



COURT OF APPEAL FOR ONTARIO

COUR D'APPEL DE L'ONTARIO

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General Inquiry Number: (416) 327-5020

FACSIMILE TRANSMISSION SHEET

Date: Tuesday, October 18, 2011

RE: R. v. Castonguay Blasting Ltd.
Court of Appeal File No.: C53611 – M40564

Attached please find a copy of the endorsement given by Justice Feldman regarding the motion to intervene.

Please deliver the following pages to:

<u>NAME</u>	<u>OFFICE</u>	<u>FAX</u>
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From: Victoria Anderson for John Kromkamp, Senior Legal Officer, Court of Appeal for Ontario.

I am transmitting 5 pages (including this cover sheet). If all pages are not received, please contact Victoria Anderson at (416) 327-5112 as soon as possible.

DATE: 20111018
DOCKET: M40564 (C53611)

COURT OF APPEAL FOR ONTARIO

Feldman J.A. (Chambers)

BETWEEN

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

Joseph F. Castrilli and Ramani Nadarajah, for the moving party and

Proposed intervenor Canadian Environmental law Association

J. Bruce McMeekin, for the appellant Castonguay blasting Ltd.

Danielle Meuleman, for the respondent Her Majesty the Queen

Heard: October 14, 2011

Motion for an order allowing the Canadian Environmental Law Association to Intervene in this Appeal. Heard by Justice Kathryn Feldman as a designate of Associate Chief Justice Dennis O'Conner.

ENDORSEMENT

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[1] The applicant, Canadian Environmental Law Association, seeks leave to intervene in this appeal for the purpose of raising two issues not raised by the respondent, the prosecuting authority, the Ministry of the Environment. The proposed intervener will submit that the *Environmental Protection Act* should be interpreted in two ways not proposed by the Ministry: (1) the Act should be interpreted to include liability for events that are covered by common law torts such as nuisance, *Rylands v Fletcher* strict liability, trespass and negligence; (2) the Act should be interpreted using the “precautionary principle”. The interest of the intervener is to broaden the reach of the Act on behalf of the public.

[2] The respondent Ministry confirmed that it did not make these arguments at trial, and does not intend to do so on the argument of the appeal, but does not oppose the intervention by the Canadian Environmental Law Association.

[3] On a motion for intervener status in the public interest, the issues to be considered are:

- the nature of the case;
- the issues that arise;
- the likelihood that the applicant will make a useful contribution without causing an injustice or prejudice to the parties. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (Ont. C.A.)

[4] The appellant opposes the intervention on the ground that the arguments that the proposed intervener intends to raise are irrelevant to the facts of the present prosecution and therefore will not make a useful contribution to the argument of the appeal. It does not argue injustice or prejudice.

[5] The appellant was prosecuted by the Ministry for failing to report the discharge of a contaminant into the natural environment, contrary to s. 15(1) of the *EPA*. The appellant was blasting rock for highway construction when rock fragments known as “fly-rock” were unintentionally released into the air, landing about 90 metres away and damaging a car and home. The appellant compensated the injured party, paying approximately \$15,000. It also informed the Ministry of Labour in accordance with the *Occupational Health and Safety Act*, but did not inform the Ministry of the Environment.

[6] The appellant was acquitted at trial, but convicted on appeal. The Crown opposed the granting of leave to appeal, and argued that any concerns about unwarranted prosecutions for failing to report would be alleviated by the exercise of prosecutorial discretion. In granting leave to appeal to this court, Winkler C.J.O. rejected the Crown’s position and found that “the relative breadth of the duty to report is an issue that is potentially relevant to a broad range of activities beyond blasting. Moreover, the duty to report is a proactive duty imposed on members of the public requiring direction from the statute as interpreted by the court, as to when this duty will be triggered.” 2011 ONCA 292 para.21.

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[7] I agree with the applicant that the issues it wishes to raise may be useful to the court in considering the breadth of the duty to report in the context of the appeal. I would grant the intervention on that basis.

[8] However, it will be up to the panel hearing the appeal to consider whether it is open to the court on the appeal to apply against the appellant an interpretation to a provision that was not sought by the prosecuting authority at trial or on appeal.

[9] The following shall be the terms of the order:

- 1) The intervener shall take the record as it is and file no further material.
- 2) Within one week from the release of these reasons, the intervener may deliver a factum substantially in the form attached to its motion factum, modified as it deems appropriate to address the case of *Smith v. Inco*, 2011 ONCA 628, released by this court on Friday, Oct 7, 2011, and not to exceed 18 pages.
- 3) The appellant may file a Reply factum up to 18 pages in length as it deems necessary.
- 4) The Intervener shall be allocated 15 minutes for oral argument.
- 5) There shall be no costs associated with the intervention or of this motion.

K. F. J.A.