

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

CASTONGUAY BLASTING LTD.

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO
as represented by **THE MINISTER OF THE ENVIRONMENT**

RESPONDENT
(Respondent)

-and-

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION AND
LAKE ONTARIO WATERKEEPER**

INTERVENERS

FACTUM OF THE INTERVENERS

(Canadian Environmental Law Association and Lake Ontario Waterkeeper)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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I. PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal involves key questions of statutory interpretation that lie at the heart of reporting requirements in provincial and territorial environmental laws across Canada. Therefore, the interpretation by this Honourable Court of s. 15(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (“*EPA*”) will have significant national implications for protection of the environment, public health and safety.
2. If the majority judgment of the Ontario Court of Appeal is left intact, the Interveners submit that it will provide the appropriate guidance to the regulated community respecting their duty to report discharges of contaminants into the natural environment out of the normal course of events that cause or are likely to cause an adverse effect as defined in the Act. Such an approach will best effectuate the provisions and purposes of the *EPA* and comports most effectively with relevant and applicable principles of international law. If overturned, the result could undermine not only the reporting requirements but also the general pollution prohibition provision of the Act (s. 14(1)) because of its similar wording to s. 15(1) and have a correspondingly detrimental effect on provincial and territorial environmental laws across the nation.
3. Accordingly, the Interveners respectfully submit that s. 15(1) of the *EPA* should be interpreted in a manner that:
 - (a) recognizes the common law tort origins of the *EPA* which explain the wide ambit afforded the Ontario government to protect not only the environment, but also humans, plants, animals, and property under the Act;
 - (b) reflects the international legal context within which the provision must be interpreted generally, and specifically applies the precautionary principle; and
 - (c) properly reflects the importance to the public of the protections afforded by s. 15(1) and related provisions.

B. Statement of Facts

1. The Interveners

4. The Canadian Environmental Law Association and Lake Ontario Waterkeeper (hereinafter referred to together as the “Interveners”) were granted leave to intervene in this appeal pursuant to the order of Mr. Justice Cromwell of this Honourable Court dated March 6, 2013.

2. The Facts

5. The facts relied upon by the Interveners for the purposes of their intervention may be summarized as follows:

- (a) the Appellant’s rock blasting operations sent rock debris flying through the air (fly-rock) that caused non-trivial property damage to a nearby residence and vehicle; and
- (b) the Appellant did not report the incident to the Ontario Ministry of the Environment (“MOE”).

Appellant’s Record (“AR”), Tab 7: Reasons of the Court of Appeal, at para 76 (MacPherson J.A. (for majority)) and paras 1-3 (Blair J.A. (dissent)).

II. PART II – STATEMENT OF QUESTION AT ISSUE

6. At paragraphs 33-34 of its factum, the Appellant frames the issue for this appeal as whether a proper interpretation of the term “adverse effect” in s. 1(1) of the *EPA* necessitates there being both non-trivial harm (1) to the natural environment, and (2) to one or more of its uses, in order for s. 15(1) to be engaged.

7. The Interveners respectfully submit that this Honourable Court should answer this question in the negative. The obligation to report under s. 15(1) is triggered even in the absence of harm to the natural environment, if there is a discharge of a contaminant to the natural environment out of the normal course of events that causes an adverse effect, as defined in s. 1(1)(b)-(h) of the Act, which is non-trivial.

8. As outlined below, the Interveners’ arrive at this position by breaking down the Appellant’s issue addressing the scope of the s. 15(1) obligation into two points:

- a) that a proper interpretation of the definition of “adverse effect” in s. 1(1) supports the view that the *EPA* applies to, and incorporates, events covered by one or more common law tort principles making them regulatory offences irrespective of whether they constitute harm to the natural environment; and
 - b) that a proper interpretation of s. 15(1) of the *EPA* is aided by the application of the precautionary principle, a principle of international law.
9. The Interveners submit that these two points provide a different and fresh perspective from that of the Appellant and the Respondent.

III. PART III – STATEMENT OF ARGUMENT

A. Submission 1: Common Law Tort Origins of EPA Explain Wide Ambit of Adverse Effect Definition

1. Overview

10. The common law tort origins of the *EPA* explain the wide ambit afforded the Ontario government to protect not only the natural environment, but also humans, plants, animals, and property under the Act. 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. 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.

11. The *EPA* has incorporated several causes of action in tort through its definition of “adverse effect”, and authorizes their enforcement as environmental offences through ss. 14(1) and 15(1) of the Act, irrespective of whether there is also harm to the natural environment, so long as the conduct preceding the occurrence of the adverse effect constitutes environment-disturbing activity. The statute’s definitions of “contaminant”, “discharge”, and “natural environment” in s. 1(1) are consistent with this interpretation.

