



Independence, Accountability & Transparency:
The Role of the Environmental Commissioner of Ontario

**A Background Paper for
Public Participation and the Environment
Five Years of the *Environmental Bill of Rights* in Ontario
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Introduction

In the early 1970s in both Canada and the U.S., problems with existing environmental laws, together with the lack of enforcement of those laws, led many observers to argue the need for formal environmental rights. On October 1, 1991, a nine-member "Task Force on the Environmental Bill of Rights" was established by the Ontario government, with the mandate of drafting an environmental bill of rights. The Task Force's first report was released in July 1992, and their supplementary report was released after public consultation in the fall of 1992. The *Environmental Bill of Rights (EBR)* was proclaimed into law February 15, 1994.

The Task Force on the Environmental Bill of Rights saw the need for an Environmental Commissioner (ECO). Since "political accountability is at the foundation of the proposed Environmental Bill of Rights," the report said, "the Task Force . . . recommends that the government create an Office of the Environmental Commissioner."¹ The current Commissioner, Eva Ligeti, who is an officer of the Legislative Assembly, was appointed by a 13-member, all-party committee of the Legislature for a five-year renewable term. The independence of the office requires that the Commissioner be sworn to impartiality. The *EBR* provides that the Commissioner "will not do any work or hold any office that interferes with the performance of his or her duties as Commissioner." The ECO is removable only "for cause."

The members of the Task Force on the Ontario Environmental Bill of Rights were able to develop a consensus on the content of the *EBR*, and their reports provide a key source of evidence on the legislative intent of the *EBR*.

The initial *Report of the Task Force on the Ontario Environmental Bill of Rights* proposed that an Office of the Environmental Commissioner of Ontario be established to provide objective oversight and measurement of the implementation of the *EBR*. The Task Force also proposed that the ECO review ministry compliance with the Statements of Environmental Values required under the *EBR*.

The Task Force explained that its recommendation for establishing the ECO arose out of a concern for the enforceability of the Act. They recognized there should be consequences for ignoring the Statements of Environmental Values or the requirements of the Act in general, for exercising discretion inappropriately, and for not consulting the public on significant environmental decisions. The Task Force also recommended that the ECO publish biannual reports about the government's performance, ministry by ministry, with respect to the *EBR*.

The Task Force intended the ECO to review both posted Registry decisions and unposted² ministry decisions to ensure compliance with *EBR* requirements. Since then, the ECO has developed detailed procedures to carry out reviews of these types of decisions.³

Nearly 80 groups and individuals provided comments on the Task Force's initial report. As a general rule, most commenters felt that the ECO required stronger powers and that the role of the ECO needed clarification. In its supplementary report released in December 1992,⁴ the Task Force recommended that "the provisions which establish this position ensure the independence of the Environmental Commissioner, his or her tenure, and the method of appointment and remuneration." The Task Force stated it considered the seniority of the position to be equivalent to that of the Ombudsman or the Provincial Auditor.⁵

The Task Force also recommended that the term "monitor" be replaced by "review" to describe the functions of the ECO, in response to public submissions that "monitor" was too vague. "Review" was "a word that would emphasize the more active role contemplated for the Environmental Commissioner."⁶ The Task Force also insisted that the position be given extensive powers to examine ministry staff and others under oath in order to allow the ECO to obtain the information necessary to support the review functions.

The Task Force indicated its intention that the ECO possess a broad power of review under the *EBR*, envisioning the role as one of objective oversight, knowledgeable authority and measurement of the implementation of the *EBR*, including the ability to suggest improvements under the *EBR*. The Task Force commented specifically on the ECO's review of the use of the Environmental Registry established under the *EBR*, anticipating that the ECO's analysis might lead to suggestions for improving the way that the Registry is used. The Task Force also emphasized that the ECO would have the duty to review and comment on the exercise of discretion by ministers, particularly where that discretion is, in the ECO's opinion, exercised inappropriately.⁷

In summary, the legislative history of the *EBR* with respect to the role of the Environmental Commissioner makes it clear that he or she is intended to ensure that the government be held accountable for its decisions under the Act.

