

# **Brief Senior Management: When in Doubt, Report Environmental Incidents to Government Officials**



- ☒ During a highway blasting operation, flyrock damaged a house and car. The blasting company reported the incident to the Ontario Ministries of Transportation and Labour but not the Environment. It was charged with failing to report the discharge of a contaminant that caused or was likely to cause an adverse effect. The trial court dismissed the charge, ruling that the reporting requirement only applied to "environmental events." But the appeals court ruled that, under the Ontario *EPA*, flyrock fit the definition of "contaminant" and "adverse effect" included property damage. And the Court of Appeal agreed [*Ontario (Minister of the Environment) v. Castonguay Blasting Ltd.*].

## **THE PROBLEM**

When a company has an environmental incident, such as a spill of a hazardous substance, it generally must report the incident to the appropriate government officials. But if an incident is small or it's not clear that the environment has actually been harmed, the company may decide not to bother reporting it. After all, who wants environmental officials nosing around company operations if it can be avoided? The problem is that the government may not think the incident is

so minor. And failing to report it could be an environmental violation itself. The *Castonguay* case is a good example of what can happen when a company opts not to report an environmental incident.

## THE EXPLANATION

One of the key components of the environmental laws is the duty to report certain incidents that have impacted or may impact the environment. ([See this chart for the types of incidents you must report in each jurisdiction.](#)) In many cases, deciding whether to report an incident is an easy call. For example, if a truck gets into an accident and releases hundreds of litres of a toxic substance into a river, clearly you must report this incident.

But sometimes whether the company must report an incident won't be so clear. For example, suppose a worker spills a small amount of a hazardous substance on a concrete floor and immediately cleans it up before it can spread. Must the company report what appears to be a minor incident with no impact on the environment?

The specific reporting requirements in each jurisdiction's environmental law spell out which environmental incidents must be reported. So the law is the first place to check. However, the law's requirements can be vague. For example, in Alberta, you must report unauthorized releases of a substance into the environment that are causing or have caused an adverse effect. It's often easy to tell if a release has harmed or is harming the environment. For example, when fish are going belly up in a river after a spill, clearly the environment has been harmed.

But in Alberta and most jurisdictions, companies must also report releases or spills that *may cause* an adverse effect to the environment—and that's where things can get tricky. You may not be able to easily determine whether an incident may or

could harm the environment. And because you typically must report environmental incidents immediately or as soon as possible, you'll have to make this judgment fast.

Further complicating reporting is the fact that the environmental laws often define "adverse effect" broadly. In fact, it was the definition of "adverse effect" in Ontario environmental law that tripped up the company in *Castonguay*. The company argued that although there was damage to private property as a result of the flying rock generated by the blasting operation, there was no or minimal harm to or impairment of the natural environment. Thus, it said the reporting requirement wasn't triggered.

The Court of Appeals explained that the definition of "adverse effect" under the *EPA* specifically included "injury or damage to property." It also explained that the *EPA* should be interpreted broadly to ensure the protection and preservation of the environment. And it added that the law was also concerned about *uses of the environment* that could cause harm to people, animals or property. In this case, the discharge of flyrock into the air during a blasting operation being carried out in the natural environment caused an adverse effect under the law, that is, property damage. Thus, the incident triggered the reporting requirements under the *EPA*, concluded the Court.

## THE LESSON

The key lesson from the *Castonguay* case is that when in doubt, the company should err on the side of caution and report an incident that could fall within the environmental reporting requirements. You and your fellow members of senior management are unlikely to be deciding whether to report an environmental incident. But you must ensure that the company has clear reporting policies based on the requirements of the environmental law in its jurisdiction. These policies should generally take a conservative approach that advocates

reporting incidents that the government could reasonably expect companies to report. And you must ensure that all workers and supervisors are trained on these policies.

## **SHOW YOUR LAWYER**

*Ontario (Minister of the Environment) v. Castonguay Blasting Ltd.*, [2012] ONCA 165 (CanLII), March 16, 2012