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THE *ENVIRONMENTAL BILL OF RIGHTS* TURNS 10 YEARS-OLD: CONGRATULATIONS OR CONDOLENCES?

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Prepared by:

Richard D. Lindgren
CELA Counsel

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301-130 SPADINA AVENUE • TORONTO • ON. • M5V 2L4
TEL: 416/960-2284 • FAX: 416/960-9392 • website • www.cela.ca

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Richard D. Lindgren[1]

Executive Summary

Over the past decade, the implementation of Ontario's Environmental Bill of Rights ("EBR") has achieved some – but not all – of the legislative intent underlying the statute. For example, there has been some measurable success in meeting the EBR's procedural goal of increasing public participation in environmental decision-making. However, there has been considerably less success in attaining the EBR's goals of increasing governmental accountability and ensuring environmental sustainability. Accordingly, the 10th anniversary of the EBR should be viewed as an important opportunity to develop appropriate amendments that improve and strengthen the EBR to ensure that the legislative intent is more fully achieved.

PART I – OVERVIEW

(a) Introduction

Ontario's *Environmental Bill of Rights* ("EBR") has been in force for the past ten years, and numerous Ontarians have used the EBR to address diverse issues of environmental law and policy at the local, regional and provincial level.

Accordingly, it is appropriate to use the EBR's 10th anniversary as an opportunity to scrutinize the environmental track record under the EBR, and to determine whether the EBR has fully achieved what the Ontario Legislature had intended when enacting the legislation.

Having regard for the EBR experiences of CELA, other non-governmental organizations ("NGOs"), and the public at large, it is apparent that in many key respects, the EBR has fallen short of fully achieving the legislative intent underlying the statute. In particular, while the EBR has significantly improved public access to environmental decision-making, there is little or no evidence that the EBR has made demonstrable progress in attaining the environmental principles and policies entrenched in the EBR, as discussed below.

Nevertheless, it does not necessarily follow that the EBR should be repealed or gutted. To the contrary, Ontario legislators, NGOs and stakeholders should work together in an open and timely manner to identify the shortcomings of the current EBR regime, and to develop corresponding amendments to the EBR that address or overcome these deficiencies.

Thus, the 10th anniversary of the EBR should be utilized as a springboard to enact the necessary reforms to ensure that the legislative intent is more fully achieved as Ontarians grapple with the environmental challenges of the 21st century.

At the outset, it should be noted that the opinions expressed herein represent CELA's preliminary views on some specific aspects of EBR reform. Accordingly, this article should be regarded as a "work in progress", and CELA will shortly be preparing a more detailed and comprehensive position paper on EBR reform.

(b) What is the "Legislative Intent"?

To discern the legislative intent of the EBR, it is possible to draw upon a wide variety of sources, such as the origins and legislative history of the EBR concept itself, which can be traced back to law reform efforts of CELA and other NGO's, to private members' bills introduced in Ontario the 1970s and 1980s, and to legislative developments in other jurisdictions such as Michigan.[2]

In addition, one may consider other facets of the EBR's legislative evolution, such as: the Report of the Minister's Task Force on the EBR; the Task Force's Supplementary Recommendations; and the extensive comments of the Premier, Environment Minister and other MPP's during the legislative debates on the EBR.

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[1] Counsel, Canadian Environmental Law Association. The author served as CELA's representative on the Minister's Task Force on the Environmental Bill of Rights.

[2] For a concise history of the EBR, see P. Muldoon & R. Lindgren, *The Environmental Bill of Rights: A Practical Guide* (1994, Emond Montgomery), pp.5 to 26. See also J. Castrilli, "Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences", [1998] Vol. IX *Villanova. Env. L. Journal*, 349, at pp. 357 to 370.

However, the simplest and clearest statements of legislative intent are contained within the EBR itself. For example, the EBR's preamble affirms the "inherent value of the natural environment", provides that Ontarians "have a right to a healthful environment", and states that Ontarians have a common goal of protecting, conserving and restoring the natural environment "for the benefit of present and future generations". The preamble further provides that while "the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner."

