

ENVIRONMENTAL RIGHTS IN ALBERTA:

Module 2: Third Party Oversight and Environmental Rights

A publication of the Environmental Law Centre's Environmental Rights Program



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The Environmental Law Centre (Alberta) Society

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Executive Summary

How can we ensure there is accountability to a right to a clean and healthy environment? A right to healthy environment, to be realized, must be accompanied by a set of procedural rights. One mechanism to create accountability and ensure enforcement of environmental rights is the provision of third party oversight. This paper reviews and analyzes the use of administrative third party oversight bodies in various Environmental Bill of Rights (EBR) frameworks. Our research focused on jurisdictions that have created or are planning to establish oversight bodies. One obvious outcome of the research is that the use of third party oversight bodies is very common in Canada. Third party oversight is usually performed through offices such as an ombudsman, commissioner, or auditor general. Independent oversight by these review bodies facilitates the enforcement of environmental rights and standards. Typical powers and duties of review bodies are monitoring, reporting on environmental performance and violations, and conducting reviews, examinations and investigations.

The review of various Canadian EBR regimes shows some similarities. The provinces have either established a specialist office (Environmental Commissioner) or have explicitly or implicitly given power to the Auditor General to carry out environmental audits. Based on the review of Ontario's, BC's, Alberta's and Manitoba's EBR framework and the federal Commissioner of Environment and Sustainable Development (CESD) the following conclusions are considered to be important for the office of a third party oversight body in order to improve existing regimes or those to come. The review of various third party oversight mechanisms provides Alberta with a path forward to strengthening its consideration and protection of environmental rights. In addition, we make recommendations for the design of a third party environmental oversight in Alberta.

#1: Specific mandate

We recommend that the third party oversight body receives a legal basis and mandate for review of environmental matters.

Currently, Alberta's Auditor General does not have a specific environmental mandate but conducts financial audits or process/system audits of various environmental matters. An environment specific mandate is required to ensure broad consideration of environmental principles in policies and regulations.

#2: Independence

It must be ensured that the third party oversight body is independent of government.

3: Report/review topics

One central obligation of review bodies is to report on specific topics relating to environmental rights. The third party oversight body should be tasked with reviewing and reporting on preassigned topics, such as GHG reductions, but also have the discretion to determine additional review topics that it considers important. The third party oversight body should report on a regular basis, for example at least once a year.

Alberta's third party oversight body, whether the Auditor General or a prospective separate office, should be mandated to conduct specific preassigned reviews of environmental topics, such as water management, conservation and protection, climate change mitigation and adaption, and reduction of greenhouse gas emissions in Alberta.

#4: Binding character of recommendations

All review bodies surveyed in this report were assigned with the task of issuing reports on the status of compliance with environmental rights. However, in most cases, the existence or content of reports are only acknowledged by government. We recommend that the third party oversight body be authorized to issue recommendations which are either binding for the respective government entities or that a process is established to ensure that outcomes are considered and used to trigger change in the respective recommended area.

The Alberta Auditor General's audit of the water supply management system in 2010 did not receive any Government response. Therefore, the Alberta framework should ensure that environmental audits or reviews trigger a response by the Government.

#5: Handling of petitions

The third party oversight body should be responsible for handling citizens' petitions. That entails that Canadian residents are entitled to file petitions in environmental matters. The third party oversight body ensures that petitions are addressed by the responsible ministry and follows up on them. Public reporting regarding petitions should occur annually.

#6: Procedural rights

It is important that the third party oversight body receives specific procedural rights in order to fulfill all assigned tasks and responsibilities. These include:

1. Access to required information

The third party oversight body must be able to access and request information that is necessary to prepare reports. Upon request, government entities must provide the required information or produce documents relevant to the review.

2. Cooperation

Government entities and organizations must be obliged to cooperate regarding requests by the third party oversight body, for example to access information, to carry out examinations and investigations, and to implement recommendations. It is advisable to create a mechanism/process to ensure such cooperation.

3. Examinations and investigations

The third party oversight body will conduct examinations upon request by authorized entities such as the Legislative Assembly. It is advisable that the third party oversight body can also carry out examinations and investigations if it believes it is in public interest to ensure environmental rights.

The Alberta Auditor General Act stipulates the Auditor General's right to access information and to carry out examinations and investigation. However, Alberta should ensure that the environmental third party oversight body's work receives support and cooperation by governmental entities.

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INTRODUCTION: Third Party Oversight and Environmental Rights

In the 1960s and 70s, increased environmental awareness led to a global movement on environmental issues. The world community gathered to raise this awareness for global environmental issues and to find solutions for them like in Stockholm in 1972, in Rio in 1992 and recently Rio plus 20 in 2012. Part of the evolving environmental movement was also the call for a right to a healthy environment for everybody.¹

Despite the ongoing awareness of environmental problems and an apparent increased recognition of the importance of the environment for humans, there is no universally accepted basic right for a clean and healthy environment in international law. At a national level, many jurisdictions still lack a clearly established basic right to a healthy environment. Whereas in some countries, the right to a healthy environment has received the status of a basic right it is ultimately left to individual jurisdictions to acknowledge and manifest such rights.

In the US and Canada, some states and provinces have incorporated environmental statements and rights into their constitutions and laws. For instance, several US states have adopted in their state constitutions provisions on environmental rights.² These basic environmental rights very often reflect the specific nature and culture of that particular state.³ For example, Pennsylvania's constitution sets out:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.⁴

¹ See for the history and more background: Kristen Douglas, "An Environmental Bill of Rights" (1991), online at: <<http://publications.gc.ca/Collection-R/LoPBdP/BP/bp281-e.htm#EXISTING>>.

² Examples are: Illinois (1970), Pennsylvania (1971), Montana (1972), Massachusetts (1972), Hawaii (1978), Rhode Island (1987).

³ Art English and John J. Carroll, "State Constitutions and Environmental Bills of Rights" in *The Book of the States 2015* (2015) at 18, online at: <<http://knowledgecenter.csg.org/kc/system/files/English%20Carroll%202015.pdf>>.

⁴ Constitution of the Commonwealth of Pennsylvania, Article I, section 27 (Natural Resources and the Public Estate). In 1971, Pennsylvania held a successful referendum which allowed the introduction of environmental rights into its constitution (declaration of rights). The referendum reflected growing environmental concerns in the state. For that time the definition of a healthy environment was unique by explicitly listing "scenic, historic and aesthetic values". English & Carroll, *ibid* at 19.

Pennsylvania's constitution understands its environmental values "as a public trust of the state to preserve and articulate on behalf of the people, including 'generations yet to come.'"⁵

Another US state, Montana, gave itself a new constitution in 1972,⁶ in which its preamble expresses a commitment to environmental rights. The most important and direct references to the environment are made in the preamble and in Article II (declaration of rights) and Article IX (environment and natural resources). The preamble to Montana's constitution refers to the "beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution." In the declaration of rights, people of Montana have the inalienable right to a "clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."⁷

Article IX of the Montana Constitution deals with the environment and natural resources. It states "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."⁸ The protection of the environment is public policy but also holds each person and the state responsible to protect the environment for present and future generations.

Each jurisdiction has its own understanding of what an environmental right is. Here in this report we build on our previous paper and adopt the following:⁹

A right to a healthy environment (also referred to as "environmental rights" in this report) is premised on the fact that humans depend on a clean or healthy environment to flourish and

⁵ English & Carroll, *ibid* at 19.

⁶ Montana constitution, see online at: <http://leg.mt.gov/bills/mca_toc/index.htm>.

⁷ Montana constitution, Part II, section 3.

⁸ Montana constitution, Part IX, section 1. Article IX further specifically deals with reclamation, water rights and the protection of cultural resources for the use and enjoyment by the people.

⁹ See the Environmental Law Centre's (ELC) publications on environmental rights: Jason Unger (ELC), *Environmental Rights in Alberta: Do we have the rights we need?* (Edmonton: Environmental Law Centre, 2016).

thrive. As a subset of human rights, environmental rights are central to the exercise of other rights and freedoms. A compromised environment may compromise human health and economic prosperity thereby limiting and undermining individual human rights.

Once the content of environmental rights is formed, it is of paramount importance to effectively implement and enforce the environmental rights. Legal scholars have developed criteria to determine or to make environmental rights legally enforceable:

- a) ability of environmental rights holder to undertake legal action,
- b) existence of a third party oversight body, such as a court or other public authoritative body for the review of complaints,
- c) recognition of the injury to the rights-holder, and
- d) relief of the rights-holder.¹⁰

For this paper, the second aspect of enforceability is of interest.¹¹ A public authoritative body is any third party oversight body that reviews a complaint.¹² This could be a court or any other administrative body such as a tribunal, ombudsman or commissioner. The third party oversight body should be independent and be able to hold the government accountable.¹³ Due to the comprehensiveness of this aspect, it seems appropriate to separate the topic into two: access to courts/justice in environmental rights cases and third party/non-judicial oversight. In this paper we focus on administrative review bodies other than courts. Generally, third party oversight can be part of an effective environmental control of state agencies and departments whose activities or omissions have environmental impact.¹⁴ Third party oversight is usually performed through offices such as an ombudsman, commissioner, or auditor general. Independent oversight by these review bodies facilitates the enforcement of environmental rights and standards. Typical powers and duties of review bodies are, for example, monitoring, reporting on environmental performance and violations, and conducting reviews, examinations and investigations.