The Functions of the ECO

The functions of the ECO are contained in section 57 of the *EBR*. They include a number of explicit powers of review, most of which are set out below:

In addition to fulfilling his or her other duties under this Act, it is the function of the Environmental Commissioner to,

(a) review the implementation of this Act and compliance in ministries with the requirements of the Act;.....

(f) review the use of the registry;

- (g) review the exercise of discretion by ministers under this Act;
- (h) review recourse to the [appeal] rights provided in sections 38 to 47;
- (i) review the receipt, handling and disposition of applications for review under Part VI and applications for investigation under Part V;
- (j) review ministry plans and priorities for conducting reviews under Part IV;
- (k) review the use of the right of action set out in section 84, the use of defences set out in section 85, and reliance on section 103 respecting public nuisance actions; and
- (l) review recourse to the procedure under Part VII for complaints about employer reprisals.

Independence is a vital feature of the ECO's effectiveness, not only for objective oversight, but especially for reviewing the implementation of and compliance with the *EBR*. "The Environmental Commissioner is intended to be an independent and impartial person who is appointed by, and reports to, the Ontario Legislature, rather than the government of the day."⁸ As Canadian public administration analyst Evert Lindquist observes in *How Ottawa Spends, 1997-98*:

Public servants and members of the government caucus have great incentives not to embarrass the government, while Opposition members have great incentives to exaggerate problems and ignore well-managed programs and institutions. Such an environment is not conducive to developing sound performance information and, even if such information were deemed credible, reasoned use of that information in the public domain.⁹

The nature of the ECO's legal obligations to report on ministry compliance with the *EBR* makes it likely that at least some ministry officials will find these reports disagreeable. In particular, the ECO's position is independent of the party in power, and its impartiality cannot be compromised by pressure from non-statutory considerations such as political pressures, potential reprisals or interference.

The Task Force envisioned that "the Environmental Commissioner would have responsibility for oversight of this implementation and effectiveness of the Environmental Bill of Rights."¹⁰ As Task Force chair Michael Cochrane has written, "It would take a quantum leap of faith in government to assume that one government or a succession of governments could maintain willingly a high standard of compliance with such a piece of legislation."¹¹ Accordingly, the ECO has been described by the media and some observers as an "environmental watchdog."

In all of its roles, the ECO's overriding function is to uphold the *EBR* goals of public accountability and transparency. As Helen Hughes, the first New Zealand Parliamentary Commissioner for the Environment (PCE), has said, "Having an authoritative independent view of

the government system should ensure that public authorities are accountable for their environmental management decisions and provide some confidence for the people of New Zealand that their environment will be protected.”¹²

Accountability and Transparency

The *EBR* has two basic premises: The “government has the primary responsibility for . . . protection . . . conservation . . . and restoration of the natural environment.”¹³ But “the people should have means to ensure that it is achieved in an effective, timely, open, and fair manner.”¹⁴

The *EBR* processes combine these two premises. The Act assigns the government the main responsibility for protecting the environment, while providing the public with new tools to participate in government decision-making (and giving the ECO the responsibility for evaluating the implementation of the *EBR*). When a proposal is placed on the Environmental Registry, the public has a minimum of 30 days to comment on it. Notices must be given for activities ranging from very specific proposals for “instruments” (an approval for an individual or company to carry out a specified environmentally significant activity, like building an extra smoke stack) to something with potentially wide-reaching environmental implications such as a new environmental law or policy.

To be “accountable” one is “required to account for one’s conduct (accountable for one’s actions)” as well as “explicable” and “understandable.”¹⁵ The two key mechanisms in the *EBR* that promote accountability are the Environmental Registry and the ECO. The Registry provides a public place¹⁶ where prescribed ministers can describe the effects of public comment on their decisions and therefore “account for their conduct” in making specific decisions. The Registry also helps promote accountability in the second sense by explaining why particular decisions were made. The ECO promotes accountability through the responsibility to report to the Ontario Legislative Assembly on ministerial environmental decision-making and the level of compliance with the *EBR* by ministry decision-makers.

