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The Impact of Parliamentary Officers on  
Canadian Parliamentary Democracy:  
A Study of The Commissioner of the Environment and Sustainable  
Development & The Environmental Commissioner of Ontario

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**I. INTRODUCTION**

Canadian legislatures are increasingly crowded with parliamentary officers. Parliament, the 10 provincial legislatures and the three territorial legislatures now host 78 of these offices. The Harper government has created three new officers. Six of the provinces have added at last one new parliamentary officer this decade, as have two of the three territorial legislatures. Some of the recently created officers represent innovative experiments in parliamentary governance. The new Parliamentary Budget Officer has been described as “one of the most radical parliamentary reforms in Canadian history” (Levy 2008: 39). The provincial Environmental Commissioner discussed in this paper is not only unique in Canada, but has few counterparts elsewhere in the Commonwealth.

Parliamentary Officers perform a number of roles. They adjudicate individual cases, support citizens in their dealings with bureaucracy, monitor various aspects of public administration and assist legislatures in their scrutiny functions. The proliferation of new officers in recent years discourages sweeping generalizations about their contribution to the practice of democracy in Canada. As Thomas points out, we lack a general typology of this phenomenon (Thomas 2003).<sup>1</sup>

Many political scientists have noted the growing popularity of this institution with some unease. They are concerned about the parliamentary officers who support legislatures in scrutinizing the executive. They argue that the increasing prominence of these parliamentary officers appears to pose a constitutional issue for responsible government.

**The Academic Critique**

The academics’ case is summarized as follows (see Hartle 1988; Savoie 2008A, 2008B; Smith 2004, 2006, 2007; Sutherland 1980, 1986, 1993, 1999, 2002, 2006; Sutherland and Mitchell 1997; Thomas 2003, 2006). It should be emphasized that this critique is far from developed, as few officers have been studied comprehensively.

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<sup>1</sup> If this is true then how was the total of 78 cited in the text above calculated? The operational definition of a parliamentary officer employed in this paper is based on the criteria suggested by Thomas (Thomas 2003), a reading of the federal and provincial statutes under which parliamentary officers are appointed, and the formal lists Parliament and the provincial legislatures post on their websites.

It should be noted however that during the controversy over Commissioner Gélinas’ termination Auditor General Sheila Fraser told the Standing Committee on Environment and Sustainable Development that strictly speaking, the Commissioner of Environment and Sustainable Development should not be defined as a parliamentary officer because s/he was not directly appointed by cabinet on the recommendation of Parliament, but instead by her (Fraser 2007). On the other hand, her predecessor as Auditor General appeared before the same committee and suggested that the criteria for identifying a parliamentary officer should be less formalized and take into consideration the official’s substantive autonomy and profile (Desautels 2007). Under this interpretation, the CESD is a parliamentary officer.

The influence of parliamentary officers is a symptom of Parliament's decline. Their popularity with the general public reflects the corrosive cynicism about party politics now pervading the Canadian political culture. Many parliamentary officers are not organically connected to the legislature they formally serve, but instead try to appeal directly to public opinion in order to pressure the executive to adopt their recommendations. They are skilful at projecting an image of objectivity, appearing to rise above the shallow partisanship indulged in by parliamentarians. For example, Sutherland has documented how the Office of the Auditor General (OAG) has been able to deploy the intellectual prestige of the professional audit to extend its influence within the decision-making process. The OAG sees Parliament as just one among many consumers of its reports (Sutherland 1986, 2002). Parliamentary officers such as the Integrity Commissioner in Ontario and the federal Conflict of Interest and Ethics Commissioner reinforce the popular perception that elected officials cannot be trusted to police their own actions.

Parliament's duty is to scrutinize the executive and hold it accountable. But accountability is slipping away from Parliament and is now being enforced by parliamentary officers as well as other external bodies including the courts and the media. A veritable accountability industry is being created outside the walls of Parliament and the provincial legislatures.

Savoie and Smith argue that insofar as MPs support the proliferation of new parliamentary officers they are enabling the delegitimation of Parliament (Savoie 2008b, Smith 2007). Malloy's study of the Standing Committee of Public Accounts showed that MPs are happy to defer to the Auditor General and indeed, had difficulty conceiving how the Committee could be effective without the Auditor General's input (Malloy 2006). Government Members and even Prime Ministers are reluctant to challenge parliamentary officers for fear of being accused of tampering with their independence. Smith has declared "that where once seen as servants of Parliament, they are evolving into its masters" (Smith 2004: 25). The same phenomenon can be observed at work in some provincial legislatures.

Parliamentary officers' credibility may rest on their structural independence from the executive, but independence should not be confused with objectivity. They are turf warriors just like other bureaucrats. This is not always recognized because of confusion over the concept of independence. Parliamentary officers are described as independent and nonpartisan but these terms should not be treated as synonyms. Their equation reflects the anti-party sentiment which is a source of the officers' influence. Members are quick to condemn ministers when it appears they might threaten the officers' independence, but they rarely question whether independence is an adequate proxy for objectivity.

The status of parliamentary officers as servants of Parliament depends on a polite fiction, that Parliament has a corporate existence separate from the executive. For practical purposes however oversight of the executive is the work of the opposition. The tools vested in Parliament for the exercise of its scrutiny function are usually employed by the opposition parties to discredit the government. Parliamentary officers must operate within this framework. No matter how objective they may strive to be in their work, it is received by an audience with its own agenda. Opposition Members have little interest in reading reports which cannot be wielded as a weapon against ministers. It is wishful thinking to believe that strengthening the powers of

parliamentary officers, or creating new ones, will change the existing dynamics in Canadian legislatures.

### **The Subjects of This Study**

This paper explores the academic critique summarized above through a study of the federal Commissioner of the Environment and Sustainable Development (CESD) and the Environmental Commissioner of Ontario (ECO).

These officers were created by governments which recognized that the environment has become a defining issue of our time and that parliamentarians needed institutional support to carry out their duty to oversee the executive in this area of policy. The two institutions offer different strategies for engaging elected Members in the decision-making process.

The CESD is an environmental auditor modelled on the Office of the Auditor General (OAG). The Environmental Commissioner is a monitor of how the executive complies with an environmental bill of rights. The ECO is appointed to a fixed term by the cabinet on an address of the provincial Legislature. The CESD in contrast is appointed and may be fired by the Auditor General. The CESD's reports are subject to scrutiny by a dedicated committee of the House of Commons. The ECO's reports are tabled in the Legislature but the Standing Orders are silent as to how they should be considered.

Both of these institutions were introduced in the mid-1990s. Consequently the handful of individuals who have filled these offices have exercised a formative influence on their practices and policies. The institutional crisis at the CESD discussed in this paper centred on the performance of one Commissioner, Johanne G  linas. The contemporary prominence of the ECO reflects the leadership style of Gord Miller.

The reader will note that the section on the ECO is noticeably longer than the treatment of the CESD. This was unavoidable. The Environmental Bill of Rights is a complex statute and the secondary literature on it is negligible. On the other hand there is a sizeable literature on sustainable development, the origins of the CESD and the politics of the audit.

The individuals who have served as federal Commissioners are as follows (this list excludes one interim appointee): Brian Emmett (1996-2000); Johanne G  linas (2000-2007); Ron Thompson (2007-2008); and Scott Vaughan (2008-2009). The two Environmental Commissioners discussed in this paper are: Eva Ligeti (1994-1999) and Gord Miller (1999-2009).

## **II. THE COMMISSIONER OF ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

### **Sustainable Development**

Sustainable development in the formulation popularized by the Brundtland Commission (WCED 1987) poses broad questions about the direction of public policy in the advanced societies. At the agenda-setting stage sustainable development compels attention to the valuation of natural capital, inter-generational justice, and the responsibility of the advanced societies to address poverty in the developing world. At the implementation stage sustainable development requires policy-makers to address the negative environmental externalities generated by the market economy, posing uncomfortable questions about the distribution of power in civil society.

In short, implementation of sustainable development requires a paradigm shift in the advanced world. Since this has not occurred and is unlikely, every liberal democracy formally wedded to the concept must work out its own compromises. This cannot simply be dismissed as a cynical public relations exercise or as a gesture in symbolic politics. Sustainable development is a powerfully attractive ideal to the electorates of the Western world. It has considerable staying power in Canadian politics. Within the last five years, two provinces, Quebec and Newfoundland, have formally embraced the discourse (Quebec 2006, Newfoundland 2007). In 2005 a Senate committee issued a report lamenting Canada's lack of progress towards sustainable development (Senate 2005). The federal Liberal government led by Prime Minister Chrétien reaffirmed Canada's existing commitment to the concept at the Johannesburg Summit of 2002 (Environment Canada 2002). More recently, as we shall see below, the Harper Conservative government has supported legislation reconstituting the federal role in implementing a sustainable development strategy.

Advocates of sustainable development respond to the objection that the concept has no concrete, operational meaning by arguing that similarly, "democracy" is an amorphous term yet this does not preclude substantive debate about achieving democracy or the current state of politics in the liberal democracies (Dryzek 2007). Nevertheless, a democratic country's existing institutions – in Canada's case, the Westminster model – set the limits to practical discussions about the forms and practice of democracy. The same is true for debates about environmental governance. Sustainable development is achievable in Canada only to the extent it is compatible with the conventions of responsible government, including ministerial responsibility and the role of the House of Commons as the primary forum in which ministers and the cabinet are held accountable.

### **Sustainable Development and the Creation of the CESD**

Planning for sustainable development in Canada dates back to 1990 when the Mulroney government unveiled an ambitious multi-year, \$3 billion Green Plan. The cabinet was able to invoke favourable domestic public opinion as well as pressure from the international community to overcome internal resistance from the usual sources, most notably the Department of Finance, Treasury Board and the Privy Council Office. However, as early as 1991 Finance counter-attacked, by postponing the rollout of some of the Green Plan's big-ticket items. This was soon followed by outright cuts. This effectively doomed any prospect of Environment Canada being elevated to the status of a central agency, the essential prerequisite for entrenching sustainable development as the dominant policy paradigm within the decision-making apparatus (Doern

1993). The Green Plan was showcased at the Earth Summit in Rio in June 1992, but the Mulroney government's active interest in the environment petered out in the run-up to the 1993 election.

In opposition the Chrétien Liberals took up the environmental banner and effectively attacked the Conservative government for failing to emphasize sustainable development in the Green Plan. The Liberal campaign Red Book *Creating Opportunity: The Liberal Plan for Canada*, embraced sustainable development. Paul Martin, the future Liberal Finance Minister, served as Liberal environment critic in opposition and was the author of this chapter in the Red Book. Toner argues that the Liberal commitment to implement sustainable development was sincere, as demonstrated by the party's decision to make it a major campaign platform theme even though the economy had entered a decline in the year before the 1993 election and with it, public interest in the environment as an issue (Toner 1996).

The Liberal Red Book dutifully embraced the formal discourses of sustainable development, calling for a "fundamental shift in values and public policy," and arguing that "Sustainable Development—integrating economic with environmental goals—fits the Liberal tradition of social investment as sound economic policy" (Toner 2002: 87). The Red Book promised the creation of an Environmental Auditor General reporting directly to Parliament, with powers of investigation similar to those exercised by the Office of the Auditor General (OAG). This new parliamentary officer would report directly to the public on whether federal government programs and spending were supporting the shift to sustainable development. The reports would also review the implementation and enforcement of federal environmental laws. Finally, Canadians would be able to petition the new Environmental Auditor General to conduct special investigations to determine whether environmental laws were being ignored or violated (Toner 1992, 1994).

Once in office, Prime Minister Chrétien placed key members of his team in charge of the environmental file. Sheila Copps, the Deputy Prime Minister, became Minister of the Environment. Her parliamentary secretary, Clifford Lincoln, had previously served as provincial Minister of the Environment in Quebec. Charles Caccia, a well-respected backbencher and long-time environmentalist, was appointed chair of a new parliamentary committee, the Standing Committee on Environment and Sustainable Development. In March 1994 the government asked the new Committee to report on implementing the Red Book promise to create an Environmental Auditor General. The terms of reference invited the Committee to consider possible functions for the new Commissioner including the audit of the effectiveness and efficiency of the government in meeting its environmental and sustainable development objectives; the assessment of government policies as they related to the environment and sustainable development; and the assessment of departmental management and operational practices (Standing Committee 1994: 46).

In its May 1994 report, the Committee reported that the single biggest gap in the existing government accountability framework for achieving sustainability was the lack of independent policy evaluation. A new Office should be created to fill this gap. The Office would report on whether government policies, programs and spending were supporting the shift to sustainable development and complied with Canada's international environmental commitments. But the

new Office should not be limited to environmental auditing, which was already an established practice in the OAG. Auditing was retrospective, concerned only with how existing programs had performed. Auditing did not directly address what new policies should be introduced. Policy evaluation on the other hand was prospective. The Committee said this about the OAG's environmental auditing practice:

“As important as audit is to environmental protection, it is a ‘rear-view’ or post facto means of correction. Audit will identify a deficiency in the way a program is being carried out; once identified, the deficiency can be corrected. An additional gap, particularly for sustainability auditing, is that a deficiency will only become apparent if the goal of sustainability was a stated objective of the program. This is a very important point, for the concept of sustainable development is less than a decade old, and few federal documents make reference to sustainability as an intent or fundamental principle” (Standing Committee 1994: 33).

The Committee did agree that environmental auditing was a valuable tool and should be continued, and indeed, would become more important as sustainable development was implemented across all government departments and operations. But the Committee rejected the advice it had received from Auditor General Desautels, who in his appearance before the Committee had argued that the new office should be confined to environmental auditing and therefore could appropriately be located within the OAG. Mr. Desautels warned that policy advocacy and auditing did not mix. Advocacy would endanger the new Office's credibility as an independent and objective critic (Standing Committee 1994: 39).

Instead the Committee decided that the new office should have a broader role than merely monitoring internal efforts by federal government departments to comply with the cabinet's sustainable development programs. The transition to sustainable development required nothing less than a fundamental restructuring of Canadian society. The Committee recommended that the commissioner running the proposed new office should also: encourage co-operation and consultations between the federal and provincial levels of government over sustainable development; liaise with ENGOs, government and other stakeholders on the evolution of sustainable development concepts, practices and technologies; directly advocate to Canadians about “the necessity for Sustainable Development in all of our actions;” encourage and provide opportunities to Canadians to make suggestions for enhancing Canada's Sustainable Development initiatives; and “to provide advice and guidance, through Parliament, about new approaches which would accelerate the transition to Sustainable Development” (Standing Committee 1994: 9). The statute creating the new sustainable development commissioner should feature the Brundtland definition of sustainable development in its preamble (Standing Committee 1994: 13).

Finally, the Committee recommended that the reports of the new commissioner should be automatically referred to a standing committee in the same way OAG reports were deposited with the Standing Committee on Public Accounts. The commissioner should report annually to Parliament and more often if needed. The commissioner should be appointed to a five-year term, with the possibility of one additional term.

### **The Legislation creating the CESD (C-83) and the Debate in the House**

The government's legislative response to the Committee's report, C-83 was introduced in April 1995. Under pressure from the dismal fiscal situation, Liberal ministers were already backing away from the commitment made in opposition to a robust definition of sustainable development. Of course Environment Canada could not emerge unscathed from the Program Review of 1994-95, which culminated in Paul Martin's February 1995 budget. The real significance of the 1995 budget was that it formally signalled the failure to embrace sustainable development as the new governing paradigm. Environment Canada would not be transformed into a powerful central agency, with the authority to co-ordinate the horizontal implementation of sustainable development throughout the federal bureaucracy (Toner 1996, Juillet and Toner 1997).

C-83 must be evaluated in this context. The bill and its companion document, a *Guide to Green Government*, constituted a sophisticated political response to the problem of reconciling the Red Book commitment with the "hard realities of Canadian politics in the 1990s" (Juillet and Toner 1997: 180). This would enable the Liberal government to manage the sustainable development discourse within the existing institutional setting.

C-83 rejected the majority report of the Standing Committee on Environment and Sustainable Development and instead endorsed the substance of the minority report filed by the two Bloc Québécois Members. The Bloc fully endorsed the OAG's position that policy advocacy should be left to MPs and that the new commissioner should be limited to the non-political business of auditing.

C-83 contained the following amendments to the *Auditor General Act* (Canada 1995):

- The OAG was empowered to appoint the Commissioner on Environment and Sustainable Development. The Commissioner would report directly to the Auditor General, not Parliament (s. 15.1(1)).
- The CESD was to assist the Auditor General in performing the duties assigned to him or her relating to sustainable development (s. 15.1(2)).
- The CESD was to monitor the progress of government departments towards sustainable development, which was defined as "a continually evolving concept based on the integration of social, economic and environmental concerns" (s. 21.1). Sustainable development could be achieved by departments through a) integrating the environment and economy; b) protecting Canadians' health; c) protecting ecosystems; d) meeting international obligations; e) promoting equity; f) planning which integrated negative environmental externalities into decision-making; g) preventing pollution ; and h) maintaining "respect for nature and the needs of future generations" (s. 21.1(h)).
- The CESD could make "any examinations and any inquiries" considered necessary in order to monitor how government departments were implementing their SD strategies (s. 23(1)).
- The Auditor General (note, not the CESD) could receive petitions from Canadians about an environmental matter and forward them to the relevant ministers. The Auditor General would then monitor compliance with the timelines set out in the Act for ministerial responses (s. 22).



- The CESD was to report annually to the House of Commons “on behalf of the Auditor General” concerning any matter the CESD believed should be brought to the attention of the House, including the extent to which departments were meeting their sustainable development targets as set out in their departmental strategies, and the number of petitions received and their ongoing status (ss. 23 (2) - (3)). The reports would be referred to the Standing Committee on Environment and Sustainable Development.
- Ministers were obliged to prepare sustainable strategies and table the first version in the House within two years. These strategies had to be updated every three years and tabled in the House. The cabinet determined the content of these strategies, by regulation (s. 24).