¹⁰ Christopher D Stone, "Should Trees have Standing – toward Legal Rights for Natural Objects" at e.g. 11; Elaine L. Hughes and David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999) 30:2 Ottawa Law Review 229 at 239.

¹¹ The ELC will deal with other aspects of environmental rights in separate papers, such as substantive environmental rights, private remedies and enforcement, standing, costs, access to information, and access to courts.

¹² Hughes & Iyalomhe, *supra* note 10 at 241.

¹³ Hughes & Iyalomhe, *ibid* at 241.

¹⁴ Karl J Ege, "Enforcing Environmental Policy the Environmental Ombudsman" (1971) 56 Cornell Law Review 847 at 857.

In terms of implementing a right to a healthy environment into state or provincial law, the approach is somewhat similar in the USA and Canada. However, the approach to environmental oversight differs. In Canada, the use of public administrative review bodies is more common whereas in the US, environmental rights tend to be enforced in the courts.

This paper reviews and analyzes jurisdictions that have adopted an administrative oversight body as a tool to support environmental rights. The paper starts with Ontario, the first Canadian province to adopt an Environmental Bill of Rights. Then a review of British Columbia's and Alberta's Auditor General follows. At the federal level we canvass the Commissioner of the Environment and Sustainable Development. We then consider the recently proposed Environmental Bill of Rights in Manitoba and the proposed Federal Environmental Bill of Rights. Finally, based on our review, we make recommendations for the design of an independent environmental oversight mechanism in an environmental right's frameworks and specifically for Alberta's regime.

I. Ontario

i. Introduction

Ontario's *Environmental Bill of Rights*¹⁵ (ON EBR) was introduced and enacted by the Ontario Legislature in 1993 and came into force in 1994. The provincial Minister of the Environment praised the bill as ground-breaking with substantial improvements in environmental protection:

I believe the *Environmental Bill of Rights* is landmark legislation. It will change the way the government does business in Ontario. It will place an additional onus on the bureaucracy to stop and listen before acting, and it will bring environmental protection to a higher level. By increasing public participation, the *Environmental Bill of Rights* will help to prevent environmentally unsound decisions being made that would have had to be paid for in the future or by future generations.¹⁶

The ON EBR is an environmental law that creates and/or confirms basic environmental rights of Ontario's residents. The ON EBR also creates formal procedures for participating in environmental

¹⁵ *Environmental Bill of Rights*, S.O. 1993, c 28 [ON EBR].

¹⁶ The Hon. Bud Wildman, *Presentation to the Standing Committee on General Government* (14 October 1993), Committee Documents: Standing Committee on General Government - 1993-Oct-14 - Bill 26, Environmental Bill of Rights, 1993.

matters.¹⁷ The ON EBR aims to protect, conserve and restore the integrity of the environment, to achieve the goal of sustainability and to protect the right of Ontario residents to a healthful environment.¹⁸ Practical examples of these goals are to prevent, reduce and eliminate the use, generation and release of pollutants that affect the environment; protect and conserve biological, ecological and genetic diversity and Ontario's ecological system, plant and animal life.

The ON EBR has adopted specific design elements to ensure that these goals are met. The key elements of the ON EBR are:

- Statements of environmental values,
- the Environmental Registry,
- the right to participate in environmentally significant government decisions,
- third party appeal rights,
- applications for review,
- applications of investigation,
- the right to sue for harm to a public resource or for a public nuisance,
- whistleblower protection, and
- creation of the office of the Environmental Commissioner (ECO) as third party oversight body.¹⁹

Ontario was one of the first Canadian provinces to create a comprehensive EBR. Lindgren has pointed out "[t]he past 18 years' worth of experience under Ontario's EBR is instructive for all Canadian jurisdictions which presently have – or are proposing to enact or amend – statutory environmental rights."²⁰

One interesting feature of Ontario's EBR is the creation of the office of the Environmental Commissioner (ECO). Briefly summarized, the ECO reviews and reports on the implementation of the ON EBR and compliance of various ministries with the ON EBR. Also, the ECO reports annually on his/her work and special topics such as improvement of energy conservation and efficiency, and reduction of greenhouse gas emissions.

¹⁷ Environmental Commissioner of Ontario, *Ontario's Environmental Bill of Rights and You - A Guide to Exercising your Right to Participate in Environmental Decision Making in Ontario* (Toronto: ECO, 2013) at 3 [ON's EBR and you].

¹⁸ ON's EBR and you, *ibid* at 4.

¹⁹ For a detailed explanation of these elements see ON's EBR and you, *ibid* at 4, 5.

²⁰ Richard D Lindgren, *Statutory Environmental Rights: Lessons learned from Ontario's Experience* (Toronto: CELA, 2011) at 29.

This part explores the mandate, tasks and responsibilities assigned by the ON EBR to the ECO and the ECO's performance and contribution to the objectives of the ON EBR. However, it is beyond the scope of this paper to explore the overall efficiency, success (also failures and shortcomings) of the ON EBR in general.²¹ Instead, the focus in this paper is on the office of the ECO in the ON EBR framework.

ii. **The Office of the Environmental Commissioner: Tasks and Responsibilities**

The ECO is appointed by the Lieutenant Governor in Council and is an independent officer of the Legislative Assembly.²² The ECO's office lasts for a term of five years with the option of a reappointment.²³

Generally, the functions of the Environmental Commissioner are among other things to:

- review the implementation of the ON EBR and compliance in ministries;
- at the request of a minister, provide guidance to the ministry on how to comply with the requirements of the ON EBR, including guidance on, how to develop a ministry statement of environmental values that complies with the requirements of EBR; and 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;
- provide educational programs about the ON EBR to the public;
- provide advice and assistance to the public on participation pertaining proposals;
- review the use of the registry;
- review the exercise of discretion by ministers;
- review recourse to the right to appeal a decision or an instrument;
- review the receipt, handling and disposition of applications for review and applications for investigation;
- review ministry plans and priorities for conducting reviews;

²¹ An overview of the achievements under the ON EBR see in Richard D Lindgren, *The Environmental Bill of Rights turns 10 Years-old: Congratulations or Condolences?* (Toronto: CELA, 2004). For a critical evaluation see J F Castrilli, "Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences", (1998) IX Villanova Law Journal 349; Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995); Hughes & Iyalomhe, *supra* note 10.

²² ON EBR, s 49.

²³ ON EBR, s 49(3).

- review the use of the right of action against a person who has contravened or will contravene an Act, regulation or instrument, the use of defences against that action, and actions against public nuisance causing environmental harm; and
- review recourse to the procedure for complaints about employer reprisals.²⁴

One of the ECO's main functions is monitoring and reporting on the performance and responsibilities of government ministries ("prescribed ministries"²⁵) with regard to the EBR and their objectives. The ECO monitors and reports on the "prescribed ministries' use of the Environmental Registry and the quality of the notices posted on the Registry; ministries' handling of applications for review and investigation submitted under the EBR; whether ministries considered their Statements of Environmental Values when making environmentally significant decisions; and how ministries co-operated with information requests from the ECO."²⁶

iii. ECO's Reporting Duties

The Environmental Commissioner reports annually to the Speaker of the Assembly on his/her work.²⁷ The report states whether the ministries affected by the EBR have co-operated with requests by the ECO for information. The report includes a summary of the information gathered by the ECO as a result of performing his/her functions, in particular, a summary of information about compliance with ministry statements of environmental values; a list of all proposals for acts and regulations; and any information that the ECO considers appropriate.²⁸ The ECO has the right to issue special reports to the Speaker of the Assembly at any time on any matter related to the ON EBR if he believes that this should not be deferred until the issuance of the annual report.²⁹ And, the Speaker must present the report before the Assembly as soon as reasonably possible.³⁰

Also, the ECO reports annually 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 (energy conservation

²⁴ ON EBR, s 57.

²⁵ See List of Prescribed Ministries as of April 1, 2016 in Environmental Commissioner of Ontario, EBR Performance Checkup: Respect for Ontario Environmental Rights 2015/2016 – A special Report to the Legislative Assembly of Ontario (Toronto: ECO, 2016) at 5 [EBR performance checkup].

²⁶ EBR performance checkup, *ibid* at 6.

²⁷ ON EBR, s 58(1).