Interveners' Factum, Part VII - Legislation: *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 1(1), 14(1), 15(1) [hereinafter "EPA"].

2. Common Law Tort Principles

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

Interveners' Book of Authorities ("IBA"), Tab 1: Jamie Benidickson, "Civil Liability for Environmental Harm" in *Environmental Law* 3d ed. (Toronto: Irwin Law, 2009) at 100.

13. Private nuisance is the substantial (non-trivial) and unreasonable interference with the owner's or occupier's use and enjoyment of land, or an interest in land. Private nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier.

IBA, Tab 1: Benidickson, *supra* at 101-102.

IBA, Tab 2: Mario D. Faieta, et al, *Environmental Harm Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 3.

IBA, Tab 3: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, [2013] S.C.J. No. 13 at paras 18-23.

IBA, Tab 4: *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906 at para 10.

14. 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.

IBA, Tab 1: Benidickson, *supra* at 109-111.

IBA, Tab 2: Faieta, *supra* at 27-29.

15. 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.

IBA, Tab 1: Benidickson, *supra* at 111-112.

IBA, Tab 2: Faieta, *supra* at 65-69.

IBA, Tab 5: *Friesen v. Forest Protection Limited* (1978), 22 N.B.R. (2d) 146 at para 33 (N.B.Q.B.).

IBA, Tab 6: *Kerr v. Revelstoke Building Materials Ltd.* (1976), 71 D.L.R. (3d) 134 at paras 11, 18 (Alta. S.C.T.D.).

16. 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.

IBA, Tab 1: Benidickson, *supra* at 106-109.

IBA, Tab 2: Faieta, *supra* at 73-74.

17. 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.

IBA, Tab 7: John Swaigen, *Regulatory Offences in Canada: Liability & Defences* (Toronto: Carswell, 1992) at 65-68.

IBA, Tab 1: Benidickson, *supra* at 160.

IBA, Tab 8: *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at paras 28-30, 32, 37, 44, 48, 59-60.

IBA, Tab 9: *Levis (City) v. Tetreault*, [2006] 1 S.C.R. 420 at para 15.

18. 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 adopted 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.

3. EPA Provisions

19. It is respectfully submitted that the definition of "adverse effect" contained in s. 1(1) of the *EPA* is intended to apply to incidents that traditionally have been considered common law torts. The definitions of "contaminant", "discharge", and "natural environment" in s. 1(1) are consistent with the interpretation that common law tort principles are embedded in the statute and applicable to facts such as those associated with the within appeal.

Intervenors' Factum, Part VII - Legislation: *EPA*, s. 1(1).

20. 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”.

Interveners’ Factum, Part VII - Legislation: *EPA*, s. 1(1).

AR, Tab 4: Appeal Reasons of Superior Court, at para 21.

AR, Tab 7: Reasons of the Court of Appeal, at para 76 (MacPherson J.A. (for majority)).

21. On the facts of this case, the Appellant’s blasting activity and resulting fly-rock debris damage met each of the definitions in s. 1(1) and had several adverse effects to which the *EPA* is applicable derived, in substantial degree, from common law tort liability theories.

22. Accordingly, when the Appellant purports to parse ss. 14(1) and 15(1) of the *EPA* by suggesting that the Act cannot be engaged if there is no impairment of environmental quality, such a conclusion can only be reached by ignoring the words of the statute which, in the respectful submission of the Interveners, have deemed certain events covered by common law torts to be environmental offences in order to protect the public.

Appellant’s Factum: p. 12, para 37; p. 30, para 85; p. 31, para 89.

Interveners’ Factum, Part VII - Legislation: *EPA*, ss. 1(1)(b)-(h), 14(1), 15(1).

23. Furthermore, the Interveners’ interpretation is consistent with caselaw interpreting the *EPA* purpose section and statutory construction rules regarding (1) common law terms used in a statute retaining their common law meaning, and (2) secondary purposes and substantive provisions of a statute prevailing over a general purpose statement.

Interveners’ Factum, Part VII - Legislation: *EPA*, ss. 1(1) (“adverse effect” definition), 3(1) (purpose of *EPA*).

Appellant’s Book of Authorities (“ABA”), Tab 4: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R.1031 at para 18 (objectives of *EPA* encompass preservation of natural environment for some range of use by humans and animals).

ABA, Tab 7: *R. v. Dow Chemical Inc.*, [2000] O.J. No. 757 at para 49, 47 O.R. (3d) 577 (Ont. C.A.) (purpose of *EPA* to protect natural environment and people who live, work, play in it).

IBA, Tab 10: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Ottawa: LexisNexis, Canada, 2008) at 266-267, 391-392, 434.