This was quite a retreat from the Standing Committee’s vision of an independent policy advocate equipped with a broad mandate to comment on policy and to work with the policy community at both the federal and provincial levels on implementing sustainable development. Instead, the CESD’s review work would be confined to monitoring how departments fulfilled sustainable development strategies they themselves had composed. The cabinet would approve the content of the strategies by regulation, beyond the direct purview of Parliament. Canadians could submit petitions relating to environmental matters to the Auditor General, but the OAG was limited to forwarding them to ministers. Contrary to the Red Book promise the OAG/CESD would have no power to independently investigate the substance of the petitions.

While C-83 was before the House of Commons the government released a *Guide to Green Government*, signed by the Prime Minister and all his ministers. This document provided the framework to guide the preparation of departmental strategies which would become obligatory once C-83 became law. It signalled a government wide commitment to sustainable development, proclaiming that “achieving sustainable development requires an approach to public policy that is comprehensive, integrated, open and accountable. It should also embody a commitment to continuous improvement” (*Guide*: 1). However, achieving sustainable development was defined as greening the internal operations of the federal government, not introducing ambitious new programs for restructuring civil society or redirecting the dominant patterns of consumption or materials use as contemplated by the Brundtland commission. Despite the Prime Minister’s personal commitment, the *Guide* left it up to each individual department to prepare its own plan. Thus, sustainable development would be implemented within the traditional framework of ministerial accountability. The centre would not take direct responsibility for co-ordinating effective action on the environmental file.

The government’s strategy for incorporating sustainable development into the existing structures of the parliamentary state entailed a partnership with the OAG. Desautels had argued that the kind of environmental advocate the Standing Committee envisioned would inevitably intrude into matters of high policy. His alternative was a parliamentary officer engaged in environmental auditing, an extension of the OAG’s existing role. Lodging the new function in his office minimally disrupted the institutional status quo. The CESD/OAG relationship would enable the new commissioner to draw on the prestige of the OAG, as Copps and other Liberal spokespersons suggested in the legislative debate on C-83 (Copps 1995, Lincoln 1995, Regan 1995). Departments paid attention when they were selected for an audit by the OAG. They

would now also have to answer to an external commissioner on whether they were meeting their environmental commitments.

Copps accepted that the OAG/CESD would be empowered to embarrass the government over its alleged lack of progress on the environmental file, just as the OAG routinely did in other areas of public administration. But this trade-off was more attractive than the Standing Committee's proposal for a high profile parliamentary officer with a mandate to challenge ministers over their reluctance to embrace the sustainable development paradigm.

Copps claimed that this new partnership with the OAG demonstrated the government's commitment to the central premise of sustainable development, that environmental considerations must be fully integrated into decision-making process. However, it is important to be precise about how C-83 affected the OAG's jurisdiction. The OAG defined an environmental audit in terms of the program targeted for scrutiny. C-83 amended s. 7 of the *Auditor General Act* to add a fourth "E" to the established trilogy of economy, efficiency and effectiveness, which together provided the framework for the OAG's audits of programs under the value for money (VFM) or performance audit methodology. The fourth "E" applied to programs selected for audits because of their environmental effects (s. 7(2)(f)). According to the CESD, environmental VFM auditing was directed at government programs that delivered environmental goods (such as regulation) to the public or at least had impacts on the environment (CESD 1997: paras. 54-55; CESD 2003: paras. 10-11). But the decision to introduce a program with environmental implications remained with ministers.

C-83 also assigned the OAG/CESD the more general task of reporting on departments' progress towards sustainable development, defined as "a continually evolving concept based on the integration of social, economic and environmental concerns" (Canada 1995: s. 21.1). Certainly, the CESD could assist departments, by issuing reports on what he/she expected to see in departmental sustainable development strategies (CESD 1997: paras. 48-51). But it remained ministers' responsibility to devise their own strategies.

The result as Juillet and Toner pointed out (1997:198) is that the primary motivation for ministers to actively incorporate sustainable development into their departments' operations is the prospect of having to respond to a negative report from the CESD, and not directives from the centre. Consequently sustainable development activity has revolved around formatting plans acceptable to the CESD, an activity peripheral to the real business of government (Clark and Swain 2005). The Liberal government thus ensured that the discourse of sustainable development would be constrained within existing institutional boundaries. An environmental commissioner linked to the high-profile and well-respected OAG was a masterful compromise which bestowed credibility on the government's declaration of commitment to sustainable development, while providing that the dialogue between the cabinet and Parliament over its practical implications would be conducted through familiar and navigable channels.

### **The Political Strategy of the OAG**

The prominent role the OAG plays in contemporary parliamentary government was frankly analyzed by Auditor General Desautels in his 2001 valedictorian publication, *Reflections on a Decade of Serving Parliament*. He recognized that in 1977 Parliament was taking a "leap" when

it amended the *Auditor General Act* to grant the OAG “extensive new powers, defined only generally” (Desautels 2001: para. 263). The amendments sanctioned VFM auditing, which Desautels defined as one type of legislative auditing.<sup>2</sup> In Desautels’ words, the concern was that this expansion of the OAG’s mandate “would draw the Auditor General into policy matters and even into politics and might lead to the Office’s questioning of political judgement” (Desautels 2001: para. 264). The minister in charge of the legislation in 1977 had insisted in the House that the amendments would not draw the OAG into the realm of public policy discussion (Sutherland 2002).

Why, then, was there a concern? Because legislative auditing went beyond traditional financial auditing. Legislative audits were designed to give MPs information on “management performance across the board” (Desautels 2001: para. 259). Desautels conceded that “(t)here are no generally accepted standards for reporting non-financial performance, and the audit of any particular entity may require the development of specific standards for that purpose” (Desautels 2001: para. 259). Hence “there will always be some concern about the Auditor General’s crossing the hard-to-define line between management and policy” (Desautels 2001: para. 264). The *Auditor General Act* leaves it up to the Auditor General to decide where the line is, which is not a “fixed” one (Desautels 2001: para. 265). How does the Auditor General prevent himself from crossing this line? At one end are administrative policies, which are clearly auditable. At the other end are the policies incorporated in legislation and subject to political debate, which the OAG would never audit. In between is the “grey area” where the line between management and policy is “difficult to navigate” (Desautels 2001: para. 265). This gray area includes policies supporting programs which specify how they should be managed; and policies establishing program goals and major program decisions.

Desautels claimed that he had a solid track record of staying on the right side of the line between policy and management (Desautels 2001: para. 266). He was satisfied this was the case, because his choice of audits over the years had generated few complaints that he had crossed the line. In fact, if he had not received any complaints at all that he had crossed the line then he would likely conclude that the OAG had not fully exercised its mandate (Desautels 2001: para. 266). Desautels proclaimed that the OAG’s current role in legislative auditing was not only generally accepted, but in increasing demand by Parliament (Desautels 2001: para. 288).

The clear implication is that the extent of the OAG’s authority cannot be ascertained from a reading of the *Auditor General Act*, but instead is flexible and contingent on the Auditor General’s own sense of how far he can go without endangering the OAG’s professional reputation.

This is the essential background to understanding the OAG’s strategic response to its new responsibility for the CESD. In his appearing before the committee studying C-83, Desautels explicitly defined the parameters of the new CESD’s role in terms which protected the integrity of the OAG audit function. First, the Commissioner would not be commenting on the merits of current environmental policies. Second, C-83 did not provide for the Auditor General or the Commissioner to become an ombudsman. Such a role would endanger the credibility of the

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<sup>2</sup> The environmental audit added to the OAG’s arsenal in 1995 was another (Desautels 2001: paras. 260-261).

OAG/CESD. “This is because this role would require the commissioner to actively advance the principles of sustainable development, while auditors would generally limit themselves to pointing out instances of non-compliance with these principles” (Desautels 1995: 25-26). Leadership in formulating departmental sustainable development plans, as well as the management systems for monitoring progress in achieving the plans, had to be the responsibility of the departments. The CESD could not get involved at these stages, as this would compromise the independence of the subsequent audits. And finally, the mandate of the OAG/CESD was restricted to the responsibilities of the federal government. There could be no broad role for the CESD in co-ordinating with other levels of government.

Desautels acknowledged that for supporters of sustainable development, an “expectation gap” now existed, between the original vision of what an environmental commissioner should do “and reality, both in terms of mandate and available resources” (Desautels 1995: 25). For Liberal backbenchers unhappy with their government’s retreat from the Red Book commitment, the sustainable development initiative had become hostage to the Auditor General’s conception of the new Commissioner’s role under responsible government.

Desautels could have added that the remedy lay with the MPs themselves. Instead this point was made by the Ministry of Environment’s Deputy Minister, Mel Cappe, in his response to complaints from Liberal MPs that C-83 did not provide any programmatic content to the concept of sustainable development. Cappe replied in classic responsible government terms. Good sustainable development practices were still in evolution and had to be developed by each department. C-83 created the framework enabling Parliament to hold the executive accountable for their efforts yet without constraining ministers in crafting their sustainable development strategies. He went on:

“In this context, it is equally true that it is merely the accountability regime that is imposed on departments. So the Auditor General and the commissioner will report to Parliament on what departments said they would do and what departments have done. Then it’s up to Parliament to hold ministers accountable as to whether they’ve set adequate objectives or have met the objectives. It comes back to the fundamentals of parliamentary accountability” (Cappe 1995: 21).

When the first Commissioner appointed under the C-83 regime, Brian Emmett, made his initial appearance appeared before the Standing Committee on Environment and Sustainable Development he similarly invoked ministerial responsibility in response to Liberal MPs who urged him to take an aggressive advocacy approach (Emmett 1996). In his first annual report to the House he reminded MPs that C-83 “respected the traditional lines of ministerial accountability to Parliament.” Ministers were responsible for policy choices, while the Commissioner’s role was to assist Members in their oversight of how ministers protected the environment and fostered sustainable development (CESD 1997: para. 44).

As we shall see below, during the Gélinas crisis of February 2007 Auditor General Fraser again invoked the conventions of responsible government to protect the source of the OAG’s institutional influence, the independent legislative audit.

## **The CESD as the Bearer of Bad News: Communicating a Message of Policy Failure in the Language of the Audit**

The CESD's primary product is the annual report, which addresses three broad responsibilities under the terms of the *Auditor General Act* as amended by C-83.<sup>3</sup> These are: environmental auditing; monitoring departmental sustainable development strategies; and reporting on how departments have handled citizen petitions. The petitioning process is not relevant to the issues raised in this paper so it is not discussed below.<sup>4</sup>

The VFM or performance auditing of environmental programs continues the work handled by the OAG prior to the passage of C-83.<sup>5</sup> The CESD's audits are submitted to the Standing Committee on Environment and Sustainable Development, which may choose to review them at public hearings (see the next section of the paper).<sup>6</sup>

In her public statements on Johanne G elinas' termination as Commissioner in January 2007 the Auditor General indicated that the environmental audits were not having as much impact on government management as the OAG's other audit practice. She told the Standing Committee that the implementation rate of OAG reports was around 45%-50%, while the rate for CESD reports was certainly under 20% and might even be under 15% (Fraser 2007A: 11).

The discussion below will focus on the fate of the sustainable development initiative and not of the CESD's environmental auditing practice. The cumulative lack of success of the departmental audits, which MPs were unlikely to be aware of in the absence of briefings from the Commissioner or the Auditor General, did not sharply pose the question of the federal government's commitment to the success of the CESD as did the failure of the sustainable development strategies. It was the prospect of achieving sustainable development which had attracted Members' interest during the 1995 debate and led to the study by the Standing Committee on the contribution an independent Commissioner could make towards achieving this ultimate goal.

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<sup>3</sup> In addition to the annual reports, the CESD has released guides designed to assist ministries in developing and improving their sustainable development strategies in 1999 and 2003 (CESD 1999, 2003A). It has also released two status reports following on the results of previous audits (CESD 2008, 2009A). For the first time in 2009 the report on the CESD's regular audit work was published in two separate volumes, in the spring and fall (CESD 2009B, 2009C).

<sup>4</sup> Petitions about environmental matters raised in the "context of sustainable development" may be submitted to the OAG who forwards them to the relevant minister. The minister has 120 days from date of receipt to return a response (or longer if this proves to be impossible) (s. 22 of the amended *Auditor General Act*). The CESD reports on departmental progress in complying with this requirement in the annual reports (s. 23). Over the years this monitoring has extended from simply reporting on compliance with the timelines, to more recently, monitoring departmental implementation of the commitments made in the official responses to petitions (see CESD 2001: chap. 7; 2003: chap. 4; 2005: chap. 8; 2007: chap. 2).

<sup>5</sup> In his first report in 1997 Commissioner Emmett noted that the OAG had already completed 42 audits with a significant environmental or sustainable development component (CESD 1997: para. 38). The OAG continues to audit programs with an environmental focus, separately from the CESD's work, and reports the results in its own reports.

<sup>6</sup> These audits have on occasion been the subject of hearings held by other parliamentary committees in both the House of Commons and the Senate (CESD 2004: para. 42).

The government departments originally subject to sustainable development obligations had to prepare their first strategies within two years, and then produce new versions every three years thereafter. In the first round (1997) 24 departments were required to participate, and as well four other agencies complied voluntarily. In the most recent, fourth round (2007-09), 32 departments and agencies were required to comply.

The CESD's tenth annual report, issued by Gélinas' successor Ron Thompson in October 2007, formally acknowledged that the "sustainable development strategies have not achieved their intended purpose." It was clear "that the strategies are not helping or encouraging departments to take environmental issues into account, as was envisioned when the government set the process in motion in 1995." In the Commissioner's view, "the preparation and tabling of the strategies have become little more than a mechanical exercise, required to fill a statutory obligation. Departments may be meeting the letter of the law with the strategies but most are certainly not responding to the spirit of it" (CESD 2007: 7). This finding, which built on a decade of increasingly critical reports, provided official corroboration of a verdict already widely expressed within the policy community including by ENGOs, think tanks, academic observers, federal government insiders, and a Senate committee (Bregha 2003, 2007, Clark and Swain 2005, Senate 2005, Toner and Frey 2005).

According to these critics the implementation gap followed from the structure of the sustainable development program itself. The failure to assign responsibility for the initiative to a central agency with the authority to co-ordinate horizontal implementation across the bureaucracy all but guaranteed that sustainable development would not rise above the level of a latent paradigm within the federal government. Individual departmental reporting on short-term cycles to an external parliamentary officer fostered a "conservative, low-risk, low-impact" strategy for complying with the program within departments, instead of innovative leadership and organizational change (Bregha 2003). The lack of leadership from the centre backed by the real prospect of sanctions ensured that sustainable development would be a negligible factor in agenda-setting and the allocation of resources within departments.

In his first report, issued less than a year after his introductory appearance before the Standing Committee in 1996, Commissioner Brian Emmett recognized that the OAG's ongoing audits of programs involving environmental and sustainable development issues already revealed an "implementation gap" (CESD 1997: para. 33). However, the exact criteria he would employ to monitor and report on departments' efforts to implement their sustainable development strategies and address the implementation gap had yet to be formulated. As Desautels had explained in *Reflections on a Decade of Serving Parliament* (2001), there were no generally accepted, precise standards for legislative auditing. Instead, the introduction of a new program might require the development of new auditing standards (Desautels 2001: para. 259). In the case of sustainable development the appropriate criteria would evolve as departments learned how to formulate and implement sustainable development strategies tailored to their mandates and structures (CESD 1997: para. 48).

By 2001, when departments were required to release the second round of their sustainable development strategies, the CESD had identified successful management systems as the

appropriate indicator of a department's capacity to deliver the sustainable development goals agreed upon by ministers (CESD 2001: para. 2.13). Ottawa was failing to meet its policy commitments because it was paying "too little attention to the management side of the Sustainable Development equation" (CESD 1998: para. 4). The implementation gap could not be closed without better management systems (CESD 2000: para. 1:17). Significant improvements in environmental protection were possible through the application of these systems to the administration of sustainable development strategies (CESD 1998: para. 10). The constituent elements of an effective management system included a manageable roster of sustainable development objectives, clear and measurable targets, and effective reporting systems so managers and Parliament had good information with which to evaluate progress towards achieving the targets.

However, once it became obvious that the Liberal government had no intention of embracing sustainable development as a new governing paradigm the CESD was faced with the challenge of communicating this message of policy failure, but couched in the language of management systems. The CESD delivered this critique through scrutinies of the sustainable strategies as they were rolled out in successive rounds (in 1997, February 2001, 2004-06 and most recently 2007-09); departments' reports on achieving their strategies; and by sampling departments' progress towards implementing the strategies. The annual reports documented a protracted failure across departments to internalize sustainable development as a top organizational priority. The evidence included the failure to set clear benchmarks and targets and the lack of good information about progress. Where progress was being made, it was in the handful of departments with sound management systems in place.

After Johanne G elinas became Commissioner in 2001 the tone of the reports became more exhortatory, though the touchstone of good management practice was never formally abandoned. The failure of central agencies to take responsibility for the sustainable development program became a regular complaint in the annual reports. The 2002 report began with a reminder that Canada had committed itself to a broad sustainable development agenda at the 1992 Rio Summit and the follow-up 2002 Johannesburg Summit, including signing on to the UN Conventions for Climate Change and Biological Diversity. The lack of progress on a variety of high-profile environmental issues in the years since Rio was pointedly linked to Canada's global reputation for delivering on its commitments (CESD 2002: para. 42). The 2003 report warned that the inability of the federal government to close the gap between its commitments and its actions would pass an increasing burden on to future generations of Canadians (CESD 2003B: para. 28). In the 2004 report the Commissioner reminded her readers that the Prime Minister had signed the *Guide to Green Government* in 1995, but "since then, the quality of direction from the centre has not kept pace with needs and opportunities" (CESD 2004: para. 36). The 2005 report opened with a proclamation of global environmental decline and ecological collapse. Sustainable development, which promised to be the third great planetary transformation after the agricultural and industrial revolutions, could only be achieved if governments moved citizens and industries down the sustainability path (CESD 2005: 1-4).

