by the Legislature is very clear and cannot be ignored. When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned.

[15] Mr. Fisher submits that the order made pursuant to section 34(2) of the ***Act*** revived or resurrected the order made pursuant to section 7 of the ***Act*** for the purpose of an appeal to the Commission. The Commission finds that there is nothing in the ***Act*** that provides for such a revival or resurrection. Rather, the orders appear to have independent authority in separate provisions.

[16] Accordingly, the Commission finds that it has no jurisdiction to hear Mr. Fisher's appeal of the February 9, 2012 Order as the Legislature has not granted the Commission the authority to hear appeals of an order pertaining to costs.

[17] While it could be said that the Commission's lack of jurisdiction might leave Mr. Fisher without a recourse to appeal the Minister's Order with respect to costs, the process of judicial review is set out under the ***Judicial Review Act***, R.S.P.E.I. 1988, c. J-3 and that process may be available in these circumstances.

4. Disposition

[18] An Order determining that the Commission has no jurisdiction to hear the appeal of either order of the Minister will be issued.

IN THE MATTER of an appeal by Glen Fisher of two orders issued by the Minister of Environment, Labour and Justice.

Order

WHEREAS the Appellant Glen Fisher has appealed both the March 5, 2010 and February 9, 2012 orders issued by the Respondent Minister of Environment, Labour and Justice;

AND WHEREAS the Commission identified two preliminary issues and invited written submissions from the Appellant and the Respondent;

AND WHEREAS the Commission has reviewed the submissions of the parties and the applicable law, and has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Environmental Protection Act***

IT IS ORDERED THAT

1. **The Commission has no jurisdiction to hear an appeal of the March 5, 2010 order issued by the Respondent.**

2. **The Commission has no jurisdiction to hear an appeal of the February 9, 2012 order issued by the Respondent.**

DATED at Charlottetown, Prince Edward Island, this 14th day of June, 2012.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*
Maurice Rodgerson, Chair

(Sgd.) *Allan Rankin*
Allan Rankin, Vice-Chair

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)