

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**HER MAJESTY THE QUEEN
in right of the Province of Ontario
as represented by the Minister of the Environment**

(Respondent)

- and -

CASTONGUAY BLASTING LTD.

(Appellant)

**FACTUM
OF THE MOVING PARTY AND PROPOSED INTERVENOR
CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
Suite 301, 130 Spadina Avenue,
Toronto, Ontario
M5V 2L4

**Joseph F. Castrilli (L.S.U.C. #26123A)
Ramani Nadarajah (L.S.U.C. #30023U)**

Tel: (416) 922-7300

Fax: (416) 944-9710

Solicitors for the moving party and
proposed intervenor
Canadian Environmental Law Association

TO: **MILLER THOMSON LLP**
Suite 600, 60 Columbia Way
Markham, Ontario
L3R 0C9

Bruce McMeekin (L.S.U.C. #29993D)

Tel: (905) 415-6791

Fax: (905) 634-9049

Solicitors for the Appellant

AND TO: **MINISTER OF THE ENVIRONMENT**
Ministry of the Environment
Ottawa District Office
2430 Don Reid Drive
Ottawa, Ontario
K1H 1E1

Paul McCulloch (L.S.U.C. #41913A)

Tel: (613) 521-3450, ext. 234

Fax: (613) 521-8522

Solicitor for the Respondent

PART I - NATURE OF THE MOTION

1. The Canadian Environmental Law Association (“CELA”) seeks to intervene as a friend of the court in the within appeal brought by Castonguay Blasting Ltd. respecting the judgment of Justice Timothy D. Ray of the Superior Court of Justice dated January 28, 2011, as amended on February 1, 2011, entering a conviction on a Crown appeal from an acquittal for the failure of Castonguay to notify the Ministry of the Environment (Ontario) (“MOE”) contrary to section 15 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as am. (“*EPA*”), concerning blasting activity that caused fly rock debris damage to private property.

PART II - FACTS

2. CELA is a corporation established without share capital, whose objects include using and promoting the use of the legal system to defend the environment through advocacy before the courts and administrative tribunals, law reform, and community education.

Affidavit of Theresa McClenaghan, sworn September 30, 2011, paragraph 4 and Exhibit A thereto.

Motion Record, pages 8, 15-17.

3. CELA is a specialty clinic funded by Legal Aid Ontario to provide summary advice to the public, and to represent low-income individuals, citizens’ groups and vulnerable communities in the courts and before tribunals on a wide variety of environmental matters, often including the application, interpretation, and enforcement of the *EPA*.

Affidavit of Theresa McClenaghan, sworn September 30, 2011, paragraph 5.

Motion Record, page 8.

4. CELA has produced numerous legal briefs, books, book chapters, articles and other publications related to application, interpretation, and enforcement of the *EPA*.

Affidavit of Theresa McClenaghan, sworn September 30, 2011, paragraphs 6-7.

Motion Record, pages 9-10.

5. CELA also has undertaken private prosecutions, and filed applications for investigation under the *Environmental Bill of Rights* (“*EBR*”), alleging contraventions of section 14(1) of the *EPA*.

Affidavit of Theresa McClenaghan, sworn September 30, 2011, paragraphs 8-9.

Motion Record, page 10.

6. CELA itself has been granted leave to intervene in the past both as a friend of the court and as a party, at all levels of court including the Court of Appeal for Ontario, the Federal Court of Canada, and the Supreme Court of Canada, and with respect to several cases relevant to the issues in the within appeal, including the Supreme Court of Canada judgment in *Ontario v. Canadian Pacific Ltd.* that has been considered by the courts below, and that is cited at paragraphs 11, 14-15, 19-25, 30-31 in the factum of the Appellant.

Affidavit of Theresa McClenaghan, sworn September 30, 2011, paragraphs 11-14.

Motion Record, pages 11-12.

Appellant's Factum: pages 5-14, paras. 11, 14-15, 19-25, 30-31.

7. Though CELA has no direct interest in the specific outcome of this appeal, resolution of the issues identified by CELA will have profound and far-reaching implications that transcend the interests of the immediate parties to the appeal, and may fundamentally affect the ability of future CELA clients, and the public at large, to utilize the protections afforded under the *EPA*.

Affidavit of Theresa McClenaghan, sworn September 30, 2011, paragraphs 17-18.

Motion Record, pages 12-13.

8. The knowledge, experience, and expertise of CELA since its establishment over 40 years ago can be of assistance to the Court in the within appeal.

Affidavit of Theresa McClenaghan, sworn September 30, 2011, paragraphs 15, 19.

Motion Record, pages 12-14.

PART III - ISSUES AND LAW

Issue: Whether this Honourable Court should grant leave to CELA to intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument in the within appeal?

9. The Court may grant leave to any person to intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Rule 13.02, *Rules of Civil Procedure*.

10. Leave to intervene in the Court of Appeal as a friend of the Court may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

Rule 13.03(2), *Rules of Civil Procedure*.

11. Where applicants for leave to intervene have no direct interest in the outcome of a matter, an intervention will still be permitted where they have an interest in the public law issues involved and are able to make a useful contribution to the resolution of those issues, without injustice to the immediate parties.

MacMillan Bloedel Ltd. v. Mullin (1985), 50 C.P.C. 298 at 300-301 (B.C.C.A.).

Intervenor's Book of Authorities, Tab 1.

12. There is greater latitude for intervention in public interest cases than in private cases. On a motion for intervenor status the matters to be considered are (1) the nature of the case, (2) the issues which arise, (3) the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties, and (4) the ability to offer a perspective even slightly different from that of the existing parties.