²⁸ ON EBR, s 58(2).

²⁹ ON EBR, s 58(4).

³⁰ ON EBR, s 58(4).

reports).³¹ These energy conservation reports comment on the results of initiatives aimed to reduce or make more efficient use of electricity, natural gas, propane, oil and transportation fuels, their progress, and any barriers.³² The reports also identify any legal barriers by acts, regulations, municipal by-laws and policies to the development or implementation of measures to achieve efficient use of electricity, natural gas, propane, oil and transportation fuels.³³

The ECO is entitled to require predetermined persons to prepare and submit to the ECO a report containing specific information.³⁴ These persons are the Ontario Energy Board; the Independent Electricity System Operator; the Smart Metering Entity; a generator, transmitter or distributor as defined in the *Electricity Act*³⁵; a gas distributor, gas transmitter, producer or storage company, as defined in the *Ontario Energy Board Act*³⁶; and any other prescribed person or class of persons.

In addition, the ECO reports on Ontario's progress to reduce greenhouse gas emissions.³⁷ The reports include a review of any annual report on greenhouse gas reductions or climate change published by the Government of Ontario during the year covered by the report.

The ECO must issue the three reports as separate reports: (a) general report on his/her work and compliance of ministries with the EBR, (b) energy conservation and (c) greenhouse gas emission reductions/climate change.³⁸

iv. **ECO's rights to conduct Examinations and Investigations**

The ECO is entitled to examine any person on oath or solemn affirmation on any matter related to his/her performance duties. Also, for the purpose of an examination, the ECO can require the production in evidence of documents or other things.³⁹

Another set of ECO tasks are to receive and forward applications for review. Residents in Ontario may apply to the ECO for a review by the appropriate minister of an existing policy, act, regulation or instrument of Ontario with the aim to amend, repeal or revoke these instruments in order to protect

³¹ ON EBR, s 58.1(1).

³² ON EBR, s 58.1(2).

³³ ON EBR, s 58.1(2).

³⁴ ON EBR, s 58.1(3).

³⁵ *Electricity Act, 1998*, SO 1998, c 15, Sch A.

³⁶ *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B.

³⁷ ON EBR, s 58.2(1).

³⁸ ON EBR, s 58.3.

³⁹ ON EBR, s 60.

the environment.⁴⁰ The same applies to the application for review aiming to make or pass a new policy, act or regulation of Ontario. Then, the ECO refers the application to the appropriate minister for review.⁴¹ Within 60 days of the receipt of the application for review, the minister gives notice of his/her decision whether to conduct a review to the applicants, ECO and any other person who the minister considers might be directly affected by the decision.⁴²

The ECO also receives applications for investigations by the appropriate minister by at least two residents of Ontario who believe that a prescribed⁴³ act, regulation or instrument has been contravened.⁴⁴ The ECO refers the application for investigation to the minister responsible for the administration of the allegedly infringed act.⁴⁵ The minister informs the applicants, each person alleged in the application to have been involved in the contravention and the ECO when he/she decides to not carry out an investigation.⁴⁶ And eventually, in case the minister conducts an investigation, the minister informs these persons of the outcome of the investigation.⁴⁷

v. Performance Check & Critique

In 2004 and 2011, the Canadian Environmental Law Association's Rick Lindgren evaluated the overall success and failure of the EBR. Lindgren concluded that the EBR had facilitated public participation in environmental decision-making and to a limited extent enhanced governmental accountability.⁴⁸ However, in 2011 Lindgren remarked that "[w]hile there have been some localized examples where the EBR has helped protect, conserve or restore the environment, the overall ecological challenges currently facing Ontario remain as daunting and diverse as they were almost two decades when the EBR was first enacted."⁴⁹ Lindgren summarized the ON EBR's shortcomings as follows:

In short, the essential "lesson learned" to date is that Ontario's EBR needs to be recast, revitalized, and rebalanced in order to better achieve the broad public interest purposes of the legislation (i.e., environmental protection, public participation, and governmental accountability). (...)

⁴⁰ ON EBR, s 61.

⁴¹ ON EBR, s 62.

⁴² ON EBR, s 70.

⁴³ Prescribed acts are determined in General, O Reg 73/94.

⁴⁴ ON EBR, s 74.

⁴⁵ ON EBR, s 75.

⁴⁶ ON EBR, s 78.

⁴⁷ ON EBR, s 80.

⁴⁸ Lindgren 2011, *supra* note 20 at 1.

⁴⁹ Lindgren 2011, *ibid* at 1, 2.

However, no stand-alone, substantive public right to a clean and healthful environment is actually entrenched within the EBR. This significant omission has prompted many stakeholders and commentators to lament the irony of having an EBR that does not actually confer any enforceable environmental rights.⁵⁰

Ontario's EBR created the office of the ECO as a third party oversight body. In essence, the office of the ECO contributes to the objective to ensure a basic right to a healthy environment. However, there are many issues with the ON EBR, foremost the lack of a real substantive right to a healthy environment.⁵¹ The ON EBR provides procedural rights that are supposed to ensure the substantive right. The ECO is one of these procedural features to ensure a healthy environment. On the other hand, the design of the ECO's mandate, duties and obligations is limited and does not achieve to fully hold the government accountable or to fully protect the environment. Lindgren concludes:

[t]here are limits to the efficacy of political accountability mechanisms (i.e. annual reports, independent "watchdogs", etc.) for environmental protection purposes. While they play an important function in our democratic society, political accountability mechanisms cannot be relied upon as the sole (or predominant) means of achieving environmental protection. Thus, statutory rights legislation should include substantive rights, and should entitle citizens to go to the courts to ensure greater judicial accountability for governmental acts, omissions or decisions that contravene public rights and substantive rules established under environmental law.⁵²

Critiques and recommendations regarding the ECO focus on the scope of its power. The ECO's review and reporting responsibilities have increased over time but the ECO's evidence-gathering powers have largely remained the same since 1993.⁵³ For example: "although the ECO may examine a public servant under oath (and require him/her to produce documents for the examination: see section 6o), the EBR does not compel prescribed Ministries to cooperate with the ECO, or to provide disclosure or production upon request. In some instances, the ECO has lamented the lack of cooperation that has been received from certain Ministries in recent years."⁵⁴

⁵⁰ Lindgren 2011, *ibid* at 9, 10.

⁵¹ Lindgren 2011, *ibid* at 10.

⁵² Lindgren 2011, *ibid* at 30.

⁵³ Lindgren 2011, *ibid* at 20.

⁵⁴ Lindgren 2011, *ibid* at 20.

Also, the ON EBR does not explicitly provide the ECO the authority to insert recommendations in his/her reports to the Ontario Legislature.

Traditionally, the ECO has interpreted its reviewing/reporting powers as including the authority to make recommendations, and over the past 18 years the ECO's reports have included numerous procedural and substantive recommendations (including those relating to EBR reform). However, the EBR does not legally require the MOE (as the Ministry responsible for administration of the EBR) to actually respond to any of the ECO's important and well-founded recommendations. The result is that many key ECO recommendations languish for years without implementation or even a formal acknowledgement or response by prescribed Ministries to the Ontario Legislature.⁵⁵

In an earlier review Hughes and Iyalomhe stress:

Thus, accountability for government failures is primarily political. To enable greater political pressure to be brought to bear, the Act establishes the office of the Environmental Commissioner, whose duties include monitoring the statute's implementation and reporting any deficiencies to the Legislature. However, the Environmental Commissioner has few powers and to date, despite the Commissioner's scathing reviews of government inadequacies and reports of blatant violations of the Ontario EBR, it seems that the legislature in receipt of those reports is unmoved.⁵⁶

The ECO has suggested amending the ON EBR by imposing a legal obligation upon the ministry to provide information and produce documents as requested and needed for the review by the ECO.⁵⁷ Lindgren recommends modelling the amended provisions after sections 10 to 11.2 (such as the duty to furnish information to the Auditor General, power to examine on oath, stationing a member of the office of the Auditor General in a ministry) of Ontario's *Auditor General Act*.⁵⁸ Also, the ON EBR should give the ECO the power to make recommendations in the annual and special reports and should oblige

⁵⁵ Lindgren 2011, *ibid* at 20.

⁵⁶ Hughes & Iyalomhe, *supra* note 10 at 253.

⁵⁷ Environmental Commission of Ontario (ECO), Looking Forward: The Environmental Bill of Rights Special Report to the Legislative Assembly of Ontario (Toronto: ECO 2005) at 7 [ECO Special Report 2005].