4. Legislative Debates on Common Law Tort Connection to EPA

24. Courts may have regard to legislative history as a legitimate source of assistance in statutory interpretation cases. In this regard, the debates of the Ontario Legislature at

the time of the original enactment of the *EPA* in the early 1970s, also suggest the common law tort origins of the Act, as expressed by the Minister responsible at the time: “...I would agree that the whole field of tort is involved in many of the sections dealing with control”.

IBA, Tab 10: Sullivan, *supra* at 593, 608, 618.

IBA, Tab 11: Ontario, Legislative Assembly, Official Report of Debates (*Hansard*), 28th Leg, 4th Sess, No. 118 (27 July 1971) at 5013 (Hon. G.A. Kerr, Minister of Energy and Resources Management referring to Bill 94, establishing the *EPA*) [hereinafter “Hansard-Kerr”].

Interveners’ Factum, Part VII – Legislation: Bill 94, *An Act to Protect the Natural Environment*, 4th Sess, 28th Leg, Ontario, 1971, ss. 1, 14(1), 15(1) [hereinafter “Bill 94”].

5. Caselaw Comment on Interface Between Common Law Tort Principles and EPA

25. The courts also have linked common law torts and the regime of regulatory offences established under the *EPA*. In determining, for example, whether a particular discomfort is “material” under s. 1(1)(c), or whether a discharge interferes with the “normal use of property” under 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.

IBA, Tab 12: Dianne Saxe, *Ontario Environmental Protection Act Annotated*, Vol. 1, (Toronto: Canada Law Book, 2012) at A-2.1.

IBA, Tab 13: Stanley D. Berger, *The Prosecution and Defence of Environmental Offences*, Vol. 1 (Toronto: Canada Law Book, 2012) at 2-39.

IBA, Tab 14: *Banfai v. Formula Fun Centre Inc.* (1984), 19 D.L.R. (4th) 683, 51 O.R. (2d) 361 at paras 27, 28, 32 (H.C.J.).

IBA, Tab 15: *Walker v. Pioneer Construction Co. (1967) Ltd.* (1975), 56 D.L.R. (3d) 677, 8 O.R. (2d) 35 at paras 10, 11, 41 (H.C.J.).

26. Similarly, a panel of the Ontario Court of Appeal upheld the finding of a trial judge that the operation of a factory constituted a nuisance at law. At trial, counsel for both the plaintiff and the defendant characterized the *EPA* as designed to deal with what, at common law, would be regarded as nuisances.

IBA, Tab 16: *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd.* (1990), 73 O.R. (2d) 641 at paras 33-37 (H.C.J.), (1992), 10 O.R. (3d) 95 at para 1 (Ont. C.A.).

27. 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 a panel of this Honourable Court considered in interpreting what is now s. 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...”, thus suggesting that damage to property from explosions, by itself an event capable of being addressed through a common law tort action, is considered “environmental interference”, at the international level.

ABA, Tab 4: *Canadian Pacific, supra* at para 69.

28. 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. Seen in this context, the Ontario Court of Appeal committed no error of law in reaching its decision that a conviction under *EPA* s. 15(1) for failing to notify the MOE could be upheld by evidence of non-trivial damage to private property alone.

6. Other Ontario Laws Link EPA Adverse Effect Definition and Common Law Tort Actions

29. A further link between the broad scope of the *EPA* adverse effect definition and common law tort actions is the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. Section 17 of the *Limitations Act* states that there is no limitation period in respect of an environmental claim that has not been discovered. Section 1 of the Act defines an “environmental claim” to be a claim based on an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect. Section 1 defines the terms “adverse effect”, “contaminant”, “discharge”, and “natural environment” as having the same meaning as the *EPA*.

Interveners’ Factum, Part VII - Legislation: *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ss. 1, 17 [hereinafter “*LA*”].

30. Therefore, in the *Limitations Act* the Ontario Legislature has deemed it appropriate to link environmental civil actions to the broad “adverse effect” definition of the *EPA*, a regulatory statute. In doing so, the legislature has (1) reinforced the relationship between common law torts and the *EPA*, and (2) accepted a broad definition of what constitutes environmental impact. Alternatively, the Ontario Legislature has

recognized that non-environmental effects can attract civil as well as quasi-criminal liability based on the *EPA*'s definition of adverse effect.

31. Accordingly, to narrow or otherwise interfere with the scope of the adverse effect definition in the context of regulatory offences under the *EPA*, as suggested by the Appellant, could have unforeseen and unwanted consequences in the context of environmental civil actions as well. Overall, such a result would not further protection of the public.

7. Addressing Ontario Court of Appeal Dissent on Tort-*EPA* Issue

32. The dissenting opinion of Mr. Justice Blair in the Ontario Court of Appeal: (1) did not view the *EPA* as codifying the four torts referred to herein as environmental regulatory offences irrespective of whether harm to the environment is caused, holding instead that nothing in the Act suggests the legislature had such an intention; and (2) held further that the purposes of the torts and the *EPA* are quite different with the Act being public welfare legislation designed to protect the natural environment, whereas the torts are about recovery of quantifiable damages to persons or property and/or rights in relation thereto.