Commissioner G elinas's final report in September 2006 precipitated a legitimacy crisis for the CESD culminating in her departure and the reconstitution of the government commitment to

sustainable development. This will be discussed below following an analysis of the CESD's relationship with the Standing Committee on Environment and Sustainable Development.

### **The CESD and the Standing Committee on Environment and Sustainable Development**

Under House of Commons Standing Order 108(2), standing committees are empowered to study and report on all matters relating to the Department assigned to them. Under S.O. 108(2)(e), this mandate extends to the management and organization of the Department assigned to it, "as the committee sees fit" (House of Commons 2009). This is the clause empowering the Standing Committee on Environment and Sustainable Development to receive and study the reports of the CESD as well as the sustainable development initiative.

It is important to note that this clause also enables the Committee to pursue other matters or inquiries at its discretion. However, under S.O. 108(1) the Committee's control over its own agenda can be displaced by referrals from the House, most importantly legislation, both government and private Members.'

Under the *Auditor General Act* the annual reports of both the CESD and the Auditor General are tabled in the House of Commons (s. 7, s. 23(2)). But there is a crucial difference in how these reports are treated. Under S.O. 108(3)(g), the reports of the OAG are automatically referred to the Standing Committee on Public Accounts (PAC). These reports are the PAC's main agenda item and indeed the OAG choice of audit topics effectively drives the Committee's work. In contrast the Standing Committee on Environment and Sustainable Development exercises a broader jurisdiction.

In fact, the Standing Committee does not devote a significant amount of its time to the CESD at all, as the table below makes clear.



**Standing Committee on Environment and Sustainable Development –  
How It Spent Its Time 1998-2008**

<b>Total Number of Meetings: 460</b>
<b>On CESD &amp; Related Matters: 30 meetings</b>
Meetings with the CESD to discuss the Annual Reports: 15
Other meetings with the CESD: 5 <ul style="list-style-type: none"> <li>• 4 at which the CESD testified on environmental audits in OAG reports</li> <li>• Gélinas debut appearance as Commissioner in 2001</li> </ul>
Other meetings on role of CESD: 5 <ul style="list-style-type: none"> <li>• 4 to discuss controversy over Gélinas departure in 2007</li> <li>• 1 to discuss Green Ribbon report on future of CESD in 2008</li> </ul>
Other meetings to discuss progress on sustainable development: 5 <ul style="list-style-type: none"> <li>• 1 briefing from ENGO</li> <li>• 1 meeting with departmental officials</li> <li>• 3 to discuss Canadian role at Johannesburg Summit</li> </ul>
<b>Other Meetings – Four Most Popular Topics</b>
Government bills: 162 meetings
Study of the Kyoto Protocol (2003-05): 44 meetings
Private Members' Public Bills: 39 meetings
Pesticides Study (1999-00): 37 meetings

The Committee has little incentive to devote significant amounts of time to tracking the progress of the sustainable development initiative within the federal government. The role of the CESD is to validate the management systems ministries put in place to achieve their sustainable development strategies. Thus, debate in the Committee over the CESD's reports is not about how Ottawa is actually implementing sustainable development in Canadian society, but rather about how the federal bureaucracy is supposed to be re-organizing itself in order to implement departmental-level sustainable development strategies – by implementing processes that are auditable by the CESD.

As professional auditor, the CESD is unable to formally confront the root causes of ministers' reluctance to embrace the recommendations from the annual audits. This would take the Commissioner into the arena of policy advocacy, as Auditor General Desautels had recognized. Instead, the Commissioner can only respond to MPs' queries about the slow pace of reform in the language and terminology of the audit framework. As a result Committee debates on the CESD's work tend to be preoccupied with questions of governmental machinery and process, typically concluding that the essential problem is lack of 'leadership' at the top – as if the greening of the Canadian political economy was simply a matter of sufficient political will (for the flavour of these exchanges see Gélinas 2004, 2005). To put it simply, the Ministry of the Environment is not a central agency because of the executive's failure to recognize that a precondition of achieving sustainable development is a re-organization of the governmental decision-making process. Instead, the existing economic and ideological structures of Canadian society mean the Ministry of the Environment is not going to become a central agency.

Not surprisingly, Committee Members anxious to tackle the environmental problems besetting Canadian society have taken advantage of S.O. 108(2) to mount inquiries of their own choosing. Both the pesticides study conducted over 1999-2000 and the protracted consideration of the Kyoto Protocol between 2003 and 2005 were launched under the authority of this Standing Order. As the Committee had pointed out in its 1994 review of the Red Book commitment, the audit is not the right tool for policy evaluation and advocacy.

### **Crisis and Renewal**

Commissioner G elinas released her report on the federal government's climate change policies in September 2006. Much of the report was devoted to conventional VFM or performance auditing. For example, the CESD found that the government lacked systems for tracking and monitoring the effectiveness of the more than \$6 billion in funding already announced for climate change initiatives (CESD 2006: 10, 48). Programs managed by Natural Resources Canada designed to reduce greenhouse gas emissions were faulted for lacking clear targets and consistent practices for financial management and reporting (CESD 2006: chap. 3).

However, the report as a whole was framed in the apocalyptic language which the Commissioner had adopted in her earlier critiques of the lack of progress on sustainable development. She began: "Climate change is a global problem with global consequences: The implications are profound. Experts say we need to act quickly and effectively. I believe this is the prudent thing to do... I am more troubled than ever by the federal government's long-standing failure to confront one of the greatest challenges of our time. Our future is at stake" (CESD 2006: 5-6). All levels of government, industry, business, science, academia and civil society groups would have to collaborate to tackle this momentous crisis (CESD 2006: 9). The ensuing analysis was not confined to an audit of the management systems in place to monitor programs introduced to implement the Kyoto Protocol. The report directly criticized the effectiveness of the Martin government's plan to reduce emissions in the transportation and industrial sectors of the economy (CESD 2006: 48). It called on the Minister of Natural Resources to introduce a strategy for reducing emissions from the oil and gas sector (CESD 2006: chap. 3). It chastised the federal government for having no policy at all on adapting to climate change (CESD 2006: 10). And finally, in a clear reference to the Harper Conservatives' lack of enthusiasm for the whole issue, the Commissioner declared: "The current government has announced that Canada cannot realistically meet its Kyoto target. If so, then new targets should take its place" (CESD 2006: 13).

This report was released in the middle of the uproar over the Conservative government's disavowal of the Kyoto Protocol emissions targets the Chr tien government had formally committed Canada to shouldering. With the environment at the high point of the issue-attention cycle the CESD's report was bound to receive more intensive media coverage than usual. Climate change had become a paradigmatic example of a policy where the "implementation gap" could not plausibly be blamed on defects in the machinery of policy delivery, but instead reflected fundamental problems of political economy and the distribution of power in Canadian society. It starkly demonstrated the fallacy of interpreting sustainable development as merely a program for greening government operations. Climate change failure reflected the broader

failure of the Canadian government to embrace the substance of the sustainable development discourse.

The new Conservative government had not only disavowed its predecessor's climate change programs but further, it challenged the validity of the policy framework itself, the Kyoto Protocol (Brownsey 2007). When the Commissioner responded to the Conservative repudiation of the emissions reductions levels prescribed for 2008-2012 by asking for the adoption of new targets, she was issuing a direct challenge to cabinet. The target for emissions reductions was the heart of the Kyoto Protocol framework. The decision to sign the Protocol and commit to binding reductions had been made by Prime Minister Chrétien himself. The Harper Conservative government was in the process of dismantling Liberal climate change programs because it did not accept the rigid schedule of emissions reductions mandatory for signatories to the Protocol.

The Commissioner had definitely entered what Auditor General Desautels defined as the "gray area" for legislative auditors: the audit of a policy establishing program goals and decisions. But had she gone too far? For Desautels, Parliament's reaction was the signal which determined whether an audit had crossed the line. But the CESD was not directly accountable to Parliament – instead she reported to the Auditor General.

The media controversy over the role of the CESD sparked by the release of the climate change report came to a head in January 2007 when Auditor General Fraser dismissed Commissioner Gélinais.<sup>7</sup> In her defence of this move before the Standing Committee on the Environment and Sustainable Development, Fraser framed the decision in terms of the 1995 debate over the creation of the CESD. Responsible government imposed limits on what the OAG or the CESD could offer parliamentarians. The credibility of the audit function depended on the refusal of the OAG to engage in policy advocacy. But there was always pressure from MPs and the environmental community to cross the line.<sup>8</sup> To do would violate the 1995 agreement under which the OAG accepted responsibility for the CESD (Fraser 2007A: 3-5, 7, 11). She acknowledged there continued to be an expectations gap about the role of the Commissioner which the climate change controversy had helped to fuel (Fraser 2007A: 7). While Fraser refused to disclose whether she regarded the Gélinais report as a breach of the institutional settlement Parliament had endorsed when it created the CESD, it was clear that she regarded the controversy as a potential threat to the OAG's authority.

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<sup>7</sup> In media interviews Gélinais disclosed she had been fired, though she was planning to leave anyway (Curry 2007). Subsequently she made it clear that she disagreed with Fraser over the direction of the CESD. She favoured a parliamentary officer reporting directly to Parliament and mandated to engage in advocacy. She recognized that an advocacy role was incompatible with the OAG's auditing work (Bueckert 2007, Green Ribbon Panel 2007: 29-30, Woods 2007).

<sup>8</sup> When challenged to cite evidence of pressure from MPs the Auditor General referred to two private Members' public bills affecting her jurisdiction (Fraser 2007B: 6, 9). The first was NDP MP Pablo Rodriguez's C-288, *An Act to ensure Canada meets its global climate change obligations under the Kyoto Protocol*. The original version of this bill introduced in May 2006 would have made the CESD responsible for monitoring the government's climate change plan. However, this clause was removed at the committee stage on the bill in the fall of 2006. The second was NDP leader Jack Layton's C-377 (carrying the same title), which contained a similar clause. This bill was debated at second reading shortly after Fraser's first appearance before the Committee on the Gélinais controversy.

At the same time the Auditor General informed Members that an internal review was underway to determine why the CESD VFM audits were less influential than the OAG's work. As already noted, the rate at which government departments accepted audit recommendations was consistently lower for the CESD than for the OAG (Fraser 2007A: 3, 6, 11). The Commissioner was not as visible on Parliament Hill and in contrast to the Auditor General, had proved unable to exploit the weapon of publicity and the platform of a parliamentary committee to mobilize Members in support of her reports.<sup>9</sup>

The problem for the Auditor General was how to manage this crisis, since resolving it was beyond her jurisdiction, as she pointed out to the Committee. Ultimately this was Parliament's responsibility. It soon became evident that she could not count on the Committee's support for a reconstituted environmental audit function. Following the announcement of Gélinas' departure, the Standing Committee, now controlled by the opposition parties in a minority Parliament, passed a Liberal motion calling on the government to appoint an independent Commissioner reporting directly to Parliament, with a mandate to be an advocate on environmental and sustainable development issues (Standing Committee 2007).<sup>10</sup> As we have seen, this was the first choice of many of the backbenchers who had served on the Committee in 1994-95.

### ***The Green Ribbon Panel***

As a first step towards rehabilitating the role of the CESD the Auditor General appointed an elite panel to conduct soundings on its future throughout the policy community.<sup>11</sup> The Auditor General's advisory group, known as the Green Ribbon Panel, consulted among parliamentarians, environmental organizations, other interest groups and policy actors in the summer of 2007.

While the Panel found general support for the CESD's auditing practice, the consultations suggested that the audience for the CESD remained polarized along the same general lines as in 1995 (Green Ribbon Panel 2007: 19). The Panel endeavoured to argue that even within the scope of its existing statutory mandate the Commissioner did have some room to comment on broader environmental issues, in that s. 23(2) of the amended *Auditor General Act* authorized the Commissioner to report to Parliament on any matter within the jurisdiction of the office that he or she deemed relevant. For example, it was an established practice for the annual reports to open with a general overview of the environmental trends and policy challenges facing the federal government (Green Ribbon Panel 2007: 27). Nevertheless the Panel accepted that while the CESD should be an advocate of good management practices within the government, the

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<sup>9</sup> When asked to explain the CESD's lower success rate Fraser suggested that, pending further investigation, the possible explanations included that audit recommendations were too general, the audits themselves were unfocused, or "it may just be to a lack of commitment [by government departments] to deal with some of these issues" (Fraser 2007A: 11).

<sup>10</sup> The Conservative minority on the Committee abstained from the vote.

<sup>11</sup> The panellists were Elizabeth Dowdeswell (the chair), Jim Mitchell and Ken Ogilvie. Elizabeth Dowdeswell was a former Under-Secretary General of the UN and executive director of the UN Environment Program, and more recently the president of the Nuclear Waste Management Organization. Jim Mitchell was a former senior civil servant and then a founding partner of the Sussex Circle, a policy consulting firm in Ottawa. Ken Ogilvie was executive director of Pollution Probe and a former vice-chair of the National Round Table on the Environment and the Economy.

essential institutional prohibition against advocacy of specific policies had to be respected as long as the office was housed within the OAG (Green Ribbon Panel 2007: 28).

The Panel did recommend institutional reforms to enhance the status of the Commissioner as a parliamentary officer, such as a statutory amendment to introduce a fixed, seven-year term (Green Ribbon Panel 2007: 31). If the CESD was to continue to be appointed by the Auditor General then he or she should be obligated to consult informally with parliamentarians before appointing a new Commissioner (Green Ribbon Panel 2007: 31-32). The Commissioner should continue to issue the annual report directly to Parliament with the referral to the Standing Committee on Environment and Sustainable Development (Green Ribbon Panel 2007: 32).

But on the essential problem of legitimacy the Panel had no easy answers for the Auditor General. The Panel recognized that the absence of effective leadership from the centre was the fundamental flaw in the government's existing sustainable development program (Green Ribbon Panel 2007: 20). It noted that the Standing Committee made little use of the CESD's annual reports, a failure which Auditor General Fraser had cited as one indicator of the CESD's faltering performance. The Panel recommended that the OAG and CESD approach MPs to discuss how the reports could be better used to support the Committee's oversight role (Green Ribbon Panel 2007: 33). But the Panel declined to contemplate the essential question which inevitably must enter into the calculations of MPs serving on the Committee: why should the scarcest of resources at a parliamentarian's disposal – time – be devoted to an oversight activity which often appeared to offer scant prospects of an immediate political pay-off, given the low profile of the sustainable development initiative?

### ***Enter John Godfrey, MP***

The affirmation by the Green Ribbon Panel of the CESD's existing role as independent auditor explicitly repudiated the option recommended by the opposition-dominated Standing Committee in its February 2007 report on the Gélinas controversy. This posed a problem for the minority Conservative government, which had committed itself to a revival of the sustainable development initiative when the fourth round of departmental strategies had been tabled in December 2006 (Environment Canada 2006). So the government was receptive when veteran Liberal MP John Godfrey offered a Private Members' Public Bill, C-474, which appeared to reconstitute the sustainable development initiative in terms acceptable to the opposition parties.

Bill C-474, the *Federal Sustainable Development Act*, was introduced in November 2007, debated in the House and in the Standing Committee over the winter of 2007-08, and received third reading in June 2008 (Canada 2008). The Act reaffirms the Brundtland definition of sustainable development, which had appeared in the amended *Auditor General Act* in 1995, as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (s.2). Under the new Act the federal government accepts the basic principle that sustainable development is based on the "ecologically efficient" use of natural, social and economic resources, and acknowledges the need to integrate environmental, economic and social factors in the making of all government decisions (s. 5).

C-474 was endorsed by Commissioner Ron Thompson because it frontally addresses the key failure in the sustainable development program: the lack of institutional leadership from the

centre (Thompson 2008). The new Act requires the cabinet to develop an over-arching sustainable development strategy setting out the terms and conditions for the departmental strategies. The purpose of the Act is to provide the legal framework for developing a federal sustainable development strategy, “that will make environmental decision-making more transparent and accountable to Parliament” (s. 3). It directs the government to create a cabinet committee to oversee the development of a “Federal Sustainable Development Strategy” (s. 6). The Minister of Environment is required to create a Sustainable Development Office within the Ministry, to develop procedures and systems for monitoring progress on implementing the federal strategy (s. 7(1)). At least once every three years this Office must provide the Minister with a progress report for tabling in the House of Commons (s. 7(2)).

Within two years of Bill C-474 going into effect, and every three years following, the Minister must produce the federal Strategy setting out goals and targets and an implementation plan for meeting every target. A draft of this Strategy is to be submitted for comments to a Sustainable Development Advisory Council composed of representatives from the provinces and territories, Aboriginal peoples, ENGOs, the business community and labour; the Standing Committee on Environment and Sustainable Development; and to the general public (s. 9). Once completed, the Minister must submit the Federal Strategy to cabinet for approval. The Strategy will then be tabled in the House of the Commons and referred to the Standing Committee (s. 10). Every government department and agency covered by the Act is required to prepare its own plan compatible with the Federal Strategy, containing “objectives and plans,” to be tabled in the House of Commons within one year after the Federal Strategy was tabled. Ministers will have to update these strategies at least once every three years (s. 11). Civil servants’ performance-based contracts must contain provisions for meeting the targets set out in the Federal Strategy and in the departmental strategies (s. 12).

The Act retains the CESD, who will continue to be appointed by the Auditor General under s. 15.1(1) of the *Auditor General Act*. The CESD is to monitor how departments are meeting the targets set out in their own plans, and as well how the departments are contributing to the targets set out in the Federal Strategy (ss. 16-17). In addition the Commissioner will assume new obligations for the success of the sustainable development initiative not contemplated in 1995. The Minister is directed to submit the draft Federal Strategy to the CESD, “for review and comment as to whether the targets and implementation strategies can be assessed” (s. 9(4)). The CESD is also required to inspect the progress report prepared at least once every three years by the Sustainable Development Office, to “assess the fairness” of the information contained in it (s. 23(3)).