These themes are echoed in the EBR's statement of purpose, which provides as follows:

> 2(1) The purposes of this Act are,
>
> (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;
> (b) to provide sustainability of the environment by the means provided in this Act; and
> (c) to protect the right to a healthful environment by the means provided in this Act.

Subsection 2(2) of the EBR goes on to describe numerous environmental principles and policies that are subsumed within the above-noted statement of purpose:

> 2(2) The purposes set out in subsection (1) include the following:
>
> 1. The prevention, reduction and elimination of the use, generation, and release of pollutants that are an unreasonable threat to the integrity of the environment.
> 2. The protection and conservation of biological, ecological and genetic diversity.
> 3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.

4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.
5. The identification, protection and conservation of ecologically senstive areas or processes.

The EBR also outlines the statutory mechanisms that are available to achieve these purposes, principles and policies:

> 2(3) In order to fulfill the purposes set out in subsections (1) and (2), this Act provides,
>
> (a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;
> (b) increased accountability of the Government of Ontario for its environmental decision-making;
> (c) increased access to the courts by residents of Ontario for the protection of the environment; and
> (d) enhanced protection for employees who take action in respect of environmental harm.

Taken together, the preamble and subsections 2(1) to (3) establish that the overall legislative intent of the EBR is threefold:

- to ensure meaningful public participation in environmental decision-making;
- to enhance governmental accountability (i.e. through political and judicial means) for environmental decision-making; and
- to ensure that governmental decision-making results in the protection, conservation, and restoration of the environment (i.e. sustainability of natural resources and ecological functions).

The threshold question then becomes deceptively simple: are the tools currently contained within the EBR actually achieving these three objectives; if not, why not? In turn, the answer to this

question greatly depends upon the indicators or benchmarks used to evaluate whether the EBR is successfully meeting these objectives, as described below.

(c) Measuring "Success" under the EBR

To determine whether the EBR has been "successful", one could use relatively simple, quantifiable indicators or parameters. For example, one could examine the number of EBR Registry notices for proposed policies, Acts, regulations or instruments, or one could quantify the number of public responses to EBR Registry postings. If such statistical data is used, then it is clear that the EBR has achieved some tangible success in reaching its stated objective of facilitating public participation in decision-making processes.

For example, from January 2001 to September 2003, approximately 73% of the EBR Registry postings for proposed policies, Acts and regulations triggered written comments from the public. Similarly, over the past five years, some 3,427 public comments have been submitted in relation to proposals to issue or amend prescribed instruments.[3]

What is less clear is whether this increased public participation has substantively changed or improved the quality of the environmental decision-making by government officials. With respect to instruments, for example, there appears to be no evidence that public input via the EBR has appreciably changed the number or nature of statutory approvals being issued, even for controversial facilities such as waste disposal sites or industrial facilities. Moreover, given that the majority of third-party leave to appeal applications are dismissed -- and given the extreme rarity of EBR Part VI lawsuits or judicial review applications involving EBR non-compliance – it cannot be seriously contended that there has been "increased" access to the courts or "enhanced" legal accountability of governmental decision-makers pursuant to the EBR.

Similarly, it is exceptionally difficult to conduct a qualitative asesssment of the EBR's impact on the natural environment itself, even though the EBR explicitly intends to achieve environmental

[3] ECO, *Celebrating the 10th Anniversary of the Environmental Bill of Rights and the Environmental Commissioner of Ontario* (2004), "Snapshots".

sustainability. First, there is a continuing policy and scientific debate on what are appropriate indicators for measuring environmental sustainability or biological diversity. Second, even if there is consensus on the appropriate indicators, it is hard to obtain empirical evidence demonstrating the "on-the-ground" effectiveness of the EBR or other environmental statutes. Third, even where one can measure tangible improvements in environmental quality, it may be difficult if not impossible to determine whether these gains are attributable to the EBR regime or to other non-statutory factors (i.e. technological developments, economic downturns, etc.).

