

# *STATUTORY ENVIRONMENTAL RIGHTS: LESSONS LEARNED FROM ONTARIO'S EXPERIENCE*

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# Introduction

- Ontario's *Environmental Bill of Rights* (EBR) was enacted in 1993
- 18 years' worth of EBR experience is instructive for other Canadian jurisdictions which have passed (or proposed) statutory environmental rights
- What are the main “lessons learned” from Ontario?



# Background: EBR Reform

- In the 1970s, after passage of certain statutes in the U.S. (i.e. MEPA), concerned citizens, academics, ENGOS, etc. across Canada began to advocate law reform to entrench/protect “environmental rights”
- Not much progress at the federal level during this timeframe, but at the provincial/territorial level (i.e. Quebec, Yukon, Northwest Territories, etc.), there was growing public/political support for environmental rights legislation
- In Ontario, from 1979 to 1989, several private members’ bills to establish an EBR were introduced; none were passed

## Background: EBR Reform (cont.)

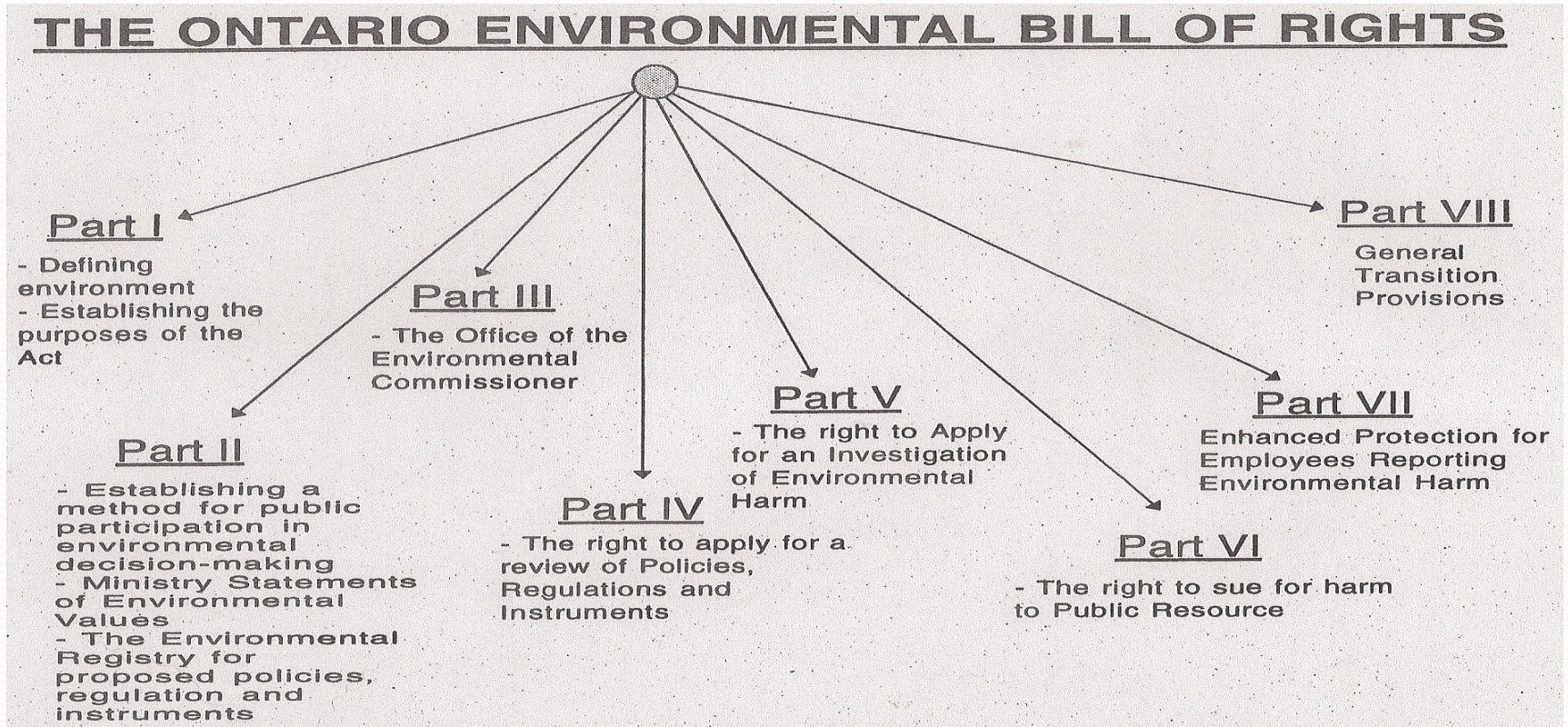
- In 1990, the NDP was elected in Ontario; Ruth Grier MPP was appointed as Minister of the Environment
- The Minister created a multi-stakeholder advisory committee, which reported in 1991 that an EBR was needed in Ontario
- The Minister then set up a smaller Task Force (including lawyers from CELA, Pollution Probe & industrial sectors) to draft/consult upon the EBR
- The Task Force Report was released in 1992, and the EBR was passed by the Ontario Legislature in 1993 (proclaimed in force in 1994 & phased in over time)