The original version of C-474 required the CESD to evaluate the draft federal Strategy itself. This was removed at the insistence of Commissioner Thompson, who could not support a bill directly implicating his office in the making of a policy which would subsequently be audited. Instead the Commissioner consented to the wording quoted above. His responsibility for the federal Strategy will be limited to determining whether the measures and indicators included in the Strategy are capable of being assessed by him in the subsequent audit. He will evaluate whether the information contained in the progress reports could reasonably be interpreted to support the government’s own claims about its success (Godfrey 2008, Thompson 2008).

The *Federal Sustainable Development Act* renews the 1995 settlement between the executive and the OAG/CESD. The Act affirms the symbolic commitment of the federal government to the sustainable development paradigm. For the first time the obligation to plan for sustainable development is formally fixed at the cabinet level. All departmental plans must conform to the over-all plan approved by cabinet. Nevertheless the new Act does not impede the PMO's control over the decision-making process. Direct responsibility for formulating the new federal strategy is assigned to the Minister of the Environment, not a central agency. The SD Office reports to the Minister of the Environment, not the new cabinet committee (Environment Canada 2008). The Act sets the table for the Ministry of the Environment to become a central agency, but that decision will still be up to the PMO.<sup>12</sup>

At the same time the OAG retains the tools it needs to protect the institutional autonomy of the audit. Its status as the guardian of the CESD's independence is confirmed. The Auditor General will continue to appoint the Commissioner, not Parliament. The Commissioner will still report to Parliament "on behalf of the Auditor General." During the legislative debates on C-474 the Commissioner succeeded at having language removed from the bill which would have integrated his office into the policy-making process. The distinction between policy advocacy and audit insisted upon by Auditor General Desautels in 1995 was thus preserved. Finally, the new Act does not affect the CESD's discretionary authority to select the departmental targets for its performance audits – affirming the legitimacy of this process and the role of the CESD as Parliament's environmental auditor.

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<sup>12</sup> The first Federal Sustainable Development Strategy must be tabled in Parliament by June 26, 2010 (Environment Canada 2008).

### III. THE ENVIRONMENTAL COMMISSIONER OF ONTARIO

#### Background to Adoption of the EBR

The campaign for an environmental bill of rights was launched by Canadian ENGOS\* in the 1970s during the era of “first wave” modern environmentalism, which was characterized by a policy style of bipartite bargaining between the executive and industry (Emond 2008, Hoberg 1998). Casting environmentalism in the language of rights was an attempt to import US-style “pluralist legalism” (Hoberg 1997:348) into a parliamentary milieu dominated by middle of the road parties where ENGOS had little real power. Business capture of the regulatory process was to be countered through legalist and procedural reforms institutionalizing citizen and ENGO access to the executive decision-making process. The reforms packaged together under the banner of a bill of rights espoused by groups such as the Canadian Environmental Law Association included: expanded standing before courts and administrative tribunals, broader judicial review powers over environmental policy-making, statutory notice-and-comment rights, freedom-of-information legislation, mandatory environmental impact studies for major infrastructure projects, class action suits, intervenor funding, and an environmental ombudsman. This agenda was heavily influenced by the environmental movement’s understanding of the American environmental law innovations of this period and in particular, was modelled on the Michigan *Environmental Protection Act* of 1970 (Muldoon and Swaigen 1993, Castrilli 1998).

Under the influence of “second wave” environmentalism in the 1980s closed bipartite bargaining was delegitimized and the Ontario government began to engage in multi-stakeholder consultations over new policy initiatives. Many of the elements in the ENGOS’ reform package most easily adaptable under the Westminster model were accepted by the Liberal (1985-90) and NDP (1990-95) governments, in the form of the *Freedom of Information Act* (1987), the *Municipal Freedom of Information Act* (1989), the *Intervenor Funding Project Act* (1988), and the *Class Proceedings Act* (1992). The ENGO strategy of building bridges to the opposition parties at Queen’s Park resulted in a flurry of Private Members’ Public Bills introduced by prominent opposition Members endorsing an environmental bill of rights (Winfield 1994). While none of these made it to third reading, those which were debated on the floor of the Legislature attracted substantial media comment. These bills reflected the legalistic model espoused by the ENGO movement, and included features appearing in some form in the Environmental Bill of Rights (EBR) eventually adopted by the NDP government, such as notice-and-comment rights, liberalized rules of standing, and whistleblower protection. The bills also provided for a statutory right to a clean environment, a concept based on US public trust doctrine. A considerable weaker version of this provision appeared in the NDP government’s EBR (Castrilli 1998).

None of the Private Members’ Public Bills provided for a parliamentary officer reporting to the Legislature. Instead, an existing tribunal, the Environmental Appeal Board, would be granted new powers to review government instruments and regulations. The cabinet would retain control over appointments to the EAB, this being a traditional tool employed by the governing party in Ontario to ensure that arm’s length agencies, boards and commissions do not stray too far beyond the acceptable boundaries of policy.

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\* Environmental Non-Government Organizations



A promise to introduce an environmental bill of rights appeared in the NDP's successful 1990 campaign platform, yet once elected, the new government relinquished control over implementing this high-profile commitment to an independent body. The Task Force appointed by Minister of the Environment Ruth Grier in 1991 contained representatives from corporate business, the legal community, the ENGO movement, and the provincial bureaucracy. In 1991-92 it consulted extensively with the policy community, including the Ontario Federation of Labour, the Ontario Federation of Agriculture, the Ontario Mining Association, the Ontario Forest Industries Association, the Sierra Club, the Canadian Bar Association, the Association of Municipalities of Ontario, the Advocates' Society, and the Environmental Appeal Board. While the Task Force's terms of reference were negotiated with the Minister's office, the work of drafting the EBR legislation was formally delegated to the Task Force.

By the time the government introduced a bill based on the Task Force report in May 1993, the NDP was in dire need of a policy victory. The provincial economy was mired in a recession, the NDP had plunged in the polls, ministers were divided over the government's retreat from key ideological positions, and program cutbacks had alienated some of the party's key constituencies including many in the environmental movement. Compounding the government's problems with environmentalists was the self-inflicted wound of the garbage dump controversy in the Greater Toronto Area. Ruth Grier, the party's environmental champion when in opposition, had been replaced by Bud Wildman, one of Premier Rae's most reliable ministers.

The Task Force report, the product of extensive community consultations, exemplified the corporatist policy style the NDP government had embraced as the strategy for addressing the province's economic problems as well as its own unpopularity. Here was an opportunity to deliver on a key promise to an important constituency while demonstrating that a social democratic government could work with the business community. Over and over again in the legislative debates on the EBR, Wildman and other New Democrats stressed its provenance as the product of wide and inclusive consultations. They emphasized how the government's bill closely resembled the version drafted by the non-partisan Task Force (Wildman 1993A, 1993B, 1993C; Grier 1993). The broad-based consensus backing the bill surely indicated that it deserved the support of the Legislature.

As we shall see however, the government's reluctance to tamper with the Task Force's final product meant that it avoided the tough decisions about how the Environmental Commissioner – an office for which there was no real precedent in the province's parliamentary history – should be integrated into the existing political system, an issue that the Task Force had understandably declined to address explicitly, given its status as an appointed and non-partisan body.

### **The Role of the ECO**

Hoberg has interpreted the EBR as an example of the judicialization of Canadian environmental policy characteristic of "second wave" environmentalism in the 1980s (Hoberg 1998). However, the EBR recommended by the Task Force and adopted by the NDP government in 1993 was quite different from the Private Members' Public Bills debated in the previous decade, which did reflect the legalism of second wave environmentalism.

At the outset of its work the Task Force deferred to its business members and rejected the judiciary as the primary institution for enforcing government compliance with the EBR (Task Force 1992A: 17). This was a significant defeat for the environmental movement which was enamoured with a Michigan-style legal regime privileging the courts as the forum for challenging executive dominance over policy (Swaigen and Muldoon 1993, Castrilli 1998). Instead, individuals would be empowered to participate in the departmental decision-making process in order to protect the environment. Yet this preference for political over judicial accountability did not absolve the Task Force of the obligation to explain how a meaningful enforcement mechanism could be incorporated into a political system dominated by the executive.

The Task Force's answer was to fall back on the traditional concept of ministerial accountability, but supported by a parliamentary officer, the independent Environmental Commissioner. The ECO would monitor the extent to which the government was complying with the EBR. The ECO's reports on the government's performance under the EBR "should provide the objective foundation of information from which accountability would flow" (Task Force 1992A: 68). Once the reports were tabled in the Legislature, the Task Force said, it "anticipates the need for specific Ministerial responses. Whether these responses occur in the Legislature or before a Standing Committee of the Legislature can be determined by others. However, ministerial responses to the Env'tal Commissioner will provide the opportunity for accountability within government" (Task Force 1992A: 186).<sup>13</sup> Thus, executive accountability for administering the EBR would occur within the existing legislative institutions. Yet the Task Force was unwilling to explain how the legislative machinery should engage ministers. Other than directing that the ECO's reports must be submitted directly to the Legislature, the EBR is silent on how the Legislature's existing procedures or practices could be adapted to address this new governmental responsibility.<sup>14</sup> The Task Force, a non-elected advisory body, prudently left this up to the elected politicians to determine.<sup>15</sup>

The statutory framework the Task Force proposed for the ECO followed logically from its conception of how this parliamentary officer would operate within the existing mechanisms of ministerial accountability. Since the ECO's role was simply to monitor implementation of the EBR by ministers, the ECO did not need any formal powers to compel the executive to abide by the procedural guarantees of the EBR. Nor did the ECO require the investigatory powers vested in other provincial parliamentary officers such as the Ombudsman and provincial

<sup>13</sup> The Task Force also noted that the degree of accountability it recommended under the EBR would not supplant, but simply complement, the existing mechanisms of accountability the political system provided, such as media publicity, the ballot box, and the executive's general accountability to the Legislature (Task Force 1992A: 68).

<sup>14</sup> On the Task Force's recommendation, s. 59 of the EBR empowers the Legislature to ask the ECO to take on special projects. However, responding to such requests cannot take precedence over the ECO's other duties. This is similar to a provision (s. 17 at the time) in the *Auditor General Act*.

<sup>15</sup> When the EBR was in Standing Committee on General Government, a senior civil servant in the Ministry of the Environment and Energy indicated that the creation of a dedicated standing committee of the legislature had been contemplated as one of a number of possible alternative mechanisms to the ECO for holding the executive accountable for compliance with the EBR, but rejected (Suter 1993).

Auditor General.<sup>16</sup> The Task Force considered, but rejected, the option of a new Environmental Auditor with the power to scrutinize government decision-making, including budgetary decisions (Task Force 1992A: 66).

Given the Task Force's conception of the ECO as providing "objective oversight" of how the executive implemented the EBR (Task Force 1992A: 66), it was important that the ECO be selected by the Legislature, not the cabinet (Task Force 1992B: 22-23). Under Part III of the EBR (ss. 49-60), the ECO is appointed by the cabinet on an address of the Legislature for a fixed term of five years. The ECO can be removed from office for cause only with the consent of the Legislature. The ECO's salary is fixed by cabinet, but cannot be reduced without the Legislature's consent. The office of the ECO's staff and budgets costs are set by the Legislature's Board of the Internal Economy and not the cabinet. According to the Task Force, these formal indicators of institutional independence were sufficient to ensure that the ECO could provide the "objective, non-partisan analysis" crucial to the concept of "political accountability which is implicit in the conceptual framework of the EBR" (Task Force 1992A: 68).

### **The Parliamentary Officer as Vox Populi**

The Task Force's report presented the NDP with a political problem. The government was determined to showcase the Task Force report on the promised EBR as a model of corporatist co-operation. This strategy severely constrained the extent to which the EBR approved by cabinet could deviate from the Task Force's proposed text. But the Task Force had avoided the tough questions of how ministers would actually be called to account for failing to comply with the EBR. This posed a credibility problem for the NDP, as opposition MPPs had little difficulty in detecting the toothlessness of the ECO as an enforcement mechanism once the EBR was tabled in the Legislature (Johnson 1993; Offer 1993A, 1993B).

The solution was to invoke the "people," and not the Legislature, as the ultimate check on government. According to Minister Wildman, the ECO was to be the "voice of the people," monitoring how ministers complied with the EBR (Wildman 1993B). The sanction for ministers flouting the EBR would be negative public opinion. However, the ECO would not be vested with any statutory powers for enforcing the people's verdict. Instead, the negative publicity resulting from critical reports by the ECO should shame the executive into action.

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<sup>16</sup> The Task Force did recommend that the EBR include a clause analogous to s. 10 of the *Audit Act*, which obliged all ministries and Crown agencies and corporations to provide the Auditor General with any information that s/he requires and grants him/her a statutory right of access to their financial records (Task Force 1992B: 25). However this was not included in the EBR, a rare example of the NDP government rejecting a Task Force recommendation. Instead, sections 58 (2)(a) and (b) direct the ECO to include in the annual reports information about the extent to which ministries complied with his/her requests for information. This language is faithful to the concept of the ECO as simply a monitor or reviewer of executive compliance. When the EBR was in committee, the government majority voted down an opposition amendment which would have vested the ECO with powers to independently investigate ministry compliance with the EBR. The reason given was that the role of the ECO was to be focused on reporting on ministry compliance with the EBR, including compliance with the ECO's requests for information (Lessard 1993, Offer 1993C).

Under this populist conception of accountability, the ECO displaced the Legislature as the institution immediately responsible for monitoring executive implementation of the EBR. But as a non-elected independent official the ECO has neither the institutional means nor the authority to actively engage popular sentiment in the operation of the executive. Only the Legislature has the democratic legitimacy to bring public opinion to bear on government.

The NDP government's failure to incorporate populism into the existing mechanisms of government was reflected in the preamble of the EBR. The EBR declares that the "people" of Ontario recognize the inherent value of the natural environment and have a right to a healthful environment; and that the people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations. The preamble adds that the government has the primary responsibility for achieving this goal; but that the people (note, not the Legislature) should have the means to ensure that it is achieved in an effective, timely, open and fair manner. This is to be achieved by empowering Ontarians to participate directly in the government's environmental decision-making:

- detailed information about the policy-making process at every stage is to be made available to the public in a timely fashion;
- advanced notice of impending policy initiatives or reforms are to be provided on an electronic registry, with opportunities to comment before irrevocable decisions are made within government; and
- citizens are granted the formal right to directly request investigations into and reforms of existing programs, and receive formal replies to such requests.

Under the EBR, environmental decisions by government are now exposed to a greater degree of scrutiny and transparency, through an electronic Registry maintained by the Ministry of the Environment, but monitored by an independent Environmental Commissioner.<sup>17</sup> Procedural access to the departmental decision-making process is on offer to members of the public interested in environmental policy.

However, apart from the prospect of negative censure in the Legislature, ministers face no real consequences for ignoring the EBR's procedural rights. This was the result of the NDP government's failure to depart from the text provided by the Task Force and consider how to institutionalize its novel conception of the ECO as a populist vehicle. The ECO lacks the institutional tools similar to those vested in other parliamentary officers such as the Ombudsman and provincial Auditor-General, which would enable it to actively investigate executive compliance with the EBR. Consequently, the credibility of the EBR as a meaningful constraint on executive discretion largely depends on the extent to which Members of the Legislature are able to exploit traditional mechanisms of control such as the convention of ministerial accountability.

### **The EBR Outlined**

#### ***Application of the EBR (s.4)***

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<sup>17</sup> The Environmental Registry can be accessed at <http://www.ebr.gov.on.ca/ERS-WEB-External>.

The EBR applies only to those ministries and statutes designated by cabinet. This followed the recommendation of the Task Force, which had acknowledged that compliance with the EBR would entail the ongoing dedication of significant ministry resources. Nevertheless, beyond the 14 ministries originally prescribed by Ontario Regulation 73/94 (ECO 1996A: 7), there was a general expectation among supporters of the EBR that coverage would be progressively expanded across the ministries and offices of the provincial state (Task Force 1992B: 39-40).

However, this expectation was promptly dashed by the Conservative government led by Mike Harris, which peremptorily exempted the Ministry of Finance from the EBR shortly after it assumed office in 1995. This in itself did not fatally compromise the integrity of the EBR as Finance's main policy output – the budget – was already formally exempted (s. 33 of the EBR). Nevertheless this move set an obvious precedent, and accordingly drew a sharply worded protest from Commissioner Eva Ligeti (ECO 1996D).

Currently, only fourteen ministries (about half of the Liberal cabinet) are prescribed for the Part II sections directing ministries to post Statements of Environmental Values on the Registry, the notice-and-comment rules for government policy proposals, and citizens' right to apply for leave to appeal implementation of certain classes of government instruments. Only five ministries are required to post a master regulation on the Registry classifying all of their proposals for new instruments for the purposes of receiving public input. Only nine ministries are subject to Part IV, which enables citizens to apply for the review of existing policies and laws, and only 17 statutes in their entirety are subject to Part V, which permits citizens to apply for an investigation into possible violations of existing laws. It can be seen that different parts of the EBR apply differently to different ministries.

The ECO readily acknowledges the factors causing the uneven coverage (ECO 2005A: 9-11). Environmental legislation is constantly subject to revision. Whenever new statutes or regulations are introduced ministries must take the initiative to ask cabinet to amend the EBR's master regulation to extend its jurisdiction. Ministries themselves are regularly subjected to restructuring, thereby contracting the existing EBR coverage. And finally, of course, from ministers' point of view, accepting the EBR not only means finding the staff resources to ensure compliance, but also raises the unpalatable prospect of being subjected to negative public scrutiny from the Commissioner.

The onus is on the ECO to monitor these developments and press the government to extend the EBR coverage. Any constriction of the EBR's jurisdiction impedes the Commissioner's ability to monitor the executive through the Registry. The Commissioner's principal resource is the material the government agrees to post on the Registry. His or her ability to access authoritative information about government activities outside of the Registry is limited, though on occasion Commissioner Miller has reported on issues his office has uncovered through other means, such as independent staff research, interviews conducted with Ministry officials, and inspection of the legislative record.

