

WHY THE ENVIRONMENTAL COMMISSIONER OF ONTARIO MATTERS: LEGAL ANALYSIS OF SCHEDULE 15 OF BILL 57

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ABSTRACT: *The Ontario government recently introduced Bill 57, which includes proposed amendments to the province's Environmental Bill of Rights (EBR). If enacted, Schedule 15 of Bill 57 eliminates the independent Environmental Commissioner of Ontario (ECO), and purports to transfer some of the ECO's existing duties and functions to the Auditor General and the Minister of the Environment, Parks and Conservation. However, a careful review of Schedule 15 reveals a number of serious substantive and procedural concerns about these proposed EBR changes. For example, the various amendments will result in considerably less accountability, transparency and oversight than currently exists under the EBR. Accordingly, this paper concludes that the Ontario government should immediately withdraw Schedule 15 of Bill 57, and should leave Part III of the EBR intact so that the non-partisan ECO can continue to perform its important environmental advocacy, oversight, reporting and educational roles.*

PART I - INTRODUCTION

(a) Overview

To implement its 2018 Fall Economic Statement, the Ontario government introduced Bill 57 (*Restoring Trust, Transparency and Accountability Act, 2018*) for First Reading on November 15, 2018.²

Bill 57 is omnibus legislation that contains 45 different schedules which, if enacted, will amend over four dozen provincial statutes, including Ontario's *Environmental Bill of Rights (EBR)*.

In particular, Schedule 15 of Bill 57 proposes a number of changes to the *EBR*, which have been summarized by the Bill's explanatory note as follows:

The *EBR, 1993* is amended so that duties currently associated with the position of Environmental Commissioner are transferred to the Environment Minister and the Auditor General. Related amendments are made.

The Auditor General shall appoint a Commissioner of the Environment from among the employees of the Office of the Auditor General, and the Commissioner of the Environment

¹ Counsel, Canadian Environmental Law Association (CELA). The author served as CELA's representative on the Environment Minister's Task Force on the Environmental Bill of Rights in 1991-93, and has extensively used and written about this statute over the past 25 years.

² See <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-57>

may, subject to the direction of the Auditor General, exercise the powers and perform the duties and functions of the Auditor General under the Act.

Transitional provisions are set out.³

When introducing Bill 57, the province's Finance Minister indicated that the legislative package is intended to fulfill the government's promise to the people of Ontario "to restore trust, transparency and accountability in government."⁴

The Canadian Environmental Law Association (CELA) has carefully assessed Schedule 15 against the Minister's pronouncements about the overall intent of Bill 57. However, CELA concludes that the proposed *EBR* amendments will not achieve the objectives espoused by the Minister of Finance.

To the contrary, CELA finds that in comparison to the current *EBR* regime, the legislative amendments set out in Schedule 15 will significantly reduce public trust, transparency and accountability in governmental decision-making in the environmental context, as described below.

In addition, CELA notes that Bill 57's explanatory text is inaccurate (if not misleading) since it implies that all of the existing statutory powers, duties and functions of the Environmental Commissioner of Ontario (ECO) are simply being transferred, in their entirety, to the Auditor General and the Environment Minister. This is not the case since Schedule 15 attempts to scope, narrow or eliminate several key powers, duties and functions currently exercised by the ECO under the *EBR*.

Accordingly, if the provincial government is seriously committed to ensuring effective oversight and meaningful public reporting on environmental law and policy matters in Ontario, then CELA recommends that Schedule 15 of Bill 57 be withdrawn forthwith.

(b) Background: The Public Interest Rationale for the Independent ECO

The form and content of environmental rights legislation varies among jurisdictions in Canada and other countries. However, a common feature of such legislation is the creation of a specialized body or institution to oversee and report upon the environmental performance of governmental decision-makers.

The need for, and essential components of, independent oversight by a stand-alone expert institution have been summarized as follows:

A vital element of an effective environmental bill of rights is independent oversight by a new or existing institution. Independent oversight, meaning that the institution is insulated from political whims and chicanery, provides credibility, expertise and accountability. The independent body's mission is to monitor the implementation of, and adherence to, the

³ Bill 57, Explanatory Note, page iii.