In preparing reports to the Legislature, the ECO has a mandate to report on her work and on whether ministries have cooperated with requests for information. The ECO also has the mandate to review ministry implementation and compliance with the *EBR*, including information about compliance with the ministry’s own Statement of Environmental Values (SEVs). As well, these reports to the Legislature can provide any other information the ECO considers appropriate.

The general direction to review overall compliance with the *EBR* also includes more specific tasks such as reviewing whether ministries meet the *EBR*’s requirements that they “consider” comments from the public. While the ministries have no obligation to modify their proposals in

accordance with public comments, they must explain how those comments have influenced their decisions.

The *EBR* also directs the ECO to review how ministries handle the applications the public can now make under the *EBR* for reviews of existing policies, Acts, regulations or instruments, as well as the public's applications for investigations of alleged contraventions of prescribed Acts, regulations or instruments. The ministries are required to cooperate with the ECO and provide the information necessary to carry out these reviews.

Statements of Environmental Values

The *EBR* further promotes accountability by requiring each prescribed ministry to prepare a Statement of Environmental Values (SEV). Since ministries write their own SEVs, the ECO is able to compare a ministry's SEV commitments with other ministry actions. This analysis, in turn, forms the basis for the ECO's review of those decisions.

Comparable Offices in Ontario

The ECO shares many characteristics with other independent offices of the Ontario Legislature, such as the Ombudsman, the Office of the Provincial Auditor, or the Information and Privacy Commissioner (IPC). These offices are all empowered to advise the Legislature publicly on issues defined by their respective enabling statutes. Each officer has a duty to address annual reports to the Legislature, which then become public documents available to the people of Ontario.

In many respects, the functions of these offices are complementary. For example, section 14.1 of the *Ombudsman Act (OA)* states that "the function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his, her or its personal capacity." The question of whether there would be unnecessary overlap between the functions of the ECO and the Ombudsman was raised at the Standing Committee hearings on the *EBR* in October 1993. However, five years of experience has proved that this is not a practical concern. As has been written about the office of the New Zealand PCE, "environmental and resource management is so complex (legally, practically and theoretically) that a specialist office is necessary."¹⁷

The ECO does have an auditor-like role when it comes to evaluating the effectiveness of the *EBR* and its public participation provisions. However, the ECO does not have the Auditor's additional powers to investigate records and operations or the support of penalties for obstruction.

In some important ways, provisions of the *Freedom of Information & Protection of Privacy Act (FIPPA)* mirror those of the *EBR*. The explicit purpose of the *FIPPA* is "to provide access to information . . . with the principles that . . . information should be available to the public," "exemptions from that right should be limited and specific," and "decisions on the disclosure of government information should be reviewed independently." When notice of a decision ("refusal"

for access to information, in the case of the *FIPPA*) is given by the relevant institutional official, there is an identical requirement to notify the public of the reasons for its decision and the right to appeal it. However, the IPC has the unique power to “order” certain actions be taken in response to an appeal and inquiry. The ECO, Auditor, and Ombudsman can only “recommend” certain actions to the Legislature.

While all of the offices are independent in the sense that the officers do not report to a ministry or to the Ontario government, there are some differences with respect to their power to carry out their responsibilities. The Ombudsman, the Auditor and the Information and Privacy Commissioner are able to get involved in the substance of the complaint, make determinations of fault, and make recommendations (orders in the case of the IPC) for settlement. The ECO for the most part does not investigate individual complaints; rather, the ECO focus is to evaluate the level of adherence to the goals of the *EBR* and the processes by which environmental comments and complaints are addressed. The ECO and the Ombudsman also have power to prepare special reports on matters they believe should not be deferred until their annual reports are delivered to the Legislature.

One role of the ECO not shared to the same extent with other offices is that of public educator. The fact that public environmental rights are new makes it necessary for the ECO to provide public education programs and to “provide advice and assistance to members of the public who wish to participate in decision-making about a proposal.”

Some aspects of the ECO mandate are also distinct from those of comparable legislative officers because of the importance of public participation, which under the *EBR* becomes the primary means of checks and balances on ministry decision-making. Thus, the work of informing and reminding the public of their *EBR* rights will continue to be necessary, even if prescribed ministries achieve substantial compliance with the *EBR*. (Appendix “A” gives a detailed overview of the similarities and differences among these four offices.)