John Doe v. Ontario (Information and Privacy Commissioner) (1991), 7 C.P.C. (3d) 33 at 36 (Ont. Ct. - Gen. Div.).

Intervenor's Book of Authorities, Tab 2.

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada (1990), 74 O.R. (2d) 164 at 167 (Ont. C.A.).

Intervenor's Book of Authorities, Tab 3.

2016596 Ontario Ltd. v. Ontario (Minister of Natural Resources) (2003), 2 C.E.L.R. (3d) 1 at para 6 (Ont. C.A.).

Intervenor's Book of Authorities, Tab 4.

Her Majesty the Queen in Right of Ontario v. Kingston (City) (2003) Docket No. M30049, (Ont. C.A.) at para 1.

Intervenor's Book of Authorities, Tab 5.

Pinet v. Penetanguishene Mental Health Centre (Administrator) (2006), 80 O.R. (3d) 139 at para 35 (S.C.J.).

Intervenor's Book of Authorities, Tab 6.

13. The within appeal respecting the relative breadth of the duty to report is an issue potentially relevant to a broad range of activities beyond blasting. Accordingly, the interpretation of the duty to report is an issue with great importance to the public.

R. v. Castonguay Blasting Ltd. (2011), 58 C.E.L.R. (3d) 30 at para 21 (Ont. C.A.).

Intervenor's Book of Authorities, Tab 7.

14. The expertise and unique perspective of a proposed intervenor is often an important consideration in granting leave to intervene. While CELA requests the same appeal disposition as the Respondent (i.e. dismissal), CELA does so from a different perspective and for different legal and public policy reasons. CELA, by reason of its special knowledge and expertise, may be able to place the issues in a slightly different perspective which will be of assistance to the court.

Pinet v. Penetanguishene Mental Health Centre (Administrator) (2006), 80 O.R. (3d) 139 at para 37 (S.C.J.).

Intervenor's Book of Authorities, Tab 6.

15. The Court should exercise its discretion to grant leave to CELA to intervene in this case because the intended argument of CELA contained in Schedule "C" herein, addresses two issues of statutory interpretation not raised before the courts below, or addressed by the Respondent. Accordingly, it is respectfully submitted that these issues should be considered by this Honourable Court and the CELA argument will make a useful contribution to resolution of the matter without causing injustice to the parties.

John Doe v. Ontario (Information and Privacy Commissioner) (1991), 7 C.P.C. (3d) 33 at 36-37 (Ont. Ct. - Gen. Div.).
Intervenor's Book of Authorities, Tab 2.

16. The terms and conditions for granting leave to intervene as a friend of the court can include that the intervenor (1) take the record as it is and not be permitted to adduce further evidence, (2) not seek costs on the appeal but costs may be awarded against it, (3) deliver its factum promptly, and (4) be limited as to time for oral argument on the appeal.

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada (1990), 74 O.R. (2d) 164 at 168 (Ont. C.A.).
Intervenor's Book of Authorities, Tab 3.

2016596 Ontario Ltd. v. Ontario (Minister of Natural Resources) (2003), 2 C.E.L.R. (3d) 1 at para 16 (Ont. C.A.).
Intervenor's Book of Authorities, Tab 4.

Her Majesty the Queen in Right of Ontario v. Kingston (City) (2003) Docket No. M30049, (Ont. C.A.) at para 2.
Intervenor's Book of Authorities, Tab 5.

17. Where a matter raises significant issues of public importance and interest as does the within appeal, the Court should exercise its discretion such that no order of costs is

made on the motion, or as a term or condition for granting leave to intervene as a friend of the court on the hearing of the appeal.

Her Majesty the Queen in Right of Ontario v. Kingston (City) (2003)
Docket No. M30049, (Ont. C.A.) at para 2.
Intervenor's Book of Authorities, Tab 5.

David Scriven and Paul Muldoon, *Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure* (1985), 6 *Advocates Quarterly* 448 at 471-472.
Intervenor's Book of Authorities, Tab 8.

PART IV - ORDER REQUESTED

18. CELA respectfully requests an Order of this Honourable Court pursuant to Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure* in the following terms:

- (a) That CELA be granted leave to intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument in the within appeal,
- (b) That CELA take the record as it is and shall not file further evidence,
- (c) That within 15 days of the order granting leave, CELA be permitted to submit a factum generally in the terms attached hereto as Schedule "C",
- (d) That CELA be allocated up to 20 minutes for oral argument at the hearing of the appeal,
- (e) That costs of this motion and the appeal shall not be awarded to or against CELA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 3, 2011

Joseph F. Castrilli

Ramani Nadarajah

Counsel for the Moving Party and Proposed
Intervenor Canadian Environmental Law
Association

SCHEDULE “A”**LIST OF AUTHORITIES**

1. *MacMillan Bloedel Ltd. v. Mullin* (1985), 50 C.P.C. 298 at 300-301 (B.C.C.A.).
2. *John Doe v. Ontario (Information and Privacy Commissioner)* (1991), 7 C.P.C. (3d) 33 at 36-37 (Ont. Ct. - Gen. Div.).
3. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 at 167-168 (Ont. C.A.).
4. *2016596 Ontario Ltd. v. Ontario (Minister of Natural Resources)* (2003), 2 C.E.L.R. (3d) 1 at paras 6, 16 (Ont. C.A.).
5. *Her Majesty the Queen in Right of Ontario v. Kingston (City)* (2003) Docket No. M30049, (Ont. C.A.) at para1-2.
6. *Pinet v. Penetanguishene Mental Health Centre (Administrator)* (2006), 80 O.R. (3d) 139 at paras 35, 37 (S.C.J.).
7. *R. v. Castonguay Blasting Ltd.* (2011), 58 C.E.L.R. (3d) 30 at para 21 (Ont. C.A.).
8. David Scriven and Paul Muldoon, *Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure* (1985), 6 Advocates Quarterly 448, at 471-472.