⁴ See <https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2018-11-15/hansard#para774>.

environmental bill of rights, report deficiencies to the Legislature and possibly take direct steps to prevent or remedy violations of the rights. Independence can be assured through legislation that clearly sets out the rights and responsibilities of the oversight body, provides tenure for office holders, and requires the institution to report to the legislature rather than a particular minister or other elected official (emphasis added).⁵

Accordingly, since the 1970's, Ontarians, non-governmental organizations, academics, politicians and lawyers have consistently advocated the development of environmental rights legislation that includes a new independent "environmental ombudsman" to review, report and advise on environmental matters.⁶

In 1978, for example, CELA lawyers wrote that:

Another element of an environmental Bill of Rights would be an environmental ombudsman, whether one person or an Environmental Council, to advise on policy, demand review of Environment Ministry decisions, report periodically on the state of the provincial environment, and act as a watchdog on environmental abuse.⁷

Similarly, in the early 1990s, Ontario's Environment Minister established a multi-stakeholder Task Force that drafted and consulted upon the proposed *EBR* for the province. The Task Force's unanimous report highlighted the need for the new legislation to create and empower an independent ECO for environmental protection, public participation and governmental accountability purposes:

Political accountability is at the foundation of the proposed *EBR* and the Task Force recommends that the government create an Office of the Environmental Commissioner. The Environmental Commissioner would have responsibility for this implementation and effectiveness of the *EBR*.⁸

In making this recommendation, the Task Force considered different options for ensuring *EBR* compliance, transparency and accountability, but preferred the establishment of an "an objective and knowledgeable authority" to address the need for "oversight and the measurement of the implementation of the *EBR* and the use of Statements of Environmental Values."⁹

The Task Force further recommended that the ECO should be given various responsibilities under the *EBR*, including:

- (i) providing the key ministries which make environmental decisions with an opportunity to draw upon any expertise developed in the Office of the

⁵ David R. Boyd, "Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201 at page 247.

⁶ Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995) at pages 7 and 14.

⁷ David Estrin and John Swaigen, *Environment on Trial: Second Edition* (Toronto: CELRF, 1978) at pages 472-73.

⁸ *Report of the Task Force on the EBR* (Toronto: Queen's Printer for Ontario, 1992) at page vi. The full text of the Report is available at: <https://archive.org/details/reportoftaskforc00taskuoft>.

⁹ *Ibid*, page 66.

Environmental Commissioner and to obtain guidance or advice on proposed environmental policies and regulations;

- (ii) providing ministries which make environmental decisions with guidance on the development and implementation of their individual Statements of Environmental Values;
- (iii) providing education and guidance to those same ministries and their officials in understanding how to use the Statements of Environmental Values in their day-to-day decision-making and how to develop self-auditing procedures with respect to environmental decisions;
- (iv) providing periodic analysis and comment about whether environmental policies, regulations and instruments are actually being infused with the Statements of Environmental Values and, if not, how to ensure that they will in future;
- (v) receiving, forwarding, and monitoring the Applications for Investigation, the number of requests, their disposition, and user satisfaction with the process;
- (vi) receiving, forwarding and monitoring the Applications for Review of government action, both with respect to the reviewing of existing policies, regulations and instruments, as well as with respect to public requests for regulation of the environment where no regulations exist. The number and disposition of requests should be monitored, as well as user satisfaction with the process;
- (vii) monitoring the use of the new statutory cause of action to a public resource;
- (viii) monitoring the use of protections for employees who report environmental harm in the workplace and the number and disposition of complaints to the Ontario Labour Relations Board;
- (ix) providing general oversight in monitoring the implementation of the EBR during phase-in transition;
- (x) monitoring individual ministry use of the Environmental Registry and the exercises of Ministerial discretion in placing policies, regulations and instruments on the Registry for public comment, the exercise of discretionary emergency powers and other related decisions.¹⁰

In 1993, the Ontario Legislature accepted and acted upon the advice of the Environment Minister's Task Force by enacting the *EBR* with detailed provisions that not only established the ECO, but also provided various powers, duties and functions to the ECO, as outlined below. The *EBR* was proclaimed in force in 1994, and the ECO has played a central role under the legislation for the past 25 years.

¹⁰ *Ibid*, pages 69-70.

