Chapter 2 Government Oversight of the Delivery of Drinking Water: Introduction

Contents

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2.1 Overview

This chapter is an introduction to the provincial government's responsibility in relation to the delivery of safe drinking water in Ontario. It is descriptive only and does not contain any recommendations. It has three components: (1) an examination of the constitutional responsibility for drinking water; (2) a brief review of the province's current approach to the oversight function; and (3) a review of the recommendations for change made in the Gibbons Report.[1] Substantial portions of the full report focus on the various elements involved in delivering safe drinking water, from source protection through treatment and distribution to the management and financing of drinking water systems. I return to the topic of provincial oversight in Chapter 13. In that chapter, I examine in detail the government's role and make recommendations for areas in which I think improvements are necessary. I note that the majority of drinking water systems are owned by municipalities. I deal with the role of municipal governments in Chapter 10.

2.2 The Constitutional Responsibility for Drinking Water

A useful starting point for examining the government oversight role is a brief discussion of how the responsibility for drinking water fits into the allocation of powers between the federal and provincial governments set out in the *Constitution Act, 1867*. Traditionally, provincial governments have taken the lead in regulating most aspects of the safety of drinking water, and the majority of my recommendations, both here and in the Part 1 report, are aimed at the provincial and municipal levels of government. Although this lead responsibility of the province is consistent with the allocation of powers set out in the Constitution, there is constitutional authority for significant federal participation in the area. Specifically, a number of federal powers, including those over navigation, fisheries, and agriculture, as well as the broad peace, order, and good government and federal spending powers, authorize a significant federal involvement in the subject matter. In addition, the federal responsibility for Indians and lands reserved for Indians results in a substantial federal role for drinking water safety on First Nations reserves.

[1] Executive Resource Group, 2001, *Managing the Environment: A Review of Best Practices* (Toronto) [hereafter Gibbons Report].

2.2.1 Drinking Water as a Constitutional Subject Matter

The power to legislate with respect to drinking water has not been expressly assigned in the Constitution. It is necessary, therefore, to assess the subject matter and determine which of the assigned heads of power set out in sections 91 or 92 or elsewhere in the Constitution relate to it. The regulation of the safety of drinking water has two general components: the regulation of drinking water sources and the regulation of treatment and distribution. There is some overlap between the two functions, but the first is generally concerned with environmental regulation and the second deals with public health, safety, and convenience. Although the environment and public health are not referred to as specific heads of power in the Constitution, there is a history of interpretation by the courts addressing issues of constitutional responsibility for these matters.[2]

It is now well established that neither the environment nor public health are within the exclusive jurisdiction of any level of government. Whether a particular level of government has the power to legislate depends on what aspect of the environment or public health the legislation relates to. The Supreme Court of Canada has referred to a shared responsibility. Justice La Forest, in *Friends of Oldman River v. Canada,*[3] stated that in relation to the environment,

> the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government . . .
>
> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.[4]

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[2] See R. Foerster, 2002, "Constitutional jurisdiction over the safety of drinking water," Walkerton Inquiry Commissioned Paper 2, pp. 3–14.

[3] [1992] 1 S.C.R. 3.

[4] Ibid. at 42, per La Forest J. See also *R. v. Crown Zellerbach Canada Ltd.* (1998), 49 D.L.R. (4th) 161 at 200–201 (S.C.C.), per La Forest J.:

> To allocate the broad subject-matter of environmental control to the federal government under its general power would effectively gut provincial legislative jurisdiction… In Canada, both federal and provincial levels of government have extensive powers to deal with these

A similar shared jurisdiction has also been recognized in respect of public health.[5]

2.2.2 Provincial Jurisdiction

Four powers set out in section 92 of the Constitution provide the provinces with a broad jurisdiction over drinking water safety: local works and undertakings (s. 92(10)); property and civil rights in the province (s. 92(13)); matters of a local or private nature (s. 92(16)); and municipal institutions in the province (s. 92(8)). In addition, section 109 gives the provinces jurisdiction over natural resources. This is reinforced by section 92A, which provides the provinces with exclusive jurisdiction over the development, conservation, and management of non-renewable resources. The provinces also have jurisdiction, held concurrently with the federal government, to regulate with respect to agriculture in each province.[6]

These powers have enabled provincial governments to legislate with respect to both the environment and public health.[7] Pursuant to these powers, the Ontario government has passed a broad variety of legislation relating both directly and

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matters. Both have enacted comprehensive and specific schemes for the control of pollution and the protection of the environment. Some environmental pollution problems are of more direct concern to the federal government, some to the provincial government. But a vast number are interrelated, and all levels of government actively cooperate to deal with problems of mutual concern…

To allocate environmental pollution exclusively to the federal Parliament would, it seems to me, involve sacrificing the problems of federalism enshrined in the Constitution. As Professor William R. Lederman has indicated in his article, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation"… environmental pollution "is not a limited subject or theme, [it] is a sweeping subject or theme virtually all-pervasive in its legislative implications." If, he adds, it "were to be enfranchised as a new subject of federal power by virtue of the federal general power, then provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce as established to date under the existing heads of provincial powers." And I would add to the legislative subjects that would be substantially eviscerated the control of the public domain and municipal government.

La Forest J. wrote for the dissent, but this aspect of his decision was not contested by the majority; see also *Friends of the Oldman River*, supra note 3 at 41.

[5] See P.W. Hogg, 1992 (looseleaf) *Constitutional Law of Canada*, vol. 1 (Toronto: Carswell) at 18-11–18-12; *Schneider v. The Queen*, [1982] 2 S.C.R. 112. Note also that shared jurisdiction in these areas is emphasized by s. 36 of the *Constitution Act, 1982*, which commits both levels of government to provide essential public services of measurable quality to all Canadians.

[6] *Constitution Act, 1967*, s. 95.

[7] See, for example, *Schneider v. The Queen*, supra note 5; and *Canadian National Railroad Co. v. Ontario* (1991), 3 O.R. (3d) 609 (Div. Ct.); aff'd (1992) 7 O.R. (3d) 97.

indirectly to the safety of drinking water, including the *Ontario Water Resources Act*,[8] the *Environmental Protection Act*,[9] the *Environmental Assessment Act*,[10] the *Health Protection and Promotion Act*,[11] and the *Farming and Food Production Protection Act*.[12] None of these enactments has been challenged as being beyond the jurisdiction of the province.[13]

In general, provincial jurisdiction is sufficiently broad to enable the province to regulate virtually all matters relating to the safety of drinking water. There are, however, two exceptions to this statement: regulation that conflicts with valid federal legislation, and regulation relating to Indians and lands reserved for Indians.

2.2.3 Potentially Conflicting Federal Jurisdiction

There are a number of federal powers pursuant to which legislation aimed at the safety of drinking water could be enacted by Parliament. These powers include navigation and shipping (s. 91(10)); seacoasts and inland fisheries (s. 91(12)); federal works and undertakings (s. 91(29) and s. 92(10)); canals, harbours, rivers, and lake improvement (s. 108); and a concurrent jurisdiction over agriculture in all or any of the provinces (s. 95). In addition, a number of conceptual powers exist, including trade and commerce (s. 91(2)); the spending power (s. 91(1A)); criminal law (s. 91(27)); and peace, order, and good government (s. 91), any of which could also be used to authorize federal action. Many of these powers have been used to justify federal legislation in the area, especially in relation to environmental matters.[14] The power over seacoasts and fisheries is the jurisdictional basis for the *Fisheries Act,* which contains a

[8] R.S.O. 1990, c. O.40 [hereafter OWRA].
[9] R.S.O. 1990, c. E.19, s. 1(1) [hereafter EPA].
[10] R.S.O. 1990, c. E.18, as amended, s. 1(1).
[11] R.S.O. 1990, c. H.7.
[12] S.O. 1988, c. 1.
[13] See, however, the discussion below about challenges to the provincial regulation of federal undertakings such as railways.
[14] See, for example, the *Canada Water Act*, R.S.C. 1985, c. C-11, which sets out a comprehensive water resource management scheme. See also *Friends of Oldman River v. Canada*, supra note 3, in which federal legislation requiring an environmental assessment on new undertakings was found to apply to the construction of a dam on a river located wholly within the province of Alberta; and *Northwest Falling Contractors v. The Queen* (1980), 113 D.L.R. (3d) 1(S.C.C.), in which the Supreme Court of Canada found no constitutional difficulty with s. 33(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14, which prohibited the deposit of substances "deleterious to fish" in waters frequented by fish. However, this result should be contrasted with *Fowler v. The Queen* (1980), 113 D.L.R. (3d) 513 (S.C.C.), where similar legislation that was not as clearly related to "fisheries" was struck.

number of environmental prohibitions aimed at the protection of fish habitats but which have a broad effect on source protection.

