



Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

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**Submission to the Standing Committee on
Environment and Sustainable Development
Regarding the Establishment of a
Federal Environmental Commissioner or Auditor-General**

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Prepared by

Paul Muldoon
Counsel

Canadian Environmental Law Association
517 College Street, Suite 401
Toronto, Ontario
M6G 4A2

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1. Introduction

Over the past number of years, there have been various proposals to establish new mechanisms and institutions to further the goal of sustainability in Canada. The recent proposal to establish an Environmental Commissioner or Auditor-General in Canada provides an important opportunity to strengthen and make more effective the federal environmental law and policy framework.

One of the primary benefits of establishing an Environmental Auditor-General is that the office will serve to promote accountability in terms of government environmental decision-making. It should be emphasized that the principle of accountability continues to gain currency for a number of reasons. First, many environmental groups, community organizations and many other members of the public remain dissatisfied with government action on the environment and natural resource protection. Initiatives that will assist in assessing the performance of governments in this regard provide a benefit in determining the strengths and weaknesses of governmental action and the need for improvement.

Second, the movement over the past decade to integrate environment and economy remains a worthy goal. While the goal is important, the task of actually undertaking this integration is a long-term endeavour and, in many instances, is still an area of uncharted territory. Hence, mechanisms to assist government departments, the private and public sectors and others to further this integration are needed. Third, there is a lag in the evolution of public participation regime in federal

environmental decision-making processes when compared to some provincial regimes. The establishment of some type of Environmental Commissioner or Auditor-General cannot be a substitute for a more comprehensive public participation regime, but it does provide some means for the public to understand how environmental decision-making works at the federal level.

In light of these comments, the Canadian Environmental Law Association (CELA) supports the establishment of an Environmental Commissioner or Auditor-General. CELA was a member of the Ontario Environmental Bill of Rights Task Force that assisted in drafting the recently proclaimed Environmental Bill of Rights Act. One of the cornerstones of that Act is the establishment of an Environmental Commissioner.

The purpose of this submission is twofold. First, it will briefly outline the essential nature and functions of the Environmental Commissioner's position under the new Environmental Bill of Rights Act in Ontario. Second, drawing from the discussions with respect to that position, a number of essential elements and components will be given that should be incorporated into the design and structure of the new Environmental Commissioner or Auditor-General in Canada.

2. The Environmental Commissioner under the Ontario Environmental Bill of Rights: Its Role and Functions

On February 15, 1994, the Ontario Environmental Bill of Rights Act (EBR) was proclaimed into law. The new law has been summarized and critically reviewed elsewhere.¹ Nevertheless, the salient points with respect to the law can be briefly summarized.

2.1 Overview to the Environmental Bill of Rights

The important components of the EBR can be summarized as follows:

1. *Statement of Environmental Values:* Part II of the law requires all 14 ministries subject to the law to undertake a Statement of Environmental Values (SEV). A SEV is, in effect, a workplan as to how the purposes of the Environmental Bill of Rights will be translated into operating principles of that particular ministry.

2. *Notice and Comment:* Part II of the law also establishes a notice and comment regime for the province. This notice and comment regime requires that all significant environmental proposals (such as proposals for new policies, regulations or approvals) must be placed on an electronic registry which is accessible to anyone with a computer throughout the province. Additional notice may also be required. In addition to notice, various opportunities to comment on those proposals are also given. Generally, the more important the decision, the more opportunities there are to comment. The decision-maker is obliged to give reasons for a decision pertaining to the proposal.

3. *Request for Review:* While the notice and comment regime provides for public participation of proposals, the Act also provides for a procedure for members of the public to have an existing policy, regulation or approval reviewed.

4. *Request for Investigation:* The Environmental Bill of Rights includes a procedure to ensure that any person can ask to cause an investigation of an alleged violation of an environmental law that may cause harm to the environment.

5. *Access to the Courts:* The new law also provides greater access to the courts by eliminating the public nuisance rule. It also establishes a new cause of action that allows anyone to bring a suit to sue for a breach of an environmental law that may be causing harm to a public resource. There are a number preconditions to the initiation of the suit.

6. *Enhanced Employee Protection:* A component of the Act also enhances protection of employees by protecting them against reprisals from employers when employees "blow the whistle" on illegal activities of their employer.