AR, Tab 7: Reasons of the Court of Appeal, at paras 41-42 (Blair J.A. (dissent)).

33. In response, the Interveners respectfully submit that in 1971 the debates in the Ontario Legislature, at the very inception of the *EPA*, recognized tort principles as the foundation that underpinned the Act. Moreover, in drawing the analogy between common law torts and the *EPA*, the Interveners were drawing attention to the similar characteristics of the causes of action in tort and the triggers for *EPA* offences, not to the remedies obtainable. Furthermore, in 2002, the Ontario Legislature underscored that an adverse effect under the *EPA*, a regulatory statute, and an environmental civil claim under the *Limitations Act*, are co-extensive. In doing so, the Ontario Legislature was acknowledging that the scope of injury under the *EPA* that could be addressed as a regulatory offence (or under the *Limitations Act* as a civil environmental claim) goes beyond simply harm to the natural environment.

IBA, Tab 11: Hansard-Kerr (“...whole field of tort is involved in many of the sections dealing with control” - referring to Bill 94, establishing the *EPA*).

Interveners’ Factum, Part VII – Legislation: Bill 94, ss. 1, 14(1), 15(1).

Interveners' Factum, Part VII - Legislation: *LA*, ss. 1, 17.

8. Common Law Tort Principles Have Been Incorporated into Federal Criminal Law and Environmental Regulatory Laws of Other Provinces

34. 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” that endangers the lives, safety, health, property or comfort of the public, or causes physical injury to any person.

Interveners' Factum, Part VII - Legislation: *Criminal Code*, R.S.C., 1985, c. C-46, s. 180(1)(2).

35. 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.

IBA, Tab 17: *R. v. Thornton*, (1991) 1 O.R. (3d) 480 at paras 12-15, 18 (Ont. C.A.), aff'd [1993] 2 S.C.R. 445.

36. Similarly, environmental laws in a number of other provinces and territories (e.g. Nova Scotia, Manitoba, Alberta, and the Yukon) define “adverse effect” in a manner similar to the *EPA* and also contain similar prohibitions and reporting requirements. It is respectfully submitted that the definition of “adverse effect” in these laws, like the *EPA*, reflects the common law tort origins of the term.

Interveners' Factum, Part VII - Legislation: *Environment Act*, S.N.S. 1994-95, c. 1, ss. 3, 67(2), 69(1).

Interveners' Factum, Part VII - Legislation: *The Environment Act*, C.C.S.M. c. E125, ss. 1(2), 30.1(1), 30.1(3).

Interveners' Factum, Part VII - Legislation: *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 1, 109(2), 110(1).

Interveners' Factum, Part VII - Legislation: *Environment Act*, R.S.Y. 2002, c. 76, ss. 2, 112, 113.

9. Summary

37. In summary, the definitions of “adverse effect” contained in s. 1(1)(b)-(h) of the *EPA*, derived in substantial degree from common law tort theory, indicate a legislative intent to deem these effects to be environmental impacts.

ABA, Tab 4: *Canadian Pacific*, *supra* at para 64 (per Gonthier, J.A.) (referring to what is now *EPA* ss. 1(1)(b)-(h) as “various other environmental impacts which attract liability”).

38. Alternatively, the Interveners respectfully submit 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”, constituted an “environmental event”, or caused “harm to the natural environment”.

AR, Tab 7: Reasons of the Court of Appeal, at paras 76-77 (MacPherson, J.A. (for majority)).

AR, Tab 4: Appeal Reasons of Superior Court, at paras 23-24.

IBA, Tab 18: Joseph F. Castrilli and Ramani Nadarajah, “Ontario (Minister of the Environment) v. Castonguay Blasting Ltd.: Litigating at the Borders of Environmental Law” in *Key Developments in Environmental Law 2012* (Toronto: Canada Law Book, 2012) at 92-93, 95-97.

B. Submission 2: The Precautionary Principle Aids in Interpreting Section 15(1) of EPA

1. EPA Section 15(1) Reflects the Precautionary Principle

39. The Appellant argues in paragraph 34 of its factum, that in order for s. 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 other adverse affects outlined in s. 1(1) of the *EPA*. In response, the Interveners submit that the Appellant’s argument is inconsistent with the precautionary principle, which is a principle of international law and policy that has been cited by another panel of this Honourable Court as an appropriate statutory interpretation aid to assist in interpreting the legal context of Canadian environmental statutes.

IBA, Tab 10: Sullivan, *supra* at 542-548.