Examples of the holes in the EBR's coverage are a regular feature in the ECO's annual reports. Such gaps starkly illustrate the limitations of a regime where executive participation is optional not mandatory. The *Oak Ridges Moraine Conservation Act* was passed in 2001, but EBR

coverage of proposed new instruments to be issued under its authority was not extended until June 2007 (ECO 2008A: 169). The *Nutrient Management Act* received third reading in June 2002, but EBR jurisdiction over proposed new regulations for implementing the Act was not forthcoming until February 2006. The *Greenbelt Act* was passed in 2005. The ECO lobbied the Ministry of Municipal Affairs and Housing to agree to prescribe the Act under the EBR to cover proposed new regulations or instruments and for Part IV applications for review. But the Act was not prescribed until June 2007 (ECO 2007A: 172).

The Ministry of Public Infrastructure and Renewal (MPIR) was created in November 2003 for the purposes of managing the McGuinty government's ambitious master plan for the Greater Golden Horseshoe, *Places to Grow*. The ECO entered into negotiations with MPIR to persuade the Ministry to accept coverage (ECO 2006A: 186). The *Places to Grow Act* was passed in spring 2005, but it was not covered. The ECO asked that it be prescribed for proposed new regulations and for Part IV applications for review. In June 2008 the McGuinty announced that the Ministry of Energy and MPIR would be merged into a new Ministry of Energy and Infrastructure. This set off a new round of consultations over whether this new Ministry should be prescribed (ECO 2008A: 170). MPIR was never prescribed, and the *Places to Grow Act* is still not covered.

#### ***Statements of Environmental Values (ss.7-11)***

The EBR requires all prescribed ministries to prepare Statements of Environmental Values (SEVs), which must explain how the EBR's purposes are to be applied within the ministry when environmentally significant decisions are made, and how the purposes of the EBR are to be integrated with other factors including the social, economic and scientific criteria that may be part of the ministry decision-making process. Draft and revised SEVs must be posted on the Registry for public comment (ss. 8-10). Ministers are enjoined to take every "reasonable step" to ensure the SEVs are taken into consideration in the departmental decision-making process (s. 11).

The EBR's architects anticipated that the SEVs would become the primary instrument for exerting influence over the substantive content of government decision-making (Winfield 1998: 339). Their fate illustrates the hazards of counting on ministerial accountability as an effective oversight mechanism. The Task Force had declared that the SEVs would guide ministries in their thinking on environmental decisions, yet it declined to offer any details as to the substantive content which should appear in the SEVs. This was up to each ministry (Task Force 1992A: 23-24, 65). ENGOs supporting the EBR unsuccessfully lobbied for the SEVs to be replaced with detailed mandatory strategic plans complete with timelines (Winfield 1998: 339). The Task Force acknowledged that the existence of the SEVs could not guarantee the effective application of the EBR's purposes in the executive decision-making process. Of course ministries would make decisions that did not reflect the purposes of the EBR. But it was at that point that "the Task Force feels that political accountability must occur" (Task Force 1992A: 24). This would be facilitated by the ECO's reports on compliance.<sup>18</sup> For the Task Force, the SEVs were a prime example of how the ministerial embrace of the EBR would be policed by the ECO's monitoring.

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<sup>18</sup> The ECO reports on SEV compliance in the annual reports, but as well under s. 58(5), can choose to issue a special report at any time on ministerial failure to comply with the EBR sections on SEVs. Under

Commissioner Ligeti routinely attacked the Harris Conservative government for the lack of substantive content in its departmental SEVs, and had little difficulty in demonstrating how ministry actions implementing the government's neo-liberal agenda of downsizing, cutbacks and deregulation actually contradicted commitments made in their own SEVs (ECO 1996A: 11-13, 31; ECO 1997: 56; ECO 1998: 18-28, 58-60; ECO 1999: 16-35). Commissioner Miller has continued this critical tradition, though the declining amount of space he has devoted in his annual reports to the subject reflects the obvious reality that the SEV requirements are not particularly relevant under the McGuinty government either (ECO 2001A: 18; ECO 2004A: 8-10; ECO 2005A: 13-14). In 2005 he formally acknowledged they were a failure: "...most observers believe, and the ECO tends to agree, that the SEVs have little impact on decision-making in the ministries" (ECO 2006A: 189).

The ECO's ten-year anniversary report *Looking Forward* (ECO 2005C) contained recommendations for improving the SEVs. In addition to exhorting ministries to take SEVs more seriously, the ECO recommended that the EBR be amended to incorporate the "new concepts that inform the decision-making in environmental protection matters that have evolved in the past decade" (ECO 2005C: ii). These were: the precautionary principle, the polluter pays principle, and the principle of intergenerational equity (ECO 2005C: ii). The Report offered recent Supreme Court of Canada decisions as the evidence for the contemporary significance of these concepts, and not actions taken by elected governments (ECO 2005C: 2). The Report did not address what consequences should directly follow if ministers continued to ignore their SEVs, even to the point of making poor environmental decisions which were politically "unwise," as the Task Force framed it (Task Force 1992A: 83).

### ***The EBR and Public Participation***

The public's rights to participate in government decision-making are secured in two basic ways: the right to comment on government policies and decisions; and the right to apply to the government to reform existing policies and laws.<sup>19</sup> These are outlined below.

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s. 57 of the EBR, a minister can ask the ECO to provide advice on composing a SEV, keeping it up to date, and on implementing it within the ministry.

<sup>19</sup> Not discussed in this paper are the legal rights available under the EBR. They are briefly summarized as follows. A person can apply for leave to appeal Ministry decisions to issue Class I or II instruments. The application is to the tribunal responsible for hearing such appeals (usually the Environmental Review Tribunal). Applicants must have a direct interest in the decision, or a statutory right to appeal the Ministry decision must already exist in law for somebody else (ss. 38-48). Under Part VI individuals can sue when they believe that someone is violating or about to violate an Act, regulation or instrument prescribed under Part V and the alleged violation has harmed or is about to harm a public resource. However, the plaintiff must already have filed an application for investigation under Part V, and either not received a response from the minister within a "reasonable time" or received a response "that is not reasonable." Before the EBR was introduced claims for public nuisances had to be brought by the Attorney General or with his or her consent. The EBR removes this barrier to suing (s. 103). It should be noted that the right to sue and nuisance lawsuit provisions are rarely invoked. Finally, the EBR contains protection for whistleblowers. Under Part VII (ss. 104-116), employees are protected from employer retribution if they seek to exercise their rights under the EBR, for example by filing applications under Part IV or V. This Part has never been utilized.

***Notice-and-Comment of Proposals (ss. 15-18)***

The EBR divides government output into four categories: instruments (such as licences, permits, approvals, orders); regulations; policies; and proposals. Proposals can be for amending, revoking, repealing or passing a new statute, instrument, policy or regulation.

All proposals, including proposals for new Acts (in other words, government bills) are subject to the notice-and-comment procedures set out in Part II of the EBR. However, these procedures only apply to proposals which, in the judgement of a minister, would have a significant effect on the environment and which the minister decides the public should have the opportunity to comment on (s. 15(1)). Moreover policies or Acts that are “predominantly financial or administrative in nature” are exempted (s. 15(2)). The government’s budget and formal economic statements are exempted (s. 33(1)), as are legislation, regulations or instruments implementing the budget or formal economic statements (s. 33(2)).

If a minister does agree to submit a proposal to the notice-and-comment procedures, the consultation process set out in the EBR must be followed (s. 27). Notice should be given at least 30 days before implementation. This timeline was intended to be the absolute minimum advance notice, and the ECO regularly urges ministries to treat it as only the minimum. Notice of the proposal must be posted on the electronic Registry. The notice must include a brief description of the proposal, and directions as to how the public can access written information about the proposal (such as the address of the local government office where the original documentation can be reviewed; or Internet hotlinks to the relevant documents). The notice must explain how the public can “participate in decision-making on the proposal” (ss. 27(2)). This usually means the opportunity to submit comments through the Registry website, or in the case of a bill receiving legislative committee consideration, the schedule of the standing committee’s public hearings and a contact number.

The minister is required to take into consideration all the comments received when decisions “about the proposal are made in the ministry” (s. 35(1)).

***Notice-and-Comment of Classifying Instruments (ss. 19-26)***

Section 1 of the EBR classifies “instruments” as any document of legal effect issued under an Act, including a permit, licence, approval, authorization, direction or order. Excluded from this definition are regulations. The importance of instruments as a modern tool of governance in Ontario can be quickly illustrated with some statistics. Between 1994 and 2001, the Ministry of the Environment posted over 10,000 instrument proposals on the Registry. In 1997, the Ministry of Natural Resources predicted it would post over 2,500 instrument proposals annually, under ten different Acts (ECO 2001C: 2-4).

When the EBR went into effect prescribed ministries were required to identify the instruments they regularly issue, evaluate them for their environmental impacts, and divide them into three classes according to their level of environmental significance (ECO 2001C: 2). Until this process was completed and finalized in the form of a regulation, citizens could not invoke the notice-and-comment procedures to comment on environmentally significant instruments through the Registry. It took MNR until 2001 to complete its classification regulation, after years of



protests by the ECO including the issuing of a special report criticizing the Ministry, *Broken Promises* (ECO 2001A: 19).

Class I instrument proposals are supposed to be posted for comment on the Registry for a minimum of 30 days (they can be bumped up to Class II if the minister considers them controversial enough). Class II instrument proposals are supposed to receive notice of more than 30 days on the Registry. In providing notice of a Class II, the minister is required to consider additional mechanisms such as news releases, media announcements, signs, door to door flyers, and direct mailings (s. 28). For receiving input on Class II instrument proposals the minister must consider offering higher levels of access, such as direct meetings with ministry officials, public meetings, and mediation (s. 24(1)). Class III instruments require full public hearings (s. 20(2)). Thus, how the instruments are classified dictates how much opportunity there will be for public input.

Under s. 32 of the EBR the minister is exempted from the 30-day minimum advance notice-and-comment requirement for instruments when in his or her opinion the instrument would implement a project already approved by an administrative tribunal, or approved (or specifically exempted) under the *Environmental Assessment Act*. The intent of s. 32 was to avoid duplication of public consultation, since tribunal hearings and environmental assessments also employ consultation processes. Commissioner Miller is harshly critical of the environmental assessment exemption, while acknowledging it was recommended by the Task Force (ECO 2002: 34-41; 2008A: 28-48). He argues ministries will invoke the environmental assessment process, which arguably is significantly flawed, in order to evade the EBR notice-and-comment requirements (ECO 2004A: 52-59; 2005A: 82-89).

### ***Applications by Citizens***

Parts IV (ss. 61-73) & V (ss. 74-81) entrench a right to lobby the executive to pass new laws or regulations; to amend existing laws and policies; and to investigate allegations of law-breaking (in effect, to ask a ministry to investigate lax enforcement of its own laws).

Under Part IV any two residents of Ontario can request that a minister review an existing policy, Act, regulation or instrument; or request that a minister review the need for a new Act, policy or regulation. Under Part V any two residents who believe that an Act, regulation or instrument has been violated can apply to the relevant minister for an investigation. Such allegations must be accompanied by sworn affidavits and some evidence.

Applications for reviews and for investigations are submitted through the ECO, who vets the application before passing it on to the minister; and who monitors and reports on the extent to which ministries comply with the timelines for responding. The minister has 60 days to respond to applications.

In determining whether it is in the public interest to grant an application for review, the minister *may* consider: the ministry's SEV; the potential harm to the environment if the review is not undertaken; whether the subject-matter of the requested review is subject to some other periodic review; any relevant social, economic, scientific evidence; and the resources which would have to be expended to conduct the review. Regarding an application for review of an existing Act,

the minister *may* consider the extent to which the public had the opportunity to participate in the development of the policy, Act, regulation or instrument for which a review is now being sought; and how recently the policy, Act, regulation or instrument was made.

A minister may dismiss an application for investigation on the grounds that the application was frivolous or vexatious; the alleged violation is not serious enough to warrant an investigation; or that the alleged violation is not likely to cause environmental harm.

Ministerial rejections of applications and the reasons for the rejections must be sent to the ECO as well as to the applicants. A minister's decision to reject a request cannot be appealed.<sup>20</sup>

Between 2000 and 2008, just over 200 applications under Part IV and V were filed. The majority of such applications under both procedures were rejected. This consistently negative stance by the executive poses an important challenge for the ECO. The EBR is silent about the criteria the ECO should employ when exercising his statutory duty to evaluate how ministries handle Part IV and V applications (s. 57(i)). It might be argued that in light of the Task Force's conception of the role of the ECO, rejections should be assessed on strictly process-oriented grounds, such as whether the minister followed the timelines or offered a comprehensive explanation for rejection. Nevertheless there is nothing in the EBR to preclude the ECO from venturing further, into critiques of the actual merits of a ministry's rationale for rejecting an application. Thus, Parts IV and V compel the ECO to consider how far a non-elected parliamentary official can legitimately go in questioning the executive's conduct of public policy.

These Parts of the EBR also raise the question of how the ECO may interact with the general public. Despite Minister Wildman's claim that the ECO would be the "voice of the people," the EBR does not grant Ontario citizens a generalized right to approach the ECO seeking redress against the executive. Parts IV and V applications filed by citizens do provide the ECO with a window for noting the issues and local controversies citizens feel strongly enough about to lobby the government for action, through the medium of the Registry. How the ECO has relied on these provisions to provide what he deems to be a legitimate picture of the state of public concern about the environment is discussed below.

### **The Role of the ECO under the EBR**

Ontario's first Environmental Commissioner, Eva Ligeti, has pointed out that while the EBR is cast in the language of rights-talk, this framework is not employed in the service of the classical liberal project of protecting citizens from government. Instead, the EBR denotes an expectation of government intervention to protect the environment. The rights enjoyed by citizens under the EBR facilitate their participation in government activism and intervention.

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<sup>20</sup> It is important to emphasize that the only Acts, regulations or instruments subject to applications for reviews are those prescribed under the EBR, that is, those to which the government consents to be subject. However, the most important Ministry of the Environment statutes, namely the *Environmental Assessment Act* (with some restrictions), the *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Pesticides Act* are prescribed for applications for reviews. These plus two other important laws, the *Aggregate Resources Act* and the *Endangered Species Act* are prescribed for applications for investigations. For the complete list of statutes covered see O. Reg. 73/94.

Hence, reviews by the ECO of how the EBR is administered will inevitably draw the ECO into questions of policy, and not just process. Therefore, argued Ligeti, the ECO must not only be independent, but also impartial. Institutional independence cannot simply be equated with impartiality. Instead, impartiality is a norm which the ECO should consciously strive to internalize (Ligeti 1997: 137-138).

The review above of the EBR's main provisions makes clear that in many places, the EBR is silent on how the ECO should exercise his or her undoubted discretion. At the same time, however, a careful reading of the EBR does suggest that the Commissioner was granted discretion for the limited purposes envisioned in the Task Force's report of 1992.

Under sections 57 and 58 of the EBR the ECO's role is essentially twofold.

As we have already seen, the ECO monitors how the ministries prescribed under the EBR comply with its terms. This includes reviewing how ministers respond to applications for reviews and for investigations, how ministries comply with the requirements to develop SEVs, and how they respond to citizens' use of the legal rights and remedies made available. The ECO is vested with a general authority to review implementation of the EBR and ministries' compliance with its requirements; and is formally empowered to "review the exercise of discretion by ministers under [the] Act" (ss. 57(a) & (g)).

If a minister so requests, the ECO can provide guidance to a ministry on how to develop and implement a SEV, assist the ministry to mount educational programs about the EBR, and generally, assist the ministry comply with the EBR.

Second, the ECO reviews how members of the public access the Registry and have recourse to the various rights they enjoy under the EBR. The ECO provides advice and assists members of the public about accessing the Registry to post comments on proposals, and is directed to "review the use of the Registry" (s. 57(f)). The ECO provides "educational programs" about the purposes and use of the EBR to the general public (s. 57(d)).

The Commissioner's annual reports to the Legislature must outline how ministries have complied with his or her requests for information, and how ministries have generally complied with the EBR requirements. As well, the reports must include lists of all proposals for which ministries have given notice on the Registry. The reports may also include "any information that the EC considers appropriate" (s. 58(2)(e)).

The Commissioner is empowered to issue special reports on "any matter" related to the EBR (s. 58(4)). This clause appears in a different section than the clauses describing the ECO's responsibilities for the annual report. Commissioner Miller has taken full advantage of s. 58(4), issuing special reports on the science of climate change and the budgetary process in the provincial government, in addition to others more directly related to ministry activities. Yet it is important to note that this wide discretion is granted for the purposes of issuing special reports, not the regular annual reports in which the ECO is required to report on the operation of the EBR (s. 58 (2)).

The ECO's power to monitor and report on how the EBR operates is closely tied to the decision-making processes the EBR creates. These processes facilitate citizen access to the executive. The ECO's role is limited to monitoring and reporting on how the ministries facilitate citizen access. Under s. 57(g), the ECO may comment in the annual reports on the exercise of ministerial discretion under the EBR, but note the conditional, under the EBR. As discussed above, the ministries and statutes prescribed under the EBR, and therefore (it is argued) subject to ECO scrutiny under this clause, are limited in number.

Section 57 clearly indicates that the ECO cannot comment in the annual reports on how ministers exercise authority under statutes *not* prescribed under the EBR; or comment on the implementation of programs by ministers in charge of ministries *not* prescribed under the EBR. This follows from the monitoring role prescribed for the ECO by the Task Force. It was not necessary for the Task Force to address in any detail how the ECO would engage the Legislature, as it did not see the ECO playing any role other than publicizing activity under the EBR, and assisting ministers in implementing the EBR.

It is important to note that the main springs of government activity are exempted from the EBR, and hence excluded from the Commissioner's jurisdiction. As noted above, the government's annual budget and the formal economic statements delivered by the Minister of Finance in the Legislature are exempted from the notice-and-comment procedures (s. 33). Further, all legislation, regulations and instruments giving effect to the budget or a financial statement are exempted. Regulations which are "predominantly financial or administrative in nature" (note, not only regulations necessary to implement the budget) are also excluded from the notice and comment procedures (s. 16(2)).