PART III – CURRENT *EBR* PROVISIONS IN RELATION TO THE ECO

The *EBR* contains an integrated suite of environment rights and responsibilities that are intended to protect the environment, enhance public participation opportunities, and ensure governmental accountability for environmental decision-making in Ontario.¹¹

In accordance with the above-noted Task Force recommendations, Part III of the *EBR* currently provides the ECO with wide-ranging powers, duties and functions:

Among his or her many functions, the environmental commissioner is to oversee the implementation of the Act and monitor the compliance of ministries with the requirements of the Act; provide guidance to ministries on how to comply with the requirements of the Act; monitor the exercise of discretion by the ministers under the Act; and prepare an annual report for the Legislature. In effect, the commissioner is also the clearinghouse for all applications for reviews, investigation, and other such tools provided to citizens under the Act.¹²

The specific *EBR* provisions pertaining to the ECO are discussed below.

(a) The ECO is an Independent Officer of the Legislature

In an attempt to shield the ECO from undue political interference, Part III of the *EBR* provides that the ECO is appointed by the Ontario Legislature, not the government in power.¹³ In practice, the province's first three ECOs (e.g. Eva Ligeti, Gord Miller and Dianne Saxe) were interviewed and selected by all-party committees of the Legislature.

In addition, the ECO is appointed on renewable five-year terms¹⁴ (which is longer than the four-year electoral cycle), and the ECO may only be removed for cause on the address of the Legislature.¹⁵

Part III of the *EBR* also contains provisions relating to the ECO's salary, pension, staffing, and budget.¹⁶ The ECO's accounts and financial transactions are audited annually by another independent officer of the Legislature, the Auditor General of Ontario.¹⁷

(b) The ECO's Specific Functions under the *EBR*

The Ontario Legislature has assigned the ECO a large number of specific functions under Part III of the *EBR*, including:

¹¹ *EBR*, subsections 2(2) and 2(3).

¹² David Estrin and John Swaigen, *Environment on Trial: Third Edition* (Toronto: Emond Montgomery, 1993) at page 809. See also Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995) at pages 129-34

¹³ *EBR*, subsections 49(1) and (2).

¹⁴ *EBR*, subsection 49(3).

¹⁵ *EBR*, subsection 49(4).

¹⁶ *EBR*, sections 50- 55.

¹⁷ *EBR*, section 56.

- review the implementation of this Act and compliance in ministries with the requirements of this Act;
- at the request of a minister, provide guidance to the ministry on how to comply with the requirements of this Act, including guidance on,
 - (i) how to develop a ministry statement of environmental values that complies with the requirements of this Act and is consistent with other ministry statements of environmental values, and
 - (ii) how to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry;
- at the request of a minister, assist the ministry in providing educational programs about this Act;
- provide educational programs about this Act to the public;¹⁸
- provide advice and assistance to members of the public who wish to participate in decision-making about a proposal as provided in this Act;
- review the use of the registry;
- review the exercise of discretion by ministers under this Act;
- review recourse to the rights provided in sections 38 to 47;
- review the receipt, handling and disposition of applications for review under Part IV and applications for investigation under Part V;
- review ministry plans and priorities for conducting reviews under Part IV;
- 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
- review recourse to the procedure under Part VII for complaints about employer reprisals.¹⁹

The results of these review and monitoring activities are to be summarized in the ECO's annual reports to the Legislature, as noted below. This reporting duty has been described as "the key mechanism to enhance governmental accountability" under the *EBR*.²⁰

¹⁸ The ECO office currently maintains a well-stocked public resource centre, holds public workshops and webinars, engages in public speaking opportunities, and employs communication/outreach coordinators and information officers to inform and assist members of the public. See <https://eco.on.ca/about-us/our-office/>.

¹⁹ *EBR*, section 57.

²⁰ Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995) at page 132.

(c) The ECO's Annual Reports under the EBR

For transparency and accountability purposes, Part III of the *EBR* requires the ECO to file annual reports with the Speaker of the Ontario Legislature.²¹ At a minimum, these annual reports shall include:

- a report on the work of the Environmental Commissioner and on whether the ministries affected by this Act have co-operated with requests by the Commissioner for information;
- a summary of the information gathered by the Environmental Commissioner as a result of performing the functions set out in section 57 including, for greater certainty, a summary of information about compliance with ministry statements of environmental values gathered as a result of the review carried out under clause 57 (a);
- a list of all proposals of which notice has been given under section 15, 16 or 22 during the period covered by the report but not under section 36 in the same period;
- any information prescribed by the regulations under this Act; and
- any information that the Environmental Commissioner considers appropriate.²²

To date, two dozen annual reports²³ have been prepared and filed by the ECO pursuant to Part III of the *EBR*. These reports not only provide detailed and objective “report cards” on governmental compliance with *EBR* obligations, but they also comprehensively address virtually every significant environmental issue that has arisen in Ontario, including toxic chemicals, approvals reform, environmental assessment, air pollution, waste management, fracking, wetlands protection, wildlife habitat, wilderness preservation, land use planning, water well regulation, and countless other high-priority public interest topics.