The federal spending power has also been used by Parliament as authority to enact legislation directed to health care and infrastructure spending, including national standards for hospital insurance, medical care, and student housing programs – all as conditions of federal financial contributions to these regimes.[15] The federal government also participates in establishing drinking water guidelines through a federal–provincial subcommittee. This important activity is discussed in detail in Chapter 5 of this report.

The special responsibility of the federal government with respect to Indians and Indian lands is discussed below.

Although broad federal powers exist, the courts have not interpreted them so as to place undue limitations on the provinces' ability to legislate with respect to matters concerning drinking water. The doctrine of paramountcy does apply, but it has not been used to limit provincial authority to any great extent. The doctrine provides that in areas where both the federal and the provincial governments have jurisdiction, any conflicts are resolved in favour of the federal legislation. However, the doctrine has developed from its original form, in which jurisdictional conflict was found to exist whenever the provincial legislation encroached upon the federal power, to the present form, in which an actual conflict between federal and provincial legislation must be found before provincial legislation will be struck down.[16] For example, provincial legislation requiring a report to be made by a business that discharges waste into the Thunder Bay harbour has been upheld despite the fact that the "harbour" is under federal jurisdiction.[17] Similarly, a provision in Ontario's *Environmental Protection Act*[18] making it an offence to discharge a contaminant into the environment that "causes or is likely to cause impairment of the quality

[15] Such initiatives have been upheld by the courts in *Re Canada Assistance Plan*, [1991] 2 S.C.R. 525; *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (upholding the *Canada Health Act*); and *Central Mortgage and Housing Corporation v. Co-op College Residences* (1975), 13 O.R. (2d) 394 (C.A.) (upholding federal loans for student housing).

[16] As then Chief Justice Dickson stated in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at 191: "In principle there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no': 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other." See also *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; and *Ontario v. Canadian Pacific Ltd.* (1993), 13 O.R. (3d) (C.A.); aff'd, [1995] 2 S.C.R. 1028.

[17] *Canadian National Railroad Co. v. Ontario*, supra note 7.

[18] EPA, s. 13 (1)(a).

of the natural environment or any use that can be made of it" was found to apply to a controlled burn of dead grass on a CP Railway right-of-way conducted pursuant to CP's obligations under the *Railway Act.*[19]

Generally, the division of powers in the Constitution allows a reasonable degree of flexibility in regard to the allocations of responsibility relating to the matters that are necessary to achieve safe drinking water. The combination of the powers conferred on the provinces in the Constitution and, no doubt, the practical advantages of provincial regulation have resulted in the provinces assuming primary responsibility for most issues relating to the safety of drinking water. However, there are also substantial benefits to be had from a federal role in certain aspects of the subject matter. I will return in other chapters to the practical advantages of cooperation between the two levels of government, especially in areas such as source protection and standards development. Here, I only wish to point out that such cooperation is constitutionally permissible.

2.2.4 Indians and Lands Reserved for Indians

One exception to what I have set out above relates to Indians and lands reserved for Indians – a jurisdiction that has been reserved for Parliament in section 91(24) of the Constitution. The federal government has traditionally taken the view that this section permits Parliament to legislate with respect to First Nations on matters that ordinarily fall under provincial jurisdiction.[20] Indeed, in relation to drinking water, the *Indian Act* explicitly authorizes First Nations to make bylaws relating to the construction of water courses, "public wells, cisterns, reservoirs and other water supplies."

Despite this express allocation, arguments exist to support a provincial power with respect to Indians and Indian lands. Specifically, there are cases that have held that provincial laws "of general application" also apply to Indians and on Indian lands.[21] Much has been written about who among federal, provincial, and First Nations governments should be responsible or empowered to regulate the various aspects of Indian life. Not surprisingly, the matter is controversial. However, I do not believe it would serve any purpose for me to enter this

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[19] *Ontario v. Canadian Pacific Ltd.*, supra note 16.

[20] See, for example, the *Indian Act*, R.S.C. c. I-6, s. 1, which covers a broad range of activities relating to Indians, including the purposes for which reserve lands may be used for property and civil rights, and education.

[21] See Foerster, pp. 36–41, particularly note 55.

debate. As I discuss in Chapter 15, the safety of drinking water on First Nations lands in Ontario faces serious problems, which will not be resolved by jurisdictional squabbles among the federal, provincial, and First Nations governments.

The province of Ontario has much to offer First Nations communities in terms of technical assistance and know-how. Although it would be inappropriate for the provincial government to impose such assistance, it would clearly be helpful for the provincial, federal, and local First Nations levels of government in each aboriginal community to sit down and work out an approach for ensuring drinking water safety. Similarly, in regard to the recommendations on source protection that I make in Chapter 4, it would be beneficial for aboriginal communities in each watershed to be given the opportunity for involvement in the watershed-based source protection planning process that I am recommending.

2.3 Overview of the Current Provincial Approach

2.3.1 Ministries with Responsibilities Relevant to the Safety of Drinking Water and Relevant Legislation

2.3.1.1 *The Ministry of the Environment*

The Ministry of the Environment (MOE) is currently the key player in the management of the drinking water system.[22] It administers both the *Environmental Protection Act* (EPA) and the *Ontario Water Resources Act* (OWRA) – the two statutes most directly related to the safety of drinking water.[23] The MOE sets standards for water quality and applies those standards through a system of approvals, permits, certification, monitoring, inspection, and enforcement. It can take action to ensure compliance or it can initiate prosecutions or applications for court orders to prevent damage. The legislation

[22] The Ministry of the Environment was created in 1972. It absorbed the Ontario Water Resources Commission, which constructed and operated water and sewage works from 1956 to 1971.

In describing current provincial government oversight of drinking water, I rely heavily on the following papers: N. d'Ombrain, 2002, "Machinery of government for safe drinking water" Walkerton Inquiry Commissioned Paper 4; and J. Merritt and C. Gore, 2002, "Drinking water services: A functional review of the Ontario Ministry of the Environment," Walkerton Inquiry Commissioned Paper 5.

[23] As noted above, however, they are by no means the only pieces of legislation affecting the subject matter.

also authorizes the MOE to approve the taking of water, the construction of water and sewage treatment facilities, and the licensing of well contractors and technicians.

Key Legislation: The EPA is Ontario's principal environmental statute; several of its sections deal with protecting water sources. Section 6 of the Act prohibits the discharge into the natural environment of any contaminant in excess of the limits prescribed in regulations. However, animal wastes disposed of in accordance with normal farm practices are exempt from section 6.

Section 6 must be read together with section 14, which prohibits discharges that cause or are likely to cause an adverse effect. From my reading, section 14, which applies "despite any other provision of the Act," has the overall effect of narrowing the animal waste exemption if such wastes cause or are likely to cause certain types of adverse effect. The problem is that section 14 is unclear. While it creates a prohibition against the discharge of contaminants into the environment that cause an adverse effect, there is then an attempt, in section 14(2), to exempt certain agricultural discharges so long as they are "disposed of in accordance with normal farm practices." The exemption relates to some but not all of the definition of "adverse effect" contained in the Act. The result, which I discuss in detail in Chapter 4, is needlessly confusing.

"Normal farm practices" are not defined in the EPA. Instead, they are determined by the Normal Farm Practices and Procedures Board under the *Farming and Food Production and Protection Act, 1998* which is discussed in some detail later in this chapter.

