



THIRD-PARTY APPEALS UNDER THE
ENVIRONMENTAL BILL OF RIGHTS IN
THE POST-*LAFARGE* ERA

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- There has been considerable debate over the proper interpretation of the “third-party” appeal rights under Ontario’s EBR; however, this debate has now been largely resolved by the *Lafarge* case:
 - April 2007: leave decision by ERT
 - June 2008: judicial review decision by Div. Ct.
 - Nov. 2008: Ont C.A. refuses to hear appeal
- Purpose of presentation is to (a) review EBR’s third-party appeal provisions; (b) summarize the *Lafarge* case; and (c) discuss implications of the *Lafarge* case



- Enacted in 1993, the EBR is intended to ensure environmental protection, enhance public participation, and increase government accountability
- The third-party appeal rights under the EBR (sections 38 to 48) seek to achieve these purposes by enabling Ontarians to seek leave to appeal environmentally significant “instruments” (e.g. approvals, permits, licences, etc.) to an independent appellate body
- With some exceptions, these rights generally apply to prescribed approvals issued by MOE under the EPA, OWRA, etc. (see O.Reg.681/94); the ERT is the appellate body for such appeals



- In order to obtain leave to appeal, the EBR applicant must:
 1. Serve/file leave materials within 15 days after notice of the instrument decision was posted on the EBR Registry
 2. Comply with ERT Rules of Practice re third-party appeals (content, supporting documents, service, etc.)
 3. Demonstrate he/she has an “interest” in the instrument decision, pursuant to section 38 of the EBR; and
 4. Present sufficient evidence/argument to satisfy the “stringent” two-branch leave test under section 41 of the EBR



- Under section 41 of the EBR, there is a statutory presumption against granting leave, unless it appears to the ERT that:
 - (a) There is good reason to believe that the instrument decision is unreasonable, having regard for relevant laws and government policies; AND
 - (b) The instrument decision could result in significant environmental harm.
- Prior to *Lafarge* case, ERT jurisprudence indicated that the burden of proof is on the EBR applicant to prove BOTH branches of leave test; however, the standard of proof is “prima facie” case (aka “preliminary merits”)



The *Lafarge* Case

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- Lafarge applied for air and waste approvals under the EPA in order to burn “alternative fuels” (i.e. scrap tires, plastics, etc.) at its cement plant near Bath
- MOE Directors issued the approvals in Dec. 2006; several parties then sought leave to appeal under the EBR



- In April 2007, the ERT granted some – but not all – of the EBR leave applications. Key findings included:
 - The standard of proof at the EBR leave stage is less than “balance of probabilities”
 - The MOE’s “Statement of Environmental Values” under the EBR (e.g. ecosystem approach, cumulative effects analysis, precautionary principle, etc.) should be applied to instrument decisions;
 - Compliance with numerical emission standards is not necessarily determinative of whether significant environmental harm could occur;



- Common law rights of neighbours should have been considered when instrument decisions were being made;
- It is unreasonable to expose Bath residents to potential adverse effects not permitted elsewhere in Ontario

- Lafarge, supported by the MOE Directors, applied for judicial review of the ERT leave decision; in June 2008, the Div. Ct. unanimously upheld the ERT decision, and dismissed the judicial review application (with costs against Lafarge and MOE Directors). Key findings included:
 - “prima facie” case is the appropriate standard of proof at the EBR leave stage;



- It was reasonable for the ERT to conclude that: (a) the MOE's SEV was applicable to instruments; (b) common law rights were relevant considerations; (c) the impugned approvals were potentially discriminatory to Bath residents; (d) full leave to appeal should be granted for both EPA approvals; and (e) the appeals should not be restricted to grounds raised at the leave stage, unless the ERT orders otherwise
- Lafarge, supported in part by the MOE Directors, moved for leave to appeal the Div. Ct. decision; in Nov. 2008, a 3 judge panel of the Ont C.A. dismissed the leave motion with costs and without reasons



- On consent, MOE Directors have revoked Lafarge's two EPA approvals, and the ERT has ended its hearings
- More broadly, it seems likely that the outcome of the *Lafarge* case may lead to renewed public interest in using the EBR's third-party appeal rights to challenge environmentally significant, risky or controversial approvals
- However, it seems unrealistic to expect a proliferation of EBR appeals, especially given the timing constraints, costs, procedural steps and evidentiary requirements involved in seeking leave to appeal



- Similarly, since the wording of the section 41 leave test remains unchanged, it seems likely that the ERT will continue its overall trend of dismissing more EBR leave applications than it grants
- From 1995 to 2004, over 14,000 instrument decisions were posted on the EBR Registry, but only 54 EBR leave applications were brought in relation to these decisions
- Of the 54 EBR leave applications, 41 were denied for factual, legal or jurisdictional reasons, and only 13 were granted (full or partial leave)
- On average, there were only 5 to 6 EBR leave applications brought per year from 1995 to 2004



- Given this overall ERT track record, EBR applicants can improve their chances of success by:
 - Demonstrating “interest” by filing written submissions on the instrument during the EBR public comment period;
 - Serving/filing their EBR leave applications on time;
 - Focusing EBR leave applications on grounds that found favour with the ERT in *Lafarge* and previous leave decisions (i.e. SEV principles, common law rights, etc.);
 - Attaching credible/reliable documentation (including opinion evidence from qualified experts where necessary) to the EBR leave application



- www.cela.ca (includes general EBR information and precedents, including the *Lafarge* EBR leave application, reply, notice of appeal, and links to ERT and Div. Ct. decisions) CELA Publication 639
- www.eco.on.ca (includes EBR user guides, background papers, annual and special reports, and link to EBR Registry)
- www.ene.gov.on.ca (includes link to EBR Registry, technical guidelines, policies and publications regarding MOE instruments)