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# "Wide and Deep": Implications of the SCC's Castonguay decision on the Interpretation of Environmental Protection Legislation, Fulfilling Reporting Requirements, Reporting Authorities' Obligations and the Precautionary Principle

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**Case commented on:** *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52

On October 17, 2013, in *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 [*Castonguay*] the Supreme Court of Canada dismissed the appeal of Castonguay Blasting Ltd. (Castonguay) upholding a conviction under section 15(1) of the Ontario *Environmental Protection Act*, RSO 1990, c E 19 (*EPA*), for failing to report the discharge of a contaminant. As Justice Abella, writing for a unanimous Court, states at the outset of her judgment, the Court was asked to engage in an interpretative exercise to determine whether, on these facts, the reporting requirement was triggered. At the end of the day, the Supreme Court of Canada considered this a relatively straight forward exercise, in that "there is clarity both of legislative purpose and language: the Ministry of the Environment must be notified when there has been a discharge of a contaminant out of the normal course of events without waiting for proof that the natural environment has, in fact been impaired. In other words: when in doubt, report." (at para 2).

## Facts

On November 27, 2007, Castonguay, a subcontractor, was conducting blasting operations for a highway widening project in Ontario when operations went awry and rock debris (fly-rock) was propelled into the air and onto a private property, causing damage to a house and car. Castonguay reported the incident to the contract supervisor, who in turn reported it to the Ministry of Transportation (which had commissioned the project) and the provincial Ministry of Labour as required under Ontario's *Occupational Health and Safety Act*, RSO 1990, c O.1. Castonguay did not report the incident to the Ontario Ministry of the Environment. In September, 2009, the Ministry for the Environment prosecuted Castonguay for failing to report "the discharge of a contaminant into the natural environment" as required by section 15(1) of the *EPA*.

Castonguay took the position that the discharge of the fly-rock did not trigger the reporting requirement on the basis that this event did not impair the natural environment. The dispute centered, therefore, not on whether there had been a discharge "into the natural environment" but whether the discharge caused, or was likely to cause, an "adverse affect" within the meaning of the *EPA*.

## Interpretation of the *EPA*

The Supreme Court of Canada began its consideration of the *EPA*, Ontario's principal environmental protection statute, by noting that its status as remedial legislation entitles it to generous interpretation (*Legislation Act,* SO 2006, c 21, s 64). Moreover, as "environmental protection is a complex subject matter - the environment itself and the wide range of activities which might harm it are not easily conducive to precise codification", it follows that environmental protection legislation must adopt an expansive approach to ensure it can respond to a wide variety of environmentally harmful scenarios, including ones the drafter of the legislation may not have foreseen (at para 9). As a result, the intended reach of the legislature in pursuing the objective of environmental protection is, in the words of Justice Abella, "wide and deep" (at para 9). Citing an earlier Ontario Court of Appeal decision, Justice Abella also stressed that the overall purpose of the *EPA* - to "provide for the protection and conservation of the natural environment" (*EPA*, section 3) - protects both the natural environment (as defined) as well as the "people who live, work and play in it".

**The Obligation to Report a Discharge**

Section 15(1) of the *EPA* states:

> 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.

The terms "adverse effect" is defined in section 1(1) of the *EPA* as follows:

> "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 persons,
> (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…

Castonguay's argument was that paragraph (a) of the definition of "adverse effect" operated as an umbrella clause, or a pre-requisite, to the eight components in (a) to (h), such that there must be an impairment of the quality of the natural environment before a discharge could be said to have an environmental effect within the meaning of the *EPA*.

The Supreme Court did not agree with this interpretation, pointing to the plain language of the "adverse effect" definition – which expressly states that "*one or more of*" the eight components set out in (a) through (h) provide "independent triggers for liability" (at para 30). Justice Abella held that "[t]o interpret 'adverse effect' restrictively not only reads out the plain and obvious meaning of the definition, it narrows the scope of the reporting requirement, thereby restricting its remedial capacity and the Ministry's ability to fulfill its mandate" (at para 31). On the facts at hand, section 15(1) was clearly triggered.

