

## **PART I – OVERVIEW OF CURRENT LEGAL REGIME IN ONTARIO**

### **1.1 Introduction**

The current legal regime for protecting Ontario's drinking water (and its sources) is best described as a diverse mix of general legislation, regulation, standards, objectives and guidelines of varying vintage. At the present time, there is no specialized safe drinking water legislation in Ontario, nor does such legislation exist at the federal level.

The centrepiece of Ontario's drinking water regime is the *Ontario Water Resources Act*<sup>1</sup> and regulations thereunder, such as the Water and Sewage Works Regulation (O.Reg. 435/93) and the new Drinking Water Protection Regulation (O.Reg. 459/00). Other provincial statutes – such as the *Environmental Assessment Act*,<sup>2</sup> *Environmental Bill of Rights*,<sup>3</sup> *Environmental Protection Act*,<sup>4</sup> and *Health Promotion and Protection Act*<sup>5</sup> – also assist in protecting water quality and public health, as described below. Similarly, a number of provincial policies, guidelines and objectives<sup>6</sup> have been developed to ensure the protection and conservation of Ontario's water resources.

This provincial regime is supplemented by environmental laws and regulations which exist at the federal level, such as the *Canada Water Act*,<sup>7</sup> *Canadian Environmental Protection Act, 1999*,<sup>8</sup> and *Fisheries Act*.<sup>9</sup> These laws apply in Ontario and confer an additional degree of protection of surface watercourses which serve as sources of drinking water. Moreover, federal water policy<sup>10</sup> includes commitments to safe drinking water, and federal drinking water guidelines have been developed with the assistance of provincial and territorial officials.<sup>11</sup>

In general, the responsibility for protecting drinking water (and its sources) is shared between federal, provincial, and municipal levels of government. However, the primary responsibility for ensuring potable water supplies in Ontario rests with the provincial and municipal governments.

Accordingly, the purpose of this section of the paper is to:

- review the constitutional framework for drinking water protection;

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<sup>1</sup> *Ontario Water Resources Act*, R.S.O. 1990, c.O.40.

<sup>2</sup> *Environmental Assessment Act*, R.S.O. 1990, c.E.18.

<sup>3</sup> *Environmental Bill of Rights*, S.O. 1993, c.28.

<sup>4</sup> *Environmental Protection Act*, R.S.O. 1990, c.E.19.

<sup>5</sup> *Health Promotion and Protection Act*, R.S.O. 1990, c.H.7.

<sup>6</sup> Ministry of the Environment, *Water Management: Policies, Guidelines, Provincial Water Quality Objectives of the Ministry of the Environment* (July 1994).

<sup>7</sup> *Canada Water Act*, R.S.C. 1985, c.C-11.

<sup>8</sup> *Canadian Environmental Protection Act, 1999*, S.C. 1999, c.33 (Royal Assent on September 14, 1999).

<sup>9</sup> *Fisheries Act*, R.S.C. 1985, c.F-14.

<sup>10</sup> Environment Canada, *Federal Water Policy* (1987), p.17.

<sup>11</sup> Federal-Provincial Subcommittee on Drinking Water, *Guidelines for Canadian Drinking Water Quality* (6<sup>th</sup> ed., September 1996).

- describe the current legal regime for drinking water protection at the federal, provincial and municipal levels; and
- summarize previous attempts to enact safe drinking water legislation in Ontario.

It should be noted that this Part of the paper focuses on statutes, laws and policies which have been passed or proposed by the federal and provincial levels of government in relation to the environment and public health. Accordingly, it is beyond the scope of this Part to discuss common law rights (e.g. trespass, nuisance, negligence, riparian rights, or strict liability) or remedies (e.g. damages or injunctions) which are available to persons whose drinking water quality or quantity has been impaired by activities which contravene tort or contract law principles.<sup>12</sup>

## **1.2 Constitutional Framework**

Canada's *Constitution Act, 1867*<sup>13</sup> divides legislative powers between the federal and provincial levels of government. However, the *Constitution Act, 1867* does not specify which level of government has jurisdiction over "environment", "public health", or "drinking water".

Nevertheless, there are a number of provincial heads of power under the *Constitution Act, 1867* which give Ontario considerable jurisdiction to protect the environment and public health within the province. These provincial heads of power include:

- hospitals (section 92(7));
- municipal institutions (section 92(8));
- local works and undertakings (section 92(10));
- property and civil rights (section 92(13));
- matters of a "merely local or private nature" (section 92(16)); and
- natural resources, forestry and electrical energy (sections 92A and 109).

At the same time, there are a number of federal heads of power under the *Constitution Act, 1867* which give the Government of Canada jurisdiction over environmental quality and public health. These federal heads of power include:

- peace, order and good government (section 91));

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<sup>12</sup> See, for example, Swanson et al., *The Price of Pollution: Environmental Litigation in Canada* (Environmental Law Centre, 1990); Bilson, *The Canadian Law of Nuisance* (Butterworths Canada Ltd., 1991); Faieta et al., *Environmental Harm: Civil Actions and Compensation* (Butterworths, 1996); Fleming, *The Law of Torts* (9<sup>th</sup> ed.) (LBC Information Services, 1998); and Lindgren, "The New 'Toxic Torts': An Environmental Perspective" (Canadian Institute, 2000).

<sup>13</sup> *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c.3 (formerly the *British North America Act*)

- trade and commerce (section 91(2));
- navigation and shipping (section 91(10));
- sea coast and inland fisheries (section 91(12));
- criminal law (section 91(27));
- federal works and undertakings (sections 91(29) and 92(10));
- canals, harbours, rivers and lake improvements (section 108).

In addition, the *Constitution Act, 1867* has assigned “agriculture” to both the federal and provincial levels of governments (section 95). This overlapping jurisdiction has permitted both levels of government to enact regulatory controls over pest control products, such as herbicides and insecticides.<sup>14</sup>

Given the above-noted division of legislative powers, it is clear that environmental quality and public health are largely matters of concurrent (or shared) jurisdiction between the federal and provincial levels of government.

Across Canada, however, responsibility for water resource management has generally been assumed by provincial authorities or agencies, rather than by the federal government. In Ontario, for example, the Ministry of the Environment (“MOE”) has taken the lead role in water resource management,<sup>15</sup> and the MOE administers a number of statutes, regulations and policies intended to protect and conserve the province’s water resources.<sup>16</sup>

Despite this well-established provincial regime, recent judicial pronouncements have confirmed that there is a strong constitutional basis for federal laws aimed at protecting water quality and/or public health.<sup>17</sup> The existence of such federal jurisdiction has led some commentators to suggest that the federal government should enact a *Safe Drinking Water Act*,<sup>18</sup> or, at very least,

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<sup>14</sup> Cf. the federal *Pest Control Products Act*, R.S.C. 1985, c.P-9 and Ontario’s *Pesticides Act*, R.S.O. 1990, c.P.11.

<sup>15</sup> Ontario’s Minister of the Environment has supervisory jurisdiction over the province’s groundwater and surface water: see section 29 of the *Ontario Water Resources Act*, R.S.O. 1990, c.O.40.

<sup>16</sup> Ontario’s Ministry of Natural Resources (“MNR”) also exercises jurisdiction over certain aspects of water resource management: see, for example, the *Conservation Authorities Act*, R.S.O. 1990, c.C.27; *Lakes and Rivers Improvement Act*, R.S.O. 1990, c.L.3; and *Public Lands Act*, R.S.O. 1990, c.P.43. In addition, the MNR regulates various resource extraction activities which may impact water quality or quantity: see, for example, the *Aggregates Resources Act*, R.S.O. 1990, c.A.8; and *Crown Forest Sustainability Act*, S.O. 1994, c.25.

<sup>17</sup> *Northwest Falling Contractors v. R.* [1980] 2 S.C.R. 292 (federal prohibition against water pollution upheld on basis of fisheries power); *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401 (federal regulation of ocean dumping upheld on basis of “peace, order and good government” residual power); *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213 (federal regulation of toxic substances upheld on basis of criminal law power).

<sup>18</sup> T. Vigod and A. Wordsworth, “Water Fit to Drink? The Need for a *Safe Drinking Water Act* in Canada” (1982), 11 C.E.L.R. 80.

promulgate binding national drinking water standards rather than guidelines.<sup>19</sup> Indeed, the federal government's current water policy contains a commitment to "consider legislation to ensure the safety of drinking water within federal jurisdiction and to complement provincial and territorial programs".<sup>20</sup>

Regardless of whether the federal government can or should statutorily protect drinking water quality, it is beyond dispute that Ontario has clear constitutional authority to enact and enforce safe drinking water legislation. Accordingly, the primary focus of this paper is whether – or to what extent – safe drinking water legislation may be required in Ontario to address shortcomings in the current legal framework for protecting drinking water.

To answer this central question, it is first necessary to review the current legal framework for protecting drinking water at the federal, provincial, and municipal levels, as set out below.

### **1.3 Analysis of Current Legal Regime**

#### ***(a) Federal Regime***

At the present time, there is no federal legislation which specifically protects or regulates drinking water, particularly at the point of consumption.

Nevertheless, the federal government has developed various water-related laws and policies which are relevant to drinking water quality and quantity across Canada, as described below. In addition, representatives from Environment Canada and Health Canada (as well as Ontario's MOE and other provincial and territorial representatives) serve on the joint Federal-Provincial Subcommittee on Drinking Water, which publishes and updates drinking water guidelines for numerous microbial, chemical, physical and radiological parameters.<sup>21</sup>

For substances known or suspected to be harmful to human health, these national guidelines establish a maximum acceptable concentration ("MAC") or interim maximum acceptable concentration ("IMAC"). In addition, the guidelines include aesthetic objectives for substances which may cause appearance, odour or taste problems in drinking water. Although these national guidelines are not legally binding, they have generally been adopted and/or refined by provincial authorities, either as drinking water objectives or standards (see Part II of this paper below).

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<sup>19</sup> See, for example, Sierra Legal Defence Fund, *Waterproof: Canada's Drinking Water Report Card* (January 2001), at page 35.