# Overview of EBR

- Purposes of the EBR are to: protect the natural environment; facilitate public participation in environmental decision-making; increase public access to the courts; and enhance governmental accountability
- These purposes include: pollution prevention; biodiversity protection; conservation of natural resources; protection of ecologically sensitive areas/processes
- However, over the past 18 years, it is questionable whether – or to what extent – these objectives have been fully achieved in Ontario under the existing EBR

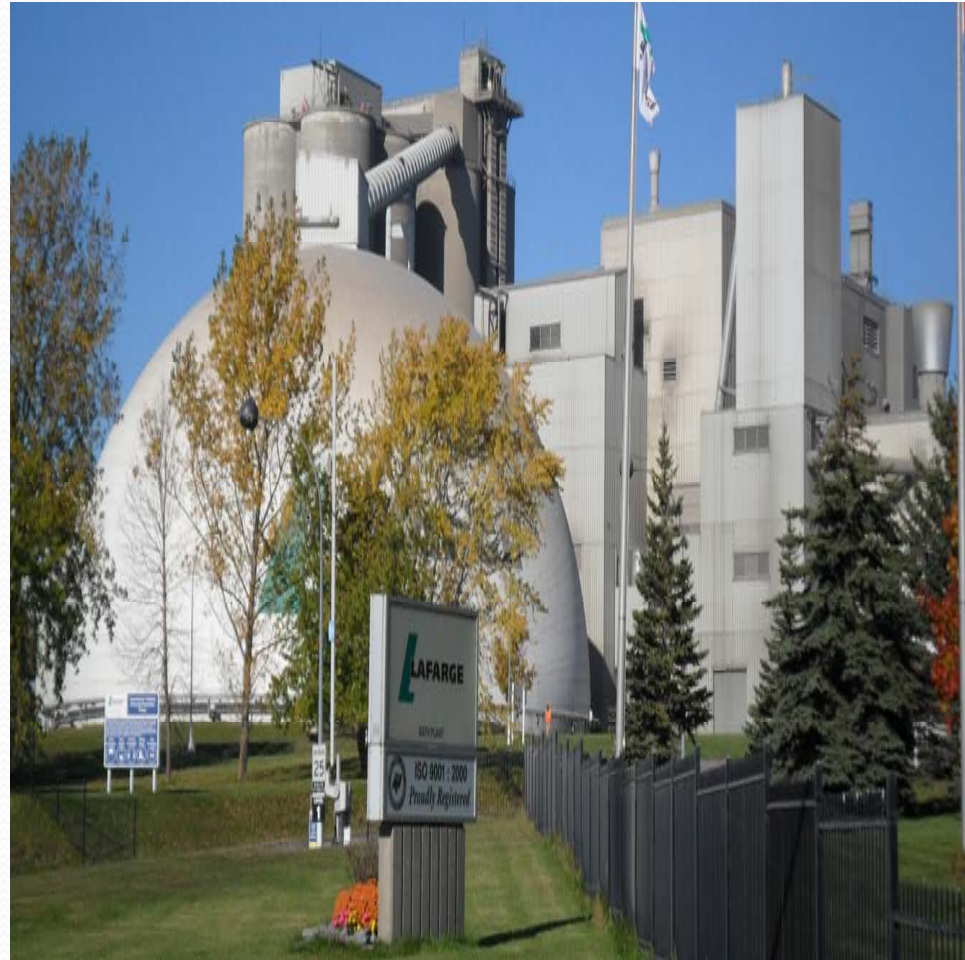
# Overview of EBR (cont.)