## Purpose of Reporting in the Context of Environmental Protection Legislation

In her decision, Justice Abella emphasized that the purpose of the reporting requirement in section 15(1) "is to ensure that it is the Ministry of the Environment, and not the discharger, who decides what, if any, further steps are required" (at para 18). This is important because it is the Ministry who possesses the expertise or resources to understand the magnitude of damage caused, or likely to be caused. It is for this reason, according to Justice Abella, that the statute places "both the obligation to investigate and the decision about what further steps are necessary with the Ministry and not the discharger" (at para 18). Notification, in turn, allows the Ministry of the Environment to "conduct an inspection as quickly as possible" and fulfill its statutory mandate by determining whether any whether preventative or remedial measures are required, without waiting for proof that the remedial steps are required (at para 19). In this regard, the Supreme Court of Canada accepts the interveners' position that section 15(1) is consistent with the precautionary principle, described in the judgment as an "emerging international law principle [which] recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation" (at para 20, referencing O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 J Envtl L 221 at p 221-22; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at paras 30-32).

## Implications of this Decision for Alberta

The upshot of the *Castonguay* decision in Ontario is that all discharges of contaminants into the natural environment (as those terms are defined in the *EPA*) that are outside the normal course of events must be reported without waiting for proof that the natural environment has in fact been impaired. The implications of this decision do not, however, stop at the Ontario border. Rather, it resonates more generally in four ways.

First, the Supreme Court of Canada makes it clear that environmental protection legislation is to be interpreted broadly. In pursuing the objective of environmental protection, the reach of the legislature is "wide and deep". Going forward, lower courts should have little patience for arguments which attempt to construe environmental protection legislation in a way that restricts this reach and obviates its preventative objective.

Second, other provincial legislation (e.g. Alberta's principal environmental protection legislation, the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*)), and federal legislation designed to protect the environment or components of it, (e.g. the *Fisheries Act*, RSC 1985, c F-14) all contain reporting requirements which share common features with the Ontario *EPA*. Section 110(1) of *EPEA* requires reporting when a person releases, causes or permits the release of a substance in the environment that may cause, is causing or has caused an adverse effect. Section 38(5) of the *Fisheries Act* requires reporting if there is an unauthorized deposit of a deleterious substance in water frequented by fish or if there is serious or imminent danger of such an occurrence, and detriment to fish habitat, fish or the use by humans of fish either results or may reasonably be expected to result. The same purpose underlies these reporting requirements as those the Supreme Court of Canada articulated for their counterpart in the Ontario *EPA* – to require immediate reporting when an incident of the nature contemplated in the legislation occurs without first waiting for proof of harm. Given this, the same requirement follows – when in doubt, report.

Third, the *Castonguay* decision emphasizes that once an incident has been reported, the statute places an obligation on the Ministry to employ its expertise and resources to quickly investigate and make a determination as to what preventative or remedial steps are necessary in the circumstances. The Supreme Court of Canada does not point to a particular provision in the *EPA* as the source of this obligation. Rather, it follows from the purpose of the reporting requirement. Given this, the relevant legislation must place a similar obligation on the Ministry of Environment and Sustainable Resource Development or the Department of Fisheries and Oceans. In essence, the Supreme Court of Canada is suggesting that proactive and well-resourced government agencies should be standing ready to investigate and respond if the purpose of reporting requirements in environmental protection legislation, and ultimately the overall goal of environmental protection legislation itself, is to be achieved.

Finally, as it did in the 2001 S*praytech* decision, the Supreme Court of Canada has once again endorsed the importance of the precautionary principle, even when not expressly incorporated into legislation. In *Spraytech*, after establishing that the precautionary principle is part of customary law, the Court read a provision of the Quebec *Cities and Towns Act* in a manner consistent with the principle and international law. Drawing on Spraytech, in *Castonguay*, the precautionary principle is used as an interpretive aid – section 15(1) is read to give effect to the concerns underlying the precautionary principle. With this, the Supreme Court of Canada has once again confirmed that the precautionary principle, and by implication customary international law principles more generally, are relevant to the interpretation and should guide implementation of domestic environmental protection legislation.