(d) The ECO's Special Reports under the EBR

In addition to annual reporting requirements, Part III of the *EBR* also empowers the ECO to prepare and file special reports on particularly urgent or important matters:

The Environmental Commissioner may make a special report to the Speaker of the Assembly at any time on any matter related to this Act that, in the opinion of the Commissioner, should not be deferred until the annual report, and the Speaker shall lay the report before the Assembly as soon as reasonably possible.²⁴

²¹ *EBR*, subsection 58(1).

²² *EBR*, subsection 58(2).

²³ See <https://eco.on.ca/our-reports/environmental-protection/>.

²⁴ *EBR*, subsection 58(4).

The ECO's special reporting power has been described as "one of the most potent powers" under the *EBR* since it gives the ECO "unlimited access to the Legislature to report on significant issues that arise under the *EBR*."²⁵

To date, a number of special reports²⁶ have been prepared and filed by the ECO in order to address pressing issues such as waste diversion, energy planning, *EBR* reform, species at risk, biodiversity conservation, household hazardous waste, groundwater protection and intensive farming.

(e) The ECO's Reports on Ministries' Statement of Environmental Values

The *EBR* directed the ECO to report immediately to the Legislature if it appeared that a minister was failing to comply with the legal duty to prepare and consult upon draft Statements of Environmental Values during the initial phase-in period for the *EBR*.²⁷ However, the ECO declined to exercise this discretionary reporting power since the prescribed ministries undertook public consultation while crafting the Statements of Environmental Values under the *EBR*.²⁸

(f) The ECO's Reports on Energy Conservation

The *EBR* was amended in 2009 to impose a duty upon the ECO to report annually to the Legislature "on the progress of activities in Ontario to reduce the use or make more efficient use of electricity, natural gas, propane, oil and transportation fuels."²⁹

In particular, these types of annual reports from the ECO must include the following matters:

- describe the results of initiatives in Ontario during the year covered by the annual report to reduce the use or make more efficient use of electricity, natural gas, propane, oil and transportation fuels;
- describe the progress in meeting targets established by the Government of Ontario for reducing the use or making more efficient use of electricity, natural gas, propane, oil and transportation fuels; and
- identify,
 - (i) any Acts or regulations of Canada or Ontario that result in barriers to the development or implementation of measures to reduce the use or make more efficient use of electricity, natural gas, propane, oil and transportation fuels,
 - (ii) any by-laws of municipal councils in Ontario that result in barriers to the development or implementation of measures to reduce the use or make more efficient use of electricity, natural gas, propane, oil and transportation fuels, and

²⁵ Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995) at page 133.

²⁶ See <https://eco.on.ca/our-reports/special-reports/>.

²⁷ *EBR*, subsection 58(5).

²⁸ Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995) at page 133.

²⁹ *EBR*, subsection 58.1(1).

(iii) any policies of the Government of Canada, the Government of Ontario or municipal councils in Ontario that result in barriers to the development or implementation of measures to reduce the use or make more efficient use of electricity, natural gas, propane, oil and transportation fuels.³⁰

In order to carry out this annual reporting duty, the *EBR* authorizes the ECO to require reports and information within specified timeframes from various persons, entities or agencies, including:

- the Ontario Energy Board;
- the Independent Electricity System Operator;
- the Smart Metering Entity within the meaning of the *Electricity Act, 1998*;
- a generator, transmitter or distributor, as those terms are defined in the *Electricity Act, 1998*;
- a gas distributor, gas transmitter, producer or storage company, as those terms are defined in the *Ontario Energy Board Act, 1998*; and
- any other prescribed person or class of persons.³¹

To date, the ECO has filed fourteen energy conservation reports³² in accordance with the above-noted *EBR* provisions in order to outline issues and opportunities in energy use and conservation across the province.

(g) The ECO's Reports on Greenhouse Gas Emissions

In 2009, the *EBR* was also amended to require the ECO to annually report to the Legislature “on the progress of activities in Ontario to reduce emissions of greenhouse gases.”³³ These gases are defined in the *EBR* as follows:

- carbon dioxide;
- methane;
- nitrous oxide;
- hydrofluorocarbons;
- perfluorocarbons; and
- sulphur hexafluoride.³⁴

³⁰ *EBR*, subsection 58.1(2).

