

**SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE
DEVELOPMENT REGARDING THE OFFICE OF THE COMMISSIONER OF THE
ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

**Prepared by
Richard D. Lindgren
Counsel, Canadian Environmental Law Association**

PART I – INTRODUCTION

These are the submissions of the Canadian Environmental Law Association (CELA) on the question of whether the Commissioner of the Environment and Sustainable Development (CESD) should remain situated within the office of the Auditor General of Canada, or whether the CESD should be restructured to serve as an independent officer of Parliament.

For the reasons outlined below, and based on CELA’s experience with the Environmental Commissioner of Ontario (ECO) under the *Environmental Bill of Rights*¹ (*EBR*), we recommend that consideration be given to re-constituting the CESD as a stand-alone Parliamentary officer.

In our view, if properly empowered, staffed and resourced, an independent CESD can play an integral role in providing oversight, direction, and accountability in relation to the Government of Canada’s environmental performance, policy development, and decision-making (i.e. standard setting and approvals issuance under federal environmental legislation).

In reaching this conclusion, CELA is not being critical of the important work performed to date by the CESD within its current statutory framework. To the contrary, CELA greatly appreciates the annual reports² and insightful analysis provided over the years by the CESD.

However, having regard for the *EBR* track record in Ontario, CELA respectfully submits that the nature, profile and effectiveness of the CESD can be enhanced if appropriate legislative provisions are enacted to entrench the CESD as an independent officer of Parliament.

(a) CELA’s Background and EBR Experience

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing laws to protect the environment and safeguard human health and safety. Over the past five decades, CELA lawyers have represented low-income persons and vulnerable, disadvantaged or Indigenous

¹ S.O. 1993, c.28. Online, [Environmental Bill of Rights, 1993, S.O. 1993, c. 28 \(ontario.ca\)](http://www.ontario.ca).

² The most recent CESD reports are available online: [Commissioner of the Environment and Sustainable Development Reports \(oag-bvg.gc.ca\)](http://www.commissioner-of-the-environment-and-sustainable-development.gc.ca).

communities in the courts and before tribunals on a wide variety of environmental issues and test cases. CELA is funded by Legal Aid Ontario and operates as a specialty legal clinic. Our strategic priorities include ensuring access to justice, preventing pollution, and protecting environmental and human health.³

Over the past several decades, CELA has been actively involved in the development and implementation of Ontario's *EBR*. In the early 1990s, for example, CELA was appointed as a member of the Environment Minister's Task Force that assisted in the drafting of Ontario's *EBR*. After the *EBR* was enacted by the Ontario Legislature in 1993, CELA lawyers have provided summary advice, public legal education, and client representation in relation to various *EBR* tools, including Applications for Review, Applications for Investigation, and third-party appeals of instrument decisions.

Based on our extensive *EBR* experience, and from the public interest perspective of our client communities, CELA has compared and contrasted Part III of the *EBR* with the current statutory provisions governing the CESD. Our comparative analysis has identified some potential opportunities to reformulate, strengthen and expand the CESD's important functions under federal law, as described below.

(b) Overview of the CESD

On February 1, 2021, the Standing Committee on Environment and Sustainable Development (Standing Committee) passed a motion to hold a meeting in relation to the office of the CESD.⁴ This meeting has been scheduled for March 8, 2021.

CELA notes that the role, responsibilities and powers of the CESD have been much discussed since the CESD was established 25 years ago under amendments to the *Auditor General Act*.⁵ As noted by an interim CESD in his testimony to the Standing Committee in November 2020, the original decision to establish the CESD within the Auditor General's Office was a "policy" decision made by Parliamentarians:

It's important to recognize that a policy decision was made very early on with the way the act was set up, so that the commissioner is not a stand-alone office. The commissioner supports the Office of the Auditor General, and there has been discussion over the years about whether or not a commissioner should be a stand-alone commissioner.

The way we're structured, the commissioner of the environment and sustainable development is a senior officer appointed by the Auditor General to assist her with her mandate. It should be noted that the mandate belongs to the Auditor General. The commissioner assists her.⁶

³ See [Canadian Environmental Law Association \(CELA\)](#).