<sup>20</sup> Environment Canada, *Federal Water Policy* (1987), at p.17: < <http://www.ec.gc.ca/water/index.htm>.>

<sup>21</sup> Federal-Provincial Subcommittee on Drinking Water, *Guidelines for Drinking Water Quality* (6<sup>th</sup> ed., September 1996). The Subcommittee has also released a Drinking Water Substances Priority List (October 2000), which identifies various parameters (e.g. viruses, pesticides, disinfection by-products, etc.) which are undergoing assessment or re-evaluation.

In an apparent attempt to move beyond these guidelines, Health Canada commenced public consultations in 1996 on a proposed *Drinking Water Materials Safety Act*.<sup>22</sup> The primary purpose of this Act was to certify and regulate drinking water materials, such as water treatment devices, chemical additives, or water system components (section 3). Among other things, the Act proposed to:

- authorize the Minister of Health to establish national drinking water guidelines on various matters (section 5), conduct research on improving drinking water quality (section 6), and enter into administrative agreements with provincial governments (section 20);
- establish an accreditation and certification process for evaluating drinking water materials (sections 7 to 9);
- prohibit deceptive practices (e.g. misleading advertising) regarding drinking water materials (sections 10 to 12);
- authorize the Minister of Health to require the submission of information on drinking water materials (sections 22 and 23), and to prohibit unsafe drinking water materials (sections 24 and 25); and
- enable the passage of regulations respecting water drinking materials (section 27).

However, this proposed federal legislation has not been enacted to date.<sup>23</sup> In the wake of the recent *Cryptosporidium* outbreak in North Battleford, Saskatchewan, it has been suggested that the federal government should enact nationally binding drinking water standards, or, alternatively, should regulate drinking water quality via amendments to the *Food and Drug Act*. At this time, it is unclear when – or whether – such proposals will be acted upon by federal officials.

It should be noted that Health Canada has undertaken other non-regulatory drinking water initiatives, such as conducting drinking water research, assessing water treatment processes and products,<sup>24</sup> and promoting public awareness of drinking water safety.<sup>25</sup> In addition, given the relatively high incidence of water-borne disease within First Nation communities, Health Canada, in conjunction with the Assembly of First Nations, established a Drinking Water Safety Program for Native People to assist in identifying and remedying drinking water quality

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<sup>22</sup> The 1996 version of the *Drinking Water Materials Safety Act* (Bill C-76) died on the order paper when the 1997 federal election was called. The Act was reintroduced as Bill C-14 in 1997, but it, too, died on the order paper in September 1999.

<sup>23</sup> Until such legislation is enacted, drinking water materials could theoretically be regulated by Health Canada as prohibited, restricted or controlled products pursuant to the *Hazardous Products Act*, R.S.C. 1985, c.H-3.

<sup>24</sup> For example, Health Canada has retained an accredited laboratory to test and report upon drinking water materials which fail health-based performance standards:

<[http://www.hc-sc.gc.ca/ehp/ehd/bch/water\\_quality/materials.htm](http://www.hc-sc.gc.ca/ehp/ehd/bch/water_quality/materials.htm)>.

<sup>25</sup> Health Canada, “Water Quality Activities” (September 2000):

<[http://www.hc-sc.gc.ca/ehp/ehd/bch/water\\_quality.htm](http://www.hc-sc.gc.ca/ehp/ehd/bch/water_quality.htm)>.

problems.<sup>26</sup> Health Canada has also published recreational water quality guidelines for use by provincial health officials involved in monitoring water quality of public beaches and investigating illnesses resulting from the use of recreational waters.<sup>27</sup>

The principal water-related statutes administered by the federal government include:

- *Arctic Waters Pollution Prevention Act*;
- *Canada Shipping Act*;
- *Canada Water Act*;
- *Canadian Environmental Protection Act, 1999*;
- *Dominion Water Power Act*;
- *Fisheries Act*;
- *International Boundary Waters Treaty Act*;
- *International River Improvements Act*;
- *Lake of the Woods Control Board Act*;
- *Navigable Waters Protection Act*;
- *Northwest Territories Waters Act*; and
- *Yukon Waters Act*.

In addition, the federal government has enacted the *Canadian Environmental Assessment Act* (“CEAA”),<sup>28</sup> which requires the preparation of an environmental assessment for certain projects and physical activities caught by CEAA.<sup>29</sup> CEAA requirements may be triggered by municipal infrastructure projects (e.g. water treatment, distribution or storage facilities) which require the provision of federal lands, federal funding, or federal approvals or permits which are prescribed

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<sup>26</sup> This program includes: increasing water testing and monitoring; establishing new laboratories; developing operator training programs; and providing technical and public health advice: see Health Canada, *Health and Environment: Partners for Life* (1997), at page 101.

<sup>27</sup> Health Canada, *Guidelines for Recreational Water Quality* (1992).

<sup>28</sup> *Canadian Environmental Assessment Act*, S.C. 1992, c.37: <<http://www.ceaa.gc.ca>>. Generally, see Northey, *The 1995 Annotated Canadian Environmental Assessment Act and EARP Guidelines Order* (Carswell, 1994); and Hazell, *Canada v. The Environment: Federal Environmental Assessment 1984-1998* (Canadian Environmental Defence Fund, 1999).

<sup>29</sup> “Project” is defined as “any proposed construction, operation, modification, decommissioning, abandonment or other undertaking” of a physical work, and includes certain physical activities (e.g. tree cutting, water taking, altering fish habitat, etc.) prescribed by regulation: see *Canadian Environmental Assessment Act*, S.C. 1992, c.37, section 2(1) and the Inclusion List Regulations (SOR/94-637).

on the CEAA Law List Regulation.<sup>30</sup> In addition, while CEAA does not address drinking water *per se*, the various types of environmental assessment under the Act (e.g. screening, comprehensive study, panel review and mediation) offer opportunities to identify, assess, and mitigate potential impacts of projects upon groundwater or surface watercourses which serve as sources of drinking water.<sup>31</sup>

Of the above-noted federal statutes, the laws which are the most directly relevant to drinking water (and its sources) include the *Canada Water Act*, *Canadian Environmental Protection Act, 1999*, and *Fisheries Act*. The essential elements of these statutes are summarized below.

### Canada Water Act

Enacted in 1970 and presently administered by Environment Canada, the *Canada Water Act* (“CWA”)<sup>32</sup> is not used to specifically regulate drinking water quality or quantity. However, the CWA contains a number of provisions which are related to water quality in general. These provisions include:

- authorizing various federal-provincial arrangements (e.g. joint subcommittees, programs or agreements) regarding water resource management (Part I);
- regulating discharges of waste into prescribed “water quality management areas”, and establishing federal water quality management programs for inter-jurisdictional waters (Part II);
- establishing advisory committees to assist in the implementation of the Act (section 28); and
- requiring the Minister of the Environment to report annually to Parliament on operations under the Act (section 38).

Persons convicted of contravening the CWA face small fines (sections 30 and 31) and prohibition orders (section 32).

### Canadian Environmental Protection Act, 1999

The new *Canadian Environmental Protection Act, 1999* (“CEPA”) is the centrepiece of the federal government’s pollution control regime.<sup>33</sup> CEPA is principally administered by Environment Canada, although Health Canada has certain responsibilities in relation to the assessment and regulation of toxic substances.<sup>34</sup> The underlying principles of CEPA are to ensure pollution prevention, achieve sustainable development, protect biological diversity, exercise precaution in cases of scientific uncertainty, adopt an ecosystem approach to

<sup>30</sup> A partial list of CEAA triggers for municipal projects is set out in Appendix 7 of the *Municipal Class Environmental Assessment*, which was approved under Ontario’s *Environmental Assessment Act* in October 2000.

<sup>31</sup> “Environment” is defined as including water: see *Canadian Environmental Assessment Act*, S.C. 1992, c.37, section 2(1).

<sup>32</sup> *Canada Water Act*, R.S.C. 1985, c.C-11.

<sup>33</sup> *Canadian Environmental Protection Act*, S.C. 1999, c.33 (Royal Assent September 14, 1999).

<sup>34</sup> *Ibid.*, section 3(2) and Part V.

environmental management, and virtually eliminate persistent and bioaccumulative toxic substances.<sup>35</sup>

While CEPA does not specifically address drinking water quality, the Act nevertheless contains numerous provisions which address water pollution and environmental enforcement, and therefore provides some degree of protection for surface watercourses which serve as sources of drinking water.<sup>36</sup> These provisions include:

- creating a public right to formally apply for an investigation of suspected contraventions of CEPA (sections 17 to 21);
- creating a public right to bring a civil “environmental protection action” in respect of contraventions of CEPA (sections 22 to 38);
- creating a civil cause of action for loss or damage resulting from contraventions of CEPA (sections 39 and 40);
- requiring pollution prevention plans from companies whose commercial, manufacturing, processing or other activities involve toxic substances specified on Schedule 1 of CEPA (Part 4);
- establishing an extensive regime for identifying, assessing, and regulating toxic substances (Part 5);<sup>37</sup>
- establishing an extensive regime for identifying, assessing and regulating “animate products of biotechnology” (e.g. genetically modified organisms)(Part 6);
- regulating nutrients (e.g. phosphates) that may adversely affect or degrade aquatic ecosystems (sections 116 to 119);
- regulating ocean dumping and protecting the marine environment from land-based sources of pollution through non-regulatory means (sections 120 to 137);
- controlling Canadian sources of international water pollution through regulations, interim orders or pollution prevention planning (sections 175 to 184);

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<sup>35</sup> *Ibid.*, Preamble.

<sup>36</sup> “Environment” is defined as including water: *Canadian Environmental Protection Act*, S.C. 1999, c.33, section 3(1).