³¹ *EBR*, subsection 58.1(3).

³² See <https://eco.on.ca/our-reports/energy/>.

³³ *EBR*, subsection 58.2(1).

³⁴ *EBR*, subsection 58.2(5).

As a matter of law, these annual reports must include “a review of any annual report on greenhouse gas reductions or climate published by the Government of Ontario.”³⁵ To carry out this reporting duty, the ECO is empowered to compel persons (or classes of persons) to provide reports and information.³⁶

To date, the ECO has prepared and filed various annual reports³⁷ on greenhouse gas emissions and climate change mitigation and adaptation.

(h) The ECO’s Requirement to File Separate Reports

To ensure that the ECO’s three annual reports (e.g. environmental protection, energy conservation and climate change) receive appropriate public attention and due consideration by the Legislature, the *EBR* specifies that these annual reports are to be filed separately as stand-alone reports.³⁸ As a matter of practice, the ECO typically releases these annual reports at different times of the year.

(i) The ECO’s Statutory Powers under the EBR

Part III of the *EBR* enables the ECO to perform other special assignments that may be required by the Ontario Legislature.³⁹

In addition, the ECO enjoys broad powers to examine persons on oath or affirmation on “any matter related to the Commissioner’s duties” under the *EBR*, and can require “the production in evidence of documents or other things.”⁴⁰ Similarly, the *EBR* provides that in conducting an examination, the ECO has certain powers under the *Public Inquiries Act* (e.g. issuance of summons, document production, etc.).⁴¹

(j) The ECO Track Record to Date

Since the *EBR* was enacted 25 years ago, there has been widespread public recognition of the importance, benefits and effectiveness of the ECO’s advocacy, oversight, reporting and educational roles.

For example, a leading environmental law textbook acknowledges that establishing and empowering the “high-profile” ECO was “one of the most important changes brought about in Ontario through the passage of the *EBR*.”⁴² Similarly, another commentator has noted that the

³⁵ *EBR*, subsection 58.2(2).

³⁶ *EBR*, subsection 58.2(3).

³⁷ See <https://eco.on.ca/our-reports/climate-change/>.

³⁸ *EBR*, section 58.3.

³⁹ *EBR*, section 59.

⁴⁰ *EBR*, subsection 60(1).

⁴¹ *EBR*, subsection 60(2).

⁴² Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada: Second Edition* (Toronto: Emond, 2015), at page 374.

ECO has “done an excellent job” in highlighting “systemic” non-compliance with *EBR* requirements by the provincial government.⁴³

Based on our experience over the past decades, CELA concurs with these observations, and strongly commends the ECO and staff for their significant contributions to environmental sustainability, governmental accountability, and the effective exercise of public rights under the *EBR*.

However, if Schedule 15 of Bill 57 is enacted, the ECO will no longer exist as an independent officer of the Legislature. This change will leave the people of Ontario without an effective, non-partisan advocate with demonstrated institutional expertise in the daunting environmental issues that confront the province, including climate change.

PART III – ANALYSIS OF SCHEDULE 15 IN BILL 57

The proposed *EBR* amendments in Schedule 15 of Bill 57 will eliminate the ECO, and will transfer some – but not all – of the ECO’s powers, duties and functions to the Auditor General and the Environment Minister.

Therefore, as a matter of law, enacting Schedule 57 will inevitably cause a serious reduction in environmental oversight, transparency and accountability under the *EBR*, as discussed below.

(a) Schedule 15 Impairs Oversight Functions under the *EBR*

Under section 57 of the current *EBR*, the ECO has a lengthy list of functions to perform, including the duty to review and report upon various activities, applications, administrative proceedings, civil litigation and other matters undertaken pursuant to the *EBR*’s myriad provisions.

In contrast, these important functions have not been carried forward in Schedule 15. For example, none of the specific tasks under section 57 have been assigned or transferred to the Auditor General. Instead, Schedule 15 merely requires the Auditor General to report on “the operation of the Act,”⁴⁴ rather than the items currently listed under the *EBR*.

It is certainly conceivable that the Auditor General may, in her discretion, make the necessary inquiries and report upon one or more of the matters currently prescribed by section 57 of the *EBR*. But given the conspicuous absence of these matters from Schedule 15, there is no mandatory requirement or guarantee that the Auditor General will decide to do so in any given year, or at all. The resulting lack of certainty and predictability under Bill 57 makes it unclear as to whether the Auditor General will conduct the necessary investigations, at a sufficient level of detail, of the various section 57 matters.

