THE WALKERTON INQUIRY

Commissioned Paper 4

MACHINERY OF GOVERNMENT FOR SAFE DRINKING WATER

By
Nicholas d'Ombrain

Toronto

2002

Published by Ontario Ministry of the Attorney General

This paper and other Walkerton Inquiry Commissioned Papers are available on the Walkerton Inquiry CD-ROM and at <www.walkertoninquiry.com> with the complete final report.

General editor, Commissioned Papers: Sheila Protti
Editors: Elizabeth d'Anjou
Proofreader: Marie-Lynn Hammond
Design: Madeline Koch, Wordcraft Services; Brian Grebow, BG Communications

Abstract

This paper provides a description of the structure and processes of the Ontario provincial government with particular reference to its responsibilities for safe drinking water. It sets out principles for the proper functioning of the machinery of government in Westminster-style systems, applies those principles to the arrangements and practices current in the government of Ontario, and draws conclusions about future arrangements to fulfill the government's responsibilities for the provision of safe drinking water.

About the Author

Nicholas d'Ombrain, a specialist in the machinery of government in the parliamentary and Cabinet system, has for 30 years advised governments on practical means of building, operating, and reforming democratic, accountable public institutions that provide efficient and orderly government while maintaining high standards of public management.

Contents

Table

Purpose and Structure of the Report

On June 13, 2000, the Honourable Dennis R. O'Connor was appointed as a commissioner under the Public Inquires Act of Ontario with the following mandate:

> 2. The commission shall inquire into the following matters:
>
> a) the circumstances which caused hundreds of people in the Walkerton area to become ill, and several of them to die in May and June 2000, at or around the same time as Escherichia coli bacteria were found to be present in the town's water supply;
>
> b) the cause of these events including the effect, if any, of government policies, procedures and practices; and
>
> c) any other relevant matters that the commission considers necessary to ensure the safety of Ontario's drinking water,
>
> in order to make such findings and recommendations as the commission considers advisable to ensure the safety of the water supply system in Ontario.[1]

The purpose of this paper is to provide the Commissioner with the following:

- a comprehensive overview and evaluation of how the Government of Ontario is organized and functions with particular respect to the provision and management of water, as well as of its relationship with provincial agencies, municipalities, and others involved in providing safe drinking water for the residents of Ontario;

- a review of principles and practices regarding the machinery of government that need to be kept in mind when assessing existing arrangements and developing proposals for the future; and

---

This paper has been prepared for discussion purposes only and does not represent the findings or recommendations of the Commissioner.

[1] O.C. 1170/2000.

- a framework for identifying policy requirements that give effect to the government's responsibilities for safe drinking water, as well as the institutions and processes necessitated by these requirements.

Part 1 of the report defines water management in public policy terms. It discusses the evolution of water policy in Ontario and gives a brief overview of responsibilities at the federal, provincial, and municipal levels.

Part 2 deals with the institutions at the provincial and municipal levels that have responsibilities that affect the provision of safe drinking water to Ontario residents. It describes the statutory authorities, policy functions, and program and administrative roles of these institutions.

Part 3 describes the processes for providing safe drinking water that are prescribed for these institutions, including both the government decision-making processes and the regulatory processes that underpin water operations. Note that the accuracy of the factual material in parts 2 and 3 of this report has been checked by the Government of Ontario Cabinet Office.

In part 4, I evaluate the strengths and weaknesses of the government's policies, institutions, and processes for fulfilling its obligation to provide safe drinking water.

Part 5 presents some principles of sound governance to guide future water administration in Ontario. It is primarily a discussion of control and accountability, and how the application of the principles of government organization affects the fulfillment of the government's responsibilities.

Finally, part 6 provides a policy and organizational framework for assessing possible future arrangements in light of current practices, principles of good governance, and practices in other jurisdictions.