The budget and the budget bills finance government programs. The government is not required to consult with the public via the EBR about any budgetary decisions (such as ministry program financing), which are effected by passage of the budget and budgetary legislation.<sup>21</sup> It is important to stress that the EBR does not authorize the ECO to comment on how the *Legislature* exercises its discretion. A principal exercise of this discretion is of course the debate and passage of the government's budget and the annual spending estimates which fix ministry operating budgets. How the Legislature considers ministry spending estimates is set by the Legislature's Standing Orders, which are passed and amended by the Legislature and are not covered by or prescribed under the EBR.

In the parliamentary system, program funding is not effected by passage of the legislation creating ministry programs. The year's operational funding is retroactively authorized by the *Supply Act* (not prescribed under the EBR), which usually passes well into the fiscal year. Ministers do have some discretion to move funds from one estimates vote to another within a fiscal year (pursuant to financial legislation not prescribed under the EBR). Such transfers must

<sup>21</sup> Commissioner Ligeti argued that the budget was exempted from the notice-and-comment requirements because of the convention of budget confidentiality (ECO 1996D). But as noted in the text above the EBR also exempts all financial legislation flowing from the budget, which are not subject to the budget day confidentiality rule (s. 33 (1) & (2)); and as well all financial regulations regardless of whether they directly implement the budget (s. 16(2)).

be documented in the next year's estimates, which are submitted by the ministries to the Legislature, pursuant to the Standing Orders detailing the procedures for legislative scrutiny of the estimates.

The above analysis leads to the conclusion that under the terms of the EBR the ECO's authority to comment in his annual reports on government spending on the environment, including the financial implications of cabinet priority-setting, is limited. These statutory restrictions reinforce the role for the ECO contemplated by the Task Force, as simply a monitor of the fairness and transparency with which ministries comply with the EBR.<sup>22</sup>

## **Populism and Policy Entrepreneurship**

### ***Commissioner Ligeti***

Soon after Commissioner Ligeti assumed office she was confronted with the Common Sense Revolution (CSR) agenda of the Conservative government elected in 1995. The neo-liberalism of the Harris government not only entailed severe cuts to spending on environmental programs and the roll-back of environmental regulations. It also provided the ideological rationalization for a frontal challenge to the existing processes of governance in Ontario, including the procedural rights of the EBR.

At the outset Ligeti sought to define her role as monitor of the executive in terms of the participatory values enshrined in the EBR. This process-oriented approach enabled the Commissioner to issue effective critiques of the conduct of policy under the Conservatives without exposing her to charges of advocacy incompatible with her status as a non-elected official. The opening message in her 1996 annual report was that more public participation in governance results in better policy outputs (ECO 1997: 3). This became a recurring theme in her annual reports, which showcased examples of how decision-making was improved when the Ministry of Natural Resources and the Ministry of the Environment heeded the feedback it received from citizens' postings on the Registry (ECO 1997: 2; 1998: 38, 71; 1999: 108, 159, 187, 193, 196). The reports identified crucial CSR statutes reducing public access which were not posted at all on the Registry, or were posted for periods of time too brief to permit

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<sup>22</sup> This however is not Commissioner Miller's interpretation, as he regularly criticizes government budgetary allotments and spending decisions in his annual reports. In 2002-03 he argued that funding was inadequate for the Ecological Land Acquisition program (ECO 2003: 96-97), and in 2005-06, for Heritage Land Acquisition (ECO 2006A: 54-56). In 2007 he argued that funding for implementation of the new Canada-Ontario Agreement on Great Lakes Basin Ecology was chronically low (ECO 2008A: 89). In the same report he suggested that charges imposed on industrial and commercial users for water takings should be increased with the eventual goal of imposing full-cost recovery, in order to reduce tax-supported funding for water management programs (ECO 2008A: 95-97).

The Commissioner has also issued a special report, *Doing Less with Less* (ECO 2007C) protesting budget cutbacks at the Ministries of Natural Resources and the Environment. However the budget critique continued in the subsequent 2007-08 *Annual Report*, a clear indication that the ECO believes he is authorized to make editorial comments on government budgetary and spending decisions. In this report he directly criticized cabinet choices about spending priorities. He complained that Ontario Parks had not received sufficient funding to comply with the *Provincial Parks and Conservation Reserves Act*, while the Endangered Species Stewardship Program did receive significant funding even though the new *Endangered Species Act* did not go into force until June 2008 (ECO 2008A: 74-75).

meaningful opportunities for comment.<sup>23</sup> Much of this legislation was buried in massive omnibus bills called for debate in the Legislature at short notice, precluding effective and protracted legislative scrutiny. In the case of government initiatives which did provoke heated debates in the Legislature as well as in the policy community, such as the *Environmental Assessment and Consultation Improvement Act, 1996*, the *Land Use Planning and Protection Act, 1996*, the *Better Local Government Act, 1996*, and the *Savings and Restructuring Act, 1996*, the Commissioner focused on how these statutes restructured decision-making processes to reduce public input (ECO 1997: 20-37). Throughout her tenure under the Conservative government the ECO flagged the potential for losses in public accountability inherent in the policy instruments legislated by the CSR, such as self-management regulation, industry codes, public-private partnerships, and alternative service delivery reforms (ECO 1996B; ECO 1998: 53-60).

Ligeti applied this process-oriented strategy to her analysis of applications for reviews and investigations under Parts IV and V of the EBR. She argued that ministry rejections of applications should be clearly explained to the disappointed applicants (ECO 1998: 41-42; ECO 1999: 93). Ministries should develop clear and consistent criteria for evaluating applications (ECO 1997: 46). She cited an early application for investigation, which uncovered a corporate violation of the *Environmental Protection Act*, as evidence of how the EBR process could result in better environmental decision-making (ECO 1997: 42). She recommended that ministry staff in charge of handling an application for review have no prior involvement with the issue raised, to ensure procedural fairness for the applicants (ECO 1999: 167).

### ***Commissioner Miller***

Under Gord Miller the office of Commissioner has moved into open policy advocacy, progressing ever closer to direct challenges to the policy-making authority of cabinet and the Legislature.<sup>24</sup> The Commissioner has framed this activity in terms of a populism which purportedly articulates the public interest, invoked as a spur to government action. The volume of citizen responses to government postings on the Registry as well as applications for reviews and investigations is deemed to constitute a legitimate index to public opinion. The Commissioner's status as monitor of the Registry is taken as authority for freely interpreting this opinion to policy-makers.

In the introduction to the *Applications for Review* section of his 2007-08 report the Commissioner declared that applications "are an indication of the types of environmental

<sup>23</sup> Important examples highlighted in the Commissioner's annual reports were the *Aggregate and Petroleum Resources Statute Law Amendment Act, 1996* (delegating the regulation of pits and quarries to the industry itself), and the *Safety and Consumer Statutes Administration Act, 1996* (delegating the monitoring of underground fuel storage tanks to an industry-run organization) (ECO 1997: 20-37).

<sup>24</sup> It should be noted that this populist move was initiated by Commissioner Ligeti. Her final annual report in 1998 marked a change in her conception of the Commissioner's role. She now cited public concern as a legitimate ground for evaluating ministry performance under the EBR (ECO 1998: 140, 179). The opening message admonished the Harris Conservative government to "listen to the people!" Yet the Conservatives were easily re-elected a few weeks after the report was published – another demonstration of the failure of the EBR's architects to reconcile a populist role for a non-elected Commissioner with the norms of representative democracy.

concerns held by members of the public” (ECO 2008A: 133). While this was the first time such a declaration had appeared in an annual report, the view that Registry comment is a legitimate sounding board of public opinion has informed Commissioner Miller’s reports throughout his tenure. To cite an early example, in a 2001 commentary on air pollution the Commissioner invoked the volume of postings on the EBR as material evidence of the public’s concern with air quality (ECO 2002: 64).

Of course public controversies over the environment may well manifest themselves in Registry activity. A case highlighted in the 2007-08 report offers a good example (ECO 2008A: 133-138). In recent years the impact of the commercial water-bottling industry on water resources in rural Ontario has emerged as a political issue. In January 2007 two individuals filed an application for review requesting that Permits to Take Water (PTTW) under the *Ontario Water Resources Act* should no longer be issued to commercial water bottlers. The application contended that the Ministry of Environment’s permit policy failed to respect the Ministry’s SEV and did not reflect an ecosystems approach to resource management. The Ministry rejected the application on the grounds that its takings policy had already been reviewed extensively.

In the annual report for the year the Commissioner noted local anxieties about PTTWs, citing another application opposing the renewal of Nestle’s existing PTTW near Puslinch. The Nestle application had provoked 8,000 negative comments on the Registry, the largest volume ever for any single government posting of an instrument. According to the Commissioner, together these applications illustrated the “strong opposition” of many Ontarians to government support for commercial water-bottlers (ECO 2008A: 136). In April 2008 the Ministry renewed Nestle’s permit but with more stringent conditions attached. The Ministry press release noted the large volume of submissions on the Registry opposing Nestle’s application (MOE 2008).

The Commissioner in fact agreed with the Ministry rationale for rejecting the first application. However local opposition to the permits as well as the number of applications regarding PTTWs on the Registry illustrated the depth of public concern. Moreover, existing policy in this area implicated problems beyond the scope of the PTTWs under discussion. To address public concern the Ministry should assess the capacity of every watershed under pressure from the bottling industry and initiate a “public debate” about the possibility of establishing a hierarchy of users for water (ECO 2008: 136-137).

This case illustrates how applications under the EBR which undoubtedly reflect widespread local interest provide the Commissioner with a platform for ventures into policy advocacy. Inevitably, any new water policy along the ambitious lines contemplated by the Commissioner would commit the province to a rebalancing of the existing trade-off among the economic and political interests at play in this policy field. This may indeed be desirable. It is unclear, however, whether the purposes of the EBR are best served when it is the Environmental Commissioner who argues the case for a new policy initiative requiring action by a minister – even one likely to be greeted favourably by the public affected.

It must be remembered that the EBR does not commit the province to any particular set of policy outcomes. Instead, the EBR was designed to maximize the public’s ability to participate in the policies adopted by the elected government. The credibility of the EBR rests on the willingness

of ministry officials to interpret the broad timelines set out in it as generously as possible. Differences of opinion about what constitutes adequate consultation are inevitable. As noted above, one of the Commissioner's responsibilities under the EBR is to provide guidance to ministries on how to comply with the EBR (s. 57(b)). Pursuant to this clause Commissioner Ligeti issued a guidance document to assist ministry officials in interpreting their obligations to consult with the public under the EBR (ECO 1996C). Of course, ministries are not obligated to adopt the Commissioner's own interpretation of what constitutes sufficient consultation, nor could they be under the conventions of responsible government. It is the minister's, and not the Commissioner's understanding of what constitutes adequate public input which must prevail. It is for this reason that the Task Force assigned ultimate responsibility for evaluating the executive's management of the Registry to the Legislature, not the Commissioner.

When the Commissioner reports on Registry postings in light of his own assessment of the substantive merits of the policies under discussion, the Legislature may be receiving perceptive advice about the failings of environmental policy. But what MPPs may not be getting is dispassionate information about the terms of the conversation on the Registry between executive officials and members of the public.

The distinction between process values and policy outcomes is further obscured when the EBR is employed by ENGOs and local governments as a vehicle for advancing their own policy agenda at Queen's Park. In the first decade of Commissioner Miller's tenure (1999-2008), the annual reports have highlighted an average of two such high-profile applications each year. These applications are exercises in interest group politics and inevitably will ring political bells within the ministries targeted. To one degree or another ministry responses will reflect the direction received from ministers' offices. Such applications have provided the Commissioner with the opportunity to insert his office directly into public policy debates.

### ***A Case-Study: Controversy over the Aggregate Extraction Industry***

The aggregate extraction industry physically transforms local landscapes, generates significant amounts of pollution, and often conflicts with other land-uses. For these reasons the industry has been a hot political issue in southern Ontario for years. There are approximately 2,800 licenced aggregate pits and quarries in Ontario (ECO 2003: 29). More than 75% of the aggregates used in the Greenbelt planning area are extracted from the Niagara Escarpment and the Oak Ridges Moraine (ECO 2007A: 44). Province-wide, there are about 6,900 abandoned pits and quarries (ECO 2007A: 141). The impact of the industry on the landscape has stimulated the formation of local citizen groups across southern Ontario, particularly in Halton Region, around Guelph, on the Oak Ridges Moraine, and along the Escarpment. The industry has been the target of a number of provocative and well-researched reports by leading ENGOs and environmental think tanks.

In recent years two regulatory developments have sharpened public attention. The industry was a beneficiary of the Harris Conservative government's neo-liberal embrace of de-regulation. The *Aggregate and Petroleum Resources Statute Law Amendment Act, 1996* (Bill 52), devolved regulatory monitoring of the industry, including compliance with site plans and licences and requirements for rehabilitation work, from the Ministry of Natural Resources to the industry itself. An Aggregate Resources Trust (funded by licence fees) was created to spend money on



rehabilitating exhausted quarries, to be administered by an industry group, the Ontario Aggregate Resources Corporation.

The second development was the McGuinty Liberal government's recent over-haul of provincial land-use laws, including the Greenbelt, the introduction of a new Provincial Policy Statement, and the imposition of the *Places to Grow* masterplan across southern Ontario. These reforms required the province to revisit some of the trade-offs built into the existing framework. The ENGO movement seized on this opportunity to publicize the environmental problems associated with the industry.

The ECO flagged this as an emerging issue in 2002-03 (ECO 2003:29-35). However, on that occasion he avoided a direct critique of the legislation under which the industry operated. Instead, he pointed out that the speed with which existing extraction sites were exhausted far exceeded the rehabilitation rate. The focus of his analysis was on the need for a provincial strategy to reduce the significant demand for aggregates in order to relieve pressure on the landscape and mitigate the conflicts the industry provoked.

In November 2003 the ENGO Gravel Watch filed an application for review of existing policy towards the industry. In 2005 this was followed by a similar application from the prominent think tank the Pembina Institute, which included a well-researched brief on the failings of the Bill 52 regime. Pembina's brief referenced the ECO's critical 2002-03 report. The essential theme in the ENGO critique was that self-regulation by the industry was unreliable. Rehabilitation work proceeded too slowly and ineffectively, leaving behind thousands of abandoned worked-out pits and quarries.

The Ministry of Natural Resources agreed to conduct a review in response to the Gravel Watch application, which was completed in 2006. The review conceded major problems in the existing regulatory system (ECO 2007A: 141). However, the Ministry refused to grant Pembina's request for another review, in part because it had already undertaken to consider Gravel Watch's application, and also because it had formed an inter-ministerial committee to draft a new strategy for the industry (ECO 2006A: 143).

The Commissioner's 2005-06 and 2006-07 reports subjected provincial policy for the industry to a substantive and negative critique. The inter-ministerial committee set up to review existing policy was proceeding too slowly. MNR was wrong to suggest that the land-use planning framework did not privilege the industry over competing land uses. But further, the existing regulatory regime was suffering from a legitimation crisis. The Commissioner reported that "public concerns regarding aggregate operations have escalated over the years, and owners/operators are facing increasing pressure from neighbours to mitigate impacts on the environment and on the community" (ECO 2006A: 145). Evidence for the "growing public concern" was heightened activity on the Registry, as the public attempted to use the EBR "as a catalyst for reforms" (ECO 2006A: 42-43). This activity included applications for review and as well "the level and broad scope of commentary" the Ministry had received about its new *Policies and Procedures Manual for the Administration of the Aggregate Resources Act* (ECO 2006: 43). The ECO also noted that his office often received calls and letters of complaint about the operations of the aggregate extraction industry from the public as well as municipal officials

(ECO 2007A: 44). However, MNR had been slow to respond: this demonstrated “the unreadiness of the ministry to show leadership on this issue” (ECO 2006A: 43).

In the 2005-06 report the Commissioner declared that: “It is now well past time for MNR to engage the full range of stakeholders in an open discussion of the challenges and the options for policy reform...The ECO urges the Ministry of Natural Resources to give this area of its mandate a high priority in the coming year” (ECO 2006A: 44). The 2006-07 report called for a comprehensive aggregate resources strategy (ECO 2007A: 45).

In the course of his narrative of Ministry shortcomings, the Commissioner commented, “Unfortunately, there is not much the ECO can do in these situations except to explain the opportunities for public comment and appeal under various laws, including the EBR” (ECO 2007A: 44). But in fact he did not confine himself to explaining how to use the EBR to the public. Instead the Commissioner launched a broader strategy. The *Toronto Star* published an article by him in January 2005 summarizing the negative impact of the aggregate extraction industry and calling for a comprehensive policy which, he conceded, might ultimately cost consumers of the product more money. A riposte from the Aggregate Producers’ Association of Ontario subsequently appeared in the newspaper. The Commissioner attended a public meeting in Aberfoyle (Wellington County) organized by opponents of the industry to publicize his views. He was quoted in the press as saying that “Queen’s Park was out of touch with the conflict brewing over land use in rural Ontario” (Mercer 2006). In January 2006 he hosted a Round Table on Aggregates, a one-day seminar among stakeholders to discuss the parameters of a possible long-term strategy for aggregates in Ontario (ECO 2006A: 42).

What is striking about this episode is the Commissioner’s unabashed insertion of his office into civil society debates over environmental reform. He appeared to have cast off the institutional mooring of a parliamentary officer to engage directly in policy advocacy aimed squarely at the minister.

As already noted, despite NDP Minister Wildman’s vision of the Commissioner as the “voice of the people,” the EBR in fact provides for a limited relationship between the office of the Commissioner and the general public beyond Queen’s Park. The office of the ECO is formally empowered to connect with the public for the purposes of providing “educational programs about [the] Act to the public” (note, about the EBR, not government policies), and to assist individuals who wish to comment on a proposal posted on the Registry (ss. 57(d) and (e)). This is the extent to which the EBR provides a statutory basis for populist campaigns by the Commissioner, an appointed parliamentary officer.