⁴³ David R. Boyd, “Elements of an Effective Environmental Bill of Rights” (2015), 27 JELP 201 at pages 247-48. This author further states that the political accountability offered by the ECO should be accompanied by additional legal accountability mechanisms under Ontario’s *EBR*.

⁴⁴ Schedule 15, proposed subsection 51(1).

In addition, the ECO's current obligations regarding public education and assistance under the *EBR* have not been transferred to the Auditor General under Schedule 15. Instead, Schedule 15 proposes that the Environment Minister will have the lead role in providing "educational programs" and "general information" about using the *EBR*'s public participation provisions.⁴⁵

In CELA's opinion, this is a misguided and problematic approach because the Environment Minister and other ministers are typically on the receiving end of *EBR* tools (e.g. applications, third-party appeals, civil actions, etc.). Therefore, it is unrealistic to expect these elected officials to provide "general information" that will sufficiently inform Ontarians on how to use the *EBR* to hold the provincial government accountable for its environmental decision-making.

It should be further noted that at the present time, *EBR* applications for review or investigation must be filed first with the ECO. As discussed above, this arrangement enables the ECO to play an important clearinghouse role by receiving, scrutinizing and tracking these applications, and by evaluating and reporting upon the ministries' eventual decisions on the applications.

In contrast, Schedule 15 proposes that applications for review or investigation shall be filed with the relevant ministries,⁴⁶ but there is no corresponding duty to file the applications with the Auditor General. In addition, Schedule 15 does not expressly require any public reporting by the Auditor General on the outcomes of *EBR* applications for review or investigation. In our view, this proposed arrangement will make it exceptionally difficult for the Auditor General to assess the efficacy of *EBR* applications for review or investigation.

In theory, if Bill 57 is enacted, it would be open to applicants for review or investigation to file complaints with the provincial ombudsman if they believe that their applications have been improperly handled or inappropriately rejected by the relevant ministries. However, since the use of, and ministries' responses to, these *EBR* tools have been exclusively monitored and reported upon by the ECO for over two decades, it goes without saying that the ombudsman has no demonstrable experience in overseeing the application processes prescribed by Parts IV and V of the *EBR*.

(b) Schedule 15 Eliminates Special Reports under the *EBR*

As noted above, the ECO is currently empowered to prepare and file special reports with the Ontario Legislature in order to address serious or time-sensitive environmental matters. This power has been effectively utilized by the ECO over the past two decades.

In contrast, Schedule 15 does not authorize the Auditor General to submit any special environmental reports to the Legislature. Similarly, the *Auditor General Act* (even if amended in accordance with Schedule 3 of Bill 57) does not confer upon the Auditor General any statutory power to prepare and file special reports on environmental matters. On this point, CELA is aware that the *Auditor General Act* enables the Auditor to file special reports,⁴⁷ but these appear to be

⁴⁵ Schedule 15, proposed section 2.1.

⁴⁶ Schedule 15, proposed subsections 61(1) and 74(1).

⁴⁷ *Auditor General Act*, subsection 12(1).

confined to the discrete accounting matters prescribed in the Act for the minimum content of annual reports.⁴⁸

Accordingly, Schedule 15 of Bill 57 clearly eliminates the special reporting duties presently exercised by the ECO. Furthermore, the Auditor General will not be authorized under the amended *EBR* to file special environmental reports with the Legislature. This can only be characterized as a serious and potentially detrimental rollback of the broad reporting functions under the current *EBR*.

(c) Schedule 15 Constrains Annual Reports under the EBR

As noted above, the ECO is currently required to file three separate annual reports with the Ontario Legislature. These individual reporting obligations have proven to be an extremely valuable mechanism used by the ECO to flag systemic environmental problems and to identify practical solutions to address such problems.

In contrast, Schedule 15 only requires the Auditor General to file a single annual report to the Legislature,⁴⁹ which may be contained or subsumed within the Auditor General's annual fiscal report to the Legislature.⁵⁰ This blended approach will invariably dilute or reduce the profile, utility and effectiveness of the environmental reporting presently required under sections 58, 58.1 and 58.2 of the *EBR*.