Having said this, it is clear that there are some site-specific examples of where the EBR has produced or secured improvements to environmental quality at the local level. For example, the first case where third-party leave to appeal was granted (i.e. *Barker v. Director*) resulted in a settlement that revoked a certificate of approval -- and required the clean-up and permanent closure -- of a dormant landfill site, much to the satisfaction of neighbouring residents. But while occasional EBR "success" stories exist at the local level, there is little or no evidence at the provincial level that the EBR has directly led to the conservation of natural resources, protection of biological diversity, or provision of environmental sustainability.

Indeed, the available evidence suggests that despite the existence of the EBR, Ontario is still experiencing serious environmental crises, public health concerns, and threats to our quality of life. For example, during the past decade, Ontario has suffered the Walkerton Tragedy, the Plastimet fire, numerous chemical spills, increasing smog alerts, rampant urban sprawl, leaking landfills, energy shortages, climate change impacts, endangered/threatened species of flora and fauna, and intense resource management conflicts over water-takings, forestry practices, and aggregate/mining operations. In addition, annual reports from the Commission for Environmental Cooperation have consistently placed Ontario at or near the top of North American jurisdictions with the largest volume of releases of pollutants to air, land and water.[4]

Undoubtedly, the province's environmental track record over the past decade leaves much to be desired, and it appears that the EBR has had a negligible (or non-existent) effect on Ontario's

[4] These reports are available at: www.cec.org.

overall environmental performance to date. Indeed, it seems that the environmental agenda in Ontario in 2004 is virtually the same as it was when the EBR was proclaimed in force in 1994.

Thus, while the EBR has generally worked in terms of meeting its procedural objectives (i.e. facilitating public participation), the EBR has not worked very well in meeting its substantive objectives (i.e. protecting, conserving and restoring the environment). Accordingly, future law reform efforts involving the EBR should address not only the procedural problems that have arisen to date (as discussed below), but should also include improving and strengthening the substantive components of the EBR.

PART II – CRITIQUE OF THE EBR TOOLS

As currently drafted, the EBR contains a number of statutory mechanisms that are intended to achieve the various purposes, principles, and policies entrenched within the EBR. It is beyond the scope of this article to systematically identify and analyze the strengths or weaknesses of every EBR mechanism, nor is it the purpose of this article to suggest legislative wording for the full range of EBR amendments that should be considered by the Ontario Legislature.

Instead, this article focuses on five key EBR tools (i.e. Statements of Environmental Values, public participation regime under Part II, Applications for Review, Applications for Investigation, and the "public resources" cause of action), and discusses some of the main problems in interpreting or implementing these provisions to date. On the basis of this discussion, it is concluded that the EBR is in serious need of reform if it is to achieve its laudable goals and objectives.

(a) Statements of Environmental Values

In essence, Statements of Environmental Values ("SEVs") were intended to operationalize the EBR's general purposes, principles and policies into Ministry-specific guidance documents to direct the day-to-day decision-making within the Ministries.

In particular, section 7 of the EBR required each prescribed Ministry to develop an SEV that "explains how the purposes of this Act are to be applied" in the Ministry's decision-making process, and that "explains how consideration of the purposes of this Act should be integrated" with other socio-economic or scientific factors in the Ministry's decision-making process. Moreover, section 11 of the EBR specifies that Ministers "shall take every reasonable step" to ensure that SEVs are considered "whenever decisions that might significantly affect the environment are made" in the Ministries.

Despite this mandatory language, however, two main problems have emerged in relation to the content and application of SEVs.

With respect to SEV content, a perusal of the current SEVs reveals that, for the most part, they simply reiterate verbatim the EBR purposes and contain overgeneralized platitudes about the importance of protecting and conserving the environment. In short, the current SEVs fail to provide any operational detail on precisely how the EBR purposes are actually going to be applied during the Ministries' decision-making, and fail to identify any meaningful mechanisms for monitoring or reporting upon the Ministries' success (or failure) in implementing the EBR purposes. In addition, the SEVs have remained virtually unchanged since they were first finalized in the mid-1990s. At best, the SEVs are vacuous, "feel good" statements that do not fully comply with the content requirements of section 7 of the EBR.