SCHEDULE “B”

LIST OF STATUTES

1. Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure*.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

13.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

SCHEDULE “C”

Court of Appeal File No. C53611

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**HER MAJESTY THE QUEEN
in right of the Province of Ontario
as represented by the Minister of the Environment**

(Respondent)

- and -

CASTONGUAY BLASTING LTD.

(Appellant)

**ARGUMENT ON BEHALF OF
CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
Suite 301, 130 Spadina Avenue,
Toronto, Ontario
M5V 2L4

**Joseph F. Castrilli (L.S.U.C. #26123A)
Ramani Nadarajah (L.S.U.C. #30023U)**

Tel: (416) 922-7300

Fax: (416) 944-9710

Solicitors for the Intervenor
Canadian Environmental Law Association

PART I - INTRODUCTION

1. The judgment of Justice Timothy D. Ray of the Superior Court of Justice dated January 28, 2011, as amended on February 1, 2011, entered a conviction against Castonguay Blasting Ltd. (the “Appellant”) on a Crown appeal from an acquittal, for failing to notify the Ontario Ministry of the Environment (“MOE”) contrary to section 15(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as am. (“EPA”), concerning blasting activity that caused fly rock debris damage to private property.

Intervenor’s Book of Authorities, Tab 1: *R. v. Castonguay Blasting Ltd.* (2011), 57 C.E.L.R. (3d) 142 at para 44 (S.C.J.)

2. Mr. Justice Ray found that the trial judge, in dismissing the charge, erred in law in finding that the *EPA* and the jurisprudence limited application of the Act to an “environmental event”. In particular, Mr. Justice Ray held that there was “nothing in the *EPA* that limits the application of sections 14 and 15 to the natural environment or an environmental event as was decided by the trial judge.”

Intervenor’s Book of Authorities, Tab 1: *R. v. Castonguay Blasting Ltd.* (2011), 57 C.E.L.R. (3d) 142 at para 23-24 (S.C.J.)

3. The submission of the intervenor Canadian Environmental Law Association (“CELA”) is that the decision of Mr. Justice Ray should be upheld for the reasons given in his decision and also because of case law and statutory interpretation not referred to by any of the parties before that court or to date before this Honourable Court.

PART II - THE FACTS

4. CELA accepts the facts as stated by Mr. Justice Ray in his decision.

PART III - ISSUES AND LAW

ISSUE 1: THE PROPER INTERPRETATION OF THE TERMS “ADVERSE EFFECT”, “CONTAMINANT”, “DISCHARGE”, AND “NATURAL ENVIRONMENT”, COMMON TO BOTH SECTIONS 14(1) AND 15(1), AND DEFINED IN SECTION 1(1) OF THE *EPA*, SUPPORTS THE INTERPRETATION THAT THE *EPA* APPLIES TO, AND INCORPORATES, EVENTS THAT WOULD BE COVERED BY ONE OR MORE COMMON LAW PRINCIPLES .

(a) Overview

5. The *EPA* applies to, and incorporates, events covered by several common law principles, signaling an intention on the part of the Ontario Legislature to take a broad definition of environment as coming within the ambit of the statute.

6. Before there was a recognized body of environmental statute law in Ontario, there were, and still are, common law principles that could be used by persons to safeguard against incidents that modern legislation now broadly defines as environmental offences.

7. These common law principles, including private nuisance, strict liability, trespass, and negligence, were, and are, designed to remedy tortious conduct that injures, or has the potential to injure, among other things, human life, health, property or its use and enjoyment.

8. The *EPA* has codified several causes of action in tort through its definition of “adverse effect”, and authorizes their enforcement as environmental offences through

sections 14(1) and 15(1) of the Act. Nothing in the statute's definitions of "contaminant", "discharge", and "natural environment" in section 1(1) detracts from this interpretation.

(b) Common Law Principles

9. The civil courts have a long history of dealing with disputes that would readily be acknowledged today as environmental in nature.

Intervenor's Book of Authorities, Tab 2: Jamie Benidickson, "Civil Liability for Environmental Harm" in *Environmental Law* 3d ed. (Toronto: Irwin Law, 2009) at 100.

10. Private nuisance is the unreasonable interference with the owner's or occupier's use and enjoyment of land. Liability in private nuisance does not depend on physical invasion of land, as does trespass, or on interference with exclusive possession, but rather on interference with an owner's or occupier's interest in the beneficial use of land.

Intervenor's Book of Authorities, Tab 2: Jamie Benidickson, "Civil Liability for Environmental Harm" in *Environmental Law* 3d ed. (Toronto: Irwin Law, 2009) at 101-106.

Intervenor's Book of Authorities, Tab 3: Mario D. Faieta, et al, *Environmental Harm Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 3.

11. Strict liability (or the rule in *Rylands v. Fletcher*) arises from the act of a person bringing onto his or her land something that is "not naturally" there, and which is likely to cause harm if it escapes. If it does escape, the person may be required to compensate another for injury or damages, even if the loss was neither intentionally nor negligently inflicted.