The Ombudsman, Auditor, IPC, and ECO are fulfilling distinct and important roles in Ontario, roles which have gained considerable public awareness and respect. All four of these offices have come to be regarded as essential to maintaining healthy governance. All four provide independent reviews of government decisions and hold government officials accountable for those decisions. The ECO, in its first five years, has come to be regarded as an essential office because of the increasingly important and enduring need to account for the use of public environmental resources.

In spite of the differences in their powers and the means by which they carry out their mandates, the independent offices of the Ontario Legislature share the overall purpose of creating a locus of accountability for the Ontario public. As Ontario Ombudsman Roberta Jamieson has written:

... whatever our starting point, we have a common interest and common goal: creating and improving the quality of democracy enjoyed by our respective peoples by providing them with an ongoing opportunity to have an effective independent review of their complaints and concerns about government . . . ¹⁸

Conclusion

J. Morgan Williams, the current PCE for New Zealand, has suggested that the strength of such offices appears to be in their independence, credibility, neutrality, the quality of the advice in their reports, and their overview capability.¹⁹ Some commenters have expressed concern that the ECO “has no direct power to issue orders to enforce laws or require compliance with the *EBR*.”²⁰ This is also true in the case of the PCE in New Zealand: “Public authorities are not obliged to accept the PCE’s advice or recommendations. Public authorities have to balance the advice offered by the PCE with the wider interests of their constituencies/communities and must take responsibility for accepting none, some or all of the advice offered.”²¹

Yet, in the context of the history and evolution of environmental thought and practice, the power of the ECO to inform the public cannot be underestimated. The key “enforcement” power provided to the ECO by the *EBR* is political accountability. This power is based on and promotes the idea that the natural environment and its use is inherently a public issue. Although environmental review offices like the ECO and the PCE do have powerful tools at their disposal,²² their strength in providing for environmental health and sustainability depends not so much on their ability to punish violators as on their power to promote accountability and transparency in government decision-making about the environment.

APPENDIX “A”

Functions and Powers of some Ontario Legislative Officers

Functions and Powers	ECO	AUDITOR	IPC	OMBUDSMAN
Annual Reports	Yes	Yes	Yes	May be annual or semi-annual
Special Reports	Yes	No	Power to comment on privacy protection implications of new laws and programs; s.59(a)	Yes; s.21(4)
Special Assignments from Legislature	Yes	Yes; s.17	No	No
Information Gathering Powers	ECO can report on cooperation of ministries with information requests	Yes; can enter offices and seize documents	May engage in research	Yes; can enter offices and seize documents
Examination Under Oath	Yes	Yes	No	Yes
Penalties for Non-compliance	No	Yes	Yes	Yes
Review of Public Complaints	ECO reviews ministry handling of Applications	Informal	Yes; s.59(f)	Yes
Appeal Rights	Public applies to tribunal	No	Public has the right to appeal ministry’s refusal	No
Public Education About Act	Yes	No	Yes	Implicit in mandate

ENDNOTES

¹. Government of Ontario, *The Report of the Task Force on the Ontario Environmental Bill of Rights* (Toronto: Queen's Printer for Ontario, 1992), p. vi.

². Under sections 15, 16 and 22 of the *EBR*, ministers are required to "do everything in his or her power to give notice of the proposal [for new Acts, regulations, policies or instruments] to the public at least thirty days before the proposal is implemented." This means posting notice on the Environmental Registry. This general requirement is subject to a number of exceptions. Details on exceptions are provided in The Environmental Commissioner of Ontario, "Implementing the Environmental Bill of Rights: A Guidance Document" (Toronto: Environmental Commissioner of Ontario, 1998). Ministry proposals or decisions that are not posted on the Registry are referred to by the ECO as "unposted decisions." When an unposted decision comes to the attention of the ECO, the ECO writes a letter to the responsible ministry asking the following:

- ! How has the ministry determined the environmental significance of this decision?
- ! How was the ministry's SEV considered in the decision-making process that led to this decision (to determine compliance with s. 11 of the *EBR*)?
- ! Why was this decision not posted on the Registry?
- ! Did the ministry undertake other public consultation on this decision?