With respect to SEV application, there is little direct evidence that the SEVs have materially changed or improved the Ministries' decision-making or actions over the past decade. This is particularly true in relation to proposed instruments, such as those issued by the Ministry of the Environment (which appears to have steadfastly refused to consider or apply its SEV in context of instruments).

Unless and until the SEVs are substantively rewritten and actually integrated in Ministries' environmental decision-making (especially in relation to instruments), the SEV component of the EBR can only be characterized as a serious failure in terms of ensuring governmental accountability and environmental sustainability:

> Overall, the SEV requirements have been an abject failure as a key element in justifying [the EBR's] political approach to government accountability. Absent from earlier private members' bills, the SEVs were meant to partially substitute for judicial accountability, if not the public trust doctrine. The practical application of the SEV process, however, does not support the case for political accountability as a substitute for environmental rights redressable through the courts.[5]

(b) Public Participation Regime

As noted above, there are certain aspects of the Part II public participation regime that have worked satisfactorily over the past decade, such as public usage of the EBR Registry for the purposes of reviewing and commenting upon proposed policies, Acts, regulations and instruments.

Nevertheless, there are opportunities to improve and strengthen the public participation regime so that it more effectively achieves the legislative intent of increased public involvement, enhanced governmental accountability, and better environmental protection. At the same time, the past decade has demonstrated that the EBR contains some significant barriers to public participation that must be removed via legislative amendments.

For example, considerable concern has arisen regarding the inadequacy of public comment periods under the EBR. Although the EBR provides that 30 days is the minimum requirement, this timeframe has, for the most part, become the *de facto* standard, even for large, complex or controversial proposals. While comment periods greater than 30 days have been established for a small handful of proposals, the overwhelming trend has been for Ministries to provide perfunctory 30 day comment periods. In many instances, this timeframe has proven to be too short, especially in light of the difficulty experienced by Ontarians in accessing the relevant documentation in a timely manner. Such problems are exacerbated by EBR Registry notices that are administratively deficient (i.e. inadequate proposal summaries, hyper-links that do not work,

[5] J. Castrilli, *op. cit.*, p.423.

document repositories that are distant or inconvenient, etc.). Clearly, the notice/comment provisions of the EBR should be revisited to ensure that there is meaningful public participation in environmental decision-making.

Concern has also arisen over the past decade in relation to Ministries' overuse (or misuse) of "exceptions" to the EBR's notice/comment provisions. Too often, CELA and other NGOs have experienced situations where Ministries have claimed that a proposal is not subject to EBR notice/comment requirements, but then the matter is posted on the EBR Registry for "information purposes" only and public comments are solicited anyways. When this selective approach is used in the context of proposed instruments, it can only be regarded as a colourable attempt to avoid triggering the third-party appeal provisions under Part II. In CELA's view, if a proposal is important enough to be posted on the Registry so as to solicit public comment, then it should be subject to the mandatory notice/comment regime under Part II (including third-party appeal if it involves an instrument).

Arguably, the most controversial and problematic "exception" to notice/comment over the past decade has been the so-called "EA exception" established by section 32 of the EBR. This provision was originally intended to avoid unnecessary overlap or duplication in approval processes that apply to undertakings that had been either approved or exempted under the *Environmental Assessment Act* ("EA Act"). However, after section 32 went into effect in 1994, the EA Act itself was substantially rewritten in 1996 by Bill 76 so as to confer greater political discretion upon the Environment Minister regarding the timing, scope and application of the EA process to undertakings subject to the EA Act.[6]

At the same time, there have been significant changes in the regulatory regime (i.e. O.Reg. 206/97)[7] and administrative practice (i.e. few public hearing referrals,[8] increased usage of Class EAs that cover broad classes of projects/activities, few (if any) "bump-ups" to individual EA's,