<sup>37</sup> A substance may be deemed to be “toxic” if it is “entering or may enter the environment in a quantity or concentration or under conditions that, (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity; (b) constitute or may constitute a danger to the environment on which life depends; or (c) constitute or may constitute a danger in Canada to human life or health”: *Canadian Environmental Protection Act*, S.C. 1999, c.33, section 64. If a substance is found to be toxic, it is added to the Schedule 1 list and may be subject to regulations governing the manufacturing, sale, storage, importation, transportation, or release of the substance into the environment. At the present time, the Schedule 1 list includes a number of well-known toxic substances such as PCBs, CFCs, lead, asbestos, mercury, vinyl chloride, dioxins, furans, and benzene.



- controlling the transboundary movement of hazardous waste, hazardous recyclable material, and prescribed non-hazardous waste for final disposal (sections 185 to 192);
- requiring companies or facilities to prepare emergency plans for toxic substances (Part 8); and
- imposing a duty on corporate officers and directors to take all reasonable care to ensure that the corporation complies with CEPA and regulations, orders and directions made under CEPA (section 280).

To date, a number of water-related regulations have been promulgated under CEPA (and its predecessor). For example, CEPA regulations have been made in relation to:

- ocean dumping (SOR/89-500);
- phosphorus concentrations (SOR/89-501);
- pulp and paper effluent chlorinated dioxins and furans (SOR/92-267); and
- pulp and paper mill defoamer and wood chips (SOR/92-268).

CEPA makes it an offence to contravene the Act or regulations, orders, or directions made under the Act (section 272). Persons convicted of contravening CEPA face substantial penalties, such as \$1 million fines, jail terms, profit-stripping, restoration orders, and restitution orders (sections 272 to 294). In certain circumstances, a person charged with a CEPA offence may avoid prosecution by agreeing to undertake prescribed “environmental protection alternative measures” (sections 295 to 297).

### *Fisheries Act*

First enacted in 1868 and presently administered by the Department of Fisheries and Oceans, the *Fisheries Act*<sup>38</sup> is primarily aimed at protecting fish and their habitat, rather than protecting drinking water quality or quantity.

However, the Act contains some strong provisions relating to water pollution, and therefore confers some degree of protection of surface watercourses which serve as sources of drinking water. These provisions include:

- prohibiting the harmful alteration, disruption or destruction of fish habitat (section 35(1));
- prohibiting the deposit of “deleterious substances”<sup>39</sup> into or near waters frequented by fish (section 36(3));

<sup>38</sup> *Fisheries Act*, R.S.C. 1985, c.F-14: <<http://www.dfo-mpo.gc.ca>>.

<sup>39</sup> The term “deleterious substance” is defined as a substance (or water containing a substance) that would degrade or alter water quality so that it is rendered, or is likely to be rendered, harmful to fish or fish habitat: *Fisheries Act*, R.S.C. 1985, c.F-14, section 34(1).

- enabling the passage of regulations in relation to the deposit of waste, pollutants or deleterious substances (sections 36(4), 36(5), and 43); and
- imposing civil liability for loss or expenses caused by the unlawful deposit of deleterious substances (section 42).

To date, a number of regulations have been made under the *Fisheries Act* in relation to the liquid effluent from various industrial sectors, including:

- chlor-alkali plants (C.R.C., c.811);
- meat and poultry plants (C.R.C., c.818);
- metal mining facilities (C.R.C., c.819);
- petroleum refineries (C.R.C., c.828);
- potato processing plants (C.R.C., c.829); and
- pulp and paper mills (SOR/92-269).

Persons convicted for contravening the above-noted “fish habitat” and “deleterious substance” prohibitions face substantial penalties under the *Fisheries Act*, such as \$1 million fines, jail terms, profit-stripping, licence suspensions, and restoration orders (sections 40(2), 79.1, and 79.2).

### ***(b) Provincial Regime***

At the present time, Ontario lacks specialized safe drinking water legislation which specifically protects or regulates drinking water, particularly at the point of consumption.

Nevertheless, Ontario has enacted a number of environmental statutes which are relevant to drinking water quality and quantity within the province.<sup>40</sup> The principal environmental statutes in Ontario include:

- *Conservation Authorities Act*;
- *Environmental Assessment Act*;
- *Environmental Bill of Rights, 1993*;

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<sup>40</sup> It should be noted that protection of groundwater and surface water may also be achieved by ensuring compliance with other non-environmental statutes, such as the *Dangerous Goods Transportation Act*, R.S.O. 1990, c.D.1 and the *Gasoline Handling Act*, R.S.O. 1990, c.G.4. See, for example, Swaigen J., *Toxic Time Bombs: The Regulation of Canada's Leaking Underground Storage Tanks* (Emond Montgomery Publications Ltd., 1995).

- *Environmental Protection Act*;
- *Lakes and Rivers Improvement Act*;
- *Ontario Water Resources Act*;
- *Public Lands Act*;
- *Water and Sewage Services Improvement Act*; and
- *Water Transfer Control Act*.

In addition, Ontario has enacted public health legislation (e.g. the *Health Promotion and Protection Act*) as well as legislation governing municipal institutions involved in the production and delivery of potable water (e.g. the *Municipal Act* and *Public Utilities Act*) and watershed management (eg. *Conservation Authorities Act*). These statutes are discussed below in the context of the municipal drinking water regime.

Ontario's statutory regime for protecting drinking water (and its sources) has been augmented by an extensive policy framework consisting of various objectives, guidelines, manuals, and codes of practice. For example, the MOE has developed a number of water-related policies, procedures and technical guidance documents relating to:

- water management policies, guidelines and provincial water quality objectives (Guideline B-1-2);
- protection and management of aquatic sediment quality (Guideline B-1-3);
- fill quality guidelines for lakefilling (Guideline B-1-4);
- resolution of well water quality problems resulting from winter road maintenance (Guideline B-3);
- drinking water standards (Guideline B-5-1);
- evaluation of construction activities impacting water resources (Guideline B-6);
- incorporation of the "reasonable use" concept in MOE groundwater management activities (Guideline B-7);
- determination of contaminant limits and attenuation zones (Guideline B-7-1);
- resolution of groundwater quality interference problems (Guidelines B-9 and B-9-1);
- potable water storage structures (Guideline B-12);
- design of water supply systems for small residential developments (Guideline B-14-2);

- use and storage of pesticides at water works (Guideline B-15);
- planning for sewage and water services (Guideline D-5);
- application of municipal responsibility for communal water and sewage services (Guideline D-5-2);
- servicing options statement (Guideline D-5-3);
- water quality impact risk assessment for individual on-site sewage systems (Guideline D-5-4);
- water supply assessment for private wells (Guideline D-5-5);
- treatment levels for municipal and private sewage works discharging to surface waters (Guidelines F-5 to F-5-5);
- separation distances for sewer and watermain construction (Guidelines F-6 and F-6-1);
- minimum accepted level of servicing for municipal and private communal systems (Guideline F-7);
- phosphorus removal facilities at municipal, institutional and private sewage treatment works (Guidelines F-8 and F-8-1);
- use of holding tanks in sewage systems (Guideline F-9);
- manual for on-site sewage systems (Guideline F-9-1);
- sampling and analysis requirements for municipal and private sewage treatment works (Guidelines F-10 and F-10-1).<sup>41</sup>

Of Ontario's various environmental statutes, the laws which are most directly relevant to protecting drinking water (and its sources) are the *Ontario Water Resources Act*, *Environmental Protection Act*, *Environmental Assessment Act*, and *Environmental Bill of Rights, 1993*. The essential elements of these statutes are summarized below.

### Ontario Water Resources Act

Arguably, the *Ontario Water Resources Act* ("OWRA") is the most important law in relation to drinking water quality and quantity within the province. The OWRA is a general water

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<sup>41</sup> Generally, see the MOE's Manuals and Guidelines Catalogue: <<http://www.ene.gov.on.ca/envision/gp/index.htm>>

management statute whose origins date back to the 1950s,<sup>42</sup> and applies to both groundwater and surface water.<sup>43</sup>

Administered by the MOE, the OWRA contains a number of important mechanisms which assist in protecting drinking water and its sources. These mechanisms include:

- prohibiting the discharge of polluting materials in or near water (section 30);
- prohibiting or regulating the discharge of sewage (section 31);
- ordering measures to prevent, reduce or alleviate impairment of water quality (section 32);
- defining and protecting sources of public water supply (section 33);
- regulating water takings in excess of 50,000 litres/day (section 34);
- regulating well drilling and construction (sections 36 to 50);
- approving water works (section 52);<sup>44</sup>
- approving sewage works (section 53);
- enabling the Ontario Clean Water Agency (“OCWA”)<sup>45</sup> to provide or operate water works or sewage works for municipalities (sections 63 to 73);
- designating and regulating areas of public water or sewage services (section 74); and
- imposing a duty on corporate officers and directors to take all reasonable care to prevent the corporation from discharging materials into or near water that may impair water quality (section 116).

In addition, the OWRA enables the passage of regulations on a wide variety of water-related matters (sections 75 to 77). To date, this regulatory authority has been used to promulgate regulations relating to:

- licencing of well contractors and technicians, and requirements for well construction, operation, and abandonment (Regulation 903);

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<sup>42</sup> See *Ontario Water Resources Commission Act*, S.O. 1956, c.3; S.O. 1957, c.16.

<sup>43</sup> “Water” is defined as “a well, lake, river, pond, spring, stream, reservoir, artificial watercourse, intermittent watercourse, groundwater or other water or watercourse”: see *Ontario Water Resources Act*, R.S.O. 1990, c.O.40, section 1.

<sup>44</sup> As described below, a municipal project which requires a section 52 approval may also be subject to the planning requirements prescribed under the *Municipal Class Environmental Assessment* (approved October 2000).

<sup>45</sup> OCWA was established in 1993 under the *Capital Investment Plan Act*, S.O. 1993, c.23 in order to, *inter alia*, operate provincial and municipal water treatment plants, and assist municipalities in the planning, construction and delivery of sewage and water services.