Intervenor's Book of Authorities, Tab 2: Jamie Benidickson, "Civil Liability for Environmental Harm" in *Environmental Law* 3d ed. (Toronto: Irwin Law, 2009) at 109-111.

Intervenor’s Book of Authorities, Tab 3: Mario D. Faieta, et al, *Environmental Harm Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 27-29.

12. Trespass is the intentional physical invasion of property by people or objects, however minute the invasion, without the consent of the owner or occupant. Liability in trespass does not depend upon proof of damages. To deposit a foreign substance such as water on the property of another and, in so doing, disturb that person’s possession of property, however slight the disturbance, constitutes trespass, regardless of whether the substance is toxic or non-toxic.

Intervenor’s Book of Authorities, Tab 2: Jamie Benidickson, “Civil Liability for Environmental Harm” in *Environmental Law* 3d ed. (Toronto: Irwin Law, 2009) at 111-112.

Intervenor’s Book of Authorities, Tab 3: Mario D. Faieta, et al, *Environmental Harm Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 65-69.

Intervenor’s Book of Authorities, Tab 4: *Friesen v. Forest Protection Limited* (1978), 22 N.B.R. (2d) 146 at para 33 (N.B.Q.B.).

Intervenor’s Book of Authorities, Tab 5: *Kerr v. Revelstoke Building Materials Ltd.* (1976), 71 D.L.R. (3d) 134 at 136-137 (Alta. S.C.T.D.).

13. Negligence is conduct that breaches a standard of care owed to a person who is harmed by that conduct. The elements to be proved include: the plaintiff is within a class of persons to whom the defendant owes a duty of care; the defendant’s conduct fell below the standard required of a reasonable person engaged in the particular activity; and foreseeable damage (i.e. damage that is not too remote and that is caused in fact by the conduct) resulted from the breach of duty.

Intervenor’s Book of Authorities, Tab 2: Jamie Benidickson, “Civil Liability for Environmental Harm” in *Environmental Law* 3d ed. (Toronto: Irwin Law, 2009) at 106-109.

Intervenor’s Book of Authorities, Tab 3: Mario D. Faieta, et al, *Environmental Harm Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 73-74.

14. In the context of environmental offences, negligence has been determined to be a suitable basis for penal liability. In this regard, environmental offences often are described as negligence with the onus reversed.

Intervenor’s Book of Authorities, Tab 6: John Swaigen, *Regulatory Offences in Canada: Liability & Defences* (Toronto: Carswell, 1992) at 65-68.

Intervenor’s Book of Authorities, Tab 2: Jamie Benidickson, “Civil Liability for Environmental Harm” in *Environmental Law* 3d ed. (Toronto: Irwin Law, 2009) at 160.

Intervenor’s Book of Authorities, Tab 7: *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at 1313-1326.

Intervenor’s Book of Authorities, Tab 8: *Levis (City) v. Tetreault*, [2006] 1 S.C.R. 420 at para 15.

15. It is submitted that the origins of environmental statute law are based, in significant degree, on what traditionally would have been considered common law torts and, in the case of the *EPA*, the legislature has codified the principles underlying tort liability directly into the statute as environmental offences in order to protect the public. Accordingly, the *EPA* applies to events to which traditionally the common law would have applied.

(c) **EPA Provisions**

16. It is respectfully submitted that the *EPA* definition of “adverse effect” is intended to apply to incidents that traditionally have been considered common law torts. Section 1(1) of the Act states:

In this Act, ‘adverse effect’ means one or more of,

- (a) impairment of the quality of the natural environment for any use that can be made of it,
- (b) injury or damage to property or to plant or animal life,
- (c) harm or material discomfort to any person,
- (d) an adverse effect on the health of any person,
- (e) impairment of the safety of any person,
- (f) rendering any property or plant or animal life unfit for human use,
- (g) loss of enjoyment of normal use of property, and
- (h) interference with the normal conduct of business.

Intervenor’s Factum, Schedule B: *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 1(1).

17. Nothing in the *EPA* definitions of “contaminant”, “discharge”, and “natural environment” in section 1(1) of the Act detracts from the interpretation that common law principles are embedded in the statute and applicable to facts such as those associated with the within appeal:

‘contaminant’ means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect;

‘discharge’, when used as a verb, includes add, deposit, leak or emit and, when used as a noun, includes addition, deposit, emission or leak;

.....

‘natural environment’ means the air, land and water, or any combination or part thereof, of the Province of Ontario. (emphasis added)

Intervenor’s Factum, Schedule B: *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 1(1).

18. Fly rock, being a “solid...resulting directly or indirectly from human activities” can be a “contaminant”, can be “discharged” by “addition” or “deposit”, can interfere with “air” or “land”, and have an “adverse effect”, such as “damage to property”, or “impairment of the safety of any person”. On the facts of this case, the Appellant’s blasting activity and resulting fly rock debris damage met each of the definitions in section 1(1) and had several adverse effects to which the *EPA* is applicable derived in substantial degree from common law tort liability theories.

Intervener’s Factum, Schedule B: *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 1(1).

Intervenor’s Book of Authorities, Tab 1: *R. v. Castonguay Blasting Ltd.* (2011), 57 C.E.L.R. (3d) 142 at para. 21 (S.C.J.).

19. Accordingly, when the Appellant purports to parse sections 14(1) and 15(1) of the *EPA* by suggesting that the Act cannot be engaged if there is no impairment of “environmental quality”, it is respectfully submitted that such an interpretation is wrong as a matter of statutory interpretation because the Act has codified common law torts as environmental offences in order to protect the public.

Appellant’s Factum: page 16, paras 35, 36.