⁵⁸ Lindgren 2011, *supra* note 20 at 21.

the MOE or other prescribed ministers to provide the Ontario Legislature with a written response to the ECO's recommendations.⁵⁹ Alternatively, Lindgren suggests creating

a new standing committee (or use an existing committee) to review and report upon ECO recommendations and responses thereto by prescribed Ministries. This arrangement could be structured in a manner that required Ministry officials to testify before the committee on a regular basis about matters raised in ECO reports. Thus, this reform would be analogous to the obligation upon the federal government to respond to parliamentary committee reports regarding reform or renewal of Canadian environmental laws (i.e. *Canadian Environmental Assessment Act*, *Canadian Environmental Protection Act, 1999*, etc.).⁶⁰

Previous ECO reports pointed out the improvements for the office of the ECO.⁶¹ The ECO recommended giving the ECO power "similar to the power given to the Ombudsman of Ontario, to require that ministry staff provide information or produce documents relevant to matters under review by the Commissioner."⁶² Further, the ECO recommended "in order to protect the dignity and integrity of the Office, the EBR be amended to state specifically that the Environmental Commissioner and his or her staff cannot be compelled to give evidence in a court of proceedings of a judicial nature concerning information related to the Commissioner's role or functions."⁶³ And, in addition, the ECO recommended "that in order to engage the Legislature fully in the complex nature of environmental decision-making, a standing committee on the environment be struck for the purposes of receiving and discussing reports of the Environmental Commissioner and other concerns relating to the purposes of the EBR."⁶⁴

vi. Comments

Ontario was one of the first Canadian provinces to establish a comprehensive Environmental Bill of Rights. Although it has received some praise since its creation in 1993, the ON EBR has also received significant critique even to the point that it has failed to ensure fundamental environmental rights for Ontario's residents. One of the procedural features within the ON EBR is establishment of the ECO as a

⁵⁹ Lindgren 2011, *ibid* at 21.

⁶⁰ Lindgren 2011, *ibid* at 21.

⁶¹ ECO Special Report 2005, *supra* note 57 at iii-iv.

⁶² ECO Special Report 2005, *ibid* at iii.

⁶³ ECO Special Report 2005, *ibid* at iii.

⁶⁴ ECO Special Report 2005, *ibid* at iii-iv.

third party oversight body. The main functions of the ECO are to monitor and review environmental compliance of government ministries, and to issue environmental reports. Critiques have pointed out that the ECO requires more power to hold government accountable.

II. British Columbia

i. Introduction

This part canvasses the office of the BC Auditor General and its authority to engage and carry out environmental audits. The first section generally describes the BC Auditor General. The second section explores an example of an environmental audit conducted by the Auditor General.

ii. The BC Auditor General: the Framework

The BC Auditor General is an officer of the Legislature and appointed by the Legislative Assembly.⁶⁵ The Auditor General can hold the non-renewable office for a maximum of eight years.⁶⁶ The Auditor General is the auditor of the government reporting entity.⁶⁷ The Auditor General is the auditor of each:

- (a) ministry,
- (b) office administered by (i) an officer of the Legislature, or (ii) the person appointed commissioner under section 14 of the Members' Conflict of Interest Act, and
- (c) fund or appropriation that is part of the consolidated revenue fund.⁶⁸

The main mandate of the Auditor General is to annually report to the Legislative Assembly on the financial statements of the government reporting entity, the government organizations and the trust funds.⁶⁹ The Auditor General may conduct or initiate any further examinations that he/she considers advisable.

Each fiscal year, the Auditor General must report to the Legislative Assembly at least once and must report on any matter that that the Auditor General considers should be brought to the attention of the Legislative Assembly as a result of its work undertaken to exercise its powers and perform its duties. This includes any assessments concerning whether:

⁶⁵ *Auditor General Act*, SBC 2003, c 2, s 2 [BC AGA].

⁶⁶ BC AGA, s 2.

⁶⁷ BC AGA, s 10(1).

⁶⁸ BC AGA, s 10(2).

⁶⁹ BC AGA, s 11(1)-(3).

- (a) financial and administrative provisions of Acts and regulations under those Acts have been complied with,
- (b) the government, a government organization or a trust fund is operating economically, efficiently and effectively,
- (c) the procedures established by the government, government organizations or trust funds to measure and report on the effectiveness of their programs are adequate and complied with,
- (d) the accountability information provided to the Legislative Assembly by the government, government organizations and trust funds with respect to the results of their programs is adequate,
- (e) the terms and conditions applied in respect of a grant, a transfer under an agreement, an advance of money, a loan, a guarantee for the performance of an obligation, or an indemnity given by the government, a government organization or a trust fund to any individual or another organization have been complied with, and
- (f) the terms and conditions applied in respect of a collection of money on behalf of the government, a government organization or by or on behalf of a trust fund have been complied with.⁷⁰

The Auditor General's reports and examinations cannot question or challenge the merits of program policies or objectives of the government, a government organization or a trust fund.⁷¹

In addition to the financial audit reports, the BC AGA allows the Auditor General to issue other reports at any time to the Legislative Assembly, a minister, the Treasury Board, the Executive Council or an officer or employee of the government or of a government organization that, in the opinion of the Auditor General, should be made to that person or organization.⁷²

In order to fulfill his/her obligations under the BC AGA, the Auditor General may undertake examinations respecting the government, a government organization or a trust fund, or in relation to a grant, a transfer under an agreement, an advance of money, a loan, a guarantee for the performance of an obligation, or an indemnity given by the government, a government organization or a trust fund.⁷³

⁷⁰ BC AGA, s 11(8).

⁷¹ BC AGA, s 11(9).

⁷² BC AGA, s 12.

⁷³ BC AGA, s 13.

The examination must be undertaken upon request by the Legislative Assembly or a committee; or upon request of a person or an organization other than the Legislative Assembly or a committee if the Auditor General is satisfied that the examination is in the public interest and will not interfere with the discharge of his/her responsibilities.⁷⁴ Each year, the Auditor General reports his/her findings from examinations to the Legislative Assembly.⁷⁵

In order to fulfill his/her mandate, exercise the powers and perform duties, the Auditor General has the right to demand and receive access to records, information and any explanations required from a person or organization.⁷⁶ In addition to performing examinations, the Auditor General may summon the attendance of witnesses, request that witnesses give evidence on oath or in any other manner, and request that witnesses produce records, securities and things for the issuance of reports and undertakings of examinations.⁷⁷

To carry out his/her mandate, the BC AGA shields the Auditor General or a person appointed or engaged under the BC AGA from legal proceedings for damage for the exercise or intended exercise of any power of the Auditor General, or the performance or intended performance of any duty of the Auditor General.⁷⁸

iii. The BC Auditor General: An Example of an Environmental Audit

The primary mandate of the Auditor General is the financial audit and oversight of government activities. However, the mandate can also include audits of certified projects at the intersection of the environment and the economy. This section provides an example of an environmental audit where the BC Auditor General examined the post-certification stage of the government's environmental assessment process and conducted an audit of the Environmental Assessment Office's (EAO) oversight of certified projects.

⁷⁴ BC AGA, s 13(3).

⁷⁵ BC AGA, s 13(4).

⁷⁶ BC AGA, s 16.

⁷⁷ BC AGA, s 17. See s 17 for more details.

⁷⁸ BC AGA, s 18. See s 18 for more details.

The BC *Environmental Assessment Act*⁷⁹ requires project proponents of certain proposed major projects to obtain an *Environmental Assessment Certificate* before commencing the project.⁸⁰ The EAO is the responsible authority to manage the process and to issue the certificate.

To date, the Auditor General has issued 2 reports on this matter. The initial audit report was released in July 2011. Auditor General John Doyle concluded:

When major projects such as mines, dams or tourist destination resorts are undertaken in the province, British Columbians expect that any potentially significant adverse effects (whether environmental, economic, social, heritage and/or health related) will be avoided or mitigated. The Environmental Assessment Office is expected to provide sound oversight of such projects. However, this has not been happening. The audit found that the Environmental Assessment Office cannot assure British Columbians that mitigation efforts are having the intended effects because adequate monitoring is not occurring and follow-up evaluations are not being conducted. We also found that information currently being provided to the public is not sufficient to ensure accountability.⁸¹

The Auditor General 2011 report focused only on the Environmental Assessment Office (EAO) post-certification part of the BC environmental assessment process and left out the project approval process. The audit specifically looked at whether the EAO:

- provided oversight to ensure that potential significant adverse effects of certified projects are avoided or mitigated;
- evaluated the effectiveness of environmental assessment mitigation measures; and
- made appropriate monitoring, compliance and outcome information about certified projects available to the public.

The Auditor General concluded:

⁷⁹ *Environmental Assessment Act*, SBC 2002, c 43 [BC EAA].

⁸⁰ BC EAA, ss 10, 14.

⁸¹ Office of the Auditor General of British Columbia, *An Audit of the Environmental Assessment Office's Oversight of Certified Projects* (Victoria: AG BC, 2011) at 5 [BC audit report 2011].