- classifying water works and sewage works, licencing of facility operators, and operating standards (O.Reg. 435/93);
- exempting minor watermain, sewer or stormwater management projects from approval requirements (O.Reg. 525/98);
- water takings and transfers (O.Reg. 285/99); and
- drinking water treatment, testing, and reporting (O.Reg. 459/00).

The OWRA makes it an offence to contravene either the Act or the regulations (section 107), and various penalties (eg. fines, jail terms, profit-stripping, restitution, restoration order, forfeiture, licence suspension) may be imposed against individuals or corporations convicted under the OWRA (sections 108 to 112). In addition to prosecution, administrative penalties may also be available (section 106.1) It should be further noted that the recently enacted *Toughest Environmental Penalties Act, 2000* increases penalties for certain offences under the OWRA and the Drinking Water Protection Regulation.<sup>46</sup>

Significantly, the Drinking Water Protection Regulation (O.Reg. 459/00) has been in effect in Ontario since August 2000. This regulation, which essentially updates and replaces the former *Ontario Drinking Water Objectives* (“ODWO”) and related policies,<sup>47</sup> may be summarized as follows:

- applies to all water treatment and distribution systems which require approval under section 52 of the OWRA, subject to certain exceptions (section 3);<sup>48</sup>
- directs the MOE Director to have regard for the Ontario Drinking Water Standards when considering an application for approval under section 52 of the OWRA (section 4);
- requires water systems which utilize groundwater to provide a minimum level of treatment consisting of disinfection (section 5(1));
- requires water systems which utilize surface water to provide a minimum level of treatment consisting of chemically assisted filtration and disinfection, or an equivalent treatment (section 5(2));
- requires water system owners to ensure that no water enters the distribution system or plumbing unless it has been treated with chlorination or an equivalent treatment (section 5(3));

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<sup>46</sup> See *Toughest Environmental Penalties Act, 2000*, S.O. 2000, c.22, section 2 for OWRA-related amendments (Royal Assent November 21, 2000).

<sup>47</sup> For example, the new regulation supersedes former MOE guidelines relating to treatment requirements for municipal and communal water works using surface water (B-13), chlorination of potable water supplies (B-13-3), and treatment requirements for municipal and communal water works using groundwater (B-14).

<sup>48</sup> For example, the regulation does not apply to systems that supply 50,000 litres/day or less on at least 88 days of a 90 day period, or systems that are not capable of supplying water at a rate greater than 250,000 litres/day, unless the system serves more than five private residences: see O.Reg.459/00, subsections 3(3) and (4).

- provides a transitional period for pre-existing water systems to come into compliance with the new minimum treatment requirements (section 5(5));
- enables new approvals under section 52 of the OWRA to dispense with the need to disinfect and chlorinate if certain preconditions are satisfied (section 6);<sup>49</sup>
- prescribes mandatory water sampling and analysis requirements (section 7(1) and Schedule 2);
- requires water sampling to be carried out by accredited laboratories, subject to certain exceptions (section 7(3))<sup>50</sup> and other information requirements (section 7(4));
- requires water system owners to notify the MOE Director as to which laboratory will be conducting the sampling and analysis (section 7(5));
- restricts subcontracting of sampling/analysis work, and restricts the use of laboratories located outside of Ontario (sections 7(7) and (8));
- requires laboratories to submit analysis results to the MOE Director at the same time that the results are sent to water system owners (section 7(10));
- imposes a duty on water system owners and laboratories to provide immediate notice to the medical officer of health and the MOE where a sample result shows an exceedance of a prescribed standard, or otherwise contains an indicator of adverse water quality (e.g. presence of *E. coli* or total coliforms) (section 8 and Schedule 6 );
- requires water system owners to take corrective action (e.g. resample or increase chlorination) where notice of adverse water quality has been provided (section 9 and Schedule 6);
- requires water system owners to post warning notices if prescribed sampling/analysis requirements have not been followed, or if corrective action has not been taken in respect of an exceedance of a microbiological parameter (section 10);
- requires water system owners to make sampling reports and related information publicly available (section 11);
- requires water system owners to file quarterly summary reports with the MOE Director, and to make such reports available to the public (section 12);

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<sup>49</sup> Exceptions to disinfection and chlorination requirements are permissible only if: (a) the source is groundwater; (b) the application for approval includes a municipal resolution, written consent from the medical officer of health, two years' worth of water sampling data, documentation concerning public notice and comment, confirmation that standby disinfection equipment is available, and hydrogeological information regarding the aquifer, well, well head protection, and impact of existing/anticipated land uses: O.Reg. 459/00, section 6.

<sup>50</sup> These exceptions include: analysis carried out by continuous monitoring equipment; analysis for certain parameters which are not health-related; and operational analysis carried out by licenced operators or qualified persons: O.Reg.459/00, section 7(4) and Schedule 3.

- requires water system owners to periodically file reports by qualified professional engineers (section 13);<sup>51</sup> and
- requires water system owners to retain documents, reports and records for at least five years (section 14).

To assist in the interpretation and application of the Drinking Water Protection Regulation, the MOE has produced guidance documents and technical briefs on various topics, such as:

- Ontario Drinking Water Standards;
- engineer's reports for waterworks;
- sampling requirements;
- minimum treatment requirements;
- laboratory accreditation;
- licencing of analytical staff at water works;
- corrective actions for adverse drinking water quality incidents;
- notification requirements;
- public notices and quarterly consumer reports;
- applying for approval for municipal and private water works.<sup>52</sup>

In addition, the MOE has undertaken public consultation on additional measures for protecting drinking water for small water works in Ontario.<sup>53</sup>

### *Environmental Protection Act*

As Ontario's main anti-pollution statute, the *Environmental Protection Act* ("EPA")<sup>54</sup> is administered by the MOE but does not specifically address drinking water quality, particularly at the point of consumption.

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<sup>51</sup> The purpose of the engineer's report is to: (a) assess the potential for microbiological contamination; (b) identify operational and physical improvements to mitigate this potential; and (c) determine an appropriate monitoring program: see Ministry of the Environment, *Terms of Reference for Engineers' Reports for Water Works* (August 2000; rev. January 2001), at page 1.

<sup>52</sup> See Ministry of Environment, *Ontario's New Drinking Water Protection Regulation*: <<http://www.ene.gov.on.ca/envision/WaterReg/WaterReg.htm>>.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Environmental Protection Act*, R.S.O. 1990, c.E.19. Generally, see Saxe, *Ontario Environmental Protection Act Annotated* (Canada Law Book, looseleaf service).



Nevertheless, the EPA does contain a number of general provisions which can be used to protect surface water and groundwater against contamination. These provisions include:

- prohibiting discharges of contaminants<sup>55</sup> into the natural environment<sup>56</sup> in an amount, concentration or level in excess of prescribed regulatory standards (section 6);<sup>57</sup>
- authorizing the issuance of binding administrative orders to prevent, control, minimize or remediate discharges of contaminants into the natural environment (sections 7 to 12, sections 17 to 18, section 97, Part XI, and Part XIV);
- prohibiting the discharge of contaminants into the natural environment that causes or is likely to cause an adverse effect<sup>58</sup> (section 14);<sup>59</sup>
- regulating structures located on ice over water (Part IV);
- approving and regulating waste disposal sites and waste management systems (Part V);
- imposing duties to report and clean up pollutant spills, and imposing civil liability for loss or damage arising from pollutant spills (Part X);<sup>60</sup>
- authorizing conditions of approval (including permits and approvals under the OWRA) which require proponents to provide financial assurance to secure performance of environmental protection measures (Part XII); and
- imposing a duty on corporate officers and directors to take all reasonable care to prevent the corporation from causing or permitting unlawful discharges of contaminants into the natural environment (section 194).

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<sup>55</sup> “Contaminant” is defined broadly as “any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that may cause an adverse effect”: see *Environmental Protection Act*, R.S.O. 1990, c.E.19, section 1(1).

<sup>56</sup> “Natural environment” is defined as “the air, land and water, or any combination or part thereof, of the Province of Ontario”: see *Environmental Protection Act*, R.S.O. 1990, c.E.19, section 1(1).

<sup>57</sup> Significantly, the section 6 prohibition does not apply to “animal wastes disposed of in accordance with normal farm practices”: see *Environmental Protection Act*, R.S.O. 1990, c.E.19, section 6(2).

<sup>58</sup> “Adverse effect” is defined as “one or more of: (a) impairment of the that quality of the natural environment for any use that can be made of it; (b) injury or damage to property or plant and animal life; (c) harm or material discomfort to any person; (d) an adverse effect on the health of any person; (e) impairment of the safety of any person; (f) rendering any property or plant or animal life unfit for human use; (g) loss of enjoyment of normal use of property; and (h) interference with the normal conduct of business”: see *Environmental Protection Act*, R.S.O. 1990, c.E.19, section 1(1).

<sup>59</sup> Significantly, the anti-pollution prohibition in section 14(1) does not apply to certain adverse effects caused by “animal wastes disposed of in accordance with normal farming practices”: see *Environmental Protection Act*, R.S.O. 1990, c.E.19, section 14(2).

<sup>60</sup> “Pollutant” is defined as “a contaminant other than heat, sound, vibration or radiation, and includes any substance from which a pollutant is derived”, while “spill” is defined as “a discharge, (a) into the natural environment; (b) from or out of a structure, vehicle or container; and (c) that is abnormal in quality or quantity in light of all the circumstances of the discharge”: see *Environmental Protection Act*, R.S.O. 1990, c.E.19, section 91(1).

In addition, the EPA creates broad regulation-making authority on a lengthy list of environmental matters (sections 175.1 to 177). To date, this EPA authority has been used to promulgate regulations on various water-related topics, such as:

- deep well disposal (Regulation 341);
- discharge of sewage from pleasure boats (Regulation 343);
- marina facilities (Regulation 351); and
- sewage systems (Regulations 358 and 359).