Further confusion results from the overlap of these provisions with the OWRA, section 30 of which makes it an offence to discharge or permit the discharge of "any material of any kind into or in any waters … that may impair the quality of the water." The term "may impair the quality" is not defined. There is no exemption for normal farm practices for this section. The scope of the prohibition in the OWRA is expressed in different terms than is the prohibition in section 14 of the EPA (i.e., discharges that have an adverse effect). Absent the exemption for some farming activities, the EPA section 14 prohibition seems to be very similar to the OWRA section 30 prohibition.

The EPA has been used interchangeably with the OWRA to control water pollution. Like the OWRA, the EPA contains provisions for control orders (s. 7), stop orders (s. 8), and prevention orders (s. 18). In addition, the EPA

provides for remedial orders (s. 17) that can require the clean-up of damage that has already occurred. Farm operations are exempt from requirements for certificates of approval for discharges by virtue of section 9(3) of the EPA.

Other relevant environmental legislation administered by the MOE includes the *Environmental Assessment Act*,[24] the *Environmental Review Tribunal Act 2000*,[25] the *Drainage Act,*[26] and the *Pesticides Act*.[27] In addition, Ontario also has an *Environmental Bill of Rights, 1993*[28] which gives the public a right to be consulted prior to certain governmental decisions affecting them. For example, the EBR allows members of the public to review approvals issued under the OWRA before they are issued. It also provides a mechanism for the public to request investigations of environmental compliance. A member of the public may request that the MOE investigate any suspected violation of a prescribed Act, regulation, or approval (Part V). If the complainant does not receive a response or receives a response that he or she considers unreasonable, a legal proceeding in respect of harm to public resources, including water, can be commenced (Part VI).

The government has introduced but not yet passed a new *Nutrient Management Act* (Bill 81), which, among other things, provides for the passage of regulations respecting the management of materials containing nutrients. It is possible that the MOE may be designated as the ministry responsible for the administration of this Act.

The OWRA serves a dual purpose in dealing with both environmental protection and the treatment and distribution of drinking water. It is the main statute for the management and protection of surface water and groundwater in the province and makes the Minister of the Environment responsible for "the supervision of all surface waters and ground waters in Ontario" for the purposes of the Act.[29] The OWRA also empowers the MOE to "control and regulate the collection, production, treatment, storage, transmission, distribution and use of water for public purposes and to make orders with respect thereto."[30] The Act:

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[24] R.S.O. 1990, c. E.18.
[25] S.O. 2000, c. 26, Sched. F.
[26] R.S.O. 1990, c. D.17.
[27] R.S.O. 1990 c. P.11.
[28] S.O. 1993, c. 28.
[29] OWRA, s. 29.
[30] Ibid., s. 10 (3).

- prohibits the discharge into water of polluting materials that may impair the quality of water;

- enables the MOE to take remedial and enforcement action to protect water quality;

- provides a regime for overseeing water taking, water wells, water supply and treatment facilities, and sewage works; and

- enables the Ontario Clean Water Agency (OCWA) to operate municipal and sewage works.

Policy Guidelines: Prior to August 2000, the province applied two main policy guidelines to decisions about drinking water protection and management: the Ontario Drinking Water Objectives (ODWO)[31] and the Chlorination Bulletin.[32]

The ODWO were first introduced in 1964. They were last revised in 1994 and superseded by Ontario Regulation 459/00 in August 2000. The ODWO included:

- maximum acceptable concentrations in drinking water of substances that are harmful to human health or that may interfere with the taste, odour, or appearance of drinking water;

- minimum sampling requirements;

- circumstances in which notification of the MOE was required;

- a definition of unsafe drinking water and instructions about who was to be notified in the event it was detected;

- a requirement that all public water supply systems using groundwater be sampled for the following physical parameters: turbidity, disinfectant residuals, volatile organics, inorganics, nitrates/nitrites, and pesticides and PCBs; and

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[31] Ontario, Ministry of the Environment, Water Policy Branch, "Ontario Drinking Water Objectives" (1994 revision).

[32] Ontario, Ministry of the Environment, Water Policy Branch, "Chlorination of Potable Water Supplies," Technical Bulletin 65-W-4 (updated March 1987).

- monitoring requirements, including continuous disinfectant residual monitoring for systems serving more than 3,300 people from surface water or groundwater under the influence of surface water.

The ODWO were a guideline and were thus not legally binding. However, the MOE sometimes made compliance with the ODWO a condition of a Certificate of Approval, and the ODWO or portions of them were also sometimes made conditions of Field Orders.

The Chlorination Bulletin was first introduced in the 1970s. It provided detailed information about a number of areas, including determinations of when disinfection was required, minimum chlorine residuals, chlorination equipment, and monitoring.

Regulation 459/00: In August 2000, following the Walkerton outbreak, the policy approach described above was altered with the passage of a new Drinking Water Protection Regulation, Ontario Regulation 459/00. The revised ODWO and the Chlorination Bulletin are now contained in a document entitled "Ontario Drinking Water Standards" (ODWS) and referred to in the new regulation.

Key requirements under the regulation include:

- the increased testing and treatment of water (minimum levels of treatment, sampling, and analysis);

- mandatory regular water sampling by all waterworks and testing by accredited labs;

- stricter procedures for reporting contamination;

- more frequent inspections (a report of each facility is to be submitted to the municipality and the MOE every three years);

- the upgrading of existing water treatment systems and facilities;

- the issuance of quarterly reports by large waterworks;

- the notification of both the Medical Officer of Health and the MOE of adverse water quality; and

- public access to all sample results, approvals, and orders.[33]

The regulation places the onus for ensuring water treatment, testing, reporting, and the publicizing of results, as well as corrective action, on the owners of facilities. It does not, however, regulate or provide any guidelines for the activities of the regulator.

Regulation 505/01: In 2001, the provincial government passed Ontario Regulation 505/01, which requires designated types of small water systems, to which Ontario Regulation 459/00 does not apply, to meet certain treatment requirements. The designated systems include those that provide water to at-risk groups, such as the young, the elderly, and the infirm.[34]

Organizational Structure: The MOE is organized into divisions, branches, regions, and regional district and area offices that carry out its functions (see Figure 2.1). It has four divisions:

- Integrated Environmental Planning (policy and planning);
- Environmental Sciences and Standards (science and standards);
- Operations (delivery); and
- Corporate Management (human resources and *Environmental Bill of Rights*).

The Integrated Environmental Planning Division: The Integrated Environmental Planning Division provides policy planning, program development, and long-term thinking for the MOE. The division is organized by media (land use, air, and water). The Water Policy Branch is responsible for developing programs and policies related to the quality and quantity of Ontario's drinking water. Representatives from the Water Policy Branch lead the Drinking Water Coordination Committee (DWCC), an interministerial committee with a mandate to coordinate the implementation of the MOE's drinking water program.

The Environmental Sciences and Standards Division: The Environmental Sciences and Standards Division supplies the MOE with the science base used