[t]he EAO's oversight of certified projects is not sufficient to ensure that potential significant adverse effects are avoided or mitigated. Specifically, the EAO is not ensuring that:

- certificate commitments are measurable and enforceable;
- monitoring responsibilities are clearly defined; and
- compliance and enforcement actions are effective.

The EAO is not evaluating the effectiveness of environmental assessment mitigation measures to ensure that projects are achieving the desired outcomes.

The EAO is not making appropriate monitoring, compliance and outcome information available to the public to ensure accountability.⁸²

Based on the audit, the BC Auditor General issued six recommendations to the EAO:

1. Ensure commitments are clearly written in a measurable and enforceable manner.
2. Continue to work with the Ministry of Environment to finalize a policy framework that will provide provincial guidance on environmental mitigation.
3. Clarify the post-certification monitoring responsibilities and compliance mechanisms for each commitment.
4. Develop and implement a comprehensive compliance and enforcement program that includes an integrated information management system to monitor project progress and ensure compliance.
5. Conduct post-certificate evaluations to determine whether environmental assessments are avoiding or mitigating the potentially significant adverse effects of certified projects.
6. Provide appropriate accountability information for projects certified through the environmental assessment process.

In May 2015, the Auditor General issued a follow-up report on the EAO.⁸³ The follow-up report acknowledged that the EAO had implemented four of the six recommendations since the initial 2011

⁸² BC audit report 2011, *ibid* at 6.

audit.⁸⁴ The Auditor General concluded that recommendations one to four were fully or substantially implemented.⁸⁵ With respect to the first recommendation, “the EAO revised its policies and practices to improve the quality of future certificate requirements.”⁸⁶ With respect to recommendation two, the EAO continued working with the Ministry of Environment and finalized the policy in 2014. With regards to recommendation three, the EAO clarified the roles and responsibilities for monitoring compliance with the environmental assessment certificate by explicitly stating the responsibilities.⁸⁷

Recommendation four was considered to be implemented because the EAO had designated some of its full time staff as Natural Resource Officers; it confirmed the goal of its independence and objective environmental assessments; and it had finalized a Compliance and Enforcement Policy and Procedures document.⁸⁸ With respect to recommendation five, the 2015 progress report came to the conclusion that it had been implemented only partially but also acknowledged that the implementation of this recommendation is difficult to assess because of the long-term nature of the recommendation requiring a solid compliance and enforcement framework.⁸⁹ The 2015 report also concluded that the EAO had implemented only partially recommendation six and concluded that the EAO had not sufficiently provided accountability information for certified projects, such as warnings, advisories and results from field inspections.⁹⁰

The audit of the EAO’s management of certified projects in the post-certification stage of the government’s environmental assessment process demonstrates that the Auditor General can serve as an important third party oversight mechanism for environmental matters. The recommendations of the Auditor General were mostly fulfilled by the EAO which indicates that the audit process was effective in term of its outcomes. Similarly, after issuance of its report - “An Audit of Compliance & Enforcement of the Mining Sector” - the BC government has accepted all but one recommendation made by the BC Auditor General. The one recommendation not accepted by the government is under consideration.⁹¹

⁸³ Office of the Auditor General of British Columbia, *Follow-up Report: Environmental Assessment Office* (Victoria: BC AG, 2015) [BC follow-up report].

⁸⁴ The BC follow-up report also made clear that it did not assess the effectiveness of the EAO implementation actions, because effectiveness could only be demonstrated in the following years. BC follow-up report, *ibid* at 3.

⁸⁵ For details see BC follow-up report, *ibid* at 8, 10, 11.

⁸⁶ BC follow-up report, *ibid* at 8.

⁸⁷ BC follow-up report, *ibid* at 10.

⁸⁸ BC follow-up report, *ibid* at 11.

⁸⁹ BC follow-up report, *ibid* at 12.

⁹⁰ BC follow-up report, *ibid* at 12.

⁹¹ British Columbia, BC Government news, “Government accepts Auditor General’s Recommendations” (3 May 2016), online at: <<https://news.gov.bc.ca/releases/2016MEM0008-000710>>.

The audit process is an additional tool to the existing legal remedies which could lead to the challenge or examine the correctness of project approvals. The Auditor General's oversight is independent; however, it has to be stressed that the Auditor General undertakes examinations only under limited circumstances. Examinations are undertaken on the request of a person, an organization (other than the Legislative Assembly), or a committee, only if the Auditor General is satisfied that (a) it is in the public interest to undertake the examination and (b) the undertaking of the examination will not interfere with the discharge of the responsibilities of the Auditor General.⁹² This means that the third party oversight by the BC Auditor General is not a tool available for everyone to make use of.

iv. **Comments**

BC has not created a specialized administrative third party oversight body for environmental rights. However, the BC Auditor General, although not specifically mandated with environmental audit tasks, has done environmental audits in the past. The example of the audit of the EAO's oversight of certified projects has illustrated that the Auditor General issued recommendations in the audit report to the EAO. Then the Auditor General followed up on the implementation of the recommendations. The EAO responded to the recommendations by the Auditor General and explained what recommendations they had accepted and implemented. The follow up audit analyzed whether the EAO had successfully implemented their recommendations in the opinion of the Auditor General.

The EAO audit was successful because the Auditor General achieved changes within the practice of the EAO. However, it is unclear whether other environmental audits would have the same outcome. The success of environmental audits depends on the willingness to cooperate and to implement suggestions. For the purpose of legal certainty, it would be advisable to legally stipulate specific environmental powers for the Auditor General including the legal obligation of government entities to respond and implement the Auditor General's recommendations.

⁹² BC AGA, s 13(3).

III. Alberta Auditor General

Similar to British Columbia, Alberta does not have a designated environmental third party oversight body.⁹³ The main tasks of the Alberta Auditor General are to provide expert auditing of government's financial statements and management systems and processes (system audits).⁹⁴ The Auditor General's office is regulated in the *Auditor General Act* (AB AGA).⁹⁵

i. Alberta Auditor General Duties

The Alberta Assembly may specify and assign special duties to the Auditor General.⁹⁶ The main duty is to report annually on financial statements of the Crown and on the work of the Office of the Auditor General.⁹⁷ The AB Auditor General is entitled to prepare special reports to the Assembly on any matter of importance or urgency.⁹⁸

ii. Alberta Auditor General Procedural Rights

The AB AGA confers procedural rights to the Auditor General that allow him/her to fulfil the audit obligations assigned under the act.

The Auditor General is entitled to access records and electronic data processing equipment owned or leased by department, fund administrator, provincial agency, or crown-controlled organization or other organization or body of which he/she is the auditor.⁹⁹ The AB AGA specifies the persons who must provide the Auditor General with information, records or explanations:

- (a) present or former public employees, public officials or personal service contractors;
- (b) present or former employees, officers, directors or agents of a Crown-controlled organization or other organization or body of which the Auditor General is the auditor.¹⁰⁰

⁹³ Another independent review body is the Alberta Ombudsman. The Ombudsman's objective is to ensure that every Albertan is treated fairly in the provision of public services. As the Auditor General, the Ombudsman has no environmental mandate. The Ombudsman promotes standards of fairness and makes recommendations if investigations reveal unfairness. For more information see <<https://www.ombudsman.ab.ca/about/about-the-ombudsman/>>.

⁹⁴ Alberta Auditor General, online at <<https://www.oag.ab.ca/>>.

⁹⁵ *Auditor General Act*, RSA 2000, c A-46 [AB AGA].

⁹⁶ AB AGA, s 17(1).

⁹⁷ AB AGA, ss 18, 19.

⁹⁸ AB AGA, s 20.

⁹⁹ AB AGA, s 14(1).

¹⁰⁰ AB AGA, s 14(2).

In addition, the Auditor General may station his/her employees in such offices as referred to above.¹⁰¹ Other procedural rights are to require any person to attend before the Auditor General to give evidence under oath relating to any matter of the audit, examination or other duty or function.¹⁰²

iii. Environmental Audits

The AB AGA does not explicitly assign environmental tasks or audits to the Auditor General. However, the Auditor General regularly examines and carries out system audits of public institutions or matters related to the environment. For example, the AB Auditor General reviewed Alberta Environment's management of the province's water supply in 2010, or Environment and Parks audit on managing *Water Act* partnerships and regulatory activities follow up in 2015. The audit was structured in a similar fashion as the BC audit example above. The audit's objective was to determine whether Alberta Environment's systems to manage Alberta's water supply are well designed and operate effectively. The report provided background of the audit and presented the outcomes and recommendations to Alberta Environment.¹⁰³ Other audits dealt with, among other things, the implementation of Alberta's climate change strategy, financial security for land disturbances from mining and systems to manage the specified gas emitters.¹⁰⁴ However, there is no mechanism in place that enforces the Auditor General's recommendations.

iv. Comments

The Alberta Auditor General is not a third party oversight body but regularly undertakes systems audits related to environmental matters. However, the Auditor General is not responsible to monitor and report on environmental issues, degradation or other impacts on the environment. The audits analyze processes and systems. Otherwise the powers and duties of the Auditor General are similar to other provincial Auditor Generals.