Of course, the questions that arise when bestowing the authority of popular tribune on any official must include: how is the people’s will to be assessed? And further, for what purposes? The Registry may indeed offer an approximate index to the intensity of local feeling about controversial environmental problems, and provide ENGOS espousing popular causes with another forum for pressing their campaigns on the executive. But ministers and MPPs receive public input from a variety of sources and in a number of institutionalized forums. The Registry is only one such source. Moreover, it suffers from a limitation which significantly limits its utility as a tool of governance. The Registry cannot help elected officials assess the public’s

willingness to accept the trade-offs among policy goals necessary for successful political management.

Under the EBR ministers are obligated to give environmental activists and other members of the public timely and comprehensive answers to their applications and comments on postings. But ministers are not obligated to endorse their opinions. To pretend otherwise is to be less than transparent about the statutory purposes of the EBR and risks confusing the public about the appropriate criteria for evaluating ministerial compliance.

### **The ECO and Public Opinion**

In the example above and in others which could be cited the authority of the Commissioner's critique of government policy is grounded in significant levels of Registry activity, to which ministries are obliged to respond. The public's use of the Registry provides the Commission both with the occasion for advocacy and an audience in the form of the ministry required to answer.

However, the ECO regularly claims the authority to report on the state of public concern directly, unmediated through the Registry reporting relationship. The annual reports abound with examples.

- *2001-01 Report.* In the course of discussing applications for review submitted to the Ministry of the Environment, the ECO indicated that his office had received lots of complaints from individuals, citizens and farmers about Ministry enforcement of the rules regarding the application of sewage sludge to farmland (ECO 2001A: 49). In a sweeping overview of transportation planning in the GTA, the ECO claimed there was a widespread "frustration" among municipal councillors (and the Premier!) about lack of progress on transportation policy (ECO 2001A: 63). In a discussion of the government's new drinking water regulation (introduced without any reference to any relevant Registry posting or application), the Commissioner began his editorial comments with observation that drinking water quality is an issue of ongoing concern to all Ontarians (ECO 2001A: 112).
- *2003-04 Report.* After reviewing the new nutrient management regulation, the ECO claimed that it would do little to allay public concerns especially in rural areas (ECO 2004A: 78). In discussing the Waste Diversion Organization, the Commissioner declared that that many Ontarians believed consumer products were over-packaged (ECO 2004A: 83). After complaining about the slow pace at which the Ministry of the Environment had completed its response to a Registry application on the refillable soft drinks regulation, he claimed that Ontarians cared deeply about waste diversion and that there was strong public support for "innovative" action (ECO 2004A: 134).
- *2004-05 Report.* In a discussion of Ministry of Transportation policy the Commissioner suggested that "many critics" are concerned about the negative environmental impact of highway-building (ECO 2005A: 110).
- *2006-07 Report.* The Commissioner argued that the *Mining Act* be reformed to reflect Ontarians' "values and priorities today" (ECO 2007A: 71).

- *2007-08 Report.* The Commissioner proclaimed that the biodiversity crisis was one of the greatest problems facing Ontario in the 21<sup>st</sup> Century. He declared that the public expects the government to shoulder its responsibilities to address the problem (ECO 2008A: 80).

In 2006 the ECO commissioned a poll with the objective of obtaining data that could be cited to influence the provincial government's spending priorities (ECO 2006B). This survey by a pollster found that: Ontarians think that the environment is important; they grossly exaggerate the percentage of the provincial budget currently dedicated to the Ministry of the Environment; and they want a significant increase hike in spending on the Ministry with the understanding this will require proportionate decreases in other ministries' share of total spending. In the press release accompanying the publication of the poll, the Commissioner declared: "I encourage the government, in its budget planning, to consider the priorities of the public" (ECO 2007D).

How can these pronouncements be assessed in terms of the EBR? The point is not that the ECO is unable to offer an accurate or useful gauging of public concern – indeed, he may be uniquely qualified to do so. The problem is that outside of the architecture of the Registry, ministries are under no obligation to respond to him. Instead the ECO must rely on MPPs to endorse his assessment of the issues which ministers should be held accountable for in the Legislature.

How MPPs choose to use the ECO's reports in the Legislature is discussed below.

### **The ECO and the Ontario Legislature**

The ECO's publication *Celebrating the 10<sup>th</sup> Anniversary* explicitly cast the Commissioner in the role of policy advocate (ECO 2004B). The report listed various policy issues the ECO has commented upon, followed by summaries of government activity. Government action was framed in terms of the extent to which it followed the ECO's recommendations. The report failed to indicate that when the province happened to act in line with the ECO's recommendations, other actors or institutions might also have participated and indeed exercised the decisive influence. The most egregious examples of this failure were the depictions of how the Conservative government led by Premier Harris as well as the current Liberal government responded to the Walkerton tragedy and to urban sprawl on the Oak Ridges Moraine. These were complex policy episodes to say the least, where the final outcomes were shaped by a myriad of factors – not least the efforts of the opposition parties to focus public attention on the failures of existing policy.

When the ECO assumes the mantle of policy advocate and presumes that ministries should respond to his recommendations for policy change, he is claiming that ministers are to some degree accountable to his office in addition to the Legislature.

Of course, the ECO is not the only parliamentary officer who seeks to mobilize the institutional resources of his or her office to exert influence in the policy system. The institutional drive for power also characterizes the history of other parliamentary officers at Queen's Park such as the provincial Auditor General (formerly the Provincial Auditor) and the Ombudsman. The provincial Auditor General has managed to persuade the Legislature's Standing Committee on Public Accounts to support some of his favourite campaigns, most notably the 1989 amendments to the Standing Orders creating the Standing Committee on Estimates, and the introduction of the

*Auditor General Act, 2004*. This Act expanded the Auditor General's authority to conduct value for money audits to the broader public sector, including hospitals, colleges, school boards, universities, and many other organizations. The Legislature has periodically clashed with various occupants of the office of Ombudsman, such as Arthur Maloney (1977-78), Donald Morand (1982), and Roberta Jamieson (1992-94), over claims to jurisdiction, extension of powers, and office spending.

Members from all parties regularly pay tribute in the Legislature to the important role the ECO and other parliamentary officers play in holding the executive accountable. But it is important to be clear about how the ECO's work is used. MPPs scour the Commissioner's reports for the low hanging fruit – facts and revelations about the shortcomings of government programs. For the most part, they are referenced in the House by opposition MPPs to support their attacks on ministers. Thus, the reports are received in the context of the established system of incentives shaping the behaviour of Canadian parliamentarians.

However, the ECO seeks recognition as a commentator on high policy and as a policy entrepreneur. How have the political actors in positions of power responded to this campaign for greater space and authority? The ECO is able to exert meaningful influence when there is an open policy window, created by broader political forces. The best example of this during the Gord Miller era is the Walkerton crisis, the worst regulatory disaster in modern Ontario history.

The regulatory gaps in protecting groundwater from intensive agriculture had already been extensively critiqued by Commissioner Ligeti (ECO 1996A: 51-53; 1998: 69; and 1999: 208-209). The provincial Auditor General also drew attention to this problem with reports in 1996 and 1998. Two highly credible ENGOs, Pollution Probe and the Canadian Environmental Law Association, also issued reports in 1999 (McCulloch and Muldoon 1999; Pollution Probe 1999). Commissioner Miller invoked his power under s. 58(4) of the EBR to produce a special report on the problem of water pollution caused by intensive farming less than three months after the deaths in Walkerton, when the Legislature was in an uproar over the tragedy (ECO 2000C). In his prepared remarks on the release of the report, the Commissioner acknowledged that Walkerton had created a market for environmental reform proposals that had not existed previously. He indicated his special report was designed to influence the Inquiry proceedings presided over by Mr Justice O'Connor (ECO 2000B). At his press conference Miller was reported as saying that the Conservative government had appeared to deliberately mislead the public on water policy, and was unprepared to prevent another major groundwater contamination incident (McAndrew 2000; National Post 2000; Stevenson 2000). These comments did not appear in the report itself. They predictably garnered headlines.

This special report was followed by a brief to the Walkerton Inquiry and ample coverage of the issue in succeeding annual reports. At the height of the controversy in 2000-01 Conservative ministers who had previously dismissed Ligeti's critiques now promptly responded to opposition MPPs who rose in Question Period citing Commissioner Miller's reports. This atmosphere ensured a positive reception for another special report criticizing the Ministry of Natural Resources for dragging its feet in finalizing the regulation organizing all of its instruments into the three classes defined by the EBR (ECO 2001C). It will be recalled that classification is the necessary prelude for receiving public input on proposed new instruments (see above at pp. 31-

32). Commissioner Ligeti had complained about the Ministry's tardiness for years. The Conservative minister apologized for the Ministry in the Legislature and the regulation soon appeared (Snobelen 2001). The media as well as the opposition parties linked this longstanding omission to the Harris government's regulatory failures at Walkerton.

The appointment of the Walkerton Inquiry introduced an era of environmental concern in Ontario politics. The O'Connor hearings took place in the fall of 2000 and first half of 2001. Judge O'Connor's report was released in separate volumes in January and May of 2002. The initial provincial response to the report, the *Nutrient Management Act*, was introduced in June 2001, received extended consideration in a standing committee that fall, and was finally passed into law in June 2002. The safety of Ontario's drinking water was an issue in the 2003 election campaign. The Liberal government's *Clean Water Act* was introduced in April 2006 and received third reading that October. Throughout this period questions about the safety of drinking water and related issues were a staple of legislative debates and media coverage. References to the ECO's reports appeared regularly in Members' comments and speeches.

Years of advocacy by Commissioner Ligeti had failed to put the issue of clean water on the agenda. Once the Walkerton tragedy sharply focused public attention on this issue, Commissioner Miller was well positioned to contribute to the ongoing debate over solutions.

Where Commissioner Miller has signally failed is in his attempts to expand the spectrum of acceptable political discourse in Ontario. In his 2004-05 report he challenged the population growth projections underlying *Places to Grow*, the McGuinty government's masterplan for development in southern Ontario, suggesting that such population increases were environmentally unsustainable. He did not explain how the provincial government was expected to prevent people from moving into the southern Ontario job market (ECO 2005A: 46-47). The 2004-05 report attracted considerable criticism in the media, with some commentators linking Miller to anti-population groups in the US and implying he was anti-immigration. In his public remarks on the release of the report Miller suggested the province should directly control population shifts in the province, somehow redirecting people away from the prosperous labour market in southern Ontario towards the shrinking economies of northern and eastern Ontario. When challenged by journalists to explain how this was to be accomplished Miller claimed he was simply trying to stimulate public debate. His views were expressly repudiated by the minister in charge of *Places to Grow* (Gillespie 2005; Greenberg 2005; Campbell 2005; Toronto Star 2005; Urquhart 2005A, 2005B).

The ECO's subsequent report on these themes in 2006-07 invoked both the sustainable development paradigm and the ecological footprint framework, without explaining how they were to be integrated into provincial planning law. The Commissioner again suggested that continued population growth threatened southern Ontario's ecosystem limits (ECO 2007A: 17-20). The report was largely ignored by the mainstream media.

The indifferent response to these efforts at big picture thinking illustrates a significant institutional divide between the ECO and other parliamentary officers such as the provincial Auditor General, the Ombudsman and the Freedom of Information Commissioner. These latter offices affirm the liberal values underpinning the Ontario and Canadian regime. They are the

guardians of the rule of law against expanding state power. They are popularly regarded as the spokespersons for a public deeply suspicious of bureaucracy. In Ontario and Canadian politics there is a ready-made audience for horror stories of government waste, revelations of official arrogance or incompetence, and campaigns by citizens to extract information from a secretive bureaucracy. These parliamentary officers' stock in trade may be the supply of critical material which the opposition parties and the media exploit to launch effective attacks on ministers and their advisers. Yet their reports do not extend to radical questioning of the elemental principles of liberal capitalism.

The EBR does speak the language of rights, the fundamental artefact of liberal society, but as Commissioner Ligeti noted it does so as a vehicle for government intervention in the economy. Any political consensus in support of intervention directed at constraining economic growth is bound to be fragile and vulnerable to the issue-attention cycle. The boundaries within which the public is willing to contemplate significant changes to its lifestyles for the sake of the environment are narrow. The ECO was confronted with these boundaries when he questioned the virtues of continued population growth.

### **The EBR and Parliamentary Democracy in Ontario**

At a formal level the EBR consultation processes do respect the conventions of responsible government. Whether government decisions should be subject to notice-and-comment are up to ministers. No sanctions are imposed under the statute when a ministry drags its feet in complying with the procedure (s. 37). Instead ministers are accountable to the Legislature for how they choose to engage the EBR. The budget, a question of confidence, is formally exempted, as is all budgetary legislation, the passage of which is a question of confidence.

However at other substantive levels the EBR fails to be integrated into the operation of parliamentary democracy in Ontario. The issues which ministers must address under the EBR go to the heart of political judgement: should existing policies be reviewed and restructured? How much time and to what extent should the public be consulted about new initiatives? Or further, who is the public which should be consulted? Should comments posted on the Registry by private citizens trump what ministers hear from their policy communities?

In Ontario these questions are addressed under the conventions of responsible government, in parliamentary institutions. The EBR does not formally acknowledge how ministerial responsibility must shape officials' responses to the Registry.

In quantitative terms, most Registry postings relate to administrative decisions taken by civil servants exercising delegated authority. Few of these will explicitly touch on major policy considerations or be politically sensitive in ministers' offices. But other postings directly flow from cabinet or ministerial decisions, such as government bills and cabinet-level policy initiatives. Ministry officials are bound to respond differently to public queries on the Registry about local certificates of approval, dump sites, water permits, and other instruments, than they do to Registry comments on the central initiatives of the government, or to applications filed by ENGOs demanding comprehensive overhauls of existing policies. High-profile ENGOs exploiting Parts IV or V applications as a lobbying and publicity strategy are not in the same category as citizens employing the procedures to seek information and action on environmental

problems in their neighbourhoods. Ministry officials will be acutely sensitive to these distinctions. Inevitably this tempers how they respond to the EBR requirements.<sup>25</sup>

It is the Commissioner's duty to encourage ministries to extend the timelines prescribed by the EBR. As noted above, Commissioner Ligeti developed a guidance document for Ministry officials which purported to set out reasonable consultation times (ECO 1996C). But for postings of major government initiatives what is an adequate amount of prior notice or opportunity for comment is inherently a political question. For opponents of the *Greenbelt Act*, or the Harris government's restructuring of the environmental assessment process, no amount of consultation offered will be satisfactory because they are simply opposed to the initiatives.

The controversy over development on the Oak Ridges Moraine during the Harris Conservative years can be cited to illustrate the inherent limitations of the Registry as a governance mechanism. In the spring of 2000 two separate applications for review of existing provincial policy on the Moraine were filed, one by the ENGOs the Federation of Ontario Naturalists (FON) and the Save the Oak Ridges Moraine (STORM), the other by two City of Toronto municipal councillors. These applications summed up the environmental case against further development on the Moraine. They advocated aggressive provincial intervention to control development on greenfields, extensive land-use reforms to control growth, and changes to the jurisdiction of the Ontario Municipal Board to make it more difficult for the development industry to win cases against municipalities.

These filings were well-publicized political events, accompanied by press conferences, public statements and favourable coverage by sympathetic media outlets. The applications were timed to occur during a high-profile Ontario Municipal Board hearing on a development in Richmond Hill. The City of Toronto's request to be a party to the hearing had previously been rejected. Proponents of the EBR applications explicitly framed the filings as a challenge to the Conservative government (Abbate 2000, Brennan 2000).

The Harris government predictably rejected the applications, since to do otherwise would have conceded doubts about its entire approach to land-use policy in southern Ontario. In his annual report the ECO had little difficulty in demonstrating that the reasons given by the government for the rejection failed to address all of the points raised in the applications. During this episode Premier Harris and his ministers continued to defend their pro-growth policies in the Legislature and in other forums. The opposition Liberals seized on this issue as an opportunity to differentiate themselves from the government. They successfully exploited public concerns about the Moraine in the 2003 election. Commissioner Miller noted that "there is no common

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<sup>25</sup> The EBR requires the ECO to report on the extent to which ministries co-operate with his investigations. Usually he reports that the co-operation was satisfactory. However, in recent years he has complained that when pursuing his research his requests for information from the front-line ministry officials his office normally deals with are bumped up inside the bureaucracy, including on some occasions up to the deputy minister level and even Cabinet Office (ECO 2001A:159-160; ECO 2002:149; ECO 2003:183-184; ECO 2007A:187). But this is precisely what must happen when the ECO endeavours to tap the bureaucracy for information to support his policy advocacy—on these occasions ministries treat the ECO the same way they would requests from opposition MPPs, the media and ENGOs.



understanding of what level of protection is necessary to ensure ‘environmental integrity’” (2001A: 135). This is precisely the point.

### ***The EBR, Ministers and the Legislature***

The failure to co-ordinate the Registry’s accountability mechanisms with ministers’ over-riding responsibility to the Legislature is well illustrated by the EBR’s inadequacy as a vehicle for the scrutiny of legislation – the most important category of government action.

Under s. 1(2) of the EBR a proposal to make, pass, amend, revoke or repeal an Act is a “proposal for an Act.” This definition includes, but is not limited to, government bills. Ministries have maximized their freedom to operate under the terms of the EBR by interpreting the phrase “proposal for an Act” widely and inconsistently. Over the years, ministries have covered their obligations under s. 1(2) by posting a variety of initiatives which eventually have resulted in legislation, such as discussion papers, reports by advisory committees, websites mounted to invite public comment on announced initiatives, as well as on occasion draft legislative amendments.

The ECO generally urges that bills themselves should be posted as soon as they receive first reading in the Legislature. When ministers do comply however the EBR poses potential impediments to the government’s management of business in the Legislature. Section 15(1) directs that ministers should endeavour to post environmentally significant “proposals for an Act” on the Registry for a minimum of 30 days before the resulting Act receives third reading in the legislature. In the case of a bill posted on the Registry, this section appears to prescribe a fixed minimum limit of time on the debate in the Legislature before the government House leader can call for the third reading vote on the bill. Section 35(1) declares that when a proposal has been posted (including proposals for Acts which are bills), the minister must ensure that the comments received from the public “are considered when decisions about the proposal (that is, the bill) are made in the ministry.” But once a bill receives first reading in the Legislature it can only be formally changed at the standing committee stage, when public comments on the Registry posting could be incorporated into the bill in the form of amendments. Therefore, s. 35(1) would appear to require ministers to ensure that bills posted on the Registry always receive consideration in a standing committee, and further, to take care that the bill is posted on the Registry before the committee stage is concluded.