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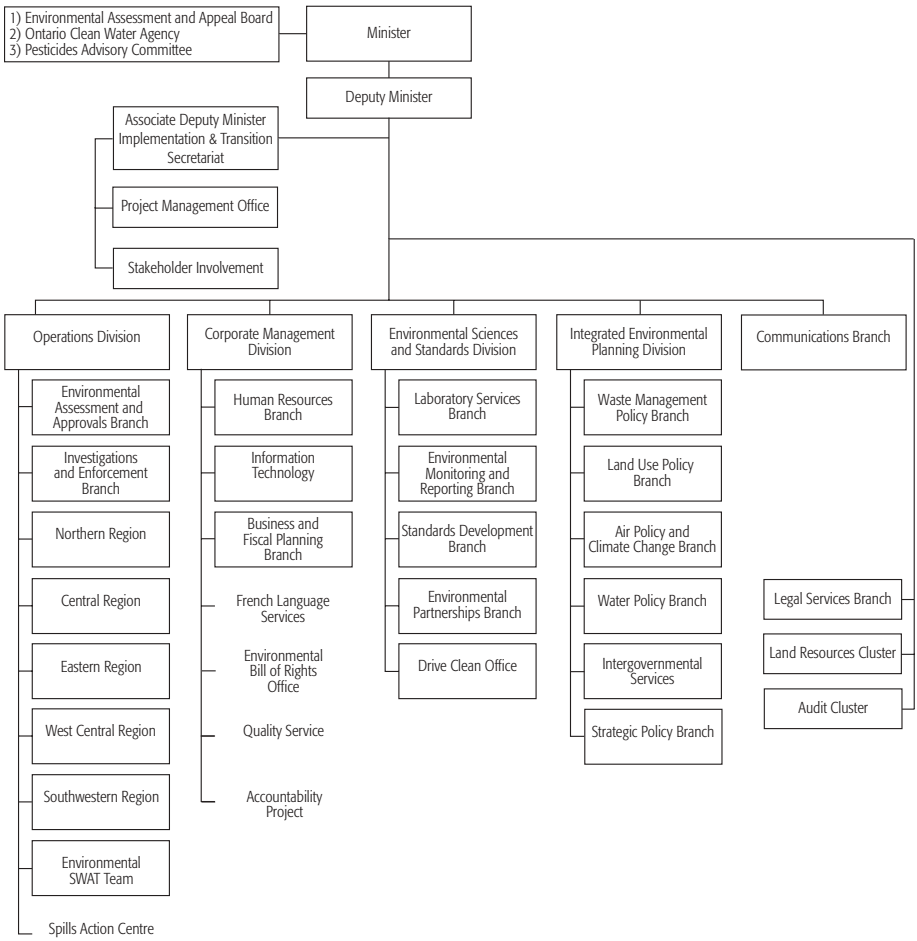
[33] O. Reg. 459/00, ss. 5–11.
[34] O. Reg. 505/01 is discussed in greater detail in section 14.4 of this report.

Figure 2.1 Organization of the Ministry of the Environment, 2002



to develop standards and monitor programs. The division consists of four branches. The Laboratory Services Branch provides analytical support for monitoring and regulatory programs. It oversees the MOE laboratory in Toronto, which provides all testing services.[35] The Environmental Monitoring and Reporting Branch maintains air and water monitoring activities, such as the Drinking Water Surveillance Program (DWSP) and the Great Lakes Sampling Program. The Standards Development Branch develops drinking water standards (ODWS) and has representation on the DWCC and the Federal–Provincial–Territorial Subcommittee on Drinking Water. The Environmental Partnerships Branch supports (non-regulatory) pollution prevention partnerships between government and industry. Such programs include grants to municipalities for waste and wastewater management.

The Operations Division: The Operations Division is divided into five regions: Northern, Central, Eastern, Southwestern, and West Central. These regional offices in turn oversee 15 district and 16 area offices that are responsible for the delivery of MOE programs at a local level, including those directed at the quality of drinking water and drinking water source protection. Environmental officers, investigations officers, and administrative staff work out of regional/district/area offices; technical support staff are primarily located in the regional offices. Communal water is one of the 15 programs for which the regional offices have responsibility.

Environmental officers (also referred to as abatement officers or field staff) in the regions perform inspections of sewage and water treatment plants and respond to complaints of environmental violations.

The work of the branches of the Operations Division is intended to ensure compliance with environmental laws. The Environmental Assessment and Approvals Branch issues permits, licences, and Certificates of Approval for new or modified water and sewage facilities under the OWRA, the EPA, the *Environmental Assessment Act*, and the *Pesticides Act.* The Investigations and Enforcement Branch (IEB) investigates suspected violations of environmental legislation and is responsible for all aspects of environmental enforcement. Investigation officers in the IEB collect the evidence and lay the charges for environmental prosecutions.

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[35] Before 1996, three regional laboratories, in London, Kingston, and Thunder Bay, handled routine testing for municipalities. Only the Toronto laboratory currently exists.

The Operations Division also runs the Spills Action Centre (SAC) and the Environmental SWAT Team. The SAC is a province-wide system staffed by environmental officers on a 24-hour basis. Its role is to record reports of spills and other urgent environmental matters and to coordinate a response. Spills must be reported when they impair or are likely to impair the quality of the natural environment (e.g., water) or pose adverse health risks.[36]

The Environmental SWAT Team is a recent addition to the Operations Division. Environmental officers and investigation officers conduct inspection sweeps of sectors that have high non-compliance rates and/or present a high risk to public health. None of the sectors currently being inspected by the Environmental SWAT Team is directly related to drinking water.

The Corporate Management Division: The Corporate Management Division includes administrative support functions such as the Human Resources Branch, Information Management and Technology Branch, Business and Fiscal Planning Branch, and French Services. The Environmental Bill of Rights staff is also included in this division.

2.3.1.2 *The Ministry of Natural Resources*

The Ministry of Natural Resources (MNR) does not play a major role in the provision of safe drinking water. It is the lead ministry for programs primarily related to water quantity, including drought and low water levels; flood forecasting, warning, and emergency response; watershed management; dams; water diversions, transfers, and withdrawals; and water conservation. The MNR works closely with local conservation authorities, and is currently developing a groundwater-monitoring network with the MOE.

The MNR administers the *Conservation Authorities Act*,[37] which provides for the creation of conservation authorities,[38] which are charged with furthering the conservation, restoration, development, and management of natural resources (other than gas, oil, coal, and minerals) in their areas.[39] An authority can regulate the use of water from surface waters in its area; regulate or prohibit

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[36] The SAC received initial calls from Walkerton residents at the onset of the *E. coli* outbreak in Walkerton and initiated the first response.
[37] R.S.O. 1990, c. C.27.
[38] Ibid., s. 3.
[39] Ibid., s. 20.

any alterations to a watercourse; and prohibit the construction of structures in areas susceptible to flooding or erosion.[40]

2.3.1.3 *The Ministry of Health and Long-Term Care*

The Ministry of Health and Long-Term Care (Ministry of Health) oversees public health administration at the local level under the *Health Protection and Promotion Act*. Currently there are 37 health units in the province, each of which is supervised by a board of health and directed by a local Medical Officer of Health. The health units act independently of the municipalities and the province (who both provide resources), but the province sets the regulatory framework for the boards' operation and maintains an advisory role.

Interaction between the Ministry of Health and the MOE is critical to the provision of safe drinking water. The Ministry of Health is involved in the development of drinking water standards. Further, under Ontario Regulation 459/00, the local health unit is to be notified (by the waterworks owner and by the testing laboratory) of adverse water quality results.[41] The Medical Officer of Health may then take action under the *Health Protection and Promotion Act* and Ontario Regulation 459/00, including issuing a boil water order or advisory.[42]

Also related to the safety of drinking water, when a complaint is made that a health hazard related to environmental (or occupational) health exists in the area covered by the local health unit, the local Medical Officer of Health is to notify the responsible ministry, and, in consultation with the ministry, investigate and determine whether the health hazard exists.[43] Medical Officers of Health can issue orders to remedy conditions they consider health hazards.[44]

Further, Ministry of Health laboratories can test water quality if requested to do so by the Medical Officer of Health or by waterworks operators and owners, including the owners of private wells. Although the ministry does not monitor water quality, it provides water quality advice to the MOE through a technical committee on water microbiology.

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[40] Ibid., s. 28.
[41] O. Reg. 459/00, ss. 8(2), 8(3)(a).
[42] O. Reg. 459/00, s. 9; *Health Protection and Promotion Act*, s. 13.
[43] *Health Protection and Promotion Act*, s. 11.
[44] Ibid., s. 13.

2.3.1.4 *The Ministry of Agriculture, Food and Rural Affairs*

The Ministry of Agriculture, Food and Rural Affairs (OMAFRA) also has an important role in relation to the safety of drinking water in Ontario. It has the mandate to regulate aspects of agricultural activity, including the management of animal waste – a major cause of water contamination.

To date, the province has not passed specific legislation restricting or regulating farm activities. Instead, it has provided certain exemptions to farm activities from some environmental statutes. In addition, it has put in place several voluntary programs that encourage environmentally sound practices. As to the exemptions granted to farmers in legislation, I received several submissions arguing that the exemptions were too broad and should be narrowed. It struck me that there was some misunderstanding about the extent of these exemptions. Let me summarize.