¹⁰¹ AB AGA, s 14(3).

¹⁰² AB AGA, s 14.1(1).

¹⁰³ See the ELC's previous blogs on this: ELC, "Alberta Auditor General looks at managing Alberta's water supply – compliance, wetland policy under scrutiny" (27 April 2010), online at: <<http://elc.ab.ca/alberta-auditor-general-looks-at-managing-albertas-water-supply-compliance-wetland-policy-under-scrutiny/>>. Alberta Auditor General, *Report of the Auditor General Alberta - October 2015* (Edmonton: AGA, 2015) online at: <<https://www.oag.ab.ca/webfiles/reports/OAGOctober2015Report.pdf>>.

¹⁰⁴ Climate change: Auditor General Alberta, *Report of the Auditor General of Alberta – July 2014*, (Edmonton: AGA, 2014) at 39-47, online at: <<https://www.oag.ab.ca/webfiles/reports/AGJuly2014Report.pdf>>; Auditor General Alberta, *Report of the Auditor General of Alberta – July 2015*, (Edmonton: AGA, 2015), financial security, at 25-26, specified gas emitters regulation, at 39-51, online at: <<https://www.oag.ab.ca/webfiles/reports/OAG%20Report%20July%202015.pdf>>.

IV. Commissioner of the Environment and Sustainable Development

i. Introduction

At the federal level, Canada has created the office of the Commissioner of the Environment and Sustainable Development (CESD) within the office of the Auditor General of Canada. The following section analyzes the function and powers of the CESD.

ii. The CESD

The Commissioner of the Environment and Sustainable Development (CESD) is an Assistant Auditor of the Auditor General of Canada. The CESD is mandated to provide the Parliament with an objective, independent analysis and recommendations on the federal government's actions on environmental protection and sustainable development.

The CESD conducts performance audits, is responsible for assessing whether federal government departments are meeting their sustainable development objectives, and oversees the environmental petitions process. The mandate and duties of the CESD are laid down in the *Auditor General Act*¹⁰⁵ (AGA) and the *Federal Sustainable Development Act*¹⁰⁶ (FSDA).

The CESD is appointed by the Auditor General and reports to him/her directly.¹⁰⁷ The CESD assists the Auditor General in performing the duties of the Auditor General relating to the environment and sustainable development.¹⁰⁸ Specifically, the CESD's duty is to

provide sustainable development monitoring and reporting on the progress of category I departments 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;

¹⁰⁵ *Auditor General Act*, RSC 1985, c A-17 [AGA].

¹⁰⁶ *Federal Sustainable Development Act*, SC 2008, c 33 [FSDA].

¹⁰⁷ AGA, s 15(1).

¹⁰⁸ AGA, s 15(2).

- (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.¹⁰⁹

The CESD is also responsible for handling written petitions by Canadian residents related to environmental matters and sustainable development.¹¹⁰

The CESD is entitled to make examinations and inquiries that it deems necessary in order to monitor the extent to which category I¹¹¹ departments have contributed in meeting the objectives under the Federal Sustainable Development Strategy and implemented their own sustainable development strategies; and replies by Ministers with respect to petitions.¹¹²

As an Assistant Auditor to the Auditor General, the CESD is not granted the same procedural rights as the Auditor General. However, the Auditor General is entitled to authorize any person employed in his or her office (such as the CESD) to exercise and perform, in any manner and subject to any terms and conditions that he or she directs, any of his or her powers and functions. The right to access to information and to carry out examinations are described in more detail for the Auditor General. The Auditor General is entitled to free access at all convenient times to information that relates to the fulfilment of his/her responsibilities and he/she is also entitled to require and receive from members of the federal public administration any information, reports and explanations that he/she considers necessary for that purpose.¹¹³ Further, the Auditor General has the right to examine any person on oath on any matter pertaining to any account subject to audit by him/her for the purposes of any such

¹⁰⁹ AGA, s 21.1. The term "category I department" means (a) any department named in schedule I to the *Financial Administration Act*; (b) any department in respect of which a direction has been made under subsection 11(3) of the *Federal Sustainable Development Act*; and (c) any agency set out in the schedule to the *Federal Sustainable Development Act*. AGA, s 2.

¹¹⁰ AGA, s 22.

¹¹¹ AGA, s 2 <category I department> means (a) any department named in schedule I to the *Financial Administration Act*; (b) any department in respect of which a direction has been made under subsection 11(3) of the *Federal Sustainable Development Act*; and (c) any agency set out in the schedule to the *Federal Sustainable Development Act*.

¹¹² AGA, s 23(1).

¹¹³ AGA, s 13(1).

examination the Auditor General may exercise all the powers of a commissioner under Part I of the Inquiries Act.¹¹⁴

The CESD must report annually to the Parliament with respect to anything that the CESD considers necessary and of importance to the Parliament concerning environmental matters and sustainable development.¹¹⁵ This duty to report includes the extent to which category I departments have contributed to achieve the targets of the Federal Sustainable Development Strategy and have implemented their own sustainable development strategies; the number of petitions recorded, the subject-matter of petitions and their status;¹¹⁶ and exercising of the authority of the Governor in Council under the FSDA.

Previous reports by the CESD have dealt with, among other things, Federal Support for Sustainable Municipal Infrastructure, Mitigating the Impacts of Severe Weather, Chemicals in Consumer Products and Cosmetics, Mitigating Climate Change, and Environmental Monitoring of Oil Sands.¹¹⁷

The CESD must examine the progress report of the federal government in implementing the Federal Sustainable Development Strategy 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.¹¹⁸ The results of the examination of the progress report must be included in one of the reports to the Parliament.¹¹⁹

Under the FSDA, the Minister of the Environment develops within every three-year period a Federal Sustainable Development Strategy.¹²⁰ The Minister must submit the draft Strategy to the CESD for review and comment.¹²¹ In summer 2016, the Government of Canada issued the latest Sustainable Development Strategy Report.¹²²

¹¹⁴ AGA, s 13(4).

¹¹⁵ AGA, s 23(2).

¹¹⁶ The reports can be found under Office of the Auditor General of Canada, Commissioner of the Environment and Sustainable Development Reports, "Environmental Petitions Annual Report", online at: <http://www.oag-bvg.gc.ca/internet/English/parl_lp_e_901.html>.

¹¹⁷ See for all recent reports by the Commissioner of the Environment and Sustainable Development Reports, "Reports to Parliament", online: http://www.oag-bvg.gc.ca/internet/English/parl_lp_e_901.html.

¹¹⁸ AGA, s 23(3).

¹¹⁹ AGA, s 23(4).

¹²⁰ AGA, s 9(1).

¹²¹ AGA, s 9(4). Previously, the CESD had responsibilities under the 2007 Kyoto Protocol Implementation Act. "Under the Act, the CESD was required to prepare a report at least once every two years, up to and including 2012, on Canada's progress in implementing the Climate Change Plans and meeting its obligations under the Kyoto Protocol. Such reports were completed

iii. Audit Examples¹²³

In 2014, the CESD published a report on “Mitigating Climate Change.”¹²⁴ The report presented the results from an audit of the actions of three federal entities Environment Canada, Natural Resources Canada, and Transport Canada. The audit’s objective was:

- to determine whether Environment Canada, working with others, has made satisfactory progress in addressing four key issues from our 2012 audit: putting measures in place to reduce greenhouse gas emissions; assessing the success of the measures; working with the provinces and territories; and developing plans to achieve the 2020 Copenhagen Accord target;
- to determine whether Environment Canada, working with others, has used sound methods for estimating and reporting Canada’s future greenhouse gas emissions; and
- to determine whether Environment Canada, working with others, is tracking, assessing, and reporting on funding under Canada’s Fast-Start Financing initiative and the results achieved, including reductions in greenhouse gas emissions.¹²⁵

The report concluded, among other things, regarding emission reductions that

federal departments have made unsatisfactory progress in each of the four areas examined. Despite some advances since our 2012 audit, timelines for putting measures in place to reduce greenhouse gas emissions have not been met and departments are

in 2009, 2011 and 2012. As the Kyoto Protocol Implementation Act was repealed in 2012, the CESD is no longer responsible for preparing these reports.”, online at: <http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_921.html>.

¹²² See Government of Canada, *Achieving a Sustainable Future – A Federal Sustainable Development Strategy for Canada 2016 – 2019*, (Ottawa: Minister of Environment and Climate Change, 2016). Before issuing the final strategy report the CESD reviewed and commented on the draft. See Minister of Environment and Climate Change, *Review and Comments on the Draft 2016–2019 Federal Sustainable Development Strategy 24 June 2016*, online at: <http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_41494.html>. The Minister of the Environment and Climate Change responded to the review of the draft: *Response to the Review of the Draft 2016–2019 Federal Sustainable Development Strategy*, online at: <http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_41504.html>.