[6] For a detailed analysis of the changes in Ontario's EA program, see A. Levy, "A Review of Environmental Assessment in Ontario" (2002), 11 J.E.L.P. 173.
[7] This regulation provides, in effect, that waste disposal sites and waste managements systems subject to the EA Act are exempted from the mandatory public hearing required by section 30 of the *Environmental Protection Act.*
[8] Since 1995, only two undertakings have been referred to the Environmental Review Tribunal for public hearings under the EA Act.

declaration orders exempting various projects/activities, etc.). In addition, it has become increasingly common for proponents subject to the EA Act to defer the critical design details of proposed undertakings to other statutory approval regimes that may be applicable (i.e. *Environmental Protection Act*, *Ontario Water Resources Act*, etc.). As a practical matter, this means that proponents can "shelter" or "hide" technical details behind the section 32 exception, which effectively excludes public notice/comment requirements and third-party appeal provisions of the EBR. In light of these significant developments, it has become imperative to reconsider the need for, and the content of, the EA exception under section 32 of the EBR.

Another component of the Part II public participation regime that has produced considerable difficulty over the past decade is the third-party appeal mechanism. First, there appears to be a growing consensus that the twin branches of the section 41 leave test (i.e. the impugned decision was unreasonable and could result result in significant environmental harm) are too onerous, which has effectively prevented serious concerns about prescribed instruments from proceeding to full public hearings by the Environmental Review Tribunal ("ERT").

For example, from 1995 to September 2003, some 96 leave to appeal applications were filed by members of the public. Of the decided applications, only 21% resulted in the granting of leave to the prospective appellants.[9] In other words, leave to appeal was refused by the ERT in approximately 80% of the cases. Given this dismal outcome, it cannot be seriously contended that the third-party appeal mechanism (or the mere threat of a third-party appeal) has produced greater governmental accountability or better environmental decisions. If anything, the strict leave test has prompted decision-makers to use better boilerplate, or to generate a bigger "paper trail", in order to bullet-proof the impugned decisions so as to preclude the possibility of an appeal hearing.

Second, the 15 day "window" under section 40 for filing leave applications is far too short to allow interested residents to find out about the decision, access the relevant documentation, obtain technical or legal assistance if necessary, assemble the leave application, and serve and file the materials in time. Indeed, CELA has been involved in leave cases where there have been

[9] ECO, *supra*, f.n. 3.

disputes over when the 15 day period actually starts or expires. Clearly, the timing of third-party appeals needs to be revisited with a view towards extending the filing timeframe to 20 or 30 days.

Third, even where leave to appeal has been granted, it has sometimes been unclear whether leave was granted in whole or in part by the ERT member.[10] Part of this uncertainty may be attributable to vagueness in the leave decision, but it is also attributable to the fact that the EBR does not expressly state whether the appellate body can grant partial leave or restrict the appeal grounds that may be pursued at the hearing. Again, this legislative ambiguity should be resolved as soon as possible, keeping in mind that instrument holders have no statutory restrictions on their ability to file appeals on any ground relevant to the subject-matter of the appeal.

Finally, consideration must be given to ensuring that EBR appellants have sufficient resources to actually prepare leave applications or proceed to hearings where leave is granted. Preparing a properly documented leave application – or participating in an appeal hearing – increasingly requires citizens to retain technical, scientific or legal assistance. It goes without saying that such assistance may be prohibitively expensive for many residents or grass-roots NGOs across Ontario. Therefore, it has become necessary to tackle the fiscal barriers that prevent more widespread or effective use of the third-party appeal mechanism under the EBR. Whether this reform requires the development of a participant funding program – or an intervenor funding (or interim costs?) regime administered by the ERT – remains to be seen. Either way, it appears likely that the EBR will have to be amended accordingly.