Prohibitions Against Pollution

As noted above:

- Section 30 of the OWRA prohibits the discharge into water of contaminants that have a deleterious effect and contains no exemption for farm activities;

- Section 6 of the EPA prohibits the discharge of contaminants into the natural environment in excess of the limits prescribed in regulations but normal farm practices are exempt; and

- Section 14 of the EPA prohibits discharges of contamination into the natural environment that cause adverse effects. Some exemptions exist for normal farm practices but not for discharges that injure or damage property, cause a material discomfort to any person, or have an adverse effect on human health or impair safety.

The continued effect of the EPA and the OWRA is that farm practices that have deleterious effects or cause specified adverse effects are prohibited.

Immunity Against Civil Action

Section 6(1) of the *Farming and Food Production Protection Act*, which provides that a farmer is not liable in nuisance for a disturbance resulting from normal farm practices, does not apply to the contamination of waters. Disturbances are defined as coming from odour, dust, flies, light, smoke, noise, and vibration. Consequently, there is no immunity from civil action for farmers who engage in farming practices that contaminate water.

Municipal Bylaws

Section 6 of the *Farming and Food Production Protection Act* exempts normal farm practices from municipal bylaws.

It is not clear which ministry will ultimately be responsible for the proposed *Nutrient Management Act, 2001* (Bill 81).[45] Although I am recommending that the MOE be the responsible ministry, it is possible that OMAFRA will have an important role to play. Under the Act, provincial regulations can be passed that establish standards respecting the management of material containing nutrients, including the management of farm practices that use this material. The Act will require farmers and other generators of nutrients to comply with those standards. It also provides for the enforcement of the standards by provincial officers.[46] I deal with the regulation of farmers in detail in Chapter 4.

2.3.1.5 *The Ministry of Municipal Affairs and Housing*

The Ministry of Municipal Affairs and Housing (MMAH) has a role in the oversight of the drinking water process through its administration of the *Planning Act*.[47] Land use planning can play an important role in the protection

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[45] The Act does not identify a lead ministry. At the September 7, 2001, Walkerton Inquiry Public Hearing #5, Peter Wallace (on behalf of the government) acknowledged that the Ministry of the Environment generally has a lead on enforcement (Transcript, p. 79) and is the lead ministry with respect to water (Transcript, p. 76).

[46] The bill contains amendments to the *Environmental Protection Act*, the *Highway Traffic Act*, the *Ontario Water Resources Act*, the *Pesticides Act*, and consequential amendments to the *Farming and Food Production Protection Act, 1998* [hereafter FFPPA]: *Compendium* <www.gov.on.ca/OMAFRA>.

[47] R.S.O. 1990, c. P.13.

of surface water and groundwater. Although the *Planning Act* does not deal expressly with drinking water quality in Ontario, it requires most municipalities to develop official plans. An official plan sets out future land use plans for a municipality and may address matters relating to water use and water quality, including expected water use, discharge and runoff into water courses relating to the patterns of land use (e.g., industrial withdrawal and consumption of water and discharge into water, agricultural withdrawal and discharge, and residential consumption and withdrawal). The *Planning Act* provides the Minister of Municipal Affairs and Housing with the power to amend official plans if a matter of "provincial interest" such as "the supply, efficient use and conservation of water" is, or is likely to be, affected by a plan.[48]

The *Planning Act* dictates that when exercising authority that affects a planning matter, a planning authority (such as MMAH, a council of a municipality, or the Ontario Municipal Board) "shall have regard to" policy statements issued by the provincial government. Some parts of the Provincial Policy Statement relate to land use and groundwater protection.[49]

The province has recently introduced two proposed Acts that are relevant to safe drinking water. First, it has introduced a revised *Municipal Act*, which comes into effect on January 1, 2003.[50] The Act gives municipalities broad authority and flexibility over ten "spheres of jurisdiction," including public utilities, waste management, and drainage and flood control.[51] These "spheres of jurisdiction" are intended not to be subject to specific prescriptive provisions but to be left open to the discretion of the municipality. Four additional powers are provided that will be subject to the more traditional prescriptive approach. These powers relate to the natural environment; to facilitating economic development; to the health, safety, protection, and well-being of people and protection of property; and to nuisance, noise, odour, vibration, illumination, and dust.

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[48] *Planning Act*, ss. 2, 23(1).

[49] PPS 1.1.1(e): "A coordinated approach should be achieved when dealing with issues which cross municipal boundaries, including infrastructure and ecosystem and watershed related issues."
PPS 1.1.1(f): "Development and land use patterns which may cause environmental or public health and safety concerns will be avoided."
PPS 2.4.1: "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."
PPS 2.1.5: "In prime agricultural areas, agricultural uses and normal farm practices will be promoted and protected."

[50] *Municipal Act, 2001*, S.O. 2001, c. 25.

[51] Ibid., s. 11.

The second significant legislative proposal is the *Sustainable Water and Sewage Systems Act, 2001* (Bill 155),[52] which would require all owners of water or wastewater systems to submit to the MMAH a written report on the full cost of providing water and wastewater services to the public (the "full-cost report"). The report would have to contain "such information as is required by regulation concerning the infrastructure needed to provide the water services, the full cost of providing the services and the revenue obtained to provide them and concerning such other matters as may be specified in the regulation."[53] In addition, the proposed Act would require a municipality to submit to the ministry, within six months of the approval of its full-cost report, a "cost-recovery plan" outlining how it "intends to pay the full cost" of water and wastewater services to the public.[54]

The Minister of Municipal Affairs and Housing would have the authority to approve, reject, or change both the full-cost report and the cost-recovery plan submitted by a municipality. Further, the minister could order a municipality to, in effect, pay the full cost of providing water or wastewater services, if the minister concluded that the municipality was "not implementing its approved cost recovery plan" or "not taking all necessary steps to pay the full cost of providing water services or wastewater services, as the case may be, to the public."[55] Such an order could require the municipality "to generate revenue in a specified manner or from a specified source to pay all or part of the cost of providing the services and to make specified or necessary amendments to existing contracts, resolutions or by-laws."[56] The proposed Act would require municipalities to establish and maintain "a dedicated reserve account that segregates from its general revenues the revenue allocated in its approved cost-recovery plan to pay the full cost (including operating and capital costs) of providing water services or wastewater services."[57]

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[52] Bill 155 received first reading on December 12, 2001.
[53] Bill 155, s. 3.
[54] Ibid., s. 9. In some sections of Bill 155, the term "regulated entity" is used. For the purposes of this report, I use the term "municipality" instead, because municipalities own the overwhelming majority of communal systems.
[55] Ibid., s. 21(1).
[56] Ibid., s. 21(3).
[57] Ibid., s. 22.

2.3.2 Agencies with Responsibilities Relevant to the Safety of Drinking Water

A number of agencies and tribunals also play an important role in the regulation of drinking water.

2.3.2.1 *The Ontario Clean Water Agency*

Ontario municipalities own their water and sewage facilities. Most municipalities operate the facilities themselves (or through public utilities commissions), but about 25% of them contract out water and sewage operations – primarily to the Ontario Clean Water Agency (OCWA).[58]

Until 1993, the MOE operated many of the province's sewage and water works. OCWA was created in 1993 to remedy the apparent conflict posed by the MOE regulating its own operations.[59] OCWA initially owned some facilities, but under the *Water and Sewage Services Improvement Act, 1997*, legal title was transferred to the municipalities.

When a municipality enters into an agreement with OCWA for the provision of water and sewage services, OCWA can exercise any statutory power given to municipalities in respect of the "establishment, construction, maintenance or operation of water works or sewage works."[60] OCWA supplies the labour and management, pays for operations and maintenance, and guarantees performance and regulatory compliance.

2.3.2.2 *The Ontario SuperBuild Corporation*

The establishment of the Ontario SuperBuild Corporation was announced in the 1999 provincial budget. The purpose of SuperBuild is to consolidate the

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[58] It has 95% of the market for municipalities that choose to outsource the operation of such facilities; the remaining 5% is operated by the private sector. At the end of 2000, the agency operated 161 water treatment and 233 sewage facilities for more than 200 municipalities; 222 of its 383 contracts were with small municipalities and were worth less than $100,000 annually.