Moreover, it should be noted that the MOE has used the EPA – not the OWRA – as the statutory basis for its Municipal-Industrial Strategy for Abatement (“MISA”) program. Under the MISA program, a number of regulations have been passed to set effluent limits and monitoring requirements for various sectors which discharge wastewater into Ontario’s watercourses.<sup>61</sup>

The EPA makes it an offence to contravene either the Act, regulations, orders, or conditions of approval (section 186), and various penalties (e.g. fines, jail terms, profit-stripping, restitution, remedial orders, forfeiture, or licence suspension) may be imposed against individuals or corporations upon conviction under the EPA (sections 187 to 193). Administrative penalties may also be available (section 182.1). It should be further noted that the *Toughest Environmental Penalties Act, 2000* has increased penalties for certain offences under the EPA or regulations.<sup>62</sup>

### Environmental Assessment Act

As Ontario’s primary environmental planning statute, the *Environmental Assessment Act* (“EAA”) is administered by the MOE but does not specifically address drinking water quality, particularly at the point of consumption.

However, with respect to undertakings caught by the EAA,<sup>63</sup> proponents are generally required to identify and evaluate ecological, social, cultural and economic impacts that may be caused by the undertaking and the alternatives.<sup>64</sup> Such undertakings cannot proceed unless the proponent

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<sup>61</sup> See, for example, O.Reg. 537/93, as am. (petroleum sector); O.Reg. 760/93, as am. (pulp and paper sector); O.Reg. 560/94, as am. (metal mining sector); O.Reg. 561/94, as am. (industrial metals sector); O.Reg. 562/94, as am. (metal casting sector); O.Reg. 63/95, as am. (organic chemical and manufacturing sector); O.Reg. 64/95, as am. (inorganic chemical sector); O.Reg. 214/95 (iron and steel manufacturing sector); and O.Reg. 215/95, as am. (electric power generation sector).

<sup>62</sup> See *Toughest Environmental Penalties Act, 2000*, S.O. 2000, c.22, section 1 for EPA-related amendments (Royal Assent November 21, 2000).

<sup>63</sup> In general, public sector undertakings (e.g. provincial or municipal projects) are subject to the EAA unless exempted, while private sector undertakings are not subject to the EAA unless designated by regulation as a major commercial or business enterprise or activity to which the EAA applies: see *Environmental Assessment Act*, R.S.O. 1990, c.E.18, section 3.

<sup>64</sup> The content of the proponent’s environmental assessment is prescribed by “Terms of Reference”, which are to be developed with agency and public input: see *Environmental Assessment Act*, R.S.O. 1990, c.E.18, sections 5.1 to 6.1).

completes the required environmental assessment (“EA”) with agency and public input, and receives approval to proceed from the Minister of the Environment.<sup>65</sup> Given the public interest purpose of the EAA,<sup>66</sup> the Minister may reject environmentally unsound undertakings, and, conversely, may approve environmentally sound undertakings, subject to terms and conditions which prevent, reduce or mitigate adverse environmental effects.<sup>67</sup> Thus, the EA process for individual undertakings can be used to safeguard groundwater or surface watercourses which serve as sources of drinking water.<sup>68</sup>

In addition, the Ministry of the Environment has utilized the provisions of the EAA (Part II.1) to approve “Class EAs” which prescribe streamlined EA procedures for certain defined classes of projects. In general, projects caught by the Class EA approach tend to be small-scale, frequently recurring activities with minor, predictable and mitigable environmental impacts.<sup>69</sup> Unlike the individual EA process (described above), the proponent of a project under a Class EA simply follows the prescribed planning process (eg. public notices, comment opportunities, environmental study reports, etc) without the need for project-specific approval from the Minister of the Environment or the Environmental Review Tribunal. Most Class EAs, however, include “bump up” provisions which allow the Minister to order proponents to carry out an individual EA of particularly significant or controversial projects.

Significantly, the Minister of the Environment has approved a Class EA for municipal road, water, and wastewater (e.g. sewage and stormwater) projects.<sup>70</sup> In the context of water projects, the stated purpose of the municipal Class EA is to ensure that “projects developed under this Class EA will be undertaken to address problems affecting the operation and efficiency of existing water systems, to accommodate future growth of communities, or to address water source contamination problems”.<sup>71</sup> The Class EA specifically recognizes environmental and health public concerns relating to municipal drinking water systems.<sup>72</sup>

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<sup>65</sup> *Environmental Assessment Act*, R.S.O. 1990, c.E.18, section 5. Note that the Minister may refer the application, in whole or in part, to the Environmental Review Tribunal [formerly the Environmental Assessment Board]: see *Red Tape Reduction Act*, 2000, S.O. 2000, c.26 (Royal Assent December 6, 2000)) for a public hearing and decision: see *Environmental Assessment Act*, R.S.O. 1990, c.E.18, sections 9.1 and 9.2.

<sup>66</sup> “The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment”: see *Environmental Assessment Act*, R.S.O. 1990, c.E.18, section 2.

<sup>67</sup> *Environmental Assessment Act*, R.S.O. 1990, c.E.18, section 9.

<sup>68</sup> For example, a proposed landfill may be approved subject to conditions which require leachate collection and/or treatment, stormwater management, groundwater and surface water monitoring, public reporting, contingency plans, and financial assurance.

<sup>69</sup> For example, Class EA’s have been approved in relation to various provincial and municipal activities and projects.

<sup>70</sup> Municipal Engineers Association, *Municipal Class Environmental Assessment* (June 2000), which was approved by the Minister of Environment on October 4, 2000. This new Class EA updates and consolidates the pre-existing Class EAs for municipal road projects, and for municipal water and wastewater projects.

<sup>71</sup> *Ibid.*, page C-4.

<sup>72</sup> “The well-being of human life may be affected...by such problems as: groundwater or surface water pollution; contamination of water through the distribution system; [or] inadequate treatment of raw water. Water may not conform to the regulated or required water quality objectives as a result of such factors as: contamination of a distribution system; deterioration in quality of the water source; [or] inefficient operation of the water treatment plant”: see *Municipal Class Environmental Assessment* (approved October 2000), pages C-4 to C-5.

The planning requirements of the municipal Class EA may be summarized as follows:

- municipal projects are categorized and listed in Schedules A, B or C;
- **Schedule A** projects generally include normal or emergency operation and maintenance activities, and are essentially “pre-approved” without further planning or study by the proponent;
- **Schedule B** projects generally include improvements or minor expansions of existing facilities, and require some environmental “screening”, documentation, and public consultation by the proponent; and
- **Schedule C** projects generally include the construction of new facilities or major expansions of existing facilities, and must proceed through the multi-stage EA planning process prescribed in the Class EA.<sup>73</sup>

The current Class EA has categorized municipal water projects in the following manner:

- **Schedule A** includes: installing new service connections; cleaning or re-lining watermain; repairing or replacing treatment, distribution or storage equipment; increasing pumping capacity; upgrading water treatment plants to existing rated capacity; installing chemical treatment or filtration equipment in existing facilities; installing or deepening wells at an existing municipal well site; and extending or enlarging distribution facilities within existing road allowances or utility corridors;<sup>74</sup>
- **Schedule B** includes: extending or enlarging distribution facilities outside existing road allowances or utility corridors; disposal facilities for process wastewater; expanding water treatment plants where land acquisition is required; increasing pumping station capacity; establishing new water storage facilities; establishing wells at new municipal well sites; water crossings by new or replacement facilities; increasing water treatment plant capacity beyond existing rated capacity without construction of new works; and replacing water intake pipes for surface water sources;<sup>75</sup>
- **Schedule C** includes: constructing new water systems; constructing new water treatment plants; expanding water treatment plants beyond existing rated capacity through construction of new facilities; establishing a new surface water source; and artificially recharging existing aquifers from surface water sources for water supply purposes.<sup>76</sup>

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<sup>73</sup> The planning process under the Class EA for a Schedule C project consists of five iterative phases: (a) identify the problem/opportunity; (b) describe/review alternative solutions and identify the preferred solution; (c) assess alternative methods of implementing the preferred solution; (d) prepare an Environmental Study Report (“ESR”); and (e) implement/monitor the project. For a Schedule B project, the planning process is somewhat less rigorous, and generally consists of maintaining a project file and providing public review/comment opportunities through the issuance of a Notice of Completion: see *Municipal Class Environmental Assessment* (approved October 2000), pages A-20 to A-33, and A-64 to A-71.

<sup>74</sup> *Ibid.*, Appendix 1, pages 1-11 to 1-12.

<sup>75</sup> *Ibid.*, pages 1-15 to 1-16.

<sup>76</sup> *Ibid.*, page 1-18.

It is important to note that the municipal Class EA does not replace, preempt or supersede other federal or provincial laws which may be applicable to a particular municipal water project.<sup>77</sup> For example, even though a new municipal water treatment plant may be planned and designed under the Class EA, the necessary technical approval(s) under the OWRA (e.g. section 52) will still be required, as described above.

In practice, an OWRA approval will not be issued for a Schedule C project until after the expiry of the 30 day review period which follows the proponent's filing of the Environmental Study Report ("ESR") on the public record (or the filing of an addendum to an ESR). Similarly, an OWRA approval will not be issued for a Schedule B project until after the expiry of the 30 day review period which follows the proponent's filing of the Notice of Completion. If, during the 30 day review period, a member of the public requests that the project be "bumped up" to individual EA, then the OWRA approval will not issue until the Minister has made a decision on the "bump up" request.<sup>78</sup>

It should be further noted that the Class EA process is, in essence, a self-assessment process. Where the provisions of the Class EA apply to a project, it is the proponent's responsibility to ensure that the prescribed planning requirements are fully complied with before the project is undertaken.<sup>79</sup> Failure to comply with the Class EA process constitutes an offence under section 38 of the EAA, and persons convicted of contravening the EAA may be subject to small fines.<sup>80</sup>

### *Environmental Bill of Rights, 1993*

Ontario's *Environmental Bill of Rights, 1993* ("EBR")<sup>81</sup> is largely a procedural statute designed to ensure public participation in environmental decision-making, increase governmental accountability for environmental decision-making, and increase access to the courts for environmental protection purposes.<sup>82</sup>

While the EBR is directed at conserving, protecting and restoring a "healthful" environment,<sup>83</sup> the EBR does not specifically regulate drinking water quality or quantity. However, the EBR contains a number of mechanisms which can be utilized to address drinking water matters. These mechanisms include:

- establishing an electronic registry to provide information to the public about environmental matters (section 5 and 6);

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<sup>77</sup> *Ibid.*, pages A-45 to A-48.