In summary, the Part II public participation regime has worked in some respects to more frequently involve the public in environmental decision-making. However, there is clearly room for improvement in relation to notice/comment requirements, the "EA exception", and the third-party appeal mechanism. In this regard, it must be concluded that over the past decade, the public participation regime has enjoyed only modest or partial success in achieving the purposes, principles and policies of the EBR:

[10] *Smith v. Ontario* (2003), 1 C.E.L.R. (3rd) 245 (Ont. Div. Ct.).

> The promise of notice, comment, appeals and reviews raised public expectations concerning [the EBR's] contribution to increased public participation in the environmental decision-making process. Apart from some occasional successes in the leave to appeal process, however, broad ministerial discretion has greatly diminished the anticipated value of notice and comment opportunities and the public's ability to help establish Ontario's environmental agenda through requests to review laws and policies. The absence of a funding requirement permitting members of the public to become involved who could not otherwise, has compounded these concerns.[11]

(c) Applications for Review

In theory, an Application for Review under Part IV of the EBR offers a valuable opportunity for Ontarians to pursue the environmental agenda by formally requesting the review and/or revision of outdated policies, laws, regulations, or instruments. Similarly, the Application for Review is available to request the development of new policies, laws or regulations to address gaps within the existing environmental framework.

In practice, however, the Application for Review track record has been less than awe-inspiring to date. For example, the Environmental Commissioner's Annual Reports to date suggest that Applications for Review have rarely been granted by the relevant Ministries. In fact, of the 109 Applications for Review submitted by the public from 1995 to 2003, only 13% resulted in reviews being undertaken by the relevant Ministries.[12] Thus, it appears that relatively few legislative, regulatory or policy changes have directly resulted from Applications for Review. Similarly, it appears that relatively few changes to instruments have directly resulted from Applications for Review filed under Part IV of the EBR.

One possible explanation for this poor track record is that the Applications for Review filed to date may have been frivolous or unmeritorious. However, this possibility has been ruled out by the Environmental Commissioner's Annual Reports, which have generally affirmed the

[11] J. Castrilli, *op. cit.*, p.419.
[12] ECO, *supra*, f.n. 3.

legitimacy and public importance of the issues raised in Applications for Review. At the same time, the Annual Reports have criticized the Ministry replies to these Applications for Review.[13] For example, the 2001-2002 Annual Report found that:

> The majority of applications for review and investigation were denied. In many cases, the ECO did not accept the ministries' rationales for denying these applications. Often, a ministry's response to an application failed to take into account all of the concerns expressed by the applicants.[14]

Similar comments were expressed in the 2002-2003 Annual Report, where the Environmental Commissioner sharply disagreed with MNR decisions not to undertake requested reviews of Regulation 328 under the *Endangered Species Act*, or the need for a provincial wolf conservation strategy.[15]

In CELA's own experience, Ministry replies to Applications for Review have often consisted of unpersuasive rhetoric or unsubstantiated arguments that are non-responsive to the issues or concerns raised by the applications.

For example, in the immediate aftermath of the Walkerton Tragedy, CELA filed a detailed Application for Review with the MOE to review the need to enact the long-overdue *Safe Drinking Water Act*. The MOE summarily rejected the CELA application, endorsed the status quo, and claimed that such legislation was not necessary in Ontario. At the Walkerton Inquiry, however, Mr. Justice O'Connor revisited this issue and agreed with CELA by recommending that the *Safe Drinking Water Act* should be enacted. Thus, some three years after the MOE rejected the CELA Application for Review, the Ontario Legislature ultimately passed the *Safe Drinking Water Act*. In these circumstances, CELA can only conclude that the MOE rejection was premised on political factors rather than environmental or public health considerations.

[13] J. Castrilli, *op. cit.,* p.419, f.n. 285.
[14] ECO, *Annual Report 2001-2002*, p.113.
[15] ECO, *Annual Report 2002-2003*, pp.137-39.