[59] The Ontario Clean Water Agency (OCWA) was established by the *Capital Investment Plan Act*, S.O. 1993, c. 23. The Ontario Water Resources Commission (OWRC) also regulated and operated water and sewage works from 1956 until the creation of the Ministry of the Environment (MOE) in 1972.

[60] OWRA, ss. 10, 12.

province's infrastructure spending. The corporation advises the Cabinet Committee on Privatization and SuperBuild (chaired by the Minister of Finance) on infrastructure spending and spending by ministries, agencies, and provincially funded municipal infrastructure.

The Ontario Small Towns and Rural Initiative (OSTAR) is a "subsidiary initiative" administered by the MMAH that is intended to fund infrastructure capital expenditures (i.e., water and sewage works) in smaller municipalities.

2.3.2.3 *The Ontario Municipal Board*

The Ontario Municipal Board occasionally arbitrates planning disputes that affect the quality of drinking water.[61]

2.3.2.4 *The Normal Farm Practices Protection Board*

The Normal Farm Practices Protection Board referees the provisions of the *Farming and Food Production Protection Act.* It is empowered to inquire into and resolve disputes respecting agricultural operations, to determine what constitutes normal farm practice, and to make the necessary inquiries and orders to ensure compliance with its decisions.[62] The Board has its own statutory mandate and is also subject to ministerial directives, guidelines, or policy statements in relation to agricultural operations or normal farm practices.[63]

2.3.2.5 *The Environmental Commissioner*

The Environmental Commissioner assists the public in preparing complaints, reviews compliance by ministries with environmental responsibilities, and

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[61] For example, in Perth County, where the West Perth township council passed a zoning bylaw limiting the size of livestock operations to 600 animal units and stipulating the intensity and location of manure-spreading activities, the bylaw was challenged before the Ontario Municipal Board by several farm operators and by the Ministry of Municipal Affairs and Housing. Protection of drinking water was the principal argument advanced by the council in defence of the bylaw, and the council bolstered its case by demonstrating that existing regulations are not adequately enforced. The board upheld the validity of the bylaw. The appeal to the Divisional Court was dismissed. See *Ben Gardiner Farms Inc. v. West Perth (Township)*, ([2001] O.J. No. 4394 (S.C.J. (Div. Ct.)).
[62] FFPPA, s. 4.
[63] Ibid., s. 9.

reports to the legislature on issues of environmental concern. The commissioner often reports on issues related to water quality in the province. The Environmental Commissioner's office was established under the *Environmental Bill of Rights 1993* (EBR). The EBR applies to 13 government ministries and agencies, requiring them to register plans that could have environmental impacts so that the public has an opportunity to present concerns at an independent environmental assessment.

2.3.2.6 *The Environmental Review Tribunal*

The Environmental Review Tribunal hears appeals from some MOE decisions made under the EPA, the OWRA, and the *Pesticides Act*. Under the Ontario *Environmental Assessment Act*, it also conducts hearings to assess the environmental impact of major projects such as water and sewage treatment facilities.

2.3.2.7 *Conservation Authorities*

Another important entity in the current structure is the conservation authority. There are 36 conservation authorities in Ontario. Their functions include the control of potential flood damage, and in many cases watershed management including planning, education, prevention, treatment, and monitoring. In managing particular watersheds they also protect lands and wetlands for recreation and wildlife and have the power to acquire lands and build structures such as reservoirs and dams.[64] The province establishes conservation authorities, and the relevant municipality (or municipalities, if the watershed extends into other municipalities) appoints the members. They are financed through user fees, municipal levies, and provincial grants.

2.3.3 Authorization Processes for Safe Drinking Water

The OWRA governs the procedure for approving new water facilities, including the alteration, extension, and replacement of existing facilities.

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[64] *Conservation Authorities Act*, R.S.O. 1990, c. C.27, s. 21(1).

2.3.3.1 *Permits to Take Water*

Under the OWRA, no person shall take more than a total of 50,000 L of water in a day without a permit issued by a Director.[65] Permits are issued by the MOE's regional offices. An application must be made to the MOE for a permit to draw surface water or groundwater. The Certificate of Approval addresses the drinking water quality aspects of the water withdrawn for communal waterworks through a Permit to Take Water (PTTW).

2.3.3.2 *Certificates of Approval*

The legal owner of waterworks or sewage works (including distribution systems) that are larger than a prescribed size must obtain approval for the construction and operation of the waterworks.[66] Certificates of Approval, originally similar to building permits, were originally approvals to build a facility with specific machinery. More recent Certificates of Approval include conditions for operating, which vary because every certificate is facility-specific. Older certificates for Ontario waterworks do not refer to any operating conditions (e.g., water quality requirements). This deficiency has been corrected by Ontario Regulation 459/00, which gave the ODWO (now the ODWS) the force of law. The conditions of approval for new facilities are based on six broad criteria that are addressed as standards under the ODWS. The six standards, performance, monitoring and recording, operations and maintenance, notification and reporting, conditions as compliance/enforcement tools, and other conditions provide the basis for inspection and enforcement of compliance. Certificates of Approval issued more recently are similar to operating licences.

Licensing requirements for waterworks and sewage works are set out in Regulation 435/93 (under the OWRA). Facilities are divided into four classes, depending on the complexity of the facility. Owners must ensure that operators are properly licensed for the particular class of facility and must provide 40 hours of training per year to each operator.[67] Operators are responsible for maintaining records of monitoring and sampling and must "take all steps reasonably necessary to operate the processes within his or her responsibility in

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[65] OWRA, s. 34(3).
[66] Ontario, Ministry of the Environment, August 2000, "Guide to applying for approval of municipal and private water and sewage works. Sections 52 and 53 Ontario Water Resources Act R.S.O. 1990," p. 1.
[67] O. Reg. 435/93, ss. 14, 17.

a safe and efficient manner in accordance with the relevant operations manuals."[68] They are also to ensure the maintenance of operating equipment and to ensure that "the processes within his or her responsibility are measured, monitored, sampled and tested in a manner that permits them to be adjusted when necessary."[69] An operator's licences may be suspended or cancelled if a contravention of the regulation results in the discharge of a pollutant into the natural environment or has an adverse effect on the health or safety of an individual.[70]

2.3.4 Compliance and Enforcement Processes

2.3.4.1 *Monitoring*

The owner of a waterworks that is capable of supplying more than 250,000 L per day and actually supplies at least 50,000 L per day on at least 88 days in a 90-day period, or that serves more than five private residences, must meet the water sampling and analysis requirements in Ontario Regulation 459/00.[71] The regulation also sets out the procedure for the notification of an adverse test result. The testing laboratory must immediately notify the owner of the waterworks, and both must immediately notify the local Medical Officer of Health and the MOE (through the Spills Action Centre).[72]

2.3.4.2 *Voluntary Monitoring*

The voluntary Drinking Water Surveillance Program (DWSP) provides the MOE with data to determine long-term trends in drinking water quality in Ontario. Waterworks operators collect raw and treated water samples on a regular basis; the samples are analyzed at the MOE laboratory to determine the presence or absence of hundreds of substances. As of the end of 1999, the DWSP monitored 162 municipal waterworks, accounting for about 88% of the population served by municipal water supplies.

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[68] Ibid., ss. 18, 19.
[69] Ibid., s. 19.
[70] Ibid., s. 11.
[71] O. Reg. 459/00, s. 7.
[72] Ibid., s. 5.8(1)–(3).

2.3.4.3 *Inspection, Investigation, and Enforcement*

Environmental officers in the MOE's district and area offices carry out inspections of waterworks. Inspection is considered an "abatement" function (i.e., a method of achieving compliance short of investigation and enforcement). The Sewage and Water Inspection Program (SWIP) was set up by the MOE in 1990 to be responsible for inspections of sewage and water facilities.

The Investigations and Enforcement Branch (IEB) is a separate branch of the MOE. It is usually made aware of information about a violation of any relevant MOE statute or regulation through an occurrence report. If necessary, an IEB officer will start an investigation to determine whether there are reasonable and probable grounds to lay charges.