7. *Environmental Commissioner:* To review the operation of the law, the statute also creates the Office of the Environmental Commissioner.

2.2 Overview to the Role of the Environmental Commissioner

The Environmental Commissioner, described in Part III of the EBR,² is an officer of the Ontario Legislative Assembly. Put in a different way, the Commissioner is a public servant but does not report to any one ministry. The Commissioner only reports to the Legislature.

The Commissioner is appointed by the government on advice of the Legislature for a term of five years and must swear to "faithfully and impartially exercise the functions of the office."³

The Office of Environmental Commissioner, although not formally described as such in the legislation, does play a number of diverse roles. For example, the Environmental Commissioner has an *Auditor* role by:

- * reviewing the implementation of the EBR and compliance by ministries with the requirements of the Act;
- * review the use of the environmental registry;
- * review the exercise of discretion by ministers under the Act;
- * review the operation of the opportunity to appeal instruments;
- * review the receipt, handling and disposition of applications for review and applications for investigation;
- * review ministry plans and priorities for conducting reviews of policies, regulations and instruments;
- * review the use of the right of action, its defences and the public nuisance provisions of the Act;
- * review the operation of the whistle blower provisions of Act.

The Environmental Commissioner has a *clearinghouse* role by:

- * acting as a depository for applications for review, investigation, and other procedures and then direct these applications to the relevant ministry;

The Environmental Commissioner has an *education* role by:

- * providing educational programs about the Act to the public; and

- * providing advice and assistance to members of the public who wish to participate in decision-making processes facilitated under the Act;

The Environmental Commissioner has a role *in furthering adherence* to the EBR by

- * submitting a report to the Legislature every year containing the work of the Commissioner, the first of which is due in early 1996;
- * submitting a report whenever the Commissioner considers that a minister has failed to comply with the ministry's statement of environmental values;
- * submitting a report to the Legislature at any time on any manner that cannot wait until the annual report is submitted.

In effect, the Environmental Commissioner is the essential mechanism to further the principle of accountability within the context of the Environmental Bill of Rights. While there is a role for the courts, the model of the EBR is to have the Environmental Commissioner further the principle of accountability through its full disclosure of government action with respect to the duties and obligations under the Act.

3. Essential Components of A Federal Auditor-General

From the experience in developing the position of Environmental Commissioner in the Ontario Environmental Bill of Rights, there are the important points revealed during that process that may be instructive in establishing an Environmental Commissioner or Auditor-General at the federal level. The first point is that there should be emphasis upon fashioning a mechanism tailored to the federal level of government and serves clear functions. Whether the position is called an "environmental commissioner," "environmental ombudsperson," "environmental auditor general" or some other name is of secondary importance to the actual nature, function

and scope of the position.

Second, at some point, the position sought to be created should be entrenched in specific legislation. One of the issues pervading this submission is that the role, scope and a host of issues pertaining to the position of Environmental Auditor-General must be clear, concise and certain. The position must also be defined in relation to other agencies within the federal bureaucracy. The most convenient way to address these issues is through specific legislation.

Apart from these points, other issues worth a brief examination include the appointment and accountability of the Federal Auditor-General; a number of important functions that the position should have; and the importance of providing adequate resources for this position.

3.1 Appointment and Accountability of the Federal Auditor-General

During the public consultation period on the Ontario's Environmental Commissioner position, one of the most commonly cited issues was the appointment procedure and the accountability process for the position. The overwhelming view was that the position is only credible to the extent that it is independent and impartial. It is submitted that great care should be taken in terms of ensuring appropriate accountability for the position and the fairness and openness of the appointment process.

Accountability

While the proposed Environmental Commissioner's position has some type of watchdog function, the question still remains "who guards the watchdog?" Under the

Environmental Bill of Rights, the Environmental Commissioner reports directly to the Ontario Legislature. The Commissioner must report to the Legislature once per year, but may address the Legislature at any time the Commissioner deems necessary. It is submitted that this kind of access to Parliament is fundamentally important. The alternatives to this reporting scheme, such as reporting through some department or agency, only serves to confuse and compromise the independence of the position. In effect, the Environmental Commissioner or Auditor-General must be in a position to criticize any branch of government and any department. Its real power emanates from its ability to act free from government interference and have the open ear of the elected federal politicians. Any interim steps to that access could be seen as a screen or filter to the views of the Environmental Auditor General. It is submitted that such reporting structures and duties should be abundantly clear in the legislation creating the position.