<sup>78</sup> *Ibid.*, pages A-46 to A-47. For more information on the "bump up" process [now called "Part II order"], see *Municipal Class Environmental Assessment* (approved October 2000), pages A-35 to A-40.

<sup>79</sup> *Ibid.*, at page A-5.

<sup>80</sup> *Environmental Assessment Act*, R.S.O. 1990, c.E.18, section 38.

<sup>81</sup> *Environmental Bill of Rights, 1993*, S.O. 1990, c.28: <<http://www.eco.on.ca>>.

<sup>82</sup> Generally, see Muldoon and Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Emond Montgomery, 1993).

<sup>83</sup> "Environment" is defined as including "water", which is further defined as "surface water and groundwater": see sections 1(1) and 2 of the *Environmental Bill of Rights*, S.O. 1993, c.28.

- requiring certain ministries (e.g. the Ministry of the Environment, Ministry of Natural Resources, Ministry of Health, and Ministry of Agriculture, Food and Rural Affairs)<sup>84</sup> to develop “Statements of Environmental Values” which explain how the ministries are going to apply the purposes of the EBR in their environmental decision-making (sections 7 to 11);
- requiring certain ministries to provide public notice and comment opportunities in relation to proposed laws, regulations, instruments,<sup>85</sup> or policies which are environmentally significant (sections 12 to 37);
- creating a public right to seek leave to appeal certain instruments to an appellate body under certain circumstances (sections 38 to 48);
- establishing an independent Environmental Commissioner who monitors, investigates and reports upon governmental compliance with the EBR (Part III);
- creating a public right to seek a review, repeal or revocation of existing laws, regulations instruments or policies on the grounds that they are inadequate to protect the environment (Part IV);<sup>86</sup>
- creating a public right to seek an investigation of suspected contraventions of prescribed laws, regulations or instruments (Part V);
- creating a new civil cause of action to protect “public resources”<sup>87</sup> against unlawful conduct causing significant environmental harm (sections 82 to 102);
- enhancing the ability of persons to sue in relation to public nuisances causing environmental harm (section 103);<sup>88</sup> and
- expanding “whistle-blower” protections for employees who report environmental misconduct by their employers (Part VII).

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<sup>84</sup> See O.Reg. 73/94 (as am.), section 1.

<sup>85</sup> The term “instrument” refers to statutory approvals, orders, permits, licences, and authorizations: see section 1 of the *Environmental Bill of Rights*, 1993, S.O. 1993, c.28.

<sup>86</sup> Alternatively, members of the public can use Part IV of the EBR to request the passage of a new law, regulation or policy to protect the environment: *Environmental Bill of Rights*, S.O. 1993, c.28, section 61(2).

<sup>87</sup> “Public resource” is defined as including “water, [except] water in a body of water the bed of which is privately owned and on which there is no public right of navigation”: section 82 of the *Environmental Bill of Rights*, S.O. 1993, c.28. It should be noted that the EBR places restrictions on this new civil cause of action where the complaint involves odour, noise or dust from an agricultural operation: section 84(4) of the *Environmental Bill of Rights*, S.O. 1993, c.28. To date, the only lawsuit brought under the EBR’s new right to sue is an action that claims tire dump toxics have contaminated (or are about to contaminate) an aquifer that serves as a source of the plaintiffs’ well water: see Environmental Commissioner, *Annual Report 1999-2000: Changing Perspectives*, at page 115.

<sup>88</sup> The EBR’s public nuisance provision has been invoked in a class action proceeding which claims that a municipal water treatment plant has supplied residents of Fort Erie with drinking water containing iron rust and micro-organisms in levels that exceed the Ontario Drinking Water Objectives: see *Annual Report 1997: Open Doors – Ontario’s Environmental Bill of Rights*, at page 75. It should be noted that the EBR’s public nuisance provision is subject to rights and defences available to agricultural defendants under the *Farm Practices Protection Act*: section 103(2) of the *Environmental Bill of Rights*, S.O. 1993, c.28.

To date, the procedural rights and remedies under the EBR have been used in relation to various drinking water issues. For example, the OWRA has been prescribed as an Act to which the EBR applies,<sup>89</sup> and a number of instruments under the OWRA have been prescribed for the purposes of the EBR.<sup>90</sup>

Similarly, pursuant to Part III of the EBR, the Environmental Commissioner of Ontario has raised concerns about drinking water (and its sources) in virtually every annual report filed with the Ontario Legislature since 1994.<sup>91</sup> A special report filed in July 2000 by the Environmental Commissioner in the wake of the Walkerton tragedy expressed similar concerns about groundwater and intensive farming.<sup>92</sup>

Ontario residents have also filed various EBR applications for review, investigation, and leave to appeal on matters arising under the OWRA. For example, the EBR has been used by Ontarians to:

- request a review of the MOE's proposed interim Ontario Drinking Water Objective ("ODWO") for tritium at a level far in excess of what had been recommended by MOE's Advisory Committee on Environmental Standards ("ACES");<sup>93</sup>
- request the MOE to review the need to develop (or revise) ODWOs for trichloroethylene, *Cryptosporidium*, viruses, dichloroethane, dichloroethylene, and atrazine;<sup>94</sup>
- request the MOE to review the need to develop a comprehensive groundwater management strategy;<sup>95</sup> and
- request the MOE to review the need to develop a *Safe Drinking Water Act* in Ontario.<sup>96</sup>

<sup>89</sup> O.Reg. 73/94 (as am.), section 3 (proposals for regulations); section 6 (application for review); and section 8 (application for investigation).

<sup>90</sup> Sections 3 to 9 of O.Reg. 681/94 (as am.) list several OWRA permits, approvals, orders and directions as being subject to the EBR. This generally means that such instruments may be subject to mandatory notice/comment, leave to appeal applications, applications for review, applications for investigation, and/or the new civil cause of action under Part VI of the EBR.

<sup>91</sup> Environmental Commissioner of Ontario, *Annual Report 1994-95: Opening the Doors to Better Environmental Decision-Making*, pages 51 to 52; *Annual Report 1996: Keep the Doors Open to Better Environmental Decision Making*, pages 17 to 20, and 44; *Annual Report 1997: Open Doors – Ontario's Environmental Bill of Rights*, page 47; *Annual Report 1998: Open Doors – Ontario's Environmental Bill of Rights*, pages 4 to 5; *Annual Report 1999-2000: Changing Perspectives*, pages 34 to 42, and 118.

<sup>92</sup> Environmental Commissioner of Ontario, *The Protection of Ontario's Groundwater and Intensive Farming: Special Report to the Legislative Assembly of Ontario* (July 27, 2000).

<sup>93</sup> Environmental Commissioner of Ontario, *Annual Report 1994-95: Opening the Doors to Better Environmental Decision Making*, page 47. After considerable delay, the MOE ultimately decided against adopting the more stringent level recommended by ACES: see O.Reg. 459/00, Schedule 5 (tritium).

<sup>94</sup> *Ibid.*, at pages 48 to 49, and *Annual Report 1994-95: Appendix*, Part 6. In all instances, the MOE decided that the requested reviews were not warranted.

<sup>95</sup> *Ibid.*, at pages 51 to 52. Again, the MOE decided against conducting the requested review.

<sup>96</sup> After undertaking the requested review in the fall of 2000, the MOE ultimately concluded there was no need for a *Safe Drinking Water Act* in Ontario: H.Wong (Director, MOE Water Policy Branch), Letter dated October 30, 2000 to CELA et al. [pers. com.].

***(c) Municipal Regime***

Ontario has enacted a number of laws creating, empowering and regulating local institutions – such as municipal corporations, public utility commissions, conservation authorities, and medical officers of health – which are involved in water resource management and public health matters. While it is beyond the scope of this paper to provide a detailed description of such laws, it is instructive to briefly review the nature and content of certain laws which, arguably, are the most directly relevant to drinking water quality and quantity at the local level. These laws include:

- *Municipal Act*;
- *Planning Act*;
- *Public Utilities Act*;
- *Conservation Authorities Act*; and
- *Health Promotion and Protection Act*.

*Municipal Act*

Administered by the Ministry of Municipal Affairs and Housing, the *Municipal Act*<sup>97</sup> (“MA”) contains a comprehensive code for the creation, expansion, restructuring and dissolution of municipalities in Ontario (Part I). The MA also prescribes the composition, duties, and meeting requirements of municipal councils (Parts II to IV), and establishes various officers of the municipal corporation (Part VI).

Once established, municipalities are empowered by the MA to enact and enforce by-laws on a wide variety of matters, including water-related issues. For example, municipal by-law powers may be used to:

- protect “the health, safety, morality and welfare of the inhabitants of the municipality” (section 102);
- acquire or expropriate lands for municipal purposes (section 191);
- enter into water supply contracts (section 207, para.2);
- enter into agreements with other municipalities for the joint operation of waterworks, systems and services (section 207, para.5 and 6);
- construct drainage and flood control works (section 207, para.13 to 17, 85, 88);
- regulate harbours, wharves, docks (section 207, para.31 to 38);

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<sup>97</sup> *Municipal Act*, R.S.O. 1990, c.M.45. Generally, see I. Rogers, *The Law of Canadian Municipalities*, looseleaf (Carswell).



- authorize the improvement, alteration or extension of any public utility undertaking controlled or managed by the municipal council or a public utility commission (section 207, para.58);
- regulate water tanks and towers (section 207, para.96);
- conduct investigations and reports regarding waterworks or water supply systems (section 207, para.98);
- authorize construction of water pipes under or across highways under municipal jurisdiction (section 207, para.118);
- regulate sewer discharges (section 207, para.150);
- impose special water charges on buildings which constitute a heavy load on the municipal water system, thereby requiring additional capacity (section 218);
- setting water rates (section 221); and
- require building owners to connect to municipal water works (section 222);

Persons convicted of offences under by-laws passed under the MA face fines and prohibition orders (sections 320 to 327). In addition, the MA provides that local ratepayers may bring civil actions to restrain contraventions of municipal by-laws (section 328).