The officer may issue an order if there has been a contravention of a provision of the OWRA or EPA, or the regulations; of a provision of an order, notice, direction, requirement, or report made under the OWRA; or of a term or condition of a licence, permit, or approval made under the OWRA.[73] Orders are issued to require operators to take corrective action. The issuance of orders is usually followed by assistance with compliance, in which environmental officers work with waterworks owners and operators to correct problems brought to the MOE's attention. Operators who do not comply with the issued order or take corrective action can be prosecuted for violating the statute, regulation, certificate of approval, permit, or order.[74]

MOE "compliance activities" are actions taken and/or procedures followed by staff to ensure that legislation is complied with and regulatory requirements are followed. Non-compliance is identified through routine inspections and abatement activities, responses to spills, the addressing of complaints, or the handling of *Environmental Bill of Rights* requests for investigation.[75] The MOE decides whether abatement measures for non-compliance should be voluntary or mandatory.

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[73] OWRA, s. 16(1). An officer might also issue orders under the EPA, such as: a stop order (s. 8), a control order (s. 7), or a remedial order (s. 17).
[74] OWRA, s. 107.
[75] Ontario, Ministry of the Environment, 1995, "Compliance guidelines," June 16, s. 2.2.0.

2.4 The Gibbons Report

After the Walkerton tragedy, the Government of Ontario retained Valerie A. Gibbons and Executive Resource Group to prepare a report and make recommendations on how the province could improve its approach to environmental regulation and oversight. The report, entitled *Managing the Environment: A Review of Best Practices,* was released in January 2001. In Gibbons's own words, the focus of the report was on "identifying best practices in other jurisdictions that could be implemented in Ontario as part of establishing this Province as a leading environmental jurisdiction and a model for others."[76]

Although the report does not focus specifically on the safety of drinking water, its focus – government regulation of the environment – is clearly relevant to my mandate. Moreover, I find the report helpful as a third-party review of the MOE's current approach. In the following sections, I set out a brief overview of what I perceive to be some of the report's more significant conclusions and recommendations, as well as my impressions of these findings and recommendations.

2.4.1 Overview of the Gibbons Report

2.4.1.1 *Review of Current Practice*

The Gibbons Report refers to a number of shortcomings of the MOE, at least in comparison with what are characterized as "best management practices" from other jurisdictions. According to the Gibbons Report, the MOE:

- is under considerable management and operational pressure;[77]
- has no coherent strategy for how to approach environmental issues.[78] (The current approach is described as "piecemeal."[79] In a similar vein,

[76] V.A. Gibbons, letter to A. Karakatsanis (secretary of Cabinet and clerk of the Executive Committee, January 31, 2001, included at the outset of the Executive Summary of the Gibbons Report).
[77] Gibbons Report, Executive Summary, p. 7.
[78] Ibid., p. 8.
[79] Ibid., p. 7.

the report also criticizes the absence of a strategic approach to policy development on environmental matters.);[80]

- focuses too much on a "command and control approach to achieving compliance and too little emphasis on more innovative compliance mechanisms";[81]

- is too centralized and does not delegate enough functions to other operating organizations, leaving fewer resources to focus on strategic capacity;[82]

- experiences "significant gaps in the knowledge and information required to support … policy development."[83] (The report also identifies shortcomings in the MOE's ability to acquire and manage information.[84] In particular, the MOE needs to work on the integration of the numerous existing government databases.);[85]

- suffers from shortcomings relating to its ability to address emerging issues;[86]

- devotes insufficient resources to research and development and has no research and development strategy;[87] and

- needs to move from its current focus on risk assessment alone, to more emphasis on risk management and risk communication.[88]

As will be seen in greater detail elsewhere in my report, some of these observations are supported by the evidence and information disclosed to me in Parts 1 and 2 of this Inquiry. In particular, the absence of a top-down strategic approach, the need for more resources and for a better allocation of such resources, the need to rebuild or obtain access to sufficient expertise, and the

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[80] Ibid., p. 20.
[81] Ibid., pp. 10–11.
[82] Ibid., p. 12.
[83] Ibid., p. 13.
[84] Ibid., pp. 14–15.
[85] Ibid., p. 16.
[86] Ibid., pp. 14–15.
[87] Ibid., pp. 17–18.
[88] Ibid., pp. 18–19.

need to better integrate the information that the MOE does have, were regular themes in the submissions made to me in both Parts 1 and 2 of this Inquiry.

2.4.1.2 *Recommendations Made in the Gibbons Report*

Two types of recommendations are made in the Gibbons Report: "strategic shifts" and more particular recommendations. At the core of the recommendations is a system-wide shift from a traditional model of environmental regulation (referred to in the report as a "command and control" model) to a "strategic approach," which

> steps beyond minimum standards to emphasize continuous improvement for all sources of pollution, cross-media and cumulative impacts, and broader public participation and access to information. It typically includes less emphasis on the role of government as "doer", i.e. protecting human health and the environment by traditional regulation and enforcement, and a greater emphasis on the role of government to provide overall *system management*, through a range of partnerships, processes, structures, and tools…[89]

According to Gibbons, this overarching shift is accomplished through five general strategic shifts:

- a "high-level, government-wide vision and goals with implementation shared across different departments";[90]

- a "new and broader emphasis on strategies to promote continuous improvement in environmental outcomes and accountability across all sources of pollution";[91]

[89] Gibbons Report, p. 91. I find some of the language used in the report to be somewhat vague and unclear. For this reason and to ensure that I do not misrepresent the recommendations made, I have quoted liberally from the Gibbons Report.

[90] Gibbons Report, Executive Summary, p. 3. According to Robert Breeze, the current Associate Deputy Minister of the Environment and a key member of Ms. Gibbons's team, this does not preclude lead or coordinating responsibility on the part of the MOE. See the letter from Timothy Hadwen to me dated September 17, 2001, reporting on a meeting with Mr. Paul Muldoon, Ms. Ramani Nadarajah from CELA, Commission Counsel, Robert Breeze, and others from the Government of Ontario.

[91] Gibbons Report, Executive Summary, p. 3. My interpretation of this recommendation is that it calls for less emphasis on ensuring compliance with minimum standards and for more emphasis on a goal of continuous improvement of environmental conditions.

- a "place-based approach with boundaries that make environmental sense and facilitate a cross-media, cumulative approach (such as watershed management)";[92]

- a "comprehensive, more flexible set of regulatory and non-regulatory tools and incentives";[93] and

- an approach based on "shared responsibility with the regulated community, NGOs, the public, and the scientific/technical community."[94]

In support of these "strategic shifts," the Gibbons Report makes a number of specific recommendations regarding the way in which the "new vision" will be achieved. Two overarching recommendations are made in support of these specific recommendations: the allocation of sufficient resources to carry out the role effectively,[95] and "a formal commitment to a Change Management approach and process."[96]

The specific recommendations include the following:

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[92] Gibbons Report, Executive Summary, p. 5.

[93] Ibid. The report recognizes, however, that "a clear understanding that strong, effective, tough inspection, investigation, and enforcement are the essential backbone" (p. 6). The recommendation is that a broader range of procedures be used in addition to tough enforcement.

[94] Gibbons Report, Executive Summary, p. 6.

[95] See ibid., p. 21. In the words of the Executive Summary to the report: "Our view is that implementation and transition management cannot be accomplished within existing structures or within existing resources. Effective implementation and transition planning and oversight will require:

- Dedicated, experienced, senior leadership at the political level;
- A significant core of human and financial resources for a period of at least three to five years that will draw on additional dedicated resources from across government;
- Resources to support the development and implementation of an integrated approach to environmental compliance assurance;
- Resources to support new monitoring systems;
- New capacities to create, share and use knowledge internally and externally;
- Significant investment in information and information technology; and
- Creating new formal and informal mechanisms and approaches to broader outreach and participation of stakeholders and the public."

[96] See Gibbons Report, Executive Summary, p. 22. This recommendation appears to contemplate putting mechanisms in place to ensure that change not only occurs but is accepted by the MOE employees and the public. In the words of the report: "This approach should acknowledge and address the changes required both inside and outside the government and be infused in the process from the very beginning: identifying the need for change, creating buy-in, developing specific strategies, and implementing specific strategies."