IBA, Tab 19: J. Abouchar (2002) “The Precautionary Principle in Canada: The First Decade” 12 *The Environmental Law Reporter, News and Analysis*, (U.S) December 2000, 11407 at 11407.

IBA, Tab 20: E.Brandon, “Does International Law Mean Anything in Canadian Courts?” (2002) 11 *Journal of Environmental Law and Practice* 399 at 424-426 and 441-443.

40. In *Spraytech v. Hudson (Town)*, a panel of this Honourable Court adopted the definition of the precautionary principle as enunciated in 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’.

ABA, Tab 1: 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40 at para 31, [2001] 2 S.C.R. 241.

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

IBA, Tab 21: *Erickson v Ontario (Director, Ministry of Environment)*, and [2011] O.E.R.T.D. No 29 at 121.

42. The establishment of an evidentiary standard in environmental legislation is one means of ensuring a precautionary approach.

IBA, Tab 22: J. Moffet, “Legislative Options for Implementing the Precautionary Principle” 7 *Journal of Environmental Law and Practice* 157 at 163.

43. 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 (underlining added). Thus, a charge under s. 15(1) can be made out even if there is no evidence of actual environmental damage.

Intervenors’ Factum, Part VII - Legislation: *EPA*, s.15(1).

44. It is submitted that the legislative intent of s. 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 the Ontario Court of Appeal 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 the discharge. As well, impairment may be caused by accumulation of materials over time.

IBA, Tab 23: *R. v Inco*, [2001] O.J No. 2098 at para 54, 54 O.R (3d) 495 (Ont. C.A.).

45. Adopting a precautionary approach to the interpretation of s. 15(1) of the *EPA*, is not only in line with the 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.

Respondent’s Book of Authorities, Tab 28: Ontario, Legislative Assembly, Official Report of Debates (*Hansard*), 28th Leg, 4th Sess, No. 83 (30 June 1971) at 3457 (Hon. Bill Davis).

46. 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.

IBA, Tab 24: Birnie, Boyle, and Redgwell, *International Law & the Environment*, 3rd ed. (United States: Oxford University Press, 2009) at 155-156.

IBA, Tab 25: C. Smith, “The Precautionary Principle and Environmental Policy, Science Uncertainty and Sustainability” (2000) 6:3 *International Journal of Occupational and Environmental Health* 263.

47. In paragraphs 106 and 107 of its factum, the Appellant suggests that the precautionary principle is engaged under s. 92(1) of the *EPA*, which sets out the reporting requirement for spills, but not by s. 15(1). The Interveners submit that the precautionary principle is reflected in both of these provisions given that s. 15(1), like s. 92(1), 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.

IBA, Tab 25: Smith, *supra* at 264.

48. The Interveners submit that the legislative intent of s. 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:

...[I]t 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’.

ABA, Tab 12: *R. v. Inco*, 2008 ONCJ 332 at para 94, [2008] No. 2963 (O.C.J.).

49. It is submitted that the legislative intent of s. 15(1) of the *EPA* thereby incorporates a precautionary approach as it ensures that MOE provincial officers are notified and have authority to respond once there has been a discharge of a contaminant, without waiting for proof that harm to the environment has occurred.

ABA, Tab 12: *Inco, supra* at para 94.

IBA, Tab 25: *Smith, supra* at 264.

2. Definition of Adverse Effect under EPA Section 15(1) and the Precautionary Principle

50. 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 term cumulative or combined effects of pollution.

IBA, Tab 26: O. McIntyre & T. Mosedale, “The Precautionary Principle as a Norm of Customary International Law”, (1997) 9 *Journal of Environmental Law* 221 at 221-222.

51. 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.

ABA, Tab 4: *Canadian Pacific supra* at paras 43, 51-53.

52. The definition of “adverse effect” in *EPA* s. 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.

Interveners’ Factum, Part VII – Legislation: *EPA*, s.1(1).

53. The Appellant’s argument that s. 15(1) of the *EPA* ought to be interpreted as requiring the contaminant discharged to cause one or more of the eight defined adverse effects listed in s. 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 the Ontario Court of Appeal 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*.

ABA, Tab 7: *Dow Chemical supra* at para 34.

54. The Interveners submit 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 s. 1(1) the *EPA*, without having to establish that there also has been a separate impairment of the natural environment.

55. Therefore, the Interveners submit that an interpretation that adds another element to the offence under s. 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.

IV. PART IV – COSTS

56. The Interveners respectfully request that no costs be awarded to or against them in respect of this appeal beyond that set out in the order granting leave to intervene.

V. PART V – ORDER SOUGHT

57. The Interveners respectfully request an Order granting them the opportunity to make oral submissions for up to 20 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of April, 2013.

Joseph F. Castrilli

Counsel for the Interveners

Ramani Nadarajah

Counsel for the Interveners

VI. PART VI – TABLE OF AUTHORITIES

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VII. PART VII - LEGISLATION

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,

- (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;

....