Another avenue for accountability is through the establishment of advisory committees that would ensure that the office had some contact with outside constituencies. One recommendation, for example, is the establishment of public advisory committees comprised of representatives of various constituencies in Canada.

Appointment

As with the accountability mechanisms, the appointment process for the Environmental Auditor-General is very important as a source of credibility and integrity for the position. It is submitted that:

- * the qualifications for the position be carefully drafted and then appended to the job description and outlined in the legislation establishing this position;
- * the position should proceed through an open competition advertised nationally; and
- * the appointment should be done through a Parliamentary Committee that, to the extent possible, is non-partisan. This principle could be achieved by the structure or voting regime within the Committee.

The appointment should also be of a tenure to cover at least two governments, such as a five year term.

3.2 Some Suggested Functions

It is not the intent of this submission to provide an exhaustive review of possible functions and duties of the proposed Environmental Auditor. Other documents and submissions have contributed to this topic.⁴ However, some of the functions worth emphasizing include:

- * the ability of the Environmental Auditor-General to review policies and programs of all federal developments;
- * the ability to identify gaps or limits of current federal law and policy pertaining to the environment and even suggest measures to address those gaps and limits. The Environmental Auditor should have the power to initiate such a review. A procedure should be included in the legislation that would allow members of the public to ask the Environmental Auditor to undertake such a review; and

* a reporting capacity to the House of Commons, as discussed above, in the context of the Ontario's Environmental Commissioner.

3.3 Providing Adequate Resources to the Environmental Auditor-General

One of the issues pertaining to the proposed position is whether the proposed Environmental Commissioner or Auditor-General will have sufficient resources to carry out its assigned tasks. Equally important is the issue of whether those resources will be sustained in the long term. Fundamental to the position of Environmental Commissioner or Auditor General is its independence. Unless it has necessary resources protected from blatant political interference, the position suffers the risk of being at the mercy of the government of the day that is fearful of a negative report.

Adequate and secure resources for this position should be considered a reasonable attribute of this position, especially in light of the fact that the total amount of resources would probably be quite modest. It is submitted that the Office is not intended to be a new bureaucracy but a focussed agency designed to facilitate a more efficient environmental decision-making at the federal level. It is submitted that, if the Environmental Auditor's office is effective, it will be cost effective in working to ensure that policies, programs and projects that are harmful to environment are not carried out. If even one major environmental problem is avoided each year by this position, it will very quickly become a cost-effective office. The benefit of avoiding an inappropriate environmental decision may reap millions of dollars in savings.

4. Summary

CELA supports the establishment of the Office of an Environmental Auditor

General. However, if the Office is to be effective, care must be taken to ensure that there is sufficient accountability of the position, a fair and open appointment process and there are adequate resources both in the short and long term. Further, it is submitted that the position should be entrenched in legislation.

It is still early to learn too many lessons from the Ontario experience under the Environmental Bill of Rights. However, it is submitted that it may be useful to take advantage of the results of the extensive discussion and consultation that occurred in the development of that legislation.

ENDNOTES

1. For example, see: Marcia Valiante and Paul Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice" in Steven A. Kennett (ed.) Law and Process in Environmental Management (Calgary: Canadian Institute of Resources Law, 1993), 142; Paul Muldoon and John Swaigen, "Environmental Bill of Rights" in David Estrin and John Swaigen (eds.) Environment on Trial (3rd Ed.) (Toronto: Emond Montgomery, 1993) 793.
2. Environmental Bill of Rights Act, Bill 26, ss. 49-60.
3. Ibid., section 52.
4. For example, see: Mark Winfield, Canadian Institute for Environmental Law and Policy, Brief to the Standing Committee on Environment and Sustainable Development Regarding the Establishment of a Federal Environmental Commissioner or Auditor-General (April 1994); Francois Bregha, A Renewed Framework for Government Accountability in the Area of Sustainable Development: Potential Role for a Canadian Parliamentary Auditor/Commissioner for the Environment (Working Paper 21 - National Round Table on the Environment and Economy, January, 1994).