⁴ See [Evidence - ENVI \(43-2\) - No. 11 - House of Commons of Canada \(ourcommons.ca\)](#).

⁵ RSC 1985, c.A-17. Online, [Auditor General Act \(justice.gc.ca\)](#).

⁶ See [Evidence - ENVI \(43-2\) - No. 6 - House of Commons of Canada \(ourcommons.ca\)](#).

CELA agrees with this assessment, but submits that it is now timely and appropriate to re-visit this 25 year-old policy decision, which is still reflected in the current *Auditor General Act*.

At present, section 15.1 of this Act provides as follows:

15.1 (1) The Auditor General shall, in accordance with the *Public Service Employment Act*, appoint a senior officer to be called the Commissioner of the Environment and Sustainable Development who shall report directly to the Auditor General.

(2) The Commissioner shall assist the Auditor General in performing the duties of the Auditor General set out in this Act that relate to the environment and sustainable development.

In addition, section 21.1 of the Act sets out the broad purpose and sustainability focus of the CESD:

21.1 In addition to carrying out the functions referred to in subsection 23(3), the purpose of the Commissioner is to provide sustainable development monitoring and reporting on the progress of designated entities towards sustainable development, which is a continually evolving concept based on the integration of social, economic and environmental concerns, and which may be achieved by, among other things,

- (a) the integration of the environment and the economy;
- (b) protecting the health of Canadians;
- (c) protecting ecosystems;
- (d) meeting international obligations;
- (e) promoting equity;
- (f) an integrated approach to planning and making decisions that takes into account the environmental and natural resource costs of different economic options and the economic costs of different environmental and natural resource options;
- (g) preventing pollution; and
- (h) respect for nature and the needs of future generations.

Section 23 of the Act establishes key monitoring and reporting duties that must be carried out by the CESD:

23 (1) The Commissioner shall make any examinations and inquiries that the Commissioner considers necessary in order to monitor

- (a) the extent to which designated entities have contributed to meeting the targets set out in the Federal Sustainable Development Strategy and have met the objectives, and implemented the plans, set out in their own sustainable development strategies laid before the Houses of Parliament under section 11 or 12 of the *Federal Sustainable Development Act*; and
- (b) the replies by Ministers required by subsection 22(3).

(2) The Commissioner shall, on behalf of the Auditor General, report annually to Parliament concerning anything that the Commissioner considers should be brought to the attention of Parliament in relation to environmental and other aspects of sustainable development, including

(a) the extent to which designated entities have contributed to meeting the targets set out in the Federal Sustainable Development Strategy and have met the objectives, and implemented the plans, set out in their own sustainable development strategies laid before the Houses of Parliament under section 11 or 12 of the *Federal Sustainable Development Act*;

(b) the number of petitions recorded as required by subsection 22(1), the subject-matter of the petitions and their status; and

(c) the exercising of the authority of the Governor in Council under sections 12.2 and 12.3 of the *Federal Sustainable Development Act*.

(3) The Commissioner shall examine the report required under subsection 7(2) of the *Federal Sustainable Development Act* in order to assess the fairness of the information contained in the report with respect to the progress of the federal government in implementing the Federal Sustainable Development Strategy and meeting its targets.

(4) The results of any assessment conducted under subsection (3) shall be included in the report referred to in subsection (2) or in the annual report, or in any of the three additional reports, referred to in subsection 7(1).

(5) The report required by subsection (2) shall be submitted to the Speakers of the Senate and the House of Commons and the Speakers shall lay it before their respective Houses on any of the next 15 days on which that House is sitting after the Speaker receives the report.

Over the years, the implementation and efficacy of the above-noted CESD provisions have been considered by various commentators. In 2007, for example, an independent report commissioned by the Auditor General of Canada concluded that:

Over the past 12 years, the Office of the Auditor General and the Commissioner have had a positive impact on the federal government's management of environmental and sustainable development issues. They have also served an important educational role...