“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.

....

Loi sur la protection de l'environnement, L.R.O. 1990, Chapitre E.19, ss, ss. 1(1), 3(1), 14(1), 15(1):

Dispositions interprétatives

s. 1(1) Les définitions qui suivent s'appliquent à la présente loi.

«conséquence préjudiciable» L'une ou plusieurs des conséquences suivantes :

- a) la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait;
- b) le tort ou les dommages causés à des biens, des végétaux ou des animaux;
- c) la nuisance ou les malaises sensibles causés à quiconque;
- d) l'altération de la santé de quiconque;
- e) l'atteinte à la sécurité de quiconque;
- f) le fait de rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains;
- g) la perte de jouissance de l'usage normal d'un bien;
- h) le fait d'entraver la marche normale des affaires («adverse effect»);

....

«contaminant» Solide, liquide, gaz, son, odeur, chaleur, vibration, radiation ou combinaison de ces éléments qui proviennent, directement ou indirectement, des activités humaines et qui ont ou peuvent avoir une conséquence préjudiciable («contaminant»);

.....

«environnement naturel» Air, terrain et eau ou toute combinaison ou partie de ces éléments qui sont compris dans la province de l'Ontario («natural environment»);

....

«rejet» S'entend en outre d'un ajout, d'un dépôt, d'une perte ou d'une émission; le verbe «rejeter» s'entend en outre d'ajouter, de déposer, de perdre ou d'émettre («discharge»);

...

Objet de la Loi

s. 3(1) La présente loi a pour objet d'assurer la protection et la conservation de l'environnement naturel. L.R.O. 1990, chap. E.19, art. 3.

....

Interdiction : rejet d'un contaminant

s. 14(1) Sous réserve du paragraphe (2), mais malgré toute autre disposition de la présente loi ou des règlements, nul ne doit rejeter un contaminant dans l'environnement naturel ou permettre ou faire en sorte que cela se fasse si le rejet cause ou peut causer une conséquence préjudiciable. 2005, chap. 12, par. 1 (5).

....

Moment où le ministère doit être avisé d'une conséquence préjudiciable

s. 15(1) Quiconque rejette un contaminant dans l'environnement naturel, ou permet ou fait en sorte que cela se fasse, en avise sans délai le ministère si un tel acte est accompli en dehors du cours normal des événements, s'il cause ou causera vraisemblablement une conséquence préjudiciable et si la personne qui l'accomplit n'est pas tenue par ailleurs d'aviser le ministère aux termes de l'article 92. 2005, chap. 12, par. 1 (6).

....

2. Bill 94, *An Act to Protect the Natural Environment*, 4th Sess, 28th Leg, Ontario, 1971, ss. 1, 2, 14(1), 15(1):

Interpretation

s. 1 In this Act

“contaminant” means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them present in the natural environment as a result, directly or indirectly, of the activities of man;

....

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

Purpose of Act

s. 2 The purpose of this Act is to provide for the protection and conservation of the natural environment.

Prohibition

s. 14(1) Notwithstanding any other provision of this Act or the regulations, no person shall deposit, add, emit or discharge, or cause or permit the deposit, addition, emission or discharge, into the natural environment of a contaminant that,

- (a) has an offensive odour;
- (b) may endanger the health or safety of any person;
- (c) may injure or damage or cause injury or damage to,

- (i) real or personal property, or
- (ii) plant or animal life.

....

Department to be notified when unusual contamination occurs

s. 15(1) Every person who,

- (a) deposits in adds to, emits or discharges into any part of the natural environment; or
- (b) is the person responsible for a source of contaminant that deposits in, adds to emits or discharges into any part of the natural environment, out of the normal course of events, any contaminant that
- (c) has an offensive odour;
- (d) may endanger the health or safety of any person;
- (e) may injure or damage or cause injury or damage to,

- (j) real or personal property, or
- (ii) plant or animal life,

shall forthwith notify the Department of the deposit, addition, emission or discharge, as the case may be.

...

(Bill drafted in English only)

3. *Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, ss. 1, 17 :*

Definitions

s. 1 “adverse effect” has the same meaning as in the *Environmental Protection Act*; (“consequence prejudiciable”)

...

“claim” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission; (“reclamation”)

“contaminant” has the same meaning as in the *Environmental Protection Act*; (“contaminant”)

“discharge” has the same meaning as in the *Environmental Protection Act*; (“rejet”, “rejeter”)

“environmental claim” means a claim based on an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect; (reclamation relative a l’ environnement”)

“natural environment” has the same meaning as in the *Environmental Protection Act*; (“l’ environnement naturel”) 2002, c. 24, Sched. B, s. 1.

...