From: EBR Task Force Report (July 1992):



# EBR Track Record

- Since 1993, there have been local success stories where the EBR has been used to protect the environment & enable Ontarians to make a difference in the decision-making process (i.e. the Lafarge case)
- The EBR Registry has been useful for notifying the public & soliciting input on Acts, regulations, policies, instruments



# The EBR Registry



Environmental Registry  
Registre environnemental



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Add	EBR Registry Number	Ministry Reference Number	Title or Proponent	Type	Published Date
<input type="checkbox"/>	<a href="#">011-1197</a>	1043-88VK5C	BASF Canada Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	September 17, 2010
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<input type="checkbox"/>	<a href="#">011-0855</a>	8537-87ZJ55	Sensient Flavors Canada Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	August 09, 2010
<input type="checkbox"/>	<a href="#">010-9114</a>	1354-7Z2NKY	FCM Recycling Inc. (EPA s. 27) - Approval for a waste disposal site.	Instrument Decision	August 03, 2010
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<input type="checkbox"/>	<a href="#">011-0508</a>	9270-86RNF9	Advantech Advanced Microwave Technologies Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	July 05, 2010
<input type="checkbox"/>	<a href="#">011-0479</a>	5924-86UPQR	Ray Bolger Steel Fabrication Limited (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	July 02, 2010
<input type="checkbox"/>	<a href="#">011-0103</a>	1350-84QSB2	Canlyte Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	May 25, 2010
<input type="checkbox"/>	<a href="#">010-6999</a>	7192-7T4NQ2	Brenntag Canada Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Decision	May 18, 2010
<input type="checkbox"/>	<a href="#">010-7332</a>	8496-7TZJFV	Matrix Coatings Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Decision	April 28, 2010

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# The EBR Registry (cont.)



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## Instrument Proposal Notice:

**Proponent:** BASF Canada Inc.  
501 Wallrich avenue  
Cornwall Ontario  
Canada K6J 2B5

**Instrument Type:** Approval for discharge into the natural environment other than water (i.e. Air) - EPA s. 9

**EBR Registry Number:** 011-1197

**Ministry Reference Number:**  
1043-88VK5C

**Ministry:**  
Ministry of the Environment

**Date Proposal loaded to the Registry:**  
September 17, 2010

**Keyword(s):** Air

The comment period for this proposal is now over.

## Description of Instrument:

This proposal is for the renewal of Basic Comprehensive Certificate of Approval (Air) No.2592-6PXXK62 which is a single Certificate of Approval that replaces the existing Certificate(s) of Approval (Air), and includes the addition of new or historically unapproved sources for all emissions from BASF Canada Inc. located in Cornwall, Ontario. This facility processes and blends various chemicals for industrial and commercial uses.

This application is for all sources of emissions from the facility which includes process emissions, laboratory fumehoods, storage tanks, sumps, lagoons, cyclones, truck loading, furnaces, cooling towers, emergency generator, and boilers.

Contaminant emissions to the atmosphere include volatile organic compounds such as 1-hexanol, 1-octanol, and methylene diphenylene diisocyanate, particulate matter, and products of combustion such as nitrogen oxides.