This process provides the ministry in question an opportunity to explain its reasons for not posting. The ECO independently reviews ministry explanations for not posting in its special or annual reports to the Legislature.

³. When ministries post Registry notices under *EBR* sections 15 (proposals for Acts and policies), 16 (proposals for regulations), or 22 (proposals for instruments), the standard course of action by the ECO is to request the following documentation from them:

- ! Full text of the proposal
- ! Full text of the decision
- ! SEV consideration of the decision
- ! Written comments submitted by members of the public during the Registry comment period

The request of the full text of the proposal and decision and SEV consideration is made pursuant to s. 57 of the *EBR*. Section 35 of the *EBR* requires that ministers who give notice of proposals under ss. 15, 16 or 22 take every reasonable step to ensure that public comments received as a result of the Registry posting are considered when decisions are made. The ECO has the power to request the actual comments submitted by members of the public in order to review ministry compliance with s. 35.

Section 58 of the *EBR* requires the ECO provide an annual report to the Speaker of the Legislative Assembly. This annual report includes a summary of the information gathered in performance of the review functions set out in s. 57 and "any information that the Environmental Commissioner considers appropriate." In addition, the annual report should include a report on whether the ministries cooperated with requests for information by the ECO. The *EBR* does not place a limit on the kind of information the ECO may seek from the subject ministries. It must be inferred that the ECO can and should seek whatever information reasonably needed to perform these duties under the *EBR*.

⁴. Government of Ontario, *Report of the Task Force on the Ontario Environmental Bill of Rights: Supplementary Recommendations* (Toronto: Queen's Printer for Ontario, December 1992).

⁵. *Ibid.*, p. 23.

- ⁶. *Ibid.*
- ⁷. *Ibid.* pp. 23-24.
- ⁸. Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995), p. 129.
- ⁹. Evert A. Lindquist, "Getting Results Right: Reforming Ottawa's Estimates," in *How Ottawa Spends: 1998-9*, Leslie A. Pal, ed. (Toronto: Oxford University Press, 1998), p. 171.
- ¹⁰. Government of Ontario, *The Report of the Task Force on the Ontario Environmental Bill of Rights* (Toronto: Queen's Printer for Ontario, 1992), p. vi.
- ¹¹. Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995), p. 130.
- ¹². Helen Hughes, "Ten Years On," in *Guardians For The Environment*, Gary Hawke, ed. (Wellington, N.Z.: Institute for Policy Studies, 1997), p. 188.
- ¹³. The Environmental Commissioner of Ontario, "The EBR & You" (Toronto: Environmental Commissioner of Ontario, 1998), p. 4.
- ¹⁴. *Ibid.*
- ¹⁵. The Concise Oxford Dictionary, 9th ed., Della Thompson, ed. (Oxford: Clarendon Press, 1995), p. 10.
- ¹⁶. On the Internet at www.ene.gov.on.ca.
- ¹⁷. Sylvia Allan, "Environmental Commissioners as Ombudsmen: A Successful Role," in *Guardians For The Environment*, Gary Hawke, ed. (Wellington, N.Z.: Institute for Policy Studies, 1997), p. 58.
- ¹⁸. Roberta Jamieson, "Ombudsman's Investigations: Serving All the People," *International Ombudsman Year Book*, v. 1, 1997, Linda C. Reif, ed. (The Hague Netherlands: Kluwer Law, 1997), p. 37.
- ¹⁹. J. Morgan Williams, "Concluding Comments," in *Guardians For The Environment*, Gary Hawke, ed. (Wellington, N.Z.: Institute for Policy Studies, 1997), p. 183-4.
- ²⁰. Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995), p. 129.
- ²¹. Bruce Taylor, "Assessing the Effectiveness of the Parliamentary Commissioner for the Environment (N.Z.: Unpublished:, 1997), p. 6.
- ²². Helen Hughes quoted in J. Morgan Williams in *Guardians For The Environment*, Gary Hawke, ed. (Wellington, N.Z.: Institute for Policy Studies, 1997), p. 3.