Of course, it is impossible for any government to allow its control over the legislative process to be driven by the timelines and procedures set out in the EBR. Not surprisingly, there is no consistency in how ministries integrate the notice-and-comment procedures into the law-making process. Sometimes a bill is posted after the legislative debate on it has started and in particular, after the committee stage has started. Many bills do not receive a committee stage at all. Thus, the impact of s. 35(1) depends on choices by ministries about the point in the legislative process when bills will be posted. In the case of one bill discussed by the ECO in his annual reports, the *Ontario Heritage Amendment Act, 2005*, s. 35(1) was explicitly negated, as the proposal for the bill (consisting of a summary of the bill, plus a hot link to the Internet site where the bill itself could be viewed) was posted on the Registry after the standing committee had reported the bill back to the House for third reading.

In reality two other consultation processes trump the EBR, which accounts for the inconsistency with how ministries interpret the phrase “proposals for an Act.” The first is the necessity of broad consultations with the relevant policy community, an essential stage in the contemporary policy-making process. It is this factor which often drives how ministries choose to opt into the EBR process, both in terms of the timing and the content of a proposal for an Act. The importance of these consultations is suggested by the fact that ministries often cite them when they file s. 36 decision notices. Under s. 36 of the EBR, the “decision notice” clause, once a proposal is implemented the ministry must post a notice which includes “a brief explanation of the effect, if any, of the public participation on decision-making on the proposal” (s. 36(4)). When ministries comply with this clause by referencing stakeholder consultation conducted outside of the formal EBR process, they demonstrate the shortcomings of the Registry as a channel for exercising influence on policy.

The consultation over the *Ontario Heritage Amendment Act* is an illustration. The proposal for this bill was not posted on the Registry until February 2005, following the completion of the committee stage in the Legislature on the bill in the fall of 2004 (EBR Registry #PI05E00010). However, accompanying the posted proposal was an outline of the extensive consultations the ministry had undertaken with the policy community and dozens of stakeholders, dating back more than a year before the bill received first reading in the Legislature in April 2004. Taken together, the ministry received over one hundred written briefs and submissions during this pre-legislative process. The bill itself had been directly posted on the websites of both the ministry and the Legislative Assembly as soon as it received first reading. Thus, while the ministry’s management of the bill formally negated the consultation procedure prescribed in s. 35(1) of the EBR, the policy community nevertheless had received ample advance notice of the bill’s contents.<sup>26</sup>

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<sup>26</sup> This analysis suggests another point – that considered as a vehicle for accessing information about government policy, the electronic Registry may be outdated. The Registry was a genuine innovation in e-democracy when it was introduced in 1994. However, since the mid-1990s the Internet has become widely available to Ontarians and the provincial government and the Legislative Assembly have invested heavily in their websites. All government bills are posted on the Legislative Assembly website the day they are introduced in the Legislature. When a ministry does post a bill on the Registry, this in fact takes the form of a hotlink to the Legislative Assembly website. The Assembly’s website provides links to all legislative debates on bills, ministry statements and even comments by ENGOs. Ministries routinely provide Internet access to background material about legislation and other initiatives. All regulations are posted online on the government’s “e-laws” website as soon as they are promulgated. (However, instruments are not posted). The result is that it is considerably more convenient to follow the evolution of government policy through the Internet than it is through the Registry.

These developments have obvious implications for the ECO’s assessment of government performance under the EBR. In criticizing the consultations over Bill 187, the *Budget Measures and Interim Appropriation Act, 2007*, the ECO correctly noted that as this was a budget bill, the government was not obligated to post notice of it on the EBR. He indicated that as a result of the ECO’s prompting, the government voluntarily posted a s. 6 information notice describing the bill’s content, after the bill was referred for third reading (under s. 6 of the EBR ministries can post notices containing information about decisions and activities without incurring any procedural obligations to the public). He lamented that other than this concession, “no further opportunity for public comment or consultation was provided” while the bill proceeded through the Legislature (ECO 2008A: 153). In fact, the bill was posted on the Assembly’s website the day it received first reading. The Ministry of Finance’s website carried the full

The progress of consultations with the opposition parties over the legislative schedule may also influence the timing of a bill's formal introduction in the Legislature and the decision as to whether the bill will receive any consideration in committee. It is difficult to offer any precise formulation about the impact of these negotiations. A number of factors will come into play. The cabinet's priorities; opposition manoeuvrings; the general political situation; the importance of the bill itself; the proximity of the next election; even the personal relations between the House leaders: all enter into the calculus which determines the disposition of legislation before the House.

As noted above, ministries are required to post decision notices on the Registry when a proposal is implemented. When the proposal is a bill, implementation means final passage by the Legislature. The ECO complains when the government does not comply with s. 36 and post timely decision notices. The ECO argues that among other problems this tardiness causes, "the result can be a loss of accountability and transparency in government decision-making" (2001A: 42).

In fact, the legislative process is far more transparent and accountable than the EBR. The Registry procedure requiring ministry officials to respond to website postings from private citizens cannot compare to the public and uncompromising scrutiny that occurs daily in a democratic legislature.

Bills introduced into the Legislature are not merely "draft legislation," which is how the ECO routinely describes them – implying that ministries have it within their power to change them at their discretion in light of Registry comment.<sup>27</sup> Bills are public documents which can only be amended by the Legislature. Ministers have to accept responsibility for any problems detected in a bill, its failures to adequately address the problem at hand, and the terms of the policy trade-off the bill is designed to implement. They must be prepared to respond to any allegations that the community affected was not adequately consulted. If members of the public are not happy with the bill they are not likely to confine their protests to the Registry website, but instead may complain to the media or approach opposition Members to enlist their support.

In recent years the ECO has editorialized on recently passed statutes in his annual reports. These little essays do not confine themselves to reporting on how the EBR consultation processes have affected the content of legislation. Instead they are model discursions on the realpolitik of the policy-making process. In his analysis of the *Toughest Environmental Penalties Act* (ECO 2001A: 101-102), the *Provincial Parks and Conservations Reserves Act* (ECO 2008A: 68-74), the *Budget Measures and Interim Appropriation Act* (ECO 2008A: 114-115), and the *Regulatory Modernization Act* (ECO 2008A:128-131), the ECO dissected the policy choices, trade-offs and compromises reflected in the legislation. He speculated on the political factors influencing the

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texts of all of the related budget documents. This of course does not speak to the adequacy of the consultations on the bill. But it is important to recognize that any Ontarian with access to the Internet can keep up to date with government initiatives without relying on the Registry.

<sup>27</sup> A recent example is the ECO's February 2009 special report on the *Species at Risk Act* passed into law in 2007. After exhaustively analyzing the Act, the ECO recommended that "MNR should change the bill" to implement his proposed legislative amendments (ECO 2009: 10-11).

contents of the statutes and the obstacles to successful implementation. He discussed the compromises ministers felt compelled to broker in order to get their legislation through cabinet and the Legislature. In short, the ECO recognized that public input is only one factor shaping the composition of government legislation. As the supreme tool of governance, statutes must respond to a range of considerations which the Registry process cannot represent. And it is in the Legislature, and not on the Registry website, where elected officials are obliged to explain and defend the terms and conditions of the statutes they have introduced.

This analysis can be extended to Part IV applications for review which, it will be recalled, empower the public to lobby the executive directly for legislative reform. The ECO often publicizes ENGO applications which usefully make the case for overhauls of legislative frameworks generally recognized in the policy community to be long overdue. ENGOs have employed Part IV applications to publicize the need for comprehensive reworkings of the *Provincial Parks Act* (ECO 2002:113-117), the *Endangered Species Act* (ECO 2003:134-138, 2004-05:148-152), and the *Mining Act* (ECO 2008A: 147-149). In each case the application was turned down but with an admission by the Ministry that amendments were needed. Eventually, the government did undertake sweeping reforms after extensive consultations, through the EBR process and directly with the ministry's established policy community.

However, other applications which are essentially gambits in the ongoing struggle between interest groups and the government over the direction of policy suggest the limitations of the EBR as an accountability mechanism. A good example is the October 2002 application filed by the Preservation of Agricultural Lands Society (PALS) requesting an overhaul of the *Planning Act*. The target of PALS' submission was Bill 20, the legislation introduced by the Harris Conservative government in 1996, which drastically revised the land-use planning framework in favour of the development industry and made it more difficult for municipalities to impose effective limits on suburban sprawl. PALS was challenging not only its political loss on the floor of the Legislature in 1996, but further, the election result of 1995. The direction of suburban development had been an issue in the election campaign, with the Conservatives promising to loosen the controls previously legislated by the NDP government. Not surprisingly, the newly elected Conservative government interpreted its victory as a mandate for proceeding with Bill 20.

The Ministry of Municipal Affairs and Housing predictably turned down PALS' application. Among the reasons cited was the extensive public consultation process undertaken in 1995-96 when Bill 20 passed through the Legislature. Bill 20 had been debated for two days at second reading, twelve days in committee and four days at third reading. This was an unusually protracted debate by Ontario legislative standards. Few bills under the Harris government (or for that matter, under other recent governments) were debated as extensively. Only a handful of government bills in the 1995-97 session, which implemented the fundamentals of the Conservative government's policy agenda, received more days in committee; only one other bill received as many as four days at third reading.

The ECO agreed with the ministry's decision to deny the application but disagreed with the rationale offered, namely the extensive legislative debates of 1995-96 (ECO 2003:133). Instead, the ECO argued that PALS' concerns would be addressed during two exercises, the mandatory

five-year review of the Provincial Policy Statement and the government's new Smart Growth initiative.

What this explanation misses is that in the 1995-96 legislative debates, and in other innumerable exchanges in the Legislature over Bill 20, such as in Question Period, during Private Member's time or Members' Statements, and in debates over related legislation, the concerns expressed by PALS and other ENGOs about suburban sprawl received more transparent consideration by government spokespersons than they ever would in an internal ministerial review. But further, this issue, which went to the heart of the philosophical differences between the neo-liberal Conservative party and its opponents in the ENGO movement, was publicly contested throughout the Harris era, not only in the Legislature but in the media, in public forums and in countless meeting rooms across the province.

The EBR is only one of many channels through which the government receives public input and assesses the state of public opinion. More importantly, it is not the medium through which ministers govern and their decisions are legitimated. Invoking compliance with the Registry as the criterion for evaluating government accountability to the public gives a partial and therefore distorted view of government performance, the political criteria governments necessarily employ when making policy, and their willingness to be held accountable under the democratic norms of parliamentary government. The ECO himself recognizes this, when he cites the attention a bill receives in a legislative committee as a factor influencing his assessment of whether there has been adequate consultation (ECO 2002-03:103, 2004-05:104). This is an implicit acknowledgement that the legitimacy of the law-making process does not rest decisively on ministerial compliance with the EBR.

#### IV. DISCUSSION

This study has illustrated the elemental lesson that parliamentarians respond to institutional changes in their workworld in terms of their own roles and priorities. It is impossible to grasp the contemporary operation of the two parliamentary officers discussed in this paper except in this context.

The CESD relates to Parliament through annual reports submitted to the Standing Committee on Environment and Sustainable Development. As we have seen, both Auditor General Fraser and the Green Ribbon Panel interpreted the Committee's unwillingness to make extensive use of the reports as a sure indicator that the CESD was faltering. In fact the Committee has spent little time on the CESD because of Members' assessment of how they see their time best being used. Members' lack of interest in debating the sustainable development initiative follows naturally from the near indifference ministers have always exhibited for this project regardless of the party in power. Whenever the opportunity has arisen to express an opinion on the fundamental role of the CESD, the Members serving on the Committee have opted for an entirely different type of parliamentary officer, a policy advocate reporting directly to Parliament.

Environmental Commissioner Gord Miller appears to be a paradigmatic example of a parliamentary officer who has successfully re-interpreted the jurisdictional boundaries of his position to suit his own vision of how his office should operate. Sutherland has pointed out that this is what can be expected when parliamentary officers are permitted to operate independently of the legislature (Sutherland 2006: 228). During his term the ECO has become precisely the kind of policy advocate which many MPs on the Standing Committee on Environment and Sustainable Development prefer to the existing CESD. The ECO's activism is strongly supported by the ENGO movement, which can be counted on to protest any move by the provincial government or the Legislature to fetter his activities.<sup>28</sup> The first page of the ECO's most recent special report proclaims that "the role of the Environmental Commissioner of Ontario is to hold the government accountable for decisions it makes to protect and conserve the environment" (ECO 2009: 1). This of course is not what the Task Force contemplated and is nowhere sanctioned by the EBR itself. Nor is it workable under the parliamentary system of government.<sup>29</sup> Nevertheless this job description is now commonly used to describe the Commissioner, by the media, his supporters and even on occasion by MPPs in the Legislature.

<sup>28</sup> After Commissioner Ligeti's term expired in 1999 a rumour made the rounds at Queen's Park that the Conservative government was considering abolishing the position of Environmental Commissioner. Dozens of ENGOs gathered together to protest, prompting an official denial (CELA 1999). The esteem in which Commissioner Miller is held by the environmental movement is suggested by Foss (2005-06).

<sup>29</sup> The recent expansion of the ECO's jurisdiction to review the provincial government's climate change policies provides another illustration of the limitations the ECO must operate under as a parliamentary officer. In 2007 the McGuinty government announced that it would submit annual progress reports on its climate change policies to the ECO "for an independent review" (Office of the Premier 2007). The ECO reviewed the first report in his 2007-08 annual report (ECO 2008A: 13-28) and a special report released in December 2008 (ECO 2008C). The *Green Energy and Green Economy Act, 2009* amended the EBR to sanction this expansion of the ECO's duties (Schedule F). Thus, for the first time the ECO was formally empowered to review the substance of government policy. It is important to note however that Schedule F only authorizes the ECO to report his findings to the Legislative Assembly. Only the Legislature can decide what political consequences if any should flow from the Commissioner's analysis.

For practical purposes the ECO's aggressive policy advocacy cannot pose an institutional crisis for parliamentary democracy in Ontario as long as ministers can choose to ignore the annual reports (while accepting responsibility for doing so in the Legislature), and ministries retain control over the extent to which they must comply with the EBR. Soon after her appointment as Commissioner Eva Ligeti appeared before the Standing Committee on Environment and Sustainable Development in Ottawa and informed MPs that provincial government policies would now have to respect the EBR or "they will be subject to some discussion in [the provincial] Parliament" (Ligeti 1995:15). Or ministers and MPPs may choose not to.

Smith and Sutherland have noted that debates about the formal status of parliamentary officers and their role in supporting the legislature do not move much beyond a focus on institutional attributes such as a statutory guarantee of legislative involvement in the appointment, a fixed term in office, and the obligation to release regular reports (Smith 2006, Sutherland 2006). For parliamentarians these issues usually resolve themselves into a simple metric: the willingness of the parliamentary officer to attack the government. This is the surest indicator of independence. Members hold parliamentary officers accountable by protecting them from political interference by the executive.

When Auditor General Fraser appeared before the Standing Committee on Environment and Sustainable Development to discuss the G elinas controversy the primary question opposition Members wanted answered was whether Fraser had fired her because of pressure from the Conservative government. As far as they were concerned the Commissioner's critical reports were a sign that the CESD was a success, and not a symptom of a larger problem about the institution's role. They responded to Fraser's efforts to initiate a dialogue over whether the CESD was having any real impact on the governance of environmental policy by voting to make the Commissioner formally independent. This solution did not begin to address the question of what role an environmental parliamentary officer should play in Parliament and how that official should be held accountable.

Gord Miller's appointment as Environmental Commissioner in December 1999, following the recommendations of a legislative committee controlled by the Conservative majority government, caused an uproar in the Legislature when it was revealed he had twice been a Conservative candidate and had served as a Conservative riding president. His appointment was denounced on the floor of the Legislature by opposition MPPs. Up to a few weeks before the release of his groundwater report in July 2000, Miller was under attack as a Conservative apologist by opposition Members (Toronto Star 2000). In a June 2000 debate on the Walkerton crisis, a senior New Democrat referred to Miller's Conservative background and effectively challenged him to issue a report on groundwater as critical as that released by his predecessor, Commissioner Ligeti (Martel 2000). Once this report was forthcoming a few months after his appointment, he was judged to be independent and the objections to his appointment were dropped.

Westminster style legislatures are poorly equipped to supervise their own bureaucracies. Members have a vested interest in playing the roles assigned to them under the conventions of responsible government which ensure that the political executive is held accountable. But they

lack similar incentives in their working relationships with parliamentary officers (d’Ombain 2007: 207). In order to hold a parliamentary officer to account Members on both sides of the House would have to tone down the partisanship and devote considerable time and effort to mastering problems of administration and management. This would require developing some level of expertise in the policy field relating to the mandate of the parliamentary officer under scrutiny. In particular, the opposition parties would have to recognize that in assessing how a parliamentary officer chooses to fulfill his or her statutory responsibilities, their own institutional needs are not the only factors to be taken into consideration.

The objective of this study was to contribute to the ongoing reconsideration of the role of parliamentary officers in Canadian democracy. The subjects were two parliamentary officers expressly created to strengthen a legislature’s oversight activities in the area of environmental policy. This paper has confirmed the relevance of the critique sketched at the outset. It suggests the following hypothesis for future studies of parliamentary officers in Canada. Parliamentary officers may be providing an alternate source of criticism of the executive; existing alongside the legislature and sometimes embraced by Members when this suits their own purposes; but for the most part functioning independently, in accord with their own institutional imperatives.

The fundamental research question which should be posed is this. Does a parliamentary officer, in the discharge of the mandate granted by the legislature, support the operation of responsible government? The evidence may indicate the opposite.



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