This paper is primarily about the nature and means of sustaining the provincial government's responsibilities for safe drinking water. The roles of municipalities and other local institutions, the private sector, and the federal government are also considered, but only in terms of how the way they carry out their roles in the provision of safe drinking water affects the Ontario government's policies.

The reader should bear in mind that, except where otherwise noted, the descriptions provided here in the present tense reflect the arrangements in place

in early 2001, and are designed principally to assist the Commissioner in making recommendations for the future.

The current form of the paper was preceded by two draft versions. Parts 2 and 3 of the first draft version, which are factual in nature, were submitted to the Government of Ontario for comment. Parts 2 and 3 of the second draft version incorporated many factual changes suggested by the government. The paper was then posted on the Inquiry's Web site, following which the Government of Ontario provided comments on the entire paper. This final version of the paper incorporates factual material provided in these comments, and sets out verbatim at appropriate places the government's views on certain specific matters discussed in the text.

1 Drinking Water Management and Public Policy

This part of the report describes the role played by water in the relationship between the citizen and the state. It discusses how various levels of government in Canada have approached – and continue to approach – the issue of providing safe drinking water, and outlines the general constitutional and practical considerations that determine who does what.

1.1 Water and Governments

A safe supply of water is fundamental to organized social, economic, and political relationships among human beings. Only in relatively recent times, however, have governments played a significant role in overseeing the provision of safe drinking water.

Privately owned water systems were installed in nineteenth-century Ontario's five cities during the 60-odd years of Queen Victoria's reign (1837–1901). Initially, these were developed for the purpose of firefighting.[2] Ontario's rural population drew its water principally from individual shallow wells. Contamination of city and rural water supplies was commonplace until after the First World War; typhoid fever, spread through the water supply, claimed 1,378 victims in Ottawa as recently as 1912.

---

[2] See Ontario, Ministry of the Environment, 1990, "Drinking Water," *Information* (summer).

From the earliest days of public water systems, the linkage between sewage treatment and potable water was recognized, if not always acted on. Victorian concerns with public health in general, and biological contamination of water supplies in particular, led to the creation of a system of medical officers of health attached to Ontario's main towns and cities. The province provided a legislative framework for the local administration of public health through the *Provincial Board of Health Act* of 1882.[3] This statute created the Provincial Board of Health, which was responsible for the safety of drinking water and mandated to use the provisions of the Act "… to deal with matters related to drinking water, as well as sewage works, septic systems, and disposal of contaminants into the province's watercourses."[4] In the same year, the province enacted *The Municipal Water-works Act, 1882,* which permitted the establishment of municipally owned and funded water utilities.[5]

Although the *Provincial Board of Health Act* gave considerable executive authority to a provincial agency, in practice responsibility for water quality remained largely at the local level because the board did not have the financial resources to overcome the resistance of municipal councils to costly proposals for avoiding the contamination of water supplies.[6]

In 1927, the powers of the board were transferred to the new Department of Health and were exercised through its Division of Sanitary Engineering.[7] In 1952, an arm's-length agency, the Pollution Control Board, was established to investigate and prosecute polluters. The Ontario Water Resources Commission superseded the Pollution Control Board in 1956.[8]

The commission was granted jurisdiction over all aspects of the development and provision of water and sewage services, including extensive financial powers.[9]

---

[3] Jamie Benidickson, 1999, "Ontario water quality, public health and the law, 1880–1930," in Jim Phillips and Blaine Baker, eds., *Essays in the History of Canadian Law: Essays in Honour of RCB Risk* (Toronto: Osgoode Society for Canadian Legal History), vol. 8, pp. 115–41.

[4] Ontario Sewer and Watermain Construction Association [OSWCA], 2001a, *Drinking Water Management in Ontario: A Brief History* (Toronto: OSWCA), p. 2.

[5] Neil B. Freeman, 1996, *Ontario's Water Industry: Models of the 21st Century*, Report prepared for the Ontario Municipal Water Association (Peterborough, Ont.), p. 35.