Within the mandate established by Parliament, we believe the Commissioner and the Office of the Auditor General have done a good job. They have developed a strong domestic and international reputation as a centre of excellence in environmental auditing.⁷

Almost 15 years later, CELA submits that these observations remain valid, and we commend the valuable work performed to date by successive Commissioners and Auditors General. However,

⁷ Report of the Independent Green Ribbon Panel to the Auditor General of Canada, *Fulfilling the Potential: A Review of the Environment and Sustainable Development Practice of the office of the Auditor General of Canada* (2007), page 9. Online, [Independent Green Ribbon Panel Report—Fulfilling the Potential — A Review of the Environment and Sustainable Development Practice of the Office of the Auditor General of Canada \(oag-bvg.gc.ca\)](http://oag-bvg.gc.ca).

as noted by the 2007 report, “there are opportunities to build upon their strength, and these are presented in our recommendations.”⁸

Among other things, this report recommended that the CESD should “draw parliamentary and public attention to key environmental and sustainable development issues,” and that the role of the CESD should “include advocacy for good environmental management and the promotion of good practices across the federal government.”⁹

In CELA’s opinion, these and related recommendations raise a fundamental question that should be considered by the Standing Committee, *viz.*, are the above-noted outcomes more likely to be achieved if the CESD is an officer appointed by the Auditor or by Parliament? In principle and on the evidence, CELA submits that the latter option is preferable from a public interest perspective.

PART II – COMPARATIVE ANALYSIS OF THE CESD AND THE ECO

The issue of whether the CESD should be recast as an independent Parliamentary officer largely depends on the specific purpose, role and function that is envisioned for the CESD.

In turn, if the CESD’s intended mandate suggests that the Commissioner should be an officer of Parliament rather than an appointee of the Auditor General, then consideration must be given to the specific types of legislative, administration, and financial arrangements that are necessary to ensure that an independent CESD operates in an effective and timely manner.

(a) Auditor, Ombudsman, or Environmental Watchdog?

Since the early 1990s, there has been ongoing debate at the federal level whether the CESD should primarily serve as an environmental auditor or an environmental advocate. As noted in 2010 by an academic review of the CESD and the ECO:

After the 1993 election the Standing Committee on Environment and Sustainable Development recommended the creation of an environmental policy advocate with a broad mandate to promote the greening of Canadian society. Instead the Liberal government accepted the advice of Auditor General Denis Desautels, that the new commissioner should be limited to the auditing of existing environmental programs, and not the advocacy of new policies. Policy advocacy was more appropriately left to MPs.¹⁰

The implications of the important distinction between auditing and advocacy is succinctly reflected in the above-noted 2007 report prepared for the Auditor General of Canada:

Those who favour the current model of a Commissioner located within the Office of the Auditor General emphasize examining barriers to implementation—failures to translate

⁸ *Ibid.*

⁹ *Ibid.*, page 11.

¹⁰ David Pond, “The Role of Parliamentary Officers: A Case Study of Two Officers,” *Canadian Parliamentary Review*, Vol.33, No. 4 (Winter). Online, [Vol 33 No 4 \(Winter\) – Canadian Parliamentary Review- La Revue parlementaire canadienne \(revparcan.ca\)](http://www.revparcan.ca).

policy direction into effective action—and the roles that accountability and audit play in this endeavour. In this view, others—ministers, parliamentarians, industry, and environmental and other groups—are to play the policy roles.

Those who favour a Commissioner as a separate officer of Parliament focus on the need to look forward, on the need for an independent policy advocate, and on the benefits of promoting environmental awareness and good practices. In this view, others, notably the Auditor General working with Parliament, would play the accountability role.

It will be up to the government and Parliament to decide whether the legislation should be changed to address these sorts of concerns, and if so, how...

The issue of placement within the audit office is directly linked to the role the Commissioner is expected to play. It will be up to the government and Parliament to decide whether the legislation should be changed, and if so, how (emphasis added).¹¹

A similar debate played out in Ontario in the early 1990s when the *EBR* Task Force was deliberating on which mechanism would best ensure independent oversight and accountability for governmental decision-making, policy development, and compliance with legislated *EBR* requirements.