CELA's experience with this and other Applications for Review has amply illustrated the shortcomings of the current Part IV regime. While Part IV imposes certain procedural obligations upon the parties involved in Applications for Review, it is clear that the responding Ministries have virtually unfettered discretion regarding the disposition of Applications for Review (subject only to the possibility of negative commentary by the Environmental Commissioner in the Annual Reports). Accordingly, Part IV of the EBR should itself be reviewed and revised to ensure that the Application for Review process actually achieves the legislative goals of enhanced governmental accountability and better environmental protection.

(d) Applications for Investigation

Conceptually, the ability to file an Application for Investigation under Part V of the EBR represents an important opportunity for residents to formally engage the investigation and enforcement functions of prescribed Ministries to ensure compliance with Ontario's laws and regulations. Indeed, it should be noted that this concept was expressly endorsed at the Walkerton Inquiry by Mr. Justice O'Connor, who recommended that the MOE should "initiate a process whereby the public can require the Investigations and Enforcement Branch to investigate alleged violations of drinking water provisions".[16] Interestingly, this recommendation was made despite the fact that Part V of the EBR was already in existence at that time.

In any event, it appears that the track record for EBR Applications for Investigation has not been very impressive over the past decade. For example, from 1995 to September 2003, some 140 Applications for Investigation were submitted by Ontario residents. Of these Applications, only 36% resulted in a decision to actually undertake the requested investigation. In other words, it appears that Applications for Investigation have been refused in approximately two-thirds of all cases. If the EBR is intended to enhance governmental accountability and ensure compliance with the law in order to protect the environment, then these figures suggest that the current Application for Investigation mechanism must be reviewed and revised.

[16] Walkerton Inquiry Part II Report, Recommendation 76.

In CELA's experience, part of the problem is that the governmental responses to Applications for Investigations have tended to exculpate not only the alleged offender(s), but also the government itself. It is unclear whether such responses are intended to preclude regulatory negligence claims against the government, or to start building a paper trail against potential Part VI "public resource" lawsuits that may follow an Application for Investigation.

It might be contended that the majority of Applications for Investigation are refused because they lack sufficient evidence or are otherwise unpersuasive that the alleged offences have been committed. However, the Annual Reports of the Environmental Commissioner have often commended the Applications for Investigations, and have admonished regulatory officials for failing to adequately investigate the subject-matter of the Applications. For example, in the most recent Annual Report, the Environmental Commissioner found as follows:

> During the 2002/2003 reporting period, the ECO has observed several instances in which MOE responses to EBR applications for investigations have been less than adequate and the environment has not been appropriately protected. This suggests that MOE may not be using its full range of tools and powers when it responds to an application for investigation. As a result, applicants may be unaware of the other options available to the Ministry to remedy the problems they had set out in their applications.[17]

Even where the MOE reply to the Application for Investigation confirms the likely existence of the alleged offence, it still remains highly discretionary as to what – if anything – that the MOE will do by way of abatement orders or prosecutions. Indeed, in an infamous Application for Investigation case, the MOE confirmed non-compliance with a regulatory standard regarding refillable soft drink containers, but then cited public policy reasons to support its decision not to prosecute the offenders.[18] When the EBR applicant then commenced a private prosecution, the Attorney General of Ontario intervened in the court proceedings to successfully withdraw the charges.[19] Faced with this result, one wonders why Ontario residents would even bother filing Applications for Investigation at all.

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[17] ECO, *Annual Report 2002-2003*, p.120.
[18] ECO, *Annual Report 1994-95*, pp.55-56.
[19] *Perks v. R.* (1998), 26 C.E.L.R. (N.S.) 251 (Ont. C.J.); affd. (Dec. 18, 1998, Doc. CA C29203 (Ont. C.A.).