[6] Benidickson, 1999, pp. 131–33.

[7] Jamie Benidickson, 2002, *The Development of Water Supply and Sewage Infrastructure in Ontario*, prepared for the Walkerton Inquiry [online], [cited January 2001]. Published in 2002 as *Water Supply and Sewage Infrastructure in Ontario, 1880–1990s: Legal and Institutional Aspects of Public Health and Environmental History* (Toronto: Ontario Ministry of the Attorney General), Walkerton Inquiry Commissioned Paper 1, Walkerton Inquiry CD-ROM, <www.walkertoninquiry.com>, p. 29.

[8] Ibid., p. 61ff.

[9] *The Ontario Water Resources Commission Act, 1957*, S.O. 1957, c. 88, s. 21, 39–45.

It was given the power to appoint and employ its own staff. Its authority was considerable, and the origins of many functions involved in overseeing the water supply today are clearly visible in this institution. The Ontario Water Resources Commission's powers included the following:

- supervising all ground and surface waters in Ontario used as a source of water supply;[10]

- controlling all aspects of the use of water for public purposes;[11]

- constructing and operating water and sewage works for use by municipalities, for which purposes it exercised powers otherwise conferred on municipalities by statute[12] (in addition, municipalities were empowered to enter into agreements with the commission for these purposes without the need to secure voter support for the costs to be incurred);[13]

- licensing well drillers;[14]

- approving the construction, renovation, and financing of water and sewage works by municipalities or others;[15]

- imposing reporting requirements and standards of maintenance on owners of water and sewage facilities;[16] and

- issuing orders to municipalities to establish, operate, and improve water and sewage works in the public interest without the need to obtain agreement from electors for any necessary debt to be incurred.[17]

The commission exercised its powers without intervention from any ministers. The minister responsible, in this case any minister designated for the purpose (by the Lieutenant-Governor-in-Council), had no general powers of direction. He or she was to receive an annual report for tabling in the legislature

[10] Ibid., s. 26(1).
[11] Ibid., s. 16.
[12] Ibid., ss. 16, 17.
[13] Ibid., s. 39. This provision was made palatable by the generous financial arrangements that the commission entered into with its clients.
[14] Ibid., s. 29.
[15] Ibid., ss. 30, 31.
[16] Ibid., ss. 30, 37.
[17] Ibid., s. 38.

"…containing such information as the Minister may require."[18] The minister designated under the act was usually the minister responsible for health.[19]

The commission set standards for water quality and supervised their implementation through a system of financing, licensing, certification, monitoring, inspection, investigation, and enforcement. In 1971/72, the newly created Ministry of the Environment took over these responsibilities. Nonetheless to this day medical officers of health continue to have local jurisdiction over many matters related to the water supply, principally in respect of biological threats to public health.

The creation of each of these two institutions – the Ontario Water Resources Commission and the Ministry of the Environment – marked an important realignment of responsibilities for the provision of safe drinking water to Ontario residents.

First, in the 1950s, through the vehicle of the Ontario Water Resources Commission, the province undertook a massive program of construction of water and sewage treatment facilities. This was designed to ensure that urban growth could take place without threatening the continued provision of safe drinking water to these growing communities. The lion's share of the costs were borne by the province and the emphasis throughout the period to about 1970 was on the public health requirements of safe drinking water and safe sewage treatment and disposal.

Second, beginning around 1970, the increasing public emphasis on environmental concerns introduced new considerations into the management of water resources in general and drinking water in particular. The transformation in 1971 of the Department of Energy and Resources Management and the Department of Lands and Forests into the Departments of the Environment and Energy and Natural Resources set the stage for a gradual shift away from the agenda of the Ministry of Health to a wider environmental agenda set by the new Environment Ministry (as it became in 1972). Note, however, that the Ministry of the Environment does not have the mandate to manage drinking water resources on a watershed basis, nor does it have a drinking water policy that applies to the activities of other ministries with responsibilities in such matters as agriculture, municipal affairs, and health.