(d) Interface Between *EPA* and Common Law Principles

20. In determining, for example, whether a particular discomfort is “material” under *EPA* section 1(1)(c), or whether a discharge interferes with the “normal use of property” under *EPA* section 1(1)(g), considerable guidance can be gleaned from the law of nuisance. This branch of tort law provides a useful analogy for defining “material

discomfort”, for example, because actionable nuisances have been defined as inconveniences that materially interfere with ordinary comfort.

Intervenor’s Book of Authorities, Tab 9: Dianne Saxe, *Ontario Environmental Protection Act Annotated*, Vol. 1, (Aurora, Ont.: Canada Law Book, 2011) at A-2.1.

Intervenor’s Book of Authorities, Tab 10: Stanley D. Berger, *The Prosecution and Defence of Environmental Offences*, Vol. 1 (Toronto: Canada Law Book, 2011) at 2-39.

Intervenor’s Book of Authorities, Tab 11: *Banfai v. Formula Fun Centre Inc.* (1984), 19 D.L.R. (4th) 683, 51 O.R. (2d) 361 at 369-371 (H.C.J.).

Intervenor’s Book of Authorities, Tab 12: *Walker v. Pioneer Construction Co. (1967) Ltd.* (1975), 56 D.L.R. (3d) 677, 8 O.R. (2d) 35 at 38, 48-50 (H.C.J.).

21. Similarly, a different panel of this Honourable Court upheld the finding of a trial judge that the operation of a factory constituted a nuisance at law and that the *EPA* is designed to deal with what, at common law, would be regarded as nuisances.

Intervenor’s Book of Authorities, Tab 13: *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd.* (1990), 73 O.R. (2d) 641 at 648 (H.C.J.), (1992), 10 O.R. (3d) 95 (Ont. C.A.).

22. Mr. Justice Gonthier, writing for the majority in *Ontario v. Canadian Pacific Ltd.*, noted that a report prepared by an international body of legal experts intended to serve as a guide for the development of domestic environmental protection legislation, and which the Supreme Court of Canada considered in interpreting what is now section 14(1) of the *EPA*, defined the generic term “environmental interference” to include “any impairment of...material property...caused, directly or indirectly, by man through....explosions...”

Intervenor’s Book of Authorities, Tab 14: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R.1031 at para 69.

23. Accordingly, it is submitted that based on existing jurisprudence interpreting the *EPA* it is reasonable to conclude that penal liability under the *EPA* applies to, and incorporates, events that traditionally would have been characterized as tortious conduct and that would have attracted civil liability at common law.

24. It is respectfully submitted, therefore, that seen in this context, Mr. Justice Ray committed no error of law in reaching his decision that a conviction under *EPA* section 15(1) for failing to notify the MOE could be upheld by evidence of damage only to private property.

(e) Common Law Principles Have Been Incorporated into Other Statutes

25. The *EPA* is not the only, nor was it the first, statute in Canada to establish offences for tortious conduct. The *Criminal Code* has long made it an offence to commit a “common nuisance”:

Every person who commits a common nuisance and thereby
 (a) endangers the lives, safety or health of the public, or
 (b) causes physical injury to any person,
 is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Intervenor’s Factum, Schedule B: *Criminal Code*, R.S.C., 1985, c. C-46, s. 180(1).

26. In this regard, the *Criminal Code* defines a “common nuisance” as follows:

For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
 (a) endangers the lives, safety, health, property or comfort of the public; or

(b) obstructs the public in the exercise or enjoyment of any right that is common to all subjects of Her Majesty in Canada.

Intervenor’s Factum, Schedule B: *Criminal Code*, R.S.C., 1985, c. C-46, s. 180(2).

27. The courts have long upheld Parliament’s authority to “criminalize” nuisance principles and apply them to events that would otherwise attract liability at common law, even though the standard of proof imposed under criminal law principles is different from that imposed in a civil proceeding for a common law tort.

Intervenor’s Book of Authorities, Tab 15: *R. v. Thornton*, (1991) 1 O.R. (3d) 480 at 484-486 (Ont. C.A.), aff’d [1993] 2 S.C.R. 445.

28. Similarly, environmental laws in a number of other provinces and territories define “adverse effect” in a manner similar to the *EPA*:

‘adverse effect’ means an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.

Intervenor’s Factum, Schedule B: *Environment Act*, S.N.S. 1994-95, c. 1, s. 3.

‘adverse effect’ means impairment of or damage to the environment, including a negative effect on human health or safety.

Intervenor’s Factum, Schedule B: *The Environment Act*, C.C.S.M. c. E125, s. 1(2).

‘adverse effect’ means impairment of or damage to the environment, human health or safety or property.

Intervenor’s Factum, Schedule B: *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 1.

‘adverse effect’ means actual or likely (a) impairment of the quality of the environment; (b) damage to property or loss of enjoyment of the lawful use of property; (c) damage to plant or animal life or to any component of the environment necessary to sustain plant or animal life; (d) harm or material discomfort to any person.

Intervenor’s Factum, Schedule B: *Environment Act*, R.S.Y. 2002, c. 76, s. 2.

29. It is respectfully submitted that the phrase “adverse effect” in these laws, like the *EPA*, reflects the common law origins of the term and indicates legislative intent to take a broad definition of the types of effects that are meant to be caught within the scope of an environmental statute.

30. Accordingly, the intervener respectfully submits that the *EPA* applies to, and incorporates, events such as those covered by the subject matter of this appeal that, like the situation in respect of a common law tort action, would be covered irrespective of whether the events separately impaired “environmental quality” or constituted an “environmental event”.