In summary, the current Application for Investigation mechanism has not proven itself to be as effective or widely used as originally envisioned when the EBR was enacted. The cumbersome process of completing and filing the Application – combined with the high refusal rate – have caused some Ontarians to forgo the process altogether. Thus, this mechanism is clearly in need of reform:

> The principal value of Part V has proven to be the Environmental Commissioner's abilities to oversee the situation and report to the public about less than satisfactory MOE responses. These efforts, while of limited effect in the short term, may spur future reforms. What is surprising is that, despite the high percentage of ministerial rejections of apparently meritorious requests, the application for investigation process has not caused the public to make many requests nor has it encouraged use of the new cause of action under Part VI. It is likely that the public is not invoking the request for investigation process because of its greater formality in comparison to the older, informal process of filing public complaints.[20]

(e) "Public Resources" Cause of Action

In addition to reforming the public nuisance standing rule, Part VI of the EBR attempted to create a new statutory cause of action that empowered Ontario residents to commence litigation to protect (or rehabilitate) "public resources" from environmental harm. Although well-intentioned, however, the reality is that the Part VI cause of action to protect public resources has only been invoked in two cases over the past decade, and neither case has gone to trial to date.

Undoubtedly, the general non-use of this cause of action may be attributable to a combination of factors arising under Part VI of the EBR: the unusual condition precedent to the cause of action (i.e. unreasonable reply to an Application for Investigation); the restricted definition of "public resource"); the dual elements of the cause of action (i.e. actual or imminent contravention and significant harm); the numerous exemptions; the limited range of judicial remedies; the extra

[20] J. Castrilli, *op. cit.*, pp.427-28.

procedural steps (i.e. public notice); the questionable defences (i.e. "reasonable interpretation" of an instrument); and the overall complexity, cost and uncertainty associated with the new cause of action. As noted in an analysis of the Part VI cause of action:

> These various limitations constitute a formidable set of impediments to its public use, and do not provide comfort to plaintiffs contemplating bringing an [EBR] action. Although the task force intended that the provision be used only as a last resort, these obstacles suggest little deterrent effect on the regulated community.[21]

Therefore, unless and until these and other limitations are removed or resolved, the Part VI cause of action will remain largely unused by most public interest environmental litigants. Since the EBR is explicitly intended to increase access to the courts and to protect the environment, it does not appear that the Part VI cause of action has achieved these objectives to date.

PART III – CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, it is hard to disagree with one commentator's critical review of the EBR's emphasis upon procedural rather than substantive rights:

> By creating rights of participation in the administrative and regulatory process of developing and approving regulations, policies and instruments, and creating new institutional mechanisms to act in an oversight capacity, [the EBR] is a statute much more fully dedicated to reforming the governmental decision-making process on environmental matters. Access to the courts under [the EBR], instead, is an exercise of limited last resort...
>
> However, based on the experience thus far under [the EBR], it is fair to say that the Ontario law is largely a "rights law" in name only. This is because the administrative rights regime established under [the EBR] to increase opportunities for notice and comment on government or citizen-initiated reforms depends highly on the government's

[21] J. Castrilli, *op. cit.*, pp.431-32.

> exercise of discretion. In practice, government discretion frequently has been exercised to limit or remove opportunities for public involvement in environmental decision-making… On the other hand, the institutional mechanisms created to monitor government compliance have mainly functioned to catalogue, not reverse, government decisions, and have essentially locked the public out of the process. The substantive right to resort to the courts established by [the EBR] is hedged with so many limitations that it has not been invoked at all during the statute's first three years…
>
> When legislators review the Ontario experience, they will likely determine that complex administrative and institutional reforms established in an environmental rights law, like [the EBR], must be subject to greater judicial scrutiny and less government discretion if they are to avoid the problems catalogued in the first three years of [the EBR's] operation.[22]

Accordingly, CELA commends the Environmental Commissioner for initiating the EBR review process, and we look forward to participating in this process to help identify the issues – and, more importantly, to develop constructive solutions – in relation to the EBR track record to date. It goes without saying that in accordance with the spirit and public participation requirements of the EBR, any proposed amendments to the EBR resulting from the review process should be developed in an open and publicly accessible manner. Thus, the 10th anniversary offers an timely opportunity to remedy the deficiencies of the current EBR so that in the near future, Ontarians can utilize an improved and strengthened EBR that more fully achieves the legislative intent.

[22] J. Castrilli, *op. cit.*, pp. 435-36.