---

[18] Ibid., s. 7.
[19] See OSWCA, 2001a, p. 3.

In addition, the new ministry absorbed the Water Resources Commission in 1972. This move signalled a gradual decline in provincial funding of new facilities, most of which had been satisfied (for that era) by the commission's extensive public works during the 1960s. The transfer of authority from the commission to the minister placed responsibility for water quality under the direct responsibility of the minister.[20]

These two developments may also be seen as part of the general growth of the role of the state in the postwar era.[21] The net result was much greater involvement of the provincial government in the provision of safe drinking water to Ontario residents, first through the subsidization of new plants and the accompanying application of more uniform standards of water quality, then, later, through the development of a licensing and certification system that emphasized the chemical as well as the biological aspects of healthy water.

By the 1990s all levels of government were suffering the consequences of 30 years of deficit financing by the federal and provincial governments. They were also caught up in various management initiatives that advocated a reduced role for government and greater reliance on private sector solutions, including self-regulation. The net result of these ideas for "reinventing government" was a reduction in the financial and human resources available to carry out the traditional roles of government.

For water management, this reduction in resources had two immediate consequences: first, the funds that smaller municipalities in particular relied on to replace aging capital equipment and physical plant became scarce; second, the scientific monitoring and inspection services that had been provided hitherto by the Ministry of the Environment and the Ministry of Health were either shifted to the private sector or moved to a cost-recovery basis.

The impact of these developments was made more acute by the fact that many municipalities had depended on infrastructure and operating subsidies that permitted them to bill their customers at rates lower than cost. These practices had also stifled competition and encouraged numerous small municipal operators across the province, which in turn placed a heavy burden on the regulatory budget.

---

[20] Freeman, pp. 45–46.

[21] The growing role of the provincial government in respect of water and the environment was accompanied by greater involvement in other aspects of economic life in the province. This included the growth in regulation of farming practices, and the provision of extensive exemptions from environmental and health regulations that might affect "normal farm practices."

1.1.1 Federal Role

The federal government has little formal involvement in the provision of drinking water to Ontario's residents. It does, however, have an informal role through its involvement, in cooperation with the provinces, in establishing Canada's Drinking Water Guidelines. These voluntary guidelines form the basis of the standards and objectives – and regulations – that some provinces promulgate to govern the provision of safe drinking water throughout Canada.[22] (After the events at Walkerton, Ontario became one of the few provinces to set out its standards in the form of mandatory regulations.)[23]

The formal federal involvement with water, such as it is, derives principally from its power over the fishery, which is outlined under section 91.12 of the Constitution. The federal *Fisheries Act*, which covers both the "Sea Coast and Inland Fisheries," includes measures to help protect the supply of surface and ground waters that are intended to counter degradation of the fish habitat. In addition, the courts have given the federal government a constitutional role in environmental protection under section 91's general powers of "peace, order, and good government."

For many years, the federal responsibility for the inland fishery was delegated to the provinces, but in the unfriendly climate surrounding this issue in the 1990s, the federal government found itself reassuming its historic role by default. In Ontario, for example, in September 1997, the Ministry of Natural Resources announced that it would no longer enforce the habitat protection provisions of the federal *Fisheries Act*.[24] This was not, however, a complete withdrawal; the ministry remains involved in the review and referral process for "work that may impact fish habitat." In addition, the government has stated that the

---

[22] The *Guidelines for Canadian Drinking Water Quality* are updated approximately every two years. They are issued by the Federal-Provincial Subcommittee on Drinking Water, which is chaired by the federal Department of Health.