ISSUE 2: THE PROPER INTERPRETATION AND SCOPE OF SECTIONS 14(1) AND 15(1), IN LIGHT OF SECTION 3(1), THE PURPOSE SECTION, OF THE *EPA*, SUPPORTS THE VIEW THAT THE PRECAUTIONARY PRINCIPLE APPLIES TO INTERPRETATION OF THE *EPA* IN DETERMINING THE SCOPE OF THE ACT’S JURISDICTION.

(a) *EPA* Section 15(1) Reflects the Precautionary Principle

31. The Appellant argues in paragraph 27 of its factum, that in order for section 15(1) of the *EPA* to be engaged, the contaminant being discharged must have caused or have been likely to cause significant impairment to the quality of the natural environment, in addition to one or more of the eight adverse affects outlined in section 1(1) of the *EPA*. In response, the Intervenor submits that the Appellant’s argument is inconsistent with the precautionary principle which has been adopted by the Supreme Court of Canada as an appropriate aid in the interpretation of Canadian environmental statutes.

Appellant’s Factum: pages 12-13, para. 27.

32. In *Spraytech v. Hudson (Town)*, the Supreme Court of Canada endorsed the precautionary principle as enunciated in the Bergen Ministerial Declaration:

The interpretation of By-law 270 contained in these reasons respects international law's 'precautionary principle', which is defined as follows at para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990):

'In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation'.

Intervenor's Book of Authorities, Tab 16: *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para 31, [2001] 2 S.C.R. 241.

33. Section 15 (1) of the *EPA* makes it an offence to fail to promptly report a discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect. Thus, a charge under s. 15(1) can be made out even if there is no evidence of actual environmental damage.

Intervenor's Factum, Schedule B: *Environmental Protection Act*, R.S.O. 1990, c. E.19, s.15(1).

34. It is submitted that the legislative intent of section 15(1) of the *EPA* reflects the precautionary principle by recognizing there may be a lack of scientific certainty about the extent of the environmental damage caused by the discharge of a contaminant. When interpreting the pollution prohibition section under the *Ontario Water Resources Act* which provided for a similarly broad scope of protection this Court observed:

Such a broad scope of protection is not difficult to justify. Environmental damage caused by discharging materials into Ontario waters may not be immediately apparent after a discharge. As well, impairment may be caused by accumulation of materials over time.

Intervenor’s Book of Authorities, Tab 17: *R. v Inco*, [2001] O.J No. 2098 at para 54, 54 O.R (3d) 495 (Ont. C.A.).

35. Adopting a precautionary approach to the interpretation of 15(1) of the *EPA*, is not only in line with the Supreme Court of Canada’s reasoning in *Spraytech*, it is also in accordance with the intent of the *EPA*’s original legislators who, when introducing the Bill for its first reading, described the bill as,

... designed to meet the needs of today as well as tomorrow. It provides the flexibility and the authority to deal effectively with any challenges to our natural environment of which at this moment we may not be fully aware. It is impossible, Mr. Speaker, to foresee future scientific and technological developments in these areas, but this bill is designed to anticipate them and deal with them so far as is humanly possible.

Intervenor’s Book of Authorites, Tab 18: Ontario, Legislative Assembly, Official Report of Debates (*Hansard*), 28th Leg, 4th Sess, Vol. 3 (30 June 1971) at 3457 (Hon. Bill Davis).

36. The precautionary principle has been used interchangeably with the term “precautionary approach”.

Intervenor’s Book of Authorities, Tab 19: *Erickson v Ontario (Director, Ministry of Environment)*, [2011] O.E.R.T.D. No 29 at 118-121.

37. The term “precautionary principle” at its core, calls for preventative, anticipatory measures to be taken when an activity raises threats of harm to the environment, wildlife or human health even if some cause-and-effect relationship has not been fully established.

Intervenor’s Book of Authorities, Tab 20: Birne, Boyle, and Redgwell, *International Law & the Environment*, 3rd ed. (United States: Oxford University Press, 2009) at 155;

Intervenor’s Book of Authorities, Tab 21: C. Smith, “The Precautionary Principle and Environmental Policy, Science Uncertainty and Sustainability” (2000) 6:3 *International Journal of Occupational and Environmental Health* 263 at 263.

38. The precautionary principle seeks to ensure that government regulators who are responsible for protecting public health and the environment will have authority to be proactive and not reactive in carrying out their work.

Intervenor’s Book of Authorities, Tab 21: C. Smith, “The Precautionary Principle and Environmental Policy, Science Uncertainty and Sustainability” (2000) 6:3 *International Journal of Occupational and Environmental Health* 263 at 264.

39. The Intervenor submits that the legislative intent of section 15(1) of the *EPA* reflects the precautionary principle by ensuring that discharges of contaminants that are likely to cause an adverse effect are reported to the MOE, irrespective of actual harm to the environment. In *R. v. Inco*, the Ontario Provincial Court, interpreting a similar provision under the *Ontario Water Resources Act*, stated:

It is not open for a discharger to “wait and see” whether there is in fact an impairing discharge prior to reporting it. I also agree that it is the objective of the legislation that the Ministry be included early on, to investigate and be part of the decision regarding the appropriate response. I adopt the views expressed in *R. v. Ontario Hydro* (Prov. Offences Court, November 26, 1986) that the legislated reporting requirement is to ‘report first and confirm and recalculate later’.

Intervenor's Book of Authorities, Tab 22: *R. v. Inco*, 2008 ONCJ 332 at para 94, [2008] No. 2963 (O.C.J.).