Undiscovered environmental claims

s. 17 There is no limitation period in respect of an environmental claim that has not been discovered. 2002, c. 24, Sched. B, s. 1.

Loi de 2002 sur la prescription des actions, L.O. 2002, Chapitre 24, Annexe B, ss. 1, 17:

Définitions

s. 1 Les définitions qui suivent s’appliquent à la présente loi.

«conséquence préjudiciable» S’entend au sens de la *Loi sur la protection de l’environnement*. («adverse effect»)

«contaminant» S’entend au sens de la *Loi sur la protection de l’environnement*. («contaminant»)

«environnement naturel» S’entend au sens de la *Loi sur la protection de l’environnement*. («natural environment»)

«réclamation» Réclamation pour obtenir réparation de préjudices, de pertes ou de dommages survenus par suite d’un acte ou d’une omission et, en outre, droit de réclamation qui peut être exercé à cette fin. («claim»)

«réclamation relative à l’environnement» Réclamation fondée sur un acte ou une omission qui a causé le rejet dans l’environnement naturel, y a contribué ou l’a permis, d’un contaminant qui a ou aura vraisemblablement une conséquence préjudiciable. («environmental claim»)

«rejet, rejeter» S’entend au sens de la *Loi sur la protection de l’environnement*. («discharge»).... 2002, chap. 24, annexe B, art. 1.

....

Réclamations relatives à l'environnement : faits non découverts

s. 17 Aucun délai de prescription n'est prévu dans le cas des réclamations relatives à l'environnement dont les faits qui y ont donné naissance n'ont pas été découverts. 2002, chap. 24, annexe B, art. 17.

4. *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.

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

Nuisance publique / Définition

180. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque commet une nuisance publique, et par là, selon le cas:

- (a) met en danger la vie, la sécurité ou la santé du public;
- (b) cause une lésion physique à quelqu'un.

(2) Pour l'application du présent article, commet une nuisance publique quiconque accomplit un acte illégal ou omet d'accomplir une obligation légale, et par là, selon le cas:

- a) met en danger la vie, la sécurité, la santé, la propriété ou le confort du public;
- b) nuit au public dans l'exercice ou la jouissance d'un droit commun à tous les sujets de Sa Majesté au Canada.

S.R., ch. C-34, art. 176.

5. *Environment Act, S.N.S. 1994-95, c. 1, ss. 3, 67(2), 69(1):*

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.

...

(r) “environment” means the components of the earth and includes

(i) air, land, water,

(ii) the layers of the atmosphere,

(iii) organic and inorganic matter and living organisms,

(iv) the interacting natural systems that include components referred to in subclauses (i) to (iii),...

Prohibition

s. 67(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause an adverse effect, unless authorized by an approval or the regulations.

Duty to report release

s. 69(1) Any person responsible for the release of a substance into the environment that has caused, is causing or may cause an adverse effect, shall forthwith, as soon as that person knows or ought to know of the release, report it to

(a) the Department at its emergency telephone number

....

(Act drafted in English only)

6. *The Environment Act, C.C.S.M. c. E125, ss. 1(2), 30.1(1), (3):*

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; (« effet nocif »)

...

“environment” means

- (a) air, land, and water, or
- (b) plant and animal life, including humans;
(« environnement »)

No unauthorized release of pollutants

s. 30.1(1) No person shall release or allow the release of a pollutant in an amount or concentration, or at a level or rate of release, that causes or may cause a significant adverse effect, unless expressly authorized or permitted to do so

- (a) under this Act or the regulations;
- (b) under another Act of the Legislature or an Act of Parliament, or a regulation made under one of those Acts; or
- (c) by a licence, permit, order, instruction, directive or other approval or authorization issued or made under this Act, another Act of the Legislature or an Act of Parliament.

....

Duty to report release

s. 30.1(3) A person who releases or causes or allows the release of a pollutant that may cause, is causing or has caused an adverse effect must report the release, in accordance with the regulations, to

- (a) the director,

....

Loi sur l'environnement, C.P.L.M. c. E125, ss. 1(2), 30.1(1), (3):

Définitions

s. 1(2) Les définitions qui suivent s'appliquent à la présente loi.

« effet nocif » Dégradation de l'environnement ou dommage qui y est causé, y compris tout effet négatif sur la santé ou la sécurité des humains. (“adverse effect”)

« environnement » S’entend, selon le cas:

- a) de l'air, du sol et de l'eau;
- b) de la vie végétale et animale, y compris les humains. ("environnement")

Émission non autorisée de polluants

s. 30.1(1) Il est interdit d'émettre des polluants ou d'en permettre l'émission lorsque la quantité, la concentration, le niveau ou le taux d'émission est tel qu'il cause ou pourrait causer des effets nocifs importants, sauf s'il est expressément permis ou autorisé de le faire en vertu :

- a) de la présente loi ou de ses règlements;
- b) de toute autre loi ou de tout règlement du Manitoba ou du Canada;
- c) d'un permis, d'une licence, d'un ordre, d'une directive ou de toute autre approbation ou autorisation que vise la présente loi ou une loi du Manitoba ou du Canada.