After considering different options (e.g. judicial supervision by the courts, “ballot box” accountability, monitoring by a legislative standing committee, etc.), the *EBR* Task Force ultimately made a consensus-based recommendation in favour of creating of the office of the ECO. Although the office of the Auditor General of Ontario was in existence at the time, the *EBR* Task Force’s 1992 report¹² specified that the ECO should be separately appointed as an independent officer of the Legislature in order to ensure political accountability in environmental matters:

The Task Force recommends that:

- the government establish an Office of the Environmental Commissioner of Ontario which should have responsibility for objective oversight and measurement of progress in implementing the *Environmental Bill of Rights*;
- the Office of the Environmental Commissioner be accountable directly to the Legislature and be a non-partisan appointment;
- the Office of the Environmental Commissioner also monitor and report on the use of Statements of Environmental Values¹³ by various Ministries;

¹¹ *Supra*, footnote 7, pages 10, 30.

¹² *Report of the Task Force on the Ontario Environmental Bill of Rights* (July 1992). Online, [Report of the Task Force on the Ontario Environmental Bill of Rights : Task Force on the Ontario Environmental Bill of Rights : Free Download, Borrow, and Streaming : Internet Archive](#).

¹³ Pursuant to sections 7-11 of the *EBR*, prescribed ministries must develop Statements of Environmental Values (SEV) that describe how the ministries will apply *EBR* purposes (e.g. environmental protection, sustainability, etc.) during their decision-making in relation to Acts, policies, regulations and instruments. For example, the provincial

- the Office of the Environment Commissioner have responsibilities which include:

(i) providing the key ministries which make environmental decisions with an opportunity to obtain guidance or advice on proposed environmental policies and regulations...

(iv) providing periodic analysis and comment about whether environmental policies, regulations and instruments are actually being suffused with the Statement of Environmental Values and, if not, how to ensure they will in the future...¹⁴

The ECO's purpose, role and function has been concisely described by two former members of the *EBR* Task Force as follows:

The Environmental Commissioner is the official “watchdog” to oversee and monitor the operation, implementation 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. The Environmental Commissioner has a large and comprehensive array of powers and responsibilities, ranging from educating the public about the *EBR* to making a report directly to the Legislature about the functioning and administration of the *EBR*.¹⁵

The multi-stakeholder Task Force's selection of the independent ECO option was accepted by the Ontario Legislature when the *EBR* was enacted, and it is consistent with the earliest conceptions of the *EBR* dating back to the 1970s.

For example, in the seminal *Environment on Trial* textbook, CELA staff called for the establishment of an *EBR* statute at the federal level and in each province that would, among other things, create an “environmental ombudsman”:

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...

An environmental ombudsman or court could force decision-making bodies to consider scientific evidence about the effects of an action on future generations, and raise questions

Environment Ministry's SEV contains commitments to the precautionary principle, polluter pays principle, ecosystem approach, and consideration of cumulative effects.

¹⁴ *Supra*, footnote 12, pages 68-69.

¹⁵ Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond, 1995), page 129.

that the present parties to the decision-making process have no interest in bringing forward.¹⁶

In CELA's experience, the ECO's hybrid role as both an environmental auditor and policy advocate under the *EBR* worked reasonably well for a quarter-century. In fact, the independent ECO's effectiveness, credibility and public visibility in recent years (especially on climate change matters) may have been a factor in the Ontario government's 2018 decision to abolish the ECO and replace it with a new "Commissioner of the Environment" appointed by the Auditor General of Ontario.

This controversial rollback was strongly opposed by CELA,¹⁷ environmental groups,¹⁸ and other commentators¹⁹ on the grounds that it was unjustified, diminished governmental accountability, and conflicted with the consensus-based recommendations of the *EBR* Task Force. In any event, this unfortunate legislative setback does not detract from the value and importance of the ECO's track record as an independent officer of the Legislature for decades after the *EBR* was first enacted.