¹²³ For other work of the CESD see the ELC’s previous post by Brenda Heelan Powell, “Climate Change Blog Series: Problems with Pesticides and Pipelines (Fall 2015 Report of Canada’s Commissioner of the Environment and Sustainable Development)”, 2 February 2016, online at <<http://elc.ab.ca/climate-change-blog-series-problems-with-pesticides-and-pipelines-fall-2015-report-of-canadas-commissioner-of-the-environment-and-sustainable-development/>>.

¹²⁴ Office of the Auditor General of Canada, *Report of the Commissioner of the Environment and Sustainable Development, Mitigating Climate Change* (Ottawa: OAG, 2014), online at: <http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_201410_01_e.pdf>.

¹²⁵ Office of the Auditor General of Canada, *Mitigating Climate Change, Audit at a Glance* (Ottawa: OAG, 2014) online at: <http://www.oag-bvg.gc.ca/internet/English/att_e_39876.html>.

not yet able to assess whether measures in place are reducing emissions as expected. We also found that Environment Canada lacks an approach for coordinating actions with the provinces and territories to achieve the national target, and an effective planning process for how the federal government will contribute to achieving the Copenhagen target. In 2012, we concluded that the federal regulatory approach was unlikely to lead to emission reductions sufficient to meet the 2020 Copenhagen target. Two years later, the evidence is stronger that the growth in emissions will not be reversed in time and that the target will be missed.¹²⁶

Environment Canada responded to the audit by agreeing with the recommendations by the CESD and promised changes.¹²⁷ However, although Environment Canada agreed to the CESD's recommendations, implementation of the recommendations is to a great extent dependent on the political willingness and ability to undertake changes. The 2014 report falls into the era of Stephen Harper's Conservative Government. The Harper government did not consider climate change as a pressing issue for Canada. So, while the CESD report pointed out weaknesses in the environmental performance, no significant actions were undertaken to mitigate climate change and to achieve the proposed greenhouse gas emission reductions.

iv. **Comments**

The CESD has comprehensive reporting tasks regarding various environmental topics. Although the CESD reports extensively on environmental matters and sustainable development and thus brings issues related to these topics to the attention of the Parliament, the CESD has no means to enforce recommendations and improvements. The decision to act upon the results and recommendations of these reports remains in the discretion of the Parliament and is dependent on the political views and majorities. Therefore, the office of the CESD has the character of an environmental problems information vehicle.

¹²⁶ *Mitigating Climate Change, Audit at a Glance, ibid.*

¹²⁷ See Appendix—List of recommendations, *Mitigating Climate Change, Audit at a Glance, ibid.*, online at: <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201410_01_e_39848.html#appa>.

Proposed Independent Third Party Oversight Bodies

The recent developments regarding Environmental Bill of Rights has shown that newly created schemes are using the idea of an administrative third party oversight body. This section briefly presents Manitoba's envisioned approach toward the implementation of a third party oversight body and the draft of a Federal EBR.

I. Manitoba

i. Manitoba's EBR Framework: the Environmental Commissioner (EC)

Manitoba, prior to calling an election, introduced an *Environmental Bill of Rights*¹²⁸ (MB EBR) in the Manitoba Legislature. The EBR did not pass prior to the calling of a provincial election and must be reintroduced after the elections. Manitoba's EBR Bill nonetheless provides additional impetus to other jurisdictions in Canada and elsewhere to consider implementing an EBR as well. This section looks at Manitoba's proposed EBR framework with respect to environmental third party oversight.

Manitoba's EBR starts with a clear explanation of the EBR's objectives. The EBR is designed to:

- (a) to protect the right of present and future generations to a healthy and ecologically balanced environment by the means provided in this Act;
- (b) to confirm the government's responsibility to protect the environment within its jurisdiction;
- (c) to ensure that Manitobans have access to sufficient environmental information and effective mechanisms for participating in environmental decision-making;
- (d) to provide a means for Manitobans to take action to enforce environmental rights;
- and
- (e) to provide legal protection against reprisals for employees who take action to protect the environment.¹²⁹

The cornerstone of the EBR is the manifestation of every resident of Manitoba to have the right to a healthy and ecologically balanced environment and to enforce that right using the measures set out in

¹²⁸ Bill 20, *The Environmental Rights Act*, 5th Session, 40th Legislature, Manitoba, 65 Elizabeth II, 2016 [MB EBR].

¹²⁹ MB EBR, s 2.

the Act.¹³⁰ The Government of Manitoba is obliged to protect the environmental rights of its residents.¹³¹

Manitoba's EBR ensures the basic environmental rights of residents of Manitoba by providing a system of independent oversight regarding alleged environmental harm. One of the MB EBR's features is the office of the Environmental Commissioner. The Lieutenant Governor in Council, on the recommendation of the Standing Committee of the Assembly on Legislative Affairs appoints the Environmental Commissioner.¹³² The Environmental Commissioner is an officer of the Assembly.¹³³ The term of the Environmental Commissioner lasts for five years with the option to become reappointed only once.¹³⁴

One of the core responsibilities of the Environmental Commissioner is, upon request of the parties, to mediate a dispute between two or more parties over conduct that is alleged to have caused significant environmental harm.¹³⁵ Other central obligations of the Environmental Commissioner are to:

- review the implementation and ongoing operation of the MB EBR,
- review government compliance with the MB EBR,
- provide or assist in providing educational programs about the MB EBR to departments and the public, and
- provide advice and assistance to members of the public who wish to participate in decision-making or to enforce environmental rights as provided in the MB EBR.¹³⁶

The MB EBR sets up a process for environmental complaints and investigations. The Environmental Commissioner receives various tasks in these processes. Manitoba residents may apply to the Environmental Commissioner for a review of an act, regulation or government policy by the responsible Minister.¹³⁷ Manitoba residents may also apply to the Environmental Commissioner for a review by the

¹³⁰ MB EBR, s 4. "Environment" is defined as "the components of the Earth and includes (a) air, land and water; (b) plant and animal life, including humans; (c) all layers of the atmosphere; and (d) the interacting natural systems that include the components referred to in clauses (a) to (c). MB EBR, s 1.

¹³¹ MB EBR, s 5.

¹³² MB EBR, s 21(1).

¹³³ MB EBR, s 22(1).

¹³⁴ MB EBR, s 23.

¹³⁵ MB EBR, s 28.

¹³⁶ MB EBR, s 29.

¹³⁷ MB EBR, s 8(1).

responsible minister with respect to the need for a new act, regulation or policy to protect the environment.¹³⁸

The Environmental Commissioner, after receiving an application for review, forwards the application to the responsible minister.¹³⁹ The minister conducts the review and communicates his/her decision to the applicant and the Environmental Commissioner.¹⁴⁰ If the minister decides to conduct the requested review, the minister must report on the progress to the applicant and the Environmental Commissioner until the review is completed.¹⁴¹ Upon completion of the review, the minister must communicate the final results in writing to the applicant and the Environmental Commissioner.¹⁴²

If a Manitoba resident believes that the contravention of an Act or regulation has caused or will imminently cause significant environmental harm, he/she may apply to the Environmental Commissioner for an investigation.¹⁴³ Then, the Environmental Commissioner sends a written notice to the responsible department to request specified information about the investigation matter and the department must provide the requested information.¹⁴⁴ The Environmental Commissioner may direct the responsible department to investigate the alleged contravention if he/she believes that there are reasonable grounds that the alleged contravention has occurred, the contravention has caused or will imminently cause significant environmental harm, and an investigation is in the public interest.¹⁴⁵ The responsible department reports on the progress and communicates the final results of the investigation and the actions undertaken to the applicant and the Environmental Commissioner.¹⁴⁶

The Environmental Commissioner reports annually to the Speaker of the Assembly on his/her work during the year.¹⁴⁷ However, the Environmental Commissioner is entitled to issue special reports at any time on any matter related to the MB EBR that he/she considers should not be deferred until the annual report.¹⁴⁸

¹³⁸ MB EBR, s 8(2).

¹³⁹ MB EBR, s 9(1).

¹⁴⁰ MB EBR, s 9(3).

¹⁴¹ MB EBR, s 9(4).

¹⁴² MB EBR, s 9(5).

¹⁴³ MB EBR, s 10(1).

¹⁴⁴ MB EBR, s 11(1), (2).

¹⁴⁵ MB EBR, s 12(1).

¹⁴⁶ MB EBR, s 13.

¹⁴⁷ MB EBR, s 30(1).