The Basic Comprehensive Certificate of Approval (Air) requires that the company demonstrate compliance on an ongoing basis with Ontario Regulation 419/05, applicable Ministry Guidelines for Air and Noise and other performance requirements as specified in their conditions. It permits modifications such as process changes, de-bottlenecking or addition of new equipment subject to limits on operational flexibility that include a production limit for the facility to be specified on the Basic Comprehensive Certificate of Approval (Air). The limited operational flexibility conditions have a five year expiry date. The company will be required to make application for amendment at that time to renew these conditions. Of specific public interest, one condition that will be included on the Basic Comprehensive Certificate of Approval (Air) will require

## Contact:

Application Processor  
Client Services Section  
Ministry of the Environment  
Operations Division  
Environmental Assessment and Approvals Branch  
2 St. Clair Avenue West  
Floor 12A  
Toronto Ontario  
M4V 1L5  
Phone: (416) 314-8001  
Fax: (416) 314-8452

## Location(s) Related to this Instrument:

501 Wallrich Avenue

Cornwall, United Counties of Stormont, Dundas and  
Glennora K6J 2B5

# EBR Problems

- CELA, other stakeholders, and Ontario's Environmental Commissioner have encountered various problems in EBR implementation (see ECO's Special Report in 2005)
- The key problems include:
  - Outdated EBR purposes & principles
  - Lack of substantive environmental rights in the EBR
  - Need for meaningful Statements of Environmental Values
  - Need for improved EBR notice/comment opportunities
  - Overbroad exceptions to notice/comment (i.e. EA matters)

## EBR Problems (cont.)

- Onerous leave-to-appeal test & no costs/funding assistance
- Need to expand ECO powers under the EBR
- Delay/refusals by government in prescribing environmentally significant approvals, statutes & Ministries under the EBR
- Delay/refusals in governmental responses to EBR Applications for Review or Investigation
- Overbroad privative clause, no public trust doctrine & too many constraints on the new EBR cause of action (section 84)
- In light of these problems, CELA has filed an Application for Review of the EBR; MOE response due by March 1, 2011

# Federal EBR?

- In October 2009, Bill C-469 was introduced as a private member's bill by Linda Duncan MP
- If enacted, this Bill would establish the *Canadian Environmental Bill of Rights* (CEBR)
- In June 2010, the Bill was referred to the Standing Committee on Environment and Sustainable Development; the Committee held public meetings on the Bill, & the Committee's report is expected in early 2011
- The Bill has been widely supported by ENGOs across Canada

# CEBR Highlights

- The CEBR contains procedural rights similar to those found in Ontario's EBR (i.e. access to information, participatory rights, application for reviews/investigations)
- However, the CEBR also contains broader purposes, substantive rights, & legal remedies to enforce these rights:
  - Public right to healthy & ecologically balanced environment
  - Imposition of public trust duty upon the federal government
  - Public right to bring an “environmental protection action”, judicial review, or civil action

# Top 3 Lessons Learned in Ontario

1. At a minimum, environmental rights statutes should entrench procedural rights which entitle all persons to participate meaningfully in environmental decision-making at all levels.
2. Procedural rights *per se* are unlikely to significantly improve environmental decision-making by government. Thus, clear rules/criteria should be developed in an open/accessible manner to structure the exercise of governmental discretion.
3. While political accountability mechanisms are important, environmental statutes should include substantive rights & should ensure judicial accountability for governmental acts, omissions or decisions which contravene these rights.

# Further References

- ECO website: [www.eco.on.ca](http://www.eco.on.ca)
- CELA website: [www.cela.ca](http://www.cela.ca)
- Ontario e-laws website: [www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca)
- EBR Registry: [www.ebr.gov.on.ca](http://www.ebr.gov.on.ca)
- *Report of the Minister's Task Force on the EBR* (July 1992)
- P. Muldoon & R. Lindgren, *The EBR: A Practical Guide* (1995)
- P. Muldoon et al., *An Introduction to Environmental Law and Policy in Canada* (2009), Chapter 15