### Planning Act

Administered by the Ministry of Municipal Affairs and Housing, the *Planning Act*<sup>98</sup> (“PA”) enables municipalities to regulate land use and development at the local (or regional) level, subject to a provincial policy framework. The stated purposes of the PA include promoting “sustainable economic development in a healthy natural environment” (section 1.1).

While the PA does not regulate drinking water *per se*, a number of provisions in the PA can be used by municipalities to protect aquifers or surface watercourses which serve as sources of drinking water. These provisions include:

- declaring a provincial interest in protecting ecological systems and functions, conserving natural resources, ensuring the supply and efficient use of water, ensuring adequate provision of sewage and water services, ensuring the orderly development of safe and healthy communities, and protecting public health and safety (section 2);
- enabling the provincial government to issue policy statements on matters of provincial interest, and requiring municipalities to have regard for such policy statements (section 3);

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<sup>98</sup> *Planning Act*, R.S.O. 1990, c.P.13. Generally, see I. Rogers, *Canadian Law of Zoning and Planning*, looseleaf (Carswell).

- establishing procedures for the preparation, approval, appeal and amendment of municipal Official Plans, which provide long-term planning direction (Part III);
- prohibiting the undertaking of public works, or the passage of by-laws, that are not in conformity with an approved Official Plan (section 24);
- establishing procedures for the preparation, approval, appeal and amendment of zoning by-laws, holding by-laws, interim control by-laws, site plan control by-laws, and other related by-laws (Part V);
- empowering municipalities to prohibit or restrict the use of land, or the erection or use of buildings or structures, particularly in areas containing significant natural heritage or land that is “a sensitive groundwater recharge area, or headwater area, or land that contains a sensitive aquifer” (section 34(1));
- empowering the Minister of Municipal Affairs and Housing to exercise zoning and subdivision control powers on any lands in Ontario (section 47); and
- establishing procedures for the preparation, approval, appeal, and amendment of plans of subdivision (Part VI).

Persons convicted of offences under the PA (e.g. violation of a section 34 zoning by-law) face fines and prohibition orders (section 67).

Pursuant to section 3 of the PA, the Ontario government has released a Provincial Policy Statement (“PPS”) in relation to certain matters of provincial interest. For example, the PPS outlines planning principles which, among other things, emphasize the need to protect the environment and public health, protect resources for environmental benefits, and reduce public costs and risks to Ontarians “by directing development away from areas where there is a risk to public health or safety”.<sup>99</sup> Similarly, the substantive policies in the PPS direct that:

- a coordinated approach should be undertaken by municipalities dealing with transboundary issues such as infrastructure and public service facilities, ecosystem and watershed matters, and shoreline and riverine hazards (Policy 1.1.1(e));
- development and land use patterns which may cause environmental or public health concerns will be avoided (Policy 1.1.1 (f));
- land requirements and land use patterns will be based on densities which: efficiently use land, resources, infrastructure and public service facilities; avoid the need for unnecessary and/or uneconomical expansion of infrastructure; and are appropriate to the type of sewage and water systems which are planned or available (Policy 1.1.2(b));

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<sup>99</sup> Ministry of Municipal Affairs and Housing, *Provincial Policy Statement* (1997): <http://www.mah.gov.on.ca/business/policye>

- economic prosperity will be supported by water conservation and efficiency, and by ensuring that major facilities (e.g. landfills, sewage treatment plants, etc.) and sensitive land uses are appropriately designed, buffered and/or separated from each to prevent adverse effects from odour, noise and other contaminants (Policy 1.1.3(d) and (g));
- full municipal sewage and water services are the preferred form of servicing for urban areas and rural settlement areas (Policy 1.3.1.1(a));
- natural heritage features and areas (e.g. significant wetlands, valleylands, fish habitat, etc.) will be protected from incompatible development (Policy 2.3.1);
- the quality and quantity of groundwater and surface water and the function of sensitive groundwater recharge/discharge areas, aquifers and headwaters will be protected or enhanced (Policy 2.4.1); and
- development will generally be directed to areas outside of hazardous lands adjacent to the shorelines of: the Great Lakes-St. Lawrence River System; large inland lakes impacted by flooding, erosion and/or dynamic beach hazards; and river and stream systems impacted by flooding and/or erosion hazards (Policy 3.1.1).<sup>100</sup>

As noted above, municipalities must merely “have regard” for these PPS principles and policies when exercising authority under the PA. In addition, the PPS recognizes that infrastructure projects may be planned or approved under other legislation, such as the OWRA and EAA (see above). In such cases, PPS principles and policies should be “considered as part of the evaluation conducted under the relevant environmental assessment process”.<sup>101</sup>

### Public Utilities Act

The *Public Utilities Act*<sup>102</sup> contains a number of provisions governing municipal operation of drinking water systems or other public utilities. These provisions include:

- empowering municipalities to establish waterworks, and to expropriate lands necessary for operating or protecting waterworks “or preserving the purity of the water supply” (section 2 and 3);
- enabling municipalities to construct and maintain various facilities (e.g. reservoirs, plants, machinery, pipes, etc.) necessary for waterworks (sections 4 to 7);
- permitting municipalities to regulate the distribution and use of water, and to set water rates and fees (sections 8 and 9 and Part III);
- authorizing municipalities to supply water to owners or occupiers of land outside municipal boundaries (section 11);

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<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Public Utilities Act*, R.S.O. 1990, c.P.52. Section 1 of this Act defines “public utility” as “water, artificial or natural gas, electrical power or energy, steam or hot water”.

- empowering municipalities to regulate water supply, and to prohibit wrongful use of water, in order to “secure to the inhabitants of the municipality a continued and abundant supply of pure and wholesome water” (section 12);
- prohibiting persons from depositing “injurious” or “offensive” matter into the water or waterworks, or committing any wilful damage or injury to the works, pipes or water (section 13);<sup>103</sup>
- stipulating that any surplus revenues generated from the supply of a public utility be directed at retiring debentures or other capital debt, and thereafter forming part of general municipal funds (section 35);
- enabling municipalities to establish (with electoral assent)<sup>104</sup> public utility commissions to construct, control and manage municipal waterworks or other public utilities (sections 38 to 40);<sup>105</sup>
- vesting public utility commissions with all powers, rights, authorities and privileges necessary for controlling and managing waterworks or other public utilities (sections 41);
- governing the number, election, term, and salary of public utility commissioners (sections 42 to 44);and
- governing books and records to be kept by public utility commissions (sections 46 and 48), and requiring commissions to report annually to municipal councils on fiscal matters (section 47).

### Conservation Authorities Act

Administered by the Ministry of Natural Resources, the *Conservation Authorities Act*<sup>106</sup> (“CAA”) establishes a statutory framework for the creation, funding and operation of local (or regional) Conservation Authorities (“CAs”) within Ontario. The CAA provides that the primary mandate of CAs is to undertake “a program designed to further conservation, restoration, development and management of natural resources” (section 20).

While the CAA does not directly regulate drinking water, it is clear that the Act contains a number of provisions which can directly affect or influence water resources serving as sources of drinking water. These provisions include:

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<sup>103</sup> This Act also prohibits wasting, reselling or otherwise obtaining or using water without municipal consent: *Public Utilities Act*, R.S.O. 1990, c.P.52, section 13.

<sup>104</sup> It should be noted that a municipality may pass a by-law dispensing with the need to obtain electoral consent to establishing or abolishing a public utility commission: *Public Utilities Act*, R.S.O. 1990, c.P.52, section 67(1).

<sup>105</sup> If the by-law establishing a public utility commission is repealed, then the commission ceases to exist and control and management of the public utility reverts back to the municipality: *Public Utilities Act*, R.S.O. 1990, c.P.52, section 38(6).

<sup>106</sup> *Conservation Authorities Act*, R.S.O. 1990, c.C.27.

- enabling the establishment of a CA at the request of municipalities within a watershed<sup>107</sup> (sections 2 and 3) or adjoining watersheds (sections 8 to 9);
- permitting a CA to be dissolved (section 13.1);
- specifying procedural requirements respecting municipal representation on the CA (section 14), meetings (sections 15 and 30), voting (section 16), and appointment of officers, employees and executive committees (sections 17 to 19);
- empowering CAs to undertake watershed management programs, acquire or expropriate lands, enter into landowner agreements, construct dams and reservoirs, and undertake flood control or watercourse diversion projects (section 21);
- authorizing CAs to make capital expenditures and apportion costs and expenses among participating municipalities (sections 25 to 27);
- empowering CAs to make regulations which restrict or regulate water use, prohibit or regulate watercourse diversion or channelization projects, and prohibit or regulate development which may affect flood control, erosion, pollution<sup>108</sup> or land conservation (section 28);<sup>109</sup> and
- empowering CAs to make regulations respecting the use of CA lands or facilities (section 29).

### *Health Promotion and Protection Act*

Administered by the Ministry of Health, the purpose of the *Health Promotion and Protection Act*<sup>110</sup> (“HPPA”) is to organize and deliver public health programs, prevent the spread of disease, and promote and protect the health of Ontarians (section 2).

The HPPA contains a number of provisions which are directly related to the investigation, reporting, and reduction of waterborne diseases in Ontario. These provisions include:

- creating boards of health for each local health unit (Part VI), and requiring boards of health to undertake specified public health programs and services for local residents (sections 4 and 5);

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<sup>107</sup> “Watershed” is defined as “an area drained by a river and its tributaries”: *Conservation Authorities Act*, R.S.O. 1990, c.C.27, section 1.

