What's the Best Way to Challenge an Environmental Administrative Order?

If government officials think your company is violating an environmental law, they may order you to take measures to correct the problem. Not complying with a so-called administrative order can lead to prosecution and penalties. But what if you think the order is invalid? How and when can you challenge it? Should you file an immediate and direct appeal? Or can you opt to disobey the order and challenge its validity only when and if you get charged and end up in court? The strategy of waiting until trial to challenge an administrative order is known as a "collateral attack." And while it buys you time, it's not something you can do in all circumstances. **Basic Rule:** If there's a mechanism to appeal orders directly, you must use it; but if such a mechanism doesn't exist, you can mount a collateral attack on the order when you get to trial. Here are 2 cases showing how the courts apply this rule in real-life situations.

Company Can't Make Collateral Attack on Environmental Order

Situation: Ontario Ministry of Environment (MOE) inspectors determine that transformers containing PCBs at an abandoned mine constitute an environmental risk. They order the mine owner to take corrective actions. The mine owner thinks the

MOE inspectors are wrong and that the order is invalid. But rather than appeal the order to the Environmental Appeals Board (EAB), the owner ignores it. The MOE cleans the site itself and charges the owner with 4 *Environmental Protection Act* (EPA) violations. The owner argues that the order was invalid and asks the court to dismiss the charges.

Ruling: The Canadian Supreme Court rules that the owner can't collaterally attack the order.

Reasoning: The question is not if persons on the receiving end of an administrative order can challenge the order's validity, but of when and how. Should it be by direct and immediate appeal or collateral attack? When the law the administrative order is meant to enforce doesn't furnish an answer, the courts must look at the law and try to figure out which method would be more consistent with the law's intentions. In this case, the Court noted that the Ontario EPA gives the MOE broad powers to prevent pollution. Allowing collateral attacks would give companies leeway to disobey orders and thus undermine the MOE's capacity to prevent pollution. Moreover, Ontario created a special tribunal for hearing environmental questions: the EAB. Thus, the Court concluded that challenges to the validity of administrative orders in Ontario should be by direct appeal to the EAB rather than by collateral attack in court.

R. v. Consolidated Maybrun Mines Ltd., 1998 CanLII 820 (SCC), [1998] 1 SCR 706

Company Can Make Collateral Attack on Environmental Order

Situation: The New Brunswick Minister of Agriculture, Fisheries and Aquaculture determines that a fish farm is in violation of the *Aquaculture Act* and issues an administrative order directing it to take corrective measures. The farm owner thinks the order is invalid and decides not to take the

measures. As a result, they're charged with 2 offences. At trial, the farm owner claims that the order was invalid under the Act. The Crown argues that the owner has no right to challenge the order's validity at trial.

Ruling: The New Brunswick Court of Appeal allows the collateral attack, finds the order invalid, and dismisses all charges.

Reasoning: Although it reached a different conclusion, the New Brunswick high court followed the same principles as *Maybrun*. The difference in this case is that New Brunswick doesn't have a mechanism for a person to directly appeal an administrative order the way Ontario does. Accordingly, bringing a collateral attack at trial is thus the only mechanism available for attacking an order's validity. In other words, in New Brunswick the choice isn't appeal or collateral attack, but rather collateral attack or no attack. And since there must be some way a person who receives an order can challenge its validity, collateral attacks in court are allowed in New Brunswick.

Hawkins Bros. Fisheries Ltd. v. R., 2006 NBCA 114 (CanLII)