[23] Prior to Ontario's decision to issue its Ontario Drinking Water Guidelines (ODWGs) as regulations, only Quebec and Alberta took formal measures to enforce the implementation of the Canadian guidelines. In Alberta, for example, the Environmental Protection Agency uses the guidelines to regulate waterworks and establish standards for their operation. Note too that Ontario and Quebec are the only provinces that routinely monitor drinking water quality. See Ontario, Ministry of the Environment, 2000b, *Drinking Water in Ontario: A Summary Report 1993–1997* (Toronto: Queen's Printer), p. 17.

[24] Canadian Institute for Environmental Law and Policy, 2000, *Ontario's Environment and the Common Sense Revolution: A Fifth Year Report* (Toronto: the institute), p. 15. See also *Fisheries Act,* RS 1985, c. F-14.

Ministry of Natural Resources and the Ministry of the Environment "… share responsibility for the enforcement of Section 36(3) of the *Fisheries Act*, which is the key pollution prevention section, and is more pertinent to the issue of water quality."[25]

Federal jurisdiction is also reflected in legislation such as the *Canadian Environmental Protection Act*, the *Canadian Environmental Assessment Act*, the *Nuclear Energy Act,* and the *Navigable Water Act.* Each of these laws sets out an important regulatory regime that has the potential to affect water quality throughout Canada. Moreover, the federal government has extensive responsibility for and control of lands used as Indian reserves, national parks, military bases, dedicated research facilities, ports and harbours, and other federal Crown lands.

Federal lands in general, and Indian reserves in particular, are thought to be subject to provincial laws of general application, including certain laws regulating drinking water, although in practice the provincial government does not regulate water and sewage developments on federal lands.[26] The provincial government has also taken the position that "… since they are under federal jurisdiction, First Nations are not eligible …" for provincial assistance for water infrastructure.[27] This position is somewhat unusual, since the federal government does not seek to use its constitutional authority over Indian lands to regulate drinking water on reserves. It has not challenged the province's regulatory function, although it has financed water and sewage infrastructure on reserves and military bases in particular.

During the 1970s, the general expansion of the role of government gave rise to greater federal interest in aspects of water management within its jurisdiction. For the most part, not surprisingly, this interest was manifested through the federal government's international jurisdiction (with the United States) over the Great Lakes. But it was also apparent in the development of its science base, which was quite strong at the time, in organizations such as the Geological Survey of Canada and the Health Protection Branch of the Department of National Health and Welfare, both of which contributed to the development

---

[25] Smith Lyons, 2001a, "Ministry Comments on … Final Report on Machinery of Government," Submission to Commission Counsel, The Walkerton Inquiry, [author's files], August 2, p. 1.
[26] Smith Lyons, 2001d, [Untitled], Submission to Commission Counsel, The Walkerton Inquiry [author's files], March 12, schedule 1.
[27] Smith Lyons, 2001b, "Responses/Comments on … Preliminary Report on Machinery of Government," Submission to Commission Counsel, The Walkerton Inquiry, February 9, p. 6.

of voluntary national drinking water standards. The Canada Centre for Inland Water, the National Waters Research Institute, the Department of Natural Resources, and the Department of the Environment also contribute expertise to the development of water quality objectives.

The federal government has an additional impact on water quality through various spending programs. In the 1970s, the Canada Housing and Mortgage Corporation had funds available to assist with capital funding for drinking water and sewage infrastructure. In the 1990s, the federal government provided assistance through its infrastructure redevelopment programs, which are still in place. Agriculture and Agri-Food Canada has funded programs to manage animal wastes in the province, which have helped to improve drinking water quality. These programs, however, represent a willingness to spend federal taxpayers' money more than the exercise of federal jurisdiction.

In practical terms, the federal government has not exercised its constitutional powers or its ownership of land in ways that significantly affect the provision of drinking water to Ontario's residents. Nor has it made much use of its now-diminished scientific resources to promote good water management in the province. Apart from its leadership role in the development of the Guidelines for Canadian Drinking Water Quality, the federal government is not a significant player in the existing arrangements for the provision and management of safe drinking water to residents of Ontario.

