

## ***What is the Role of Ontario’s New Commissioner of the Environment?***

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About a year ago, on April 1, 2019, the Office of the Environmental Commissioner of Ontario (“ECO”) was shuttered by the Ontario Government. The ECO’s responsibilities were transferred to the Office of the Auditor General of Ontario under section 15 of the *Restoring Trust, Transparency and Accountability Act*. In August 2019, the Auditor General of Ontario appointed Jerry DeMarco (previously Executive Chair of Environment and Land Tribunals Ontario) as the new Commissioner of the Environment (the “New Commissioner”). What is the New Commissioner’s role and how does it compare to the role of the ECO?

### **The Former ECO’s Role**

For 25 years, the ECO served as Ontario’s “environmental watchdog.” As an independent officer of the Ontario Legislature, the ECO was a non-partisan advocate for the environment and acted as Ontario’s environmental critic. The ECO was tasked with:

- 1 promoting and providing advice and assistance about the Environmental Bill of Rights, 1993 (“EBR”);
- 2 reporting on the implementation of, and compliance with, the EBR; and
- 3 reporting on Ontario’s progress reducing greenhouse gas emissions and improving energy conservation and efficiency.<sup>1</sup>

The ECO filled a unique role in Canada’s environmental governance landscape in that the ECO had the ability to comment on government policy. Not only did the ECO comment on whether Ontario was meeting its environmental commitments, the ECO exercised his/her authority to comment on whether Ontario’s choices were the best choices for the

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<sup>1</sup> Environmental Commissioner of Ontario, “The ECO’s Role and Goals”, (accessed 11 March 2020), online: <<https://eco.auditor.on.ca/about-us/our-role-goals-and-indicators/>>.

environment. The ECO was an advocate for the environment and was able to identify gaps in Ontario’s environmental legislation, programs and policies and argue for change. This advocacy function will not be continued under the authority of the Auditor General of Ontario.<sup>2</sup>

### **The Role of the New Commissioner of the Environment**

The New Commissioner is an Assistant Auditor General and is required to exercise the powers and perform the duties delegated by the Auditor General of Ontario.<sup>3</sup> The New Commissioner heads the Auditor General’s environmental team and is responsible for overseeing and reporting on the operation of the EBR.<sup>4</sup> The New Commissioner will also lead the Auditor General’s value-for-money audits of provincial environmental programs, a task the Office of the Auditor General has been conducting since 1978.<sup>5</sup> These value-for-money audits measure how effective government environmental programs are at meeting their intended goals.<sup>6</sup>

The New Commissioner is an employee of the Auditor General and as such answers to the Auditor General. While the Auditor General is still an independent, non-partisan, officer of the Ontario Legislature, the Auditor General typically reports on government programs from a monetary and efficiency perspective. The New Commissioner will now be fulfilling a true auditing role. Like most traditional auditors, the New Commissioner will be restricted to auditing the implementation of existing government legislation, programs and policies. If the Ontario Government does not address a particular environmental issue in its legislation, programs or policies, the New Commissioner will not address this environmental issue in his audit. The Auditor General and the New Commissioner will not continue the ECO’s role of commenting on the merits of and identifying gaps in Ontario’s environmental legislation, programs and policies.<sup>7</sup>

Some of what were the ECO’s reporting requirements are now optional under the direction of the Auditor General. For example, the ECO was required to report annually on Ontario’s progress on energy conservation and reducing greenhouse gas emissions. It

<sup>2</sup> Office of the Auditor General of Ontario, “Annual Report 2019, Reports on the Environment”, (2019), Vol 2 at 5, online (pdf): <[http://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR\\_v2\\_en\\_web.pdf](http://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v2_en_web.pdf)> [AGO, “2019 Report”].

<sup>3</sup> *Environmental Bill of Rights, 1993*, SO 1993, c 28, s 50(2) [EBR].

<sup>4</sup> Office of the Auditor General of Ontario, “Auditor General of Ontario Appoints Commissioner of the Environment”, News Release, (8 July 2019), online: <[http://www.auditor.on.ca/en/content/news/newsrelease\\_EnvCommissAppointment.pdf](http://www.auditor.on.ca/en/content/news/newsrelease_EnvCommissAppointment.pdf)> [AGO, “News Release July 2019”].

<sup>5</sup> AGO, “2019 Report”, *supra* note 2 at 8.

<sup>6</sup> *Ibid* at 8-9.

