## Ontario Court of Appeal to hear case involving flyrock

***By Michael S. Hebert and Sig Pantazis***

In the mid-afternoon on November 26, 2007, flyrock crashed through the roof of the Bertrand residence and damaged their home, lawn and the windshield of their vehicle. Fortunately, no one was injured. A company called Castonguay Blasting Ltd. was widening Highway 7 roughly 90 feet from the Bertrands' home north of Belleville, Ont. A blast propelled a large amount of rock into the air, leading to the accident.

Castonguay reported the incident to the Ontario Ministry of Transportation (MTO) and the Ministry of Labour (MOL) immediately, as required in its contracts with the provincial government. The company also compensated the Bertrands for the cost of the repairs to their property. However, it did not report the incident to the Ministry of the Environment (MOE).

The MOE learned of the incident in May 2008, and in October 2009 charged Castonguay under section 15(1) of Ontario's *Environmental Protection Act* (EPA). The Ontario Court of Justice dismissed the charge on May 14, 2010. On Feb. 1, 2011, Justice Tim Ray heard an appeal of this dismissal in the Ontario Superior Court of Justice, reversed the decision and entered a conviction. See: *HMQ (MOE) v. Castonguay Blasting Ltd.*, 2011 ONSC 767 (CanLII). In April, Castonguay was granted leave to appeal to the Ontario Court of Appeal.

Section 14 of the EPA prohibits discharge of a contaminant causing an adverse effect. Section 15 requires an individual to report any such discharge to the MOE "forthwith."

The EPAdefines "contaminant" as "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."

The EPA defines "adverse effect" as any 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.

There are similar provisions in equivalent provincial legislation throughout Canada. There were a number of issues in the appeal, but the one that makes this case so interesting from an environmental law perspective is the contaminant itself: flyrock. Flyrock is simply rock that becomes airborne during blasting or excavation. Rock and sand have been found to be contaminants in other instances. In *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, Justice Campbell of the Federal

Court held that waste rock from a proposed mining site was a “substance harmful to migratory birds.”

In *R. v. Glen Leven Properties Ltd* (1977), 15 O.R. (2d) 501, O.J. No. 286, the Divisional Court found that sand which naturally blows in the wind is not a contaminant, but when sand that would normally remain stationary is moved by human activity, such as a blasting operation, it becomes a contaminant, and the people responsible must ensure it does not cause an adverse effect.

It is clear from the Castonguay case and the legal analysis contained in the decision that many everyday activities could fall within the scope of a “discharge” under the EPA. Justice Ray specifically rejects the view that the EPA is only meant to apply when there is an “environmental event” or where the “natural environment” is impacted, citing authority from the Ontario Court of Appeal.

For example, a baseball is a solid that has resulted from human activity. It could therefore be characterized as a “contaminant.” Children playing baseball in a backyard who knock a ball through a window have “caused a discharge” of a “contaminant” that has created an “adverse effect” by breaking a window and causing property damage.

Similarly, knocking a flowerpot off a balcony, passing another vehicle on a gravel road, or even sneezing could theoretically constitute a discharge under the EPA. Arguably, section 15 requires the discharge to be “out of the normal course of events” in order to make reporting the discharge mandatory, but section 14 contains no such limitation.

According to the MOE website, the ministry has aggressively pursued non-reported discharges of flyrock by blasting companies since at least 2004. Fines have been levied under the EPAfor flyrock-related offences since at least 1992. That being the case, why didn’t Castonguay’s contract require flyrock discharges to be reported to MOE?

If the MOE wants to broaden the application of the EPA, perhaps it should begin by letting people know. The Ontario Court of Appeal may share this view. In granting leave to appeal in this case, Chief Justice Winkler expressed concern that a person could be charged with an offence (failing to report a discharge) without ever having received notice that a particular activity constitutes a discharge that must be reported.

The Ontario MOE may need to do more to effectively inform the public if it is considering applying environmental legislation in new or unanticipated ways. Otherwise, the courts may intervene to narrow prosecutorial discretion and spell out how the EPA is to be applied.