1. *Creating an environmental management vision for Ontario:* The Gibbons Report recommends that a high-level government-wide vision of environmental management be developed in Ontario that incorporates all affected ministries. The vision should provide guidance and direction to those ministries and include an articulation of what each ministry's role in the overall strategy should be.

2. *Improving governance for environmental management:* The Gibbons Report suggests that "at some point in the future" the government should consider creating an arm's-length operating agency for the "operational/program delivery of environmental management," while retaining responsibility for "policy, program design, and monitoring, and accountability for performance."[97] The creation of an arm's-length operating agency is explicitly not recommended for the present time, because of the extensive changes that would be required over the next three to five years as a result of the other recommendations made in the Gibbons Report.[98] Although an arm's-length operating agency is not recommended for the present time, the Gibbons team clearly see advantages to such a structure. The overall impression left by the report is that such an agency should be created as soon as the other recommendations have been implemented.

3. *Implementing an integrated approach to environmental compliance assurance:* The Gibbons Report favours a move away from a primary reliance on traditional enforcement techniques to achieve compliance.[99] A "tool kit" of a variety of approaches is favoured, including enforcement, abatement, cooperative agreement, compliance assistance, and economic instruments. The four main policy ends identified in the report are controlling point-pollution sources, reducing priority-pollutant emissions, controlling non–point-pollution sources, and encouraging continuous improvement.

4. *Implementing a comprehensive environmental knowledge management strategy:* The Gibbons Report includes a number of recommendations to improve information gathering and organization mechanisms. These recommendations include ensuring that the government's overall environmental management vision include an explicit commitment to knowledge management as an important means of achieving the vision;

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[97] See Gibbons Report, Executive Summary, p. 24.
[98] See Gibbons Report, p. 213.
[99] See Gibbons Report, Executive Summary, pp. 24–25.

that the vision be based on the framework proposed in Research Paper No. 5 and that the strategies developed be consistent with the principles outlined in that paper;[100] that there be strong senior leadership and sponsorship of initiatives; that investment be made in the technology required for an environmental knowledge management strategy; and that the strategy build on the new reporting requirements for water.

5. *Identifying and addressing emerging issues:* The Gibbons Report identifies a need for developing a process to assist in identifying emerging issues. Research Paper No. 6 commissioned by the Gibbons team reviews the processes used in some other jurisdictions and makes some broad recommendations on the basis of these processes.[101]

6. *Improving access to scientific and technical expertise:* The Gibbons Report recognizes that the MOE is slipping in regard to the scientific and technical expertise available to assist it in performing its functions. A number of recommendations are made to improve this situation.[102]

7. *Improving environmental monitoring and reporting:* As part of the overall environmental knowledge management strategy, the Gibbons Report also recommends an improved monitoring and reporting strategy for the province. The report recommends that this strategy include:

    - developing a new monitoring program with early investment in improving the water quality components, including the Great Lakes, and developing indicators and biomonitoring approaches;

    - integrating existing databases;

[100] These strategies include linking knowledge and business strategies; articulating and demonstrating the commitment to knowledge management; defining, classifying, organizing and disseminating types and sources of information and knowledge; institutionalizing and resourcing the function within the ministry; rewarding the creation, sharing, and using of information; and building networks and outreach strategies within communities of interest. See IBM Canada, "Creating leading knowledge and information management practices," Research Paper No. 5 to Gibbons Report.

[101] See P. Victor, E. Hanna, J. Pagel et al., "Emerging issues and the Ministry of the Environment" Research Paper No. 6 to Gibbons Report.

[102] These recommendations include the establishment of a research agenda, including a dedicated environmental research fund; the creation of an external research advisory committee to assist in shaping research priorities and to oversee the quality of the research acquired; the provision of ongoing staff training; and a clear link with the above-mentioned knowledge management strategy. See Gibbons Report, Executive Summary, pp. 26–27.

- making information available to the public; and

- creating an "Access Ontario Website" that provides public access to data and analytical tools.[103]

8. *Developing a policy framework for risk analysis:* The Gibbons Report recommends the development of a policy framework for environmental risk analysis that includes the creation of standardized analytical tools and expectations for use in the process; a clear articulation of the expected role and mandate of risk analysis in the decision-making process; and building on the work of the II&E Working Group led by the Ontario Ministry of Labour.

9. *Strengthening policy development:* The Gibbons Report recommends that MOE senior management commit to strengthening policy development capacity. This commitment should include the development of a separate strategic policy unit within the ministry to "focus on policy issues that require a strategic response" and to provide economic advice and analysis. The MOE should also strengthen the "program evaluation component" of the current policy development process.

2.4.1.3 *Comments*

During the public hearings in Part 2 of the Inquiry, a number of parties informed me that in their view the Gibbons Report contained many good points. I generally agree with this assessment. In particular, I agree with the observation and recommendation that the province needs to develop a government-wide strategy with respect to the environment; that within this strategy, clear roles and responsibilities must be assigned; and that the entire enterprise needs to be adequately resourced. I also agree with the recommended "area-based" approach (a watershed-based approach) and with the comments made about the need to improve what the report terms "Information Management." Moreover, as I point out in Chapter 13 of this report, I think there is merit to the suggestions that the MOE needs more resources to fulfill its mandate, more scientific and technical expertise, better environmental monitoring, and an improved information management system.

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[103] See Gibbons Report, Executive Summary, p. 27.

I would also make these comments of an overview nature about why my report must go beyond the Gibbons Report and address the specific issues relating to the safety of drinking water:

1. The recommendations and observations made in the Gibbons Report are quite general and broad. It is easier to achieve consensus on broad or general points. However, as the range of submissions made to me in this Inquiry establishes, there is much room for controversy and disagreement in the details. For example, like the Gibbons Report, virtually everyone who made submissions to me relating to the oversight role of government agreed that the province needs an overarching water policy (or "vision," as it is referred to in the Gibbons Report). What the elements of that policy should be is an issue on which it is far more difficult to reach consensus. Details such as this were sometimes not dealt with in the Gibbons Report or, when discussed, were not put in a "safety of drinking water" context. I raise this not as a criticism of that report, but only to note that I view my mandate in relation to safe drinking water as requiring me to go further.

2. Although the general recommendation of movement away from a command and control model to a more integrated, cooperative approach that would encourage potential polluters to change their ways may be useful for some aspects of the MOE's mandate, including the abatement of pollution, it is not in my view appropriate for the regulation of drinking water safety. Drinking water safety is different from general pollution abatement in a number of important respects. First, the public health and safety concerns arising from unsafe drinking water are acute and immediate. On the treatment and distribution side, there is little or no room for simply encouraging good performance because there is no time for gradual change. If water is contaminated, people get sick or die. As a result, the system must focus on avoiding problems in the first place and on taking swift corrective action when deficiencies are identified. Second, water providers are more susceptible to government regulation than are potential polluters. There are far fewer of them, they are easily identified, and, in general, they have the same objective as the government – safe drinking water. These factors lend themselves to a command and control system. The same is also true for the entire treatment and distribution regime. Not only is it susceptible to, but I would add that it requires, rules that are clear, easily ascertained, and strictly enforced. There is no room for variations based on factors such as the impact on the local

economy or the interests of local stakeholders. As developed in detail in Chapter 13, a strict approach to oversight is a crucial feature of the government oversight function in regard to treatment and distribution. These comments are not meant as a criticism of the Gibbons Report, but as an observation that the recommendation is not appropriate for drinking water safety.

3. As part of the recommendations on alternative service delivery, the Gibbons Report suggests the possible devolution of the regulation function to the industry. When it comes to the safety of drinking water, I have concerns about such a devolution. As I develop in more detail in Chapter 13, given the public importance of a safe drinking water system, safety can best be ensured when the government is directly involved in regulation and oversight. Allowing the industry to regulate itself could involve conflicts that might have a negative impact on safety. Obviously, if it can be shown that devolution of the function enhances safety, I would not oppose such a move. However, given my concerns, I believe that the onus should be placed on those who propose a form of alternative service delivery to establish that it will enhance safety (and not merely promote efficiency), before such a change is accepted.

Where it is useful to do so, I will discuss the consistency and inconsistency of my recommendations with those of the Gibbons Report in more detail in the relevant chapters that follow.