In summary, over its lengthy existence, the ECO was a high profile (and highly regarded) institutional office whose activities, public outreach, and annual and special reports to the Legislature were instrumental in advancing the public interest purposes of the *EBR*. This is particularly true as successive Commissioners increasingly moved from *EBR* compliance auditing to addressing new and emerging issues of environmental law and policy of concern to all Ontarians. As noted by a former Deputy Environmental Commissioner:

For almost 25 years, this small agency has shone a bright light on the province's environmental challenges and opportunities. It has served the Legislature and the public with careful research, clear explanations and early warnings on issues ranging from air quality through pollinators to wetlands.²⁰

In CELA's experience, this successful track record under the *EBR* was largely attributable to the fact that the ECO was not subordinate to the Auditor General, and was able to independently identify, prioritize and publicize the key environmental issues which warranted the ECO's involvement and follow-up over the years.

¹⁶ David Estrin and John Swaigen, *Environment on Trial* (Toronto: CELRF, 1978), pages 472-73. See also Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond, 1995), page 14.

¹⁷ See [Canadian Environmental Law Association \(CELA\) Why the Environmental Commissioner of Ontario Matters: Legal Analysis of Schedule 15 of Bill 57](#).

¹⁸ See [Canadian Environmental Law Association \(CELA\) Media Release: Environmentalists Demand that Ontario Government Withdraw its Proposed Elimination of the Province's Independent Environmental Watchdog](#).

¹⁹ See [Canadian Environmental Law Association \(CELA\) Guest Blog: So What If We Lose the Environmental Commissioner?](#).

²⁰ *Ibid.*

(b) What are the Essential Elements of an Independent Environmental Commissioner?

In CELA's view, there are a number of important conditions precedent that must be in place in order to ensure that a revamped CESD can effectively operate as an independent officer of Parliament.

First, in order to provide clarity, continuity and accountability, all essential elements of the CSED must be entrenched in comprehensive stand-alone federal legislation. On this point, we note the Ontario established the ECO in the *EBR* itself, rather than in consequential amendments to the provincial *Auditor General Act*. In short, CELA submits that the CSED should not be treated as an adjunct in federal legislation that is primarily aimed at establishing and empowering the Auditor General of Canada. Instead, the CESD should be independently appointed as an officer of Parliament in a non-partisan manner for renewable fixed terms of sufficient length²¹ to allow the CESD to operate continuously and effectively. In addition, the independent CESD should only be removable for cause by Parliament. In making these submissions, CELA recognizes that while it may be open to Parliament to make future amendments to specialized CESD legislation (as the Ontario Legislature did in relation to the *EBR*), it is necessary at first instance to place the CSED on a firm legislative footing within its own statute.

Second, the CESD legislation must contain an appropriate list of the specific functions, duties and responsibilities to be performed by the CESD. In particular, CELA notes that the *EBR* conferred a number of key tasks upon the ECO, including:

- auditing functions (e.g. reviewing ministry compliance with *EBR* requirements, ministry handling of *EBR* applications for review and investigation, operation of third-party appeals, the *EBR*'s statutory cause of action to protect public resources, etc.);
- “clearinghouse” functions (e.g. receiving and forwarding *EBR* applications);
- educational functions (e.g. providing public and ministry guidance materials, conducting public outreach, etc.); and
- reporting functions (e.g. filing annual and special reports to the Ontario Legislature on *EBR* matters, energy conservation and efficiency,²² and provincial progress in reducing greenhouse gas emissions²³).

CELA notes that a number of these basic functions are not listed or addressed in the existing provisions of the federal *Auditor General Act*. For example, while Part 2 of the *Canadian Environmental Protection Act, 1999 (CEPA)* includes certain “public participation” tools that were patterned on *EBR* provisions (e.g. Environmental Registry, application for investigation, and environmental protection action), neither *CEPA* nor the *Auditor General Act* makes it mandatory for the CESD to review and report upon the use or efficacy of these tools. In addition, two recent federal bills²⁴ have proposed a reporting role for the Commissioner in relation to climate change

²¹ At present, the CESD is appointed for a single seven year term. In contrast, the ECO's term under the *EBR* was five years, which could be renewed from time to time: see former section 49(3) of the *EBR*.

²² See former section 58.2 of the *EBR*, which was added in 2009.

²³ See former section 58.3 of the *EBR*, which was added in 2009.