1.1.2 Provincial Role

The evolution of the provincial role in drinking water management was discussed in part 1 of this paper. The province's current role is a complex matter that is examined in detail in the balance of the paper. It is sufficient here to note that the role of the province is pervasive because all local affairs fall under its constitutional jurisdiction, although many are delegated to municipalities and to local public utility commissions. The province remains responsible, however, for public health and for the protection of the environment within the province, and these two responsibilities provide the basis of its role in the provision and management of drinking water.

During the 1990s, the province's accumulated debt and annual deficits led the government in Ontario to effect significant changes to its relationship with municipalities. Various initiatives falling under the general rubric of the

"common-sense revolution," such as the Who Does What Panel and the Review of Agencies, boards and commissions, have changed the way the province carries out its overall responsibility for providing appropriate and effective government within the scope of its constitutional jurisdiction. Although many changes have been designed to rationalize and streamline the way in which services are provided, overall it is probably fair to say that the province has sought to fashion a role for itself as a regulator and provider of policy and operational frameworks within which municipalities and others are responsible for delivering services to citizens.[28]

1.1.3 Municipal Role

Municipalities are the unit of local government in the province. All local governments, including upper- and lower-tier governments, are regulated by the province's extensive legislation dealing with all aspects of municipal government. Municipalities are bound by statute to follow the regulations and directions of the provincial government. They are subject to sanctions if they fail to do so. The same applies to any local public utilities commissions that a municipality may establish. Municipalities are affected not only by provincial regulation of water and sewerage development and operations, but also by the extensive statutory provisions relating to environmental assessment, land-use planning, and public health.

Currently, municipalities are the owners, and often the operators, of water and sewage facilities. They are required to act within a framework of statutes and regulations provided by the province.

Municipalities are responsible for funding water and sewage infrastructure. From time to time, the province has provided assistance in the form of grants or loans. Until 1943, all infrastructure was funded by debt financed from property taxes. Beginning in 1943, municipalities were given the option of funding this debt through special user levies (water rates).[29] When the Ontario Water Resources Commission was created in the latter half of the 1950s, it

---

[28] For a detailed review of the impact of these initiatives on drinking water arrangements in Ontario, see Andrew Sancton and Teresa Janik, 2002, Provincial-Local Relations and Drinking Water in Ontario (Toronto: Ontario Ministry of the Attorney General), Walkerton Inquiry Commissioned Paper 3, Walkerton Inquiry CD-ROM, <www.walkertoninquiry.com>. See also the discussion of alternative service delivery in section 2.2.1 of this report.

[29] See the discussion of public utilities commissions in section 2.3.2.

began offering grants and loans for water and sewage infrastructure. These subventions, which were designed to ensure that burgeoning development in southern Ontario would not be impeded by inadequate water infrastructure, were widely available.[30]

Loans from the Ontario Water Resources Commission were an attractive alternative to floating municipal debentures because they offered lower interest rates and longer repayment periods. Alternatively, a municipality could arrange for the commission to own and operate the local water and sewage facilities, leaving the municipality responsible only for the annual costs of maintenance and repair and for a longer-term commitment to acquire ownership.[31] By the late 1960s, the commission was offering smaller municipalities grants that covered as much as 85% of the capital costs of water and sewage infrastructure.[32] One group closely involved in infrastructure development "… is not aware of a single municipality in Ontario that has paid for its water or sewage infrastructure entirely on its own."[33]

Between the birth of the Ontario Water Resources Commission and the end of the 1982/83 fiscal year, an estimated $2.04 billion was spent by the three levels of government on water and sewer infrastructure in Ontario.[34] By 1983, capital plant for water and sewage treatment was well established in the province. Thereafter, the province introduced a series of ad hoc programs (a mixture of grants and loans) to help smaller municipalities rehabilitate the systems that had been built with provincial grants over the preceding 25 to 30 years.[35]

The net effect of these programs has been to protect consumers from the real costs of the services provided, thereby encouraging over-consumption and retarding development of a competitive supply sector.