....

Déclaration obligatoire des émissions

s. 30.1(3) Quiconque émet un polluant qui pourrait entraîner, entraîne ou a entraîné des effets nocifs ou quiconque cause ou permet l'émission de tels polluants déclare l'incident aux personnes qui suivent conformément aux règlements :

- a) le directeur;

....

7. *Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, ss. 1, 109(2), 110(1):*

Definitions

s. 1 In this Act,

(b) "adverse effect" means impairment of or damage to the environment, human health or safety or property;

...

(t) "environment" means the components of the earth and includes

- (i) air, land, water,
- (ii) all layers of the atmosphere,
- (iii) all organic and inorganic matter and living organisms, and

- (iv) the interacting natural systems that include components referred to in subclauses (i) to (iii);

Prohibited release where no approval or regulation

s. 109(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

Duty to report release

s. 110(1) A person who releases or causes or permits the release of a substance into the environment that may cause an adverse effect shall, as soon as that person knows or ought to know of the release, report it to

- (a) the Director

....

(Act drafted in English only)

8. *Environment Act, R.S.Y. 2002, c. 76, ss. 2, 112, 113:*

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; « *conséquences préjudiciables* »

...

“contaminant” means a solid, liquid, gas, smoke, odor, heat, sound, vibration, pathogen or radiation or any combination thereof that is foreign to the normal constituents of the natural environment, or that exceeds normal quantities or concentrations in the environment, and that results directly or indirectly from human activity that may cause or contribute to causing adverse effect; « *pollutant* »

...

“environment” means

- (a) air, land, and water,

- (b) all organic and inorganic matter and living organisms, including biodiversity within and among species,
- (c) the ecosystem and ecological relationships,
- (d) buildings, structures, roads, facilities, works, artifacts,
- (e) all social and economic conditions affecting community life, and
- (f) the inter-relationships between or among any of the factors in paragraphs (a), (b), (c), (d), or (e) in the Yukon; « *environnement* »

Prohibition

s. 112 No person shall release a contaminant in a manner contrary to this Act or the regulations. S.Y. 1991, c.5, s. 112.

Report of release

s. 113 Every person who releases a contaminant in an amount, concentration, or level in excess of that prescribed by regulation or allowed under a permit shall, as soon as possible under the circumstances, report the release to an environmental protection officer or to a person designated by regulation. S.Y. 1991, c. c.5, s. 113.

Loi sur l'environnement, L.R.Y. 2002, Chapitre 76, ss. 2, 112, 113:

Définitions

s. 2 Les définitions qui suivent s'appliquent à la présente loi.

« conséquences préjudiciables » Les conséquences réelles ou probables ci-après:

- a) la dégradation de la qualité de l'environnement;
- b) les dommages causés à des biens ou la perte de jouissance de l'usage légitime d'un bien;
- c) les dommages causés à des végétaux ou à des animaux ou à un élément de l'environnement nécessaire à leur subsistance;
- d) les préjudices ou les malaises graves causés à quiconque "*adverse effect*";

....

« environnement » S'entend au Yukon des éléments suivants:

- a) l'air, la terre et l'eau;

- b) les matières organiques et inorganiques et les organismes vivants, y compris les espèces présentant des variants biologiques;
- c) l'écosystème et les relations écologiques;
- d) les bâtiments, les structures, les routes, les installations, les ouvrages, les objets façonnés;
- f) les interactions entre deux ou plusieurs des facteurs mentionnés aux alinéas a), b), c), d) et e). "*environment*"

...

« polluant » Solide, liquide, gaz, fume, odeur, chaleur, son, vibration, agent pathogène, radiation, ou combine de ces elements, qui est étranger aux constituants habituels de l'environnement naturel ou qui exceed les quantités ou les concentrations courantes dans l'environnement, qui est produit directement ou indirectement par l'activité humaine et qui est susceptible de causer ou de contribuer à causer des consequences préjudiciables "*contaminant*"

Interdiction

s. 112 Il est interdit de rejeter un polluant d'une manière contraire à la presente loi ou à ses réglements. L.Y. 1991, ch. 5, art. 112.

Signalement des rejets

s. 113 Quiconque rejette un polluant dont la quantité, la concentration ou le niveau dépasse ce qui est prescrit par réglement ou autorisé en vertu d'un permis, signale le rejet dans les meilleurs délais possible à un agent de protection de l'environnement ou à une personne designee par réglement. L.Y. 1991, ch. 5, art. 113.