In addition, there is a glaring lack of specificity in Schedule 15 as to the minimum content requirements of the consolidated annual report to be filed by the Auditor General under the *EBR*. As discussed above, the *EBR* contains a number of prescriptive details as to which specific matters must be addressed in the three annual reports currently required under Part III of the *EBR*.

In contrast, Schedule 15 merely provides that the Auditor General's single report under the *EBR* only needs to address three general topics:

- progress on energy conservation activities;
- progress on reducing greenhouse gas emissions; and
- any information that the Auditor General considers "appropriate."⁵¹

No further particulars are provided in Schedule 15 to shed light or provide binding direction on the nature, scope or extent of this vague reporting content. Compared to the detailed requirements of the current *EBR*, Schedule 15 clearly constrains (if not entirely undermines) annual reporting obligations under Part III of the *EBR*.

⁴⁸ *Auditor General Act*, subsection 12(2).

⁴⁹ Schedule 15, proposed subsection 51(2).

⁵⁰ Schedule 15, proposed subsection 51(3).

⁵¹ Schedule 15, proposed subsection 51(2).

(d) Schedule 15 Eliminates the Legislative Status of the ECO

As described above, Part III of the *EBR* currently makes it mandatory for the Ontario government to establish, maintain and fund the ECO as an independent officer of the Legislature.

However, these provisions are not contained within Schedule 15's proposed overhaul of Part III of the *EBR*. In effect, this means that the ECO will cease to exist under the *EBR* if Bill 57 is passed and proclaimed in force.

At the same time, Schedule 15 requires the Auditor General to appoint a "Commissioner of the Environment,"⁵² although no specific timetable or deadline for this appointment is prescribed by Schedule 15. It is therefore unclear when this new "Commissioner" will actually be appointed, and there appears to be no legal consequences if there are any significant delays in the appointment process.

Moreover, Schedule 15 provides that this new "Commissioner" shall be appointed from among the Auditor General's employees.⁵³ No special qualifications or environmental credentials are prescribed by Schedule 15 for this position (see below). This indicates that the new "Commissioner" is a staff-level public service appointment rather than an independent officer of the Legislature. In addition, the selection of the "Commissioner" appears to be an internal matter to be decided by the Auditor General in her discretion, rather than by the all-party committees of the Legislature that have selected the three ECOs appointed to date under the *EBR*.

Finally, at all material times, the new "Commissioner" is subject to the directions of the Auditor General.⁵⁴ Under Schedule 15, the "Commissioner" has no specific or mandatory legislated duties under the amended *EBR*, except to carry out whatever "directions" (or delegated duties) may be provided from the Auditor General from time to time. This paucity of detail stands in stark contrast to the explicit statutory duties, powers and responsibilities assigned to the ECO under Part III of the *EBR*.

Accordingly, the new "Commissioner" cannot be viewed as the legislative equivalent to the ECO under Part III of the current *EBR*.

On its face, Schedule 15's proposal to have the Auditor General appoint the Commissioner of the Environment is analogous to current federal arrangements in which the Auditor General of Canada appoints the Commissioner of the Environment and Sustainable Development (CESD).⁵⁵ However, upon closer examination, it appears that there are far more differences than similarities between these two regimes.

⁵² Schedule 15, proposed subsection 50(1).

⁵³ *Ibid.*

⁵⁴ Schedule 15, proposed subsection 50(2).

⁵⁵ See http://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html#Commissioner. See also the federal *Auditor General Act*, section 15.1.

For example, while the CESD is appointed to seven year terms, Schedule 15 specifies no fixed terms for the provincial Commissioner, meaning that this appointee has no security of tenure (unlike the current ECO who is appointed on renewable 5 year terms under Part III of the *EBR*).

Similarly, the CESD has been expressly assigned a number of key functions under federal law, including conducting performance audits,⁵⁶ monitoring sustainable development strategies of federal departments,⁵⁷ overseeing the environmental petition process,⁵⁸ and auditing the federal government's management of environmental and sustainable development issues. In contrast, Schedule 15 does not contain a detailed list of powers, duties and responsibilities to be exercised by Commissioner of the Environment, as noted above.

For these and other reasons, CELA concludes that Schedule 15's sparse provisions regarding the proposed Commissioner of the Environment are not comparable those which exist at the federal level in relation to the CESD. To the contrary, the CESD's various roles more closely resemble those given to the ECO under Part III of the *EBR*.