¹⁴⁸ MB EBR, s 31.

ii. **Comments on MB EBR**

While it has not progressed beyond the bill stage due to provincial elections, the MB EBR provides an idea of how a third party oversight mechanism could be designed. The tasks of the EC are mainly to handle and forward complaints and investigations. The MB EBR does not provide the EC with any procedural rights or enforcement tools to ensure that EC's recommendations are binding and investigations can be carried out (e.g. duty to cooperate etc.).

II. **Canadian Environmental Bill of Rights: Bill C-634**

On October 29, 2014 MP Linda Duncan (NDP) introduced Bill C-634 "An Act to establish a Canadian Environmental Bill of Rights."¹⁴⁹ Bill C-634 has not become law yet and most likely it will not become law any time soon.

[Bill C-634] establishes the Canadian Environmental Bill of Rights, whose provisions apply to all decisions that emanate from a federal source or are related to federal land or a federal work or undertaking. The purpose of this enactment is to (a) safeguard the right of present and future generations of Canadians to a healthy and ecologically balanced environment; (b) confirm the Government of Canada's public trust duty to protect the environment under its jurisdiction; (c) ensure all Canadians have access to adequate environmental information, justice in an environmental context and effective mechanisms for participating in environmental decision-making; (d) provide adequate legal protection against reprisals for employees who take action for the purpose of protecting the environment; and (e) enhance public confidence in the implementation of environmental law.¹⁵⁰

The Federal EBR's objectives are to

(a) safeguard the right of present and future generations of Canadians to a healthy and ecologically balanced environment;

¹⁴⁹ Linda Duncan introduced Bill C-634 "An Act to establish a Canadian Environmental Bill of Rights" as a private member's bill. C-634, Second Session, Forty-first Parliament, 62-63 Elizabeth II, 2013-2014, House of Commons of Canada, online at: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6746697>> [Bill C-634].

¹⁵⁰ Bill C-634, Summary.

- (b) confirm the Government of Canada's public trust duty to protect the environment under its jurisdiction;
- (c) ensure all Canadians have access to
 - (i) adequate environmental information,
 - (ii) justice in an environmental context, and
 - (iii) effective mechanisms for participating in environmental decision-making;
- (d) provide adequate legal protection against reprisals for employees who take action for the purpose of protecting the environment; and
- (e) enhance public confidence in the implementation of environmental law.¹⁵¹

Bill C-634 expands the office of the Commissioner of the Environment and Sustainable Development (CESD) appointed under the Federal *Auditor General Act* in its framework.

Residents of Canada may apply to the CESD to initiate a review by the responsible Minister of an existing policy, federal act or federal regulation or other statutory instrument with the aim to amend, repeal, or revoke these instruments; or with the aim to make or pass a new regulation or other statutory instrument, that protects the environment.¹⁵² The CESD makes a record of such an application and forwards a copy to the appropriate Minister. The Minister reports to the Commissioner on the progress of the review. Then, the Minister, with the approval of the CESD, communicates the final written results of the review to the parties.¹⁵³

The CESD also receives applications for conducting investigations regarding environmental offences. A resident of Canada may apply to the CESD for an investigation by the responsible Minister based on the allegation of an environmental offence of a federal act, federal regulation or other statutory instrument.¹⁵⁴ The Minister reports on the progress of the investigation and communicates the final writing results to the applicant and the CESD.¹⁵⁵

Under the Federal EBR, the CESD is assigned to examine federal bills and regulations.¹⁵⁶ The CESD examines every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a

¹⁵¹ Bill C-634, s 6.

¹⁵² Bill C-634, s 13.

¹⁵³ Bill C-634, s 13(6).

¹⁵⁴ Bill C-634, s 14.

¹⁵⁵ Bill C-634, s 14.

¹⁵⁶ Bill C-634, s 28.

minister of the Crown. The aim of the examination is to ensure that the provisions are consistent with the Federal EBR. In the event of inconsistency, the Auditor General must report such inconsistency to the House of Commons.

i. **Comments on Bill C-634**

Several attempts to implement a Federal EBR have failed. The prospects of Bill C-634 becoming law are not any greater today due to the perceived lack of importance for Canada. Bill C-634 makes use of the already existing office of the CESD but modifies and extends the CESD's power for example to initiate actions to make or pass new regulations, laws and instruments. However, Bill C-634 did not strengthen other procedural powers of the CESD such as to enforce recommendations.

CONCLUSIONS AND RECOMMENDATIONS FOR ALBERTA

This paper reviewed and analyzed the use of administrative third party oversight bodies in various EBR frameworks. The research focused on jurisdictions that have created or are planning to establish oversight bodies. Third party oversight bodies are quite common in Canada and may take the form of auditors or environmental commissions. This contrasts with the approach of several US states which have implemented environmental rights in their state constitutions but rely on the general court system to enforce environmental rights. In Canada, these review bodies exist in addition to the standard court system.

The review of various Canadian EBR regimes has shown some similarities. The provinces have either established a specialist office (Environmental Commissioner) or have explicitly or implicitly given power to the Auditor General to carry out environmental audits. Based on the review of Ontario's, BC's, Alberta's and Manitoba's EBR framework and the federal CESD the following conclusions are considered to be important for the office of a third party oversight body in order to improve existing regimes or those to come.

Alberta's Auditor General has not a specific environmental mandate. The only audits the Auditor General is conducting is a financial audit or a process/system audit. This might not be sufficient to address environmental issues and to promote a provincial right to a healthy environment. Therefore, we suggest either of two possible options. Alberta could expand the existing mandate of the Auditor

General in accordance to our recommendations, or Alberta could establish a new third party oversight body as per our recommendations.

#1: Specific mandate

We recommend that a third party oversight body receives a clear legislative mandate to carry out reviews or audits, and support, enhance and enforce environmental rights. The legal basis for a third party oversight body should specify the powers of the office and how the chair is supposed to accomplish the protection of environmental rights.

#2: Independence

It must be ensured that the administrative third party oversight body is independent from government.

3: Report/review topics

One central obligation of review bodies is to report on specific topics relating to environmental rights. The Alberta and BC Auditor Generals are not committed to report on specific environmental topics. The Ontario ECO can issue reports on any topic but the ECO must also issue specific reports on energy conservation and GHG emission reductions. It would be beneficial to adopt a combined approach where the third party oversight body must review and report on preassigned topics such as GHG reductions but is granted discretion to determine review topics that it considers important. The preassigned topics ensure a continuous observation of these topics regardless of any personality changes in the office. A third party oversight body should have the flexibility to adapt and respond to current issues.

For the future we anticipate a growing need for capacity to audit and review specific environmental topics. Thus, Alberta's third party oversight body, whether the Auditor General or a prospective separate office, should be mandated to conduct specific preassigned reviews of environmental topics, such as energy conservation, climate change mitigation and adaptation, and reduction of greenhouse gas emissions in Alberta.

#4: Binding character of recommendations

All review bodies were assigned with the task to issue reports on the status of compliance with environmental rights. However, it appeared that mostly the existence or content of reports were only acknowledged. Instead, it is preferable that the third party oversight body is authorized to issue

recommendations in the reports and that these recommendations are either binding for the respective government entities or that a process is established that makes sure that outcomes are considered and used to trigger change in the respective recommended area. The example from BC illustrated that the Auditor General issued recommendations, the reviewed entity responded to the recommendations; the Auditor General followed up on the improvements and assessed the performance. Then the reviewed entity can comment on the follow up assessment. Based on the BC experience, a mandated follow-up process could be one way to help facilitate the recommendations of such reports if a legally binding character or enforceability of recommendations is not feasible.

Another option, alternatively or in addition, is to establish a standing committee on the environment for receiving, discussing and helping to implement reports of the third party oversight body.

#5: Handling of petitions

The third party oversight body should be responsible for handling citizens' petitions. That entails that Canadian residents are entitled to file petitions in environmental matters. The third party oversight body ensures that petitions are addressed by the responsible ministry and follows up on them. Also, the third party oversight body should report publicly on petitions annually.

#6: Procedural rights

It is important that the third party oversight body receives specific procedural rights in order to fulfill all assigned tasks and responsibilities. These include:

1. Access to required information

The third party oversight body must be able to access and request information that is necessary to prepare reports. Upon request government entities must provide the required information or produce documents relevant to the review.

2. Cooperation

Government entities and organizations must be obliged to cooperate regarding requests by the third party oversight body, for example to access information, to carry out examinations and investigations, and to implement recommendations. It is advisable to create a mechanism/process to ensure such cooperation.

3. Examinations and investigations

The third party oversight body will conduct examinations upon request by authorized entities such as the Legislative Assembly. It is advisable that the third party oversight body can also carry out examinations and investigations if he/she believes it is in public interest to ensure environmental rights.

The AB AGA does stipulate that the Auditor General has the authority to access information and to carry out examinations and investigation. However, in addition, Alberta should ensure that the third party oversight body's work receives support and cooperation by governmental entities.