²⁴ See, for example, section 24 of Bill C-12 (*Canadian Net-Zero Emissions Accountability Act*) and section 9 of Bill C-215 (*Climate Change Accountability Act*).

mitigation. Assuming that this reporting obligation is enacted into law, CELA submits that it would be helpful to include or cross-reference this task in specialized CESD legislation, if passed in due course by Parliament. This kind of consolidation would prevent the need for Canadians to review different federal statutes in order to understand the independent CESD's full suite of duties, functions, and obligations.

Third, in order to facilitate the effective implementation of the CESD's statutory mandate, the enabling legislation should confer broad powers upon the CESD to compel the production of documents, obtain access to information, and conduct examinations of witnesses. This kind of evidence-gathering authority was provided under the *EBR* to the ECO, who was empowered to request production of records and examine witnesses under oath in accordance with the provincial *Public Inquiries Act*.²⁵ At present, it appears that the Auditor General's substantially similar powers under section 13 of the *Auditor General Act* may be exercisable by the Commissioner. At a minimum, CELA therefore submits that these investigative powers should be incorporated within specialized CESD legislation.

Fourth, it is necessary for the independent CESD to be appropriately staffed with senior and experienced persons in a variety of disciplines to ensure that the CESD can fully carry out all of its assigned tasks. For example, to assist the ECO in carrying out its tasks under Part III of the *EBR*, it was necessary for the office to employ persons possessing training and expertise in several different areas, including in-house counsel, policy analysts, audit staff, communications specialists, education coordinators, information officers, office administrators, and a librarian for the ECO's public resource center. In our view, depending on how broadly the independent CESD's mandate is framed, the CESD will likely require a similar complement of well-qualified staff persons, including the possibility of hiring or retaining technical and scientific experts. Although there are financial implications in creating this kind of staffing expertise within a stand-alone CESD office (as compared to pooling or sharing administrative resources under the auspices of the Auditor General's office), CELA submits that such staffing costs are reasonably necessary to safeguard the public interest, protect the environment, and promote sustainability.

Fifth, the CESD will require sufficient budget allocations from Parliament (separate from those given to the Auditor General) in order to enable the CESD to hire the requisite staff, properly implement its statutory mandate in a timely manner, and otherwise fulfill the CESD's role as a stand-alone Parliamentary officer. On this point, CELA notes that an interim CESD advised the Standing Committee in November 2020 that "because of our funding and resourcing challenges, we have had to reduce our performance audit practices work over the years."²⁶

In our view, this disappointing result highlights the risk in having the CESD's work subject to the vagaries of internal budget allocations, or differing opinions or priorities as between the CESD and the Auditor General's office regarding the nature, focus and number of performance audits²⁷ or other discretionary activities. In contrast, funding for the ECO operations under the *EBR* came from the Legislative Assembly's budget (not from Cabinet or the Auditor General's budget), and

²⁵ See former section 60 of the *EBR*.

²⁶ See [Evidence - ENVI \(43-2\) - No. 6 - House of Commons of Canada \(ourcommons.ca\)](#).

²⁷ The CESD's website states that its performance audits "do not question the merits of government policy." Online, [What We Do \(oag-bvg.gc.ca\)](#).

the provincial Board of Internal Economy would approve the ECO budget after reviewing the ECO's business plan. In addition, the ECO was audited annually by the Auditor General.²⁸

PART III - CONCLUSION

In summary, CELA acknowledges that there are legal, administrative, and financial pros and cons associated with reconstituting the CESD as an independent officer of Parliament.

However, given the positive ECO experience under Ontario's *EBR*, CELA concludes that the advantages of making the CESD an independent Parliamentary officer outweigh the perceived disadvantages. This is particularly true if the CESD is given a broad statutory mandate to not only conduct environmental auditing and reporting activities, but also to provide expert policy analysis and direction to Parliamentarians and federal departments on the daunting environmental challenges that confront Canadians in the 21st century.

Accordingly, CELA recommends to Standing Committee members and other Parliamentarians that consideration be given to transforming the CESD into an independent officer of Parliament. It goes without saying that the development of the new legislation needed to recast the CESD in this manner should involve meaningful opportunities for public input.

March 5, 2021

²⁸ See former sections 55 and 56 of the *EBR*.