40. It is submitted that the legislative intent of section 15(1) of the *EPA* thereby incorporates a precautionary approach as it ensures that provincial officers with the MOE

have authority to respond once there has been a discharge of a contaminant, without waiting for proof that harm to the environment has occurred.

Intervenor’s Book of Authorities, Tab 22: *R v. Inco*, 2008 ONCJ 332 at para 94, [2008] No. 2963 (O.C.J.).

Intervenor’s Book of Authorities, Tab 21: C. Smith, “The Precautionary Principle and Environmental Policy, Science Uncertainty and Sustainability” (2000) 6:3 *International Journal of Occupational and Environmental Health* 263 at 284.

(b) Definition of Adverse Effect under EPA Section 1(1) and the Precautionary Principle

41. The precautionary principle recognizes the inherent limits of accurately determining and predicting the direct impacts of contaminants on the environment and human health. Significant scientific uncertainty remains with respect to the “causal connection between activities and impacts, thresholds at which damage becomes significant or irreversible [and] long time cumulative or combined effects of pollution.”

Intervenor’s Book of Authorities, Tab 23: K. Barrett & C. Raffensperger, “Precautionary Science” in C. Raffensperger & J.A. Tickner *Protecting Public Health and the Environment Implementing the Precautionary Principle* (Washington D.C.: Island Press, 1999) at 106-122.

Intervenor’s Book of Authorities, Tab 24: O. McIntyre & T. Moseldale, “The Precautionary Principle as a Norm of Customary International Law”, (1997) 9 *Journal of Environmental Law* 221 at 221-222.

42. Accordingly, given the complex nature of the environment and the wide range of activities which may cause harm to it, Canadian legislators have taken a broad and general approach to drafting pollution prohibition measures in environmental protection legislation.

Intervenor’s Book of Authorities, Tab 14: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at paras 43, 57-59, [1995] S.C.J. No. 62.

43. The definition of “adverse effect” in *EPA* section 1(1) is consistent with such an approach as it explicitly aims to cover the wide range of activities that may cause harm to the environment, including injury or damage to property, plant or animal life, material discomfort to any person, impairment of the safety of any person and interference with the normal conduct of business.

Intervenor’s Factum, Schedule B, *Environmental Protection Act*, R.S.O. 1990, c. E.19, s.1(1).

44. The Appellant’s argument that section 15(1) of the *EPA* ought to be interpreted as requiring the contaminant discharge to cause one or more of the eight defined adverse effects listed in section 1(1) in addition to some other separate impairment to the natural environment, would lead to the absurd result of serious pollution offences being unregulated. To use the example cited by this court in *Dow Chemical*, such an interpretation would mean that a chlorine explosion which killed several people but dispersed almost immediately and had no impact on the natural environment would not be captured by the *EPA*.

Intervenor’s Book of Authorities, Tab 25: *R v. Dow Chemical Inc.*, [2000] O.J. No. 757 at para 34, 47 O.R. (3d) 577.

45. The Intervenor submits that an interpretation consistent with the precautionary principle recognizes the inherent limits in the ability of science to accurately predict and determine the direct impacts of pollution on human health and the environment. In the case at bar, application of the precautionary principle would favour an interpretation that would permit government regulators to lay charges when there is evidence of any one or more of the eight defined adverse effects under section 1(1) the *EPA*, without having to establish that there also has been a separate impairment of the natural environment.

46. Therefore, the Intervenor submits that an interpretation that adds another element to the offence under section 15(1) by requiring the contaminant, in this case fly rock, to separately impair the environment would be fundamentally at odds with the precautionary principle.

PART IV - ORDER REQUESTED

47. CELA respectfully requests an Order affirming the decision of the Superior Court of Justice, and dismissing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 3, 2011

Joseph F. Castrilli

Ramani Nadarajah

Counsel for the Intervenor
Canadian Environmental Law Association

SCHEDULE “D”

LIST OF AUTHORITIES

1. *R. v. Castonguay Blasting Ltd.* (2011), 57 C.E.L.R. (3d) 142 at paras 21, 23-24, 44 (S.C.J.).
2. Jamie Benidickson, “Civil Liability for Environmental Harm” in *Environmental Law* 3d ed. (Toronto: Irwin Law, 2009) at 100-106-112, 160.
3. Mario D. Faieta, et al, *Environmental Harm Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 3, 27-29, 65-69, 73-74.
4. *Friesen v. Forest Protection Limited* (1978), 22 N.B.R. (2d) 146 at para 33 (N.B.Q.B.).
5. *Kerr v. Revelstoke Building Materials Ltd.* (1976), 71 D.L.R. (3d) 134 at 136-137 (Alta. S.C.T.D.).
6. John Swaigen, *Regulatory Offences in Canada: Liability & Defences* (Toronto: Carswell, 1992) at 65-68.
7. *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at 1313-1326.
8. *Levis (City) v. Tetreault*, [2006] 1 S.C.R. 420 at para 15.
9. Dianne Saxe, *Ontario Environmental Protection Act Annotated*, Vol. 1, (Aurora, Ont.: Canada Law Book, 2011) at A-2.1.
10. Stanley D. Berger, *The Prosecution and Defence of Environmental Offences*, Vol. 1 (Toronto: Canada Law Book, 2011) at 2-39.
11. *Banfai v. Formula Fun Centre Inc.* (1984), 19 D.L.R. (4th) 683, 51 O.R. (2d) 361 at 369-371 (H.C.J.).
12. *Walker v. Pioneer Construction Co. (1967) Ltd.* (1975), 56 D.L.R. (3d) 677, 8 O.R. (2d) 35 at 38, 48-50 (H.C.J.).
13. *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd.* (1990), 73 O.R. (2d) 641 at 648 (H.C.J.), (1992), 10 O.R. (3d) 95 (Ont. C.A.).
14. *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R.1031 at paras 43, 57-59, 69, [1995] S.C.J. No. 62.