<sup>108</sup> “Pollution” is defined as “any deleterious physical substance or other contaminant that has the potential to be generated by development” within the area prescribed by the CA regulation: *Conservation Authorities Act*, R.S.O. 1990, c.C.27, section 28(25).

<sup>109</sup> A CA’s development regulation cannot be approved by the MNR unless the regulation is restricted to river or stream valleys, hazardous lands, wetlands, or shorelines of the Great Lakes-St. Lawrence River System or inland lakes that may be affected by flooding, erosion, or dynamic beach hazards. In addition, a CA’s regulations cannot limit the use of water for domestic or livestock purposes, and cannot interfere with any rights or powers conferred upon municipalities regarding the use of water for municipal purposes: *Conservation Authorities Act*, R.S.O. 1990, c.C.27, subsections 28(5) and (10).

<sup>110</sup> *Health Promotion and Protection Act*, R.S.O. 1990, c.H.7.

- requiring each board of health to hire a full-time medical officer of health (section 62);
- imposing a mandatory duty upon the medical officer of health to carry out inspections for the purposes of preventing, eliminating and decreasing the effects of “health hazards”<sup>111</sup> within the health unit (section 10);
- requiring the medical officer of health to investigate complaints of health hazards related to environmental health, and notify other appropriate Ministries of such complaints (section 11);
- requiring the medical officer of health to keep informed on matters related to environmental health (section 12);
- empowering the medical officer of health to issue written orders requiring persons to take (or refrain from) specified actions in relation to a health hazard (section 13);<sup>112</sup>
- requiring owners of residential buildings to provide potable water for residents of the building (section 20);
- imposing a duty upon physicians, health laboratories and other institutions to notify the medical officer of health about “reportable diseases”<sup>113</sup> that they have detected or suspected (sections 25 to 30);
- giving medical officers of health (and public health inspectors) broad rights of entry, investigation, and sampling (section 41);
- empowering the Minister of Health to investigate causes of disease or mortality in Ontario (section 78), and to establish public health laboratories (section 79);
- empowering the Minister of Health to take such action (e.g. issuing orders) as may be necessary to address situations in Ontario that constitute or may constitute a risk to the health of any person (section 86); and
- enabling the passage of regulations on various public health matters, including potable water (section 96(3)).

Persons convicted of offences under the HPPA face small fines and prohibition orders (sections 100 to 102).

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<sup>111</sup> “Health hazard” is defined as including premises, substances, things or liquids that have or are likely to have an adverse effect on the health of any person. “Premises” is further defined as including “water”, and “food” is defined as including “drink for human consumption”: *Health Promotion and Protection Act*, R.S.O. 1990, c.H.7, section 1(1).

<sup>112</sup> Before issuing such an order, the medical officer must believe, on reasonable and probable grounds, that a health hazard exists and that the requirements specified in the order are necessary to decrease or eliminate the effects of the health hazard: *Health Promotion and Protection Act*, R.S.O. 1990, c.H.7, section 13(2).

<sup>113</sup> Both *Campylobacter enteritis* and Verotoxin-producing *E. coli* 0157:H7 indicator conditions are reportable diseases: see O.Reg.559/91 (amended to O. Regulation. 129/96)

## **1.4 History of *Safe Drinking Water Act* Proposals in Ontario**

Notwithstanding the above-noted federal, provincial and municipal regimes, several private member's bills have been introduced in the Ontario Legislature since the early 1980s to enact a *Safe Drinking Water Act*.<sup>114</sup> Ultimately, none of these bills were passed into law, although the most current attempt to enact a *Safe Drinking Water Act* (Bill 96) received Second Reading and was referred to the Committee of the Whole House.<sup>115</sup> However, Bill 96 was not enacted to date.

In general, these private member's bills are virtually identical in scope and content. For example, the various bills from the 1980s proposed to establish a regulatory regime that:

- applied primarily to public water suppliers (e.g. 15 or more service connections serving 25 or more people);
- contained a broad statement of purpose (e.g. protection and enhancement of drinking water quality in Ontario);
- imposed various testing, reporting, and record-keeping duties upon public water suppliers;
- required immediate remedial measures and/or provision of alternate water supplies if adverse test results were obtained;
- established public participation opportunities in setting or amending regulations relating to contaminants or substances in drinking water;
- prohibited supplying consumers with drinking water that exceeded prescribed levels or standards;
- prohibited pollution of public or private water systems;
- established fines for contraventions of the Act or regulations;
- created a civil cause of action for damages caused by a contravention of the Act or regulations;
- created a public right to seek judicial review if the Minister of Environment failed to exercise powers or fulfill duties imposed under the Act;

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<sup>114</sup> These private member's bills include: Bill 45 (Mr. Charlton, First Reading April 5, 1982); Bill 62 (Mrs. Grier, First Reading November 21, 1985); Bill 62 (Mrs. Grier, April 22, 1986); Bill 99 (Mrs. Grier, First Reading June 24, 1987); Bill 14 (Mrs. Grier, First Reading November 9, 1987); Bill 25 (Mrs. Grier, First Reading May 18, 1989); Bill 96 (Ms. Churley, June 15, 2000).

<sup>115</sup> Bill 96 received Second Reading and was referred to Committee of the Whole House in September 2000: see *Ontario Hansard*, 1<sup>st</sup> Session, 37<sup>th</sup> Parliament (September 28, 2000).

- established an independent tribunal to conduct public hearings on proposed regulations relating to drinking water contaminants;
- established a multi-stakeholder advisory committee to provide assistance to the Minister of the Environment on various drinking water matters;
- required the Minister of the Environment to fund research into various drinking water matters (e.g. health effects, water quality and quantity, drinking water treatment, and sources of surface water and groundwater contamination);
- required the Minister of the Environment to cause testing of private water systems if requested by consumers; and
- enabled the passage of regulations on various drinking water matters (e.g. designating contaminants, prescribing maximum permissible contaminant levels, and setting drinking water testing procedure and frequency).

Similarly, Bill 96 (which was introduced in the wake of the Walkerton tragedy) contains most of the foregoing elements, but added or refined the following matters:

- inclusion of a preamble;<sup>116</sup>
- expansive statement of purpose;<sup>117</sup>
- revised definition of “public water supplier”;<sup>118</sup>
- duty on public water supplies to immediately take prescribed steps (e.g. notify medical officer of health, warn consumers, undertake remedial measures, and provide alternate water supply) if adverse test results are obtained, tests are delayed or not conducted, or testing or treatment equipment is malfunctioning;<sup>119</sup>

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<sup>116</sup> The Bill 96 preamble, *inter alia*, states that “the people of Ontario have the right to clean and safe drinking water”, and that “clean, safe drinking water is a basic human entitlement and essential for the protection of public health”.

<sup>117</sup> Section 1 of Bill 96 states that:

1. The purposes of this Act are,
  - (a) to recognize that people who use public water systems in Ontario have a right to receive clean and safe drinking water;
  - (b) to restore public confidence in the quality of drinking throughout Ontario;
  - (c) to protect and enhance the quality of drinking water in Ontario.
2. In order to fulfill the purposes set out in subsection (1), this Act provides,
  - (a) means for reviewing decisions about drinking water quality made by the Government of Ontario and holding it accountable for those decisions; and
  - (b) increased access to the courts for the protection of drinking water quality.

<sup>118</sup> Section 2 of Bill 96 defines a public water system as a “system for the collection, supply and distribution of drinking water” to more than five private residences.

<sup>119</sup> See section 3 of Bill 96.



- accreditation of water testing laboratories, and clarification of laboratories' reporting obligations;<sup>120</sup>
- duty on the Ministry of the Environment to establish an electronic water quality database;<sup>121</sup>
- enhanced penalties (e.g. \$1 million fines, restraining orders) for contraventions under the Act;<sup>122</sup>
- duty on the Minister of the Environment to table annual reports on the state of drinking water in Ontario;<sup>123</sup>
- inclusion of a paramountcy clause;<sup>124</sup> and
- creation of a "Safe Drinking Water Fund" to provide technical and financial assistance to public water suppliers on various matters (e.g. improving delivery systems, providing employee training, and protecting sources of drinking water).<sup>125</sup>

Since none of these private members' bills have been enacted to date, few (if any) of the foregoing provisions have been entrenched on a statutory basis in Ontario. However, some of the provisions are reflected in Ontario's new Drinking Water Protection Regulation (O.Reg. 459/00) as well as other components of Ontario's much-publicized "Operation Clean Water" program.<sup>126</sup> Given these recent initiatives, the remainder of this Paper focuses on whether -- or to what extent -- legislative reform may still be necessary or desirable in Ontario.

Accordingly, Part II of this Paper describes statutory drinking water regimes in other selected jurisdictions, and provides a comparative analysis of these various regimes. In light of this comparative analysis, Part III of this Paper critically evaluates Ontario's current drinking water regime, and identifies various gaps, weaknesses and shortcomings in the current provincial regime. Part III also describes opportunities for legislative reform, and provides a number of recommendations intended to strengthen the protection of drinking water (and its sources) in Ontario.

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<sup>120</sup> See sections 4 and 5 of Bill 96.

<sup>121</sup> See section 6 of Bill 96.

<sup>122</sup> See sections 7 and 8 of Bill 96.

<sup>123</sup> See section 15 of Bill 96.

<sup>124</sup> Section 17 of Bill 96 provides that "in the event of conflict between any provision of this Act or the regulations made under it, and a provision of any other Act or regulation, this Act and the regulations made under it shall prevail".

<sup>125</sup> See section 19 of Bill 96.

<sup>126</sup> The stated objectives of Operation Clean Water are: "tough, clear standards with the full force of the law; effective inspection and enforcement; tough penalties for non-compliance; and strategic investments and efficient delivery practices". It is claimed that these objectives will be achieved through various initiatives, such as conducting an inspection "blitz" of municipal water works, reviewing Certificates of Approval for municipal water works, and posting adverse water quality incident reports on the Ministry's website: see Ministry of the Environment, *Operation Clean Water: A Progress Report* (September 2000): <<http://www.ene.gov.on.ca/opclean>>.