<sup>7</sup> *Ibid*.

is now at the Auditor General’s discretion whether or not the New Commissioner or the Auditor General will report on the efficiency and effectiveness of the government’s programs relating to energy conservation and reducing greenhouse gas emissions.<sup>8</sup>

In the Fall of 2019, the Auditor General submitted the following reports about the environment to the Speaker of the Legislative Assembly:

- 1 Ontario’s environmental trends and key challenges regarding air, water, land resources and waste, nature and wildlife, and climate change;
- 2 Ontario ministries’ compliance with their responsibilities under the *Environmental Bill of Rights, 1993*; and
- 3 the province’s plan to address climate change.

### **Environmental Commissioners in Other Canadian Jurisdictions**

No other provinces or territories in Canada currently have independent environmental commissioners. However, members of the legislatures in Nova Scotia and British Columbia have tabled draft environmental bills of rights that include provisions providing for independent environmental commissioners.<sup>9</sup> The environmental commissioners proposed in the draft environmental bills of rights in Nova Scotia and British Columbia would possess the independence and many of the same powers previously enjoyed by the ECO.<sup>10</sup> There has also been pressure from environmental organizations in New Brunswick to adopt a similar Environmental Bill of Rights and create an independent environmental commissioner.<sup>11</sup>

Federally, there is a Commissioner of the Environment and Sustainable Development (the “Federal Commissioner”). Similar to the New Commissioner (appointed by the Auditor General of Ontario), the Federal Commissioner is appointed by the Auditor General of Canada.<sup>12</sup> But, as noted above, the New Commissioner may only exercise powers and duties delegated by the Auditor General of Ontario.<sup>13</sup> The Federal Commissioner, on the other hand, has significantly more independence from the Auditor General of Canada than the New Commissioner has from the Auditor General of Ontario. The Federal

<sup>8</sup> EBR, *supra* note 3, s 51(2).

<sup>9</sup> Bill 28, *An Act to Establish an Environmental Bill of Rights*, 2nd Sess, 63rd Leg, Nova Scotia, 2018, at Part II, online: <[https://nslegislature.ca/legc/bills/63rd\\_2nd/1st\\_read/b028.htm](https://nslegislature.ca/legc/bills/63rd_2nd/1st_read/b028.htm)> [Bill 28]; Bill M-236, *Environmental Bill of Rights Act, 2016*, 5th Sess, 40th Leg, British Columbia, 2016, at Part 5, online: <<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/40th-parliament/5th-session/bills/first-reading/m236-1>> [Bill M-236].

<sup>10</sup> *Ibid.*

<sup>11</sup> New Brunswick Environmental Network, “Environmental Bill of Rights Documents”, (accessed 24 March 2020), online: <<https://www.nben.ca/en/env-environmental-bill-of-rights-documents#>>.

<sup>12</sup> *Auditor General Act*, RSC 1985, c A-17, s 15.1 [AGA, Canada].

<sup>13</sup> EBR, *supra* note 3, s 50(2).

Commissioner has the statutory authority to report on “anything that the Commissioner considers should be brought to the attention of Parliament in relation to environmental and other aspects of sustainable development.”<sup>14</sup> For example, the previous Federal Commissioner, Julie Gelfand, examined the implementation of laws and policies relating to: (i) conserving biodiversity; (ii) salmon farming; (iii) protecting marine mammals; (iv) toxic substances; (v) tax subsidies for fossil fuels; and (vi) action on climate change. Despite the Federal Commissioner’s independence from the Auditor General of Canada, the Federal Commissioner is still a true auditor. The Federal Commissioner only audits the implementation of federal legislation, policies and programs and does not comment on the merits of implementing new legislation, policies and programs.<sup>15</sup>

### **Takeaways**

The Auditor General of Ontario now possesses many of the reporting and investigative powers previously held by the ECO, as well as additional powers under Ontario’s *Auditor General Act*. However, the New Commissioner can only act under authority delegated from the Auditor General of Ontario. Further, the New Commissioner will be restricted to auditing the implementation of existing environmental legislation, programs and policies.

While the early signs are positive, it remains to be seen the extent to which the New Commissioner will act as an effective check on the Ontario Government’s implementation of environmental legislation, policies and programs.

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<sup>14</sup> AGA, Canada, *supra* note 12, s 23(2).

<sup>15</sup> Office of the Auditor General of Canada, “What We Do”, (accessed 9 April 2020), at “What is a performance audit?” online: <[https://www.oag-bvg.gc.ca/internet/English/au\\_fs\\_e\\_371.html#performance](https://www.oag-bvg.gc.ca/internet/English/au_fs_e_371.html#performance)>.