15. *R. v. Thornton*, (1991) 1 O.R. (3d) 480 at 484-486 (Ont. C.A.), aff'd [1993] 2 S.C.R. 445.
16. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at paras 31, [2001] 2 S.C.R. 241.
17. *R. v Inco*, [2001] O.J No. 2098 at para 54, 54 O.R (3d) 495 (Ont. C.A.).
18. Ontario, Legislative Assembly, Official Report of Debates (*Hansard*), 28th Leg, 4th Sess, Vol. 3 (30 June 1971) at 3457 (Hon. Bill Davis).
19. *Erickson v Ontario (Director, Ministry of Environment)*, [2011] O.E.R.T.D. No 29 at 118-121 (excerpt only).
20. Birne, Boyle, and Redgwell, *International Law & the Environment*, 3rd ed. (United States: Oxford University Press, 2009) at 155.
21. C. Smith, "The Precautionary Principle and Environmental Policy, Science Uncertainty and Sustainability" (2000) 6:3 *International Journal of Occupational and Environmental Health* 263 at 263-264, 284.
22. *R. v. Inco*, 2008 ONCJ 332 at para 94, [2008] No. 2963 (O.C.J.).
23. K. Barrett & C. Raffensperger, "Precautionary Science" in C. Raffensperger & J.A Tickner *Protecting Public Health and the Environment Implementing the Precautionary Principle* (Washington D.C.: Island Press, 1999) at 106-122.
24. O. McIntyre & T. Moseldale, "The Precautionary Principle as a Norm of Customary International Law", (1997) 9 *Journal of Environmental Law* 221 at 221-222.
25. *R v. Dow Chemical Inc.*, [2000] O.J. No. 757 at para 34, 47 O.R. (3d) 577.

SCHEDULE “E”

LIST OF STATUTES

1. *Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 1(1), 3(1), 14(1), 15(1):*

Interpretation

s. 1(1) In this Act,

“adverse effect” means one or more of,

- (i) impairment of the quality of the natural environment for any use that can be made of it,
- (j) injury or damage to property or to plant or animal life,
- (k) harm or material discomfort to any person,
- (l) an adverse effect on the health of any person,
- (m) impairment of the safety of any person,
- (n) rendering any property or plant or animal life unfit for human use,
- (o) loss of enjoyment of normal use of property, and
- (p) interference with the normal conduct of business;

....

“contaminant” means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect;

“discharge”, when used as a verb, includes add, deposit, leak or emit and, when used as a noun, includes addition, deposit, emission or leak;

.....

“natural environment” means the air, land and water, or any combination or part thereof, of the Province of Ontario;

Purpose of Act

s. 3(1) The purpose of this Act is to provide for the protection and conservation of the natural environment.

Prohibition, discharge of contaminant

s. 14(1) Subject to subsection (2) but despite any other provision of this Act or the regulations, a person shall not discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment, if the discharge causes or may cause an adverse effect.

....

When the Ministry to be notified, adverse effect

s. 15(1) Every person who discharges a contaminant or causes or permits the discharge of a contaminant into the natural environment shall forthwith notify the Ministry if the discharge is out of the normal course of events, the discharge causes or is likely to cause an adverse effect and the person is not otherwise required to notify the Ministry under section 92.

....

2. *Criminal Code, R.S.C. 1985, c. C-46, s. 180(1)(2):*

Common Nuisance / Definition

s. 180(1) Every person who commits a common nuisance and thereby
 (a) endangers the lives, safety or health of the public, or
 (b) causes physical injury to any person,
 is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

s. 180(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
 (a) endangers the lives, safety, health, property or comfort of the public; or
 (b) obstructs the public in the exercise or enjoyment of any right that is common to all subjects of Her Majesty in Canada.

3. *Environment Act, S.N.S. 1994-95, c. 1, s. 3:*

Interpretation

s. 3 In this Act,

...

(c) “adverse effect” means an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.

4. *The Environment Act, C.C.S.M. c. E125, s. 1(2):*

Definitions

s. 1(2) In this Act,

“adverse effect” means impairment of or damage to the environment, including a negative effect on human health or safety.

5. *Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, s. 1:*

Definitions

s. 1 In this Act,

(b) “adverse effect” means impairment of or damage to the environment, human health or safety or property.

6. *Environment Act, R.S.Y. 2002, c. 76, s. 2:*

Definitions

s. 2 In this Act,

“adverse effect” means actual or likely

(a) impairment of the quality of the environment;

(b) damage to property or loss of enjoyment of the lawful use of property;

(c) damage to plant or animal life or to any component of the environment necessary to sustain plant or animal life;

(d) harm or material discomfort to any person.

Court File No. C53611

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO
(Respondent)

v. **CASTONGUAY BLASTING LTD.**
(Appellant)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT BELLEVILLE

FACTUM

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

130 SPADINA AVE., SUITE 301

TORONTO, ONTARIO M5V 2L4

Telephone: (416) 960-2284

Facsimile: (416) 960-9392

Joseph F. Castrilli (LSUC No. 26123A)

Ramani Nadarajah (LSUC No. 30023U)

Solicitors for the Moving Party and Proposed Intervenor

Canadian Environmental Law Association