---

[30] Sancton and Janik.
[31] OSWCA, 2001a, p. 4.
[32] Ibid., p. 5.
[33] Ibid., p. 3.
[34] Ibid., p. 8.
[35] The Ministry of the Environment administered Lifelines from 1987 to 1992; during the 1990s, the Ministry of Finance administered JobsOntario, which had a component for water and sewage infrastructure; the Ministry of Municipal Affairs and Housing administered the Municipal Assistance Program; and the Ministry of the Environment administered the Provincial Water Protection Fund. Currently, assistance flows through a component program under the general authority of the Ontario SuperBuild Corporation. This corporation is discussed in detail in section 2.2.3.

1.1.4 Trends

The following key points regarding trends in the history of responsibility for water provision in Ontario are worth bearing in mind for the rest of this report:

- Until the mid-1950s, municipalities financed water and sewerage development without provincial assistance. This changed because of the need to ensure adequate facilities to support urbanization.

- Between 1956 and 1972, the province took the lead in the development and operation of water and sewage facilities through the Ontario Water Resources Commission, which was also the regulator for water and sewage facilities.

- The tendency of municipalities to rely on provincial subsidies instead of charging consumers the real costs of water has not served the objectives of conservation or economic efficiency.

- Until the 1970s, the province focused its regime for drinking water control on public health considerations.

- From the 1970s onwards, health considerations in regard to drinking water safety were subsumed within wider environmental concerns under the leadership of the Ministry of the Environment.

- By the 1990s, budgetary restrictions and aging water and sewage infrastructure were converging.

- The federal government's jurisdiction over lands, fish habitat, and the broader environmental policy provide an unrealized potential for a more prominent federal role in relation to safe drinking water.

- Similarly, the province's jurisdiction over resources and the environment provides an unrealized potential for a watershed approach to the overall management of drinking water resources.

2 Mandates and Institutions for Safe Drinking Water

This part of the report describes the roles and responsibilities of the institutions at the provincial and municipal level that affect the provision of safe drinking water in Ontario. It begins with an overview of how the provincial government is organized and does business. The particular duties and functions of the ministries and agencies that deal with water are described, as well as the institutions and processes used to coordinate activities – such as water management – that span several ministries and agencies. The report reviews the relationship between Ontario's municipalities and the provincial government, both in general and in particular respect of water management. It also considers the roles of other agencies, including public utilities commissions.

The purpose of these sections is to describe the organization and processes of the government in their current form so that the Commissioner's recommendations for future drinking water management can take account of the overall organization and processes of the provincial government. As mentioned above, parts 2 and 3 of this report were submitted to the Ontario Cabinet Office for comment in order to ensure factual accuracy. In its comments on these parts, the Cabinet Office made the following general observation:

> The description of the Cabinet, Central Agencies, the Cabinet Office and the Premier's Office, the Management Board Secretariat, the Ministry of Finance (including the Ontario SuperBuild Corporation), and the decision-making process in the report reflect the machinery of the Ontario government since the last election in June 1999. The Cabinet Committee structure and the decision-making process, as they stand now, are not identical to those that were in place during the last mandate of the current Government (June 1995 to June 1999), and in previous governments. For example, the Management Board of Cabinet was responsible for all capital decisions, under the capital framework established by the Ministry of Finance, prior to the establishment of the Cabinet Committee of Privatization and SuperBuild and the Ontario SuperBuild Corporation in late 1999/ early 2000. The former Privatization Secretariat, responsible for privatization proposals, reported to the Minister without Portfolio, Responsible for Privatization, and not to the Minister of Finance, as in the current practice. Prior to June 1999, all policy decisions were made by Policy and Priorities (P&P) Board, with input from ad hoc sub-committees (e.g., the P&P Sub-committee