(e) The Accounting Expertise and Role of the Auditor General

CELA's legal analysis of Schedule 15 in Bill 57 should not be construed as criticism of the Auditor General and her staff. CELA appreciates the fiscal oversight provided by the Auditor General, and we recognize that the Auditor General plays an important role as a key financial watchdog in Ontario. In fact, CELA has assisted and cooperated with the Auditor General's staff members when they have conducted occasional value-for-money audits of the province's environmental programs.

However, it does not necessarily follow that the Auditor General should now become the environmental watchdog in Ontario, particularly since that key role has already been well-executed by the ECO for the past 25 years.

First, the Auditor General's primary function is to conduct financial audits of provincial ministries, agencies, boards, authorities, foundations, councils, institutions, and Crown corporations, and the Auditor General must be duly licenced under the *Public Accounting Act, 2004*.⁵⁹ Thus, environmental training, education or expertise is not a mandatory prerequisite for the Auditor General to be appointed by the Legislature.

⁵⁶ A performance audit is defined by the federal government as "an independent, objective and systematic assessment of how well government is managing its activities, responsibilities and resources... Performance audits do not question the merits of government policies. Rather, they examine the government's management practices, controls, and reporting systems based on its own public administration policies and on best practices" see http://www.oag-bvg.gc.ca/internet/English/au_fs_e_371.html#performance.

⁵⁷ See the federal *Auditor General Act*, section 23.

⁵⁸ Pursuant to section 22 of the federal *Auditor General Act*, Canadians may file petitions to the government regarding environmental and sustainable development issues. The CESD receives, oversees, manages and reports upon these petitions to Parliament, just as the ECO currently reports to the Ontario Legislature on *EBR* applications for review or investigation.

⁵⁹ *Auditor General Act*, sections 8 and 9.

On this point, CELA notes that the *EBR* also does not prescribe the minimum qualifications for the ECO. However, it is beyond dispute that the three ECO's selected to date by the all-party committees have been persons with extensive experience in the environmental field. Thus, environmental qualifications have become the *de facto* requirement for ECO appointees.

Second, it should be noted that when the *EBR* Task Force was formulating its advice to the Environment Minister in the early 1990s, the office of the Auditor General was already in existence at the time. Nevertheless, the Task Force recommended the establishment of the ECO as a new stand-alone officer of the Legislature, and there is no public interest justification to depart from that unanimous multi-stakeholder recommendation at the present time.

Third, given the wide range of auditing and reporting functions assigned under the *Auditor General Act*, CELA remains concerned that the Auditor General and her staff may be stretched too thinly to comprehensively review and report upon all environmental matters which are currently addressed by the ECO each year. A similar issue has been raised by CELA in relation to the existing provincial ombudsman, which "watches over so many different government activities that it cannot do justice to environmental concerns."⁶⁰ It should be further noted that the provincial ombudsman also existed in the 1990s, but the Environment Minister's Task Force similarly declined to recommend giving that office any powers, duties or functions under the *EBR*.

In summary, CELA concludes that there is no administrative overlap or functional duplication between the roles of the ECO and the Auditor General under their current enabling statutes. In our view, each of these important watchdogs should continue to separately carry out their assigned legislative duties under their respective statutes.

PART IV – CONCLUSIONS

For the foregoing reasons, CELA concludes that Schedule 15 of Bill 57 constitutes an unacceptable and unjustified rollback of current *EBR* provisions, particularly those which establish and empower the ECO to serve as an independent officer of the Legislature.

In our view, there is no persuasive legal, jurisdictional or environmental rationale for abolishing the ECO or otherwise amending the *EBR* in the manner proposed by Bill 57. Moreover, despite the Finance Minister's comments during First Reading of Bill 57, CELA concludes that eliminating the ECO and amending the *EBR* will reduce – not restore – public trust, transparency and accountability in the environmental context.

In fact and in law, the ECO is the guardian of the *EBR*. Therefore, the ECO should continue to exist to provide detailed, evidence-based recommendations to the Legislature in order to protect the public interest, conserve natural heritage features and functions, and safeguard the health and safety of the people of Ontario.

Accordingly, CELA recommends that Schedule 15 of Bill 57 be withdrawn by the Ontario government. Instead, Part III of the *EBR* should be left intact so that the non-partisan ECO can

⁶⁰ David Estrin and John Swaigen, *Environment on Trial: Second Edition* (Toronto: CELRF, 1978) at page 473.

continue to perform its important environmental advocacy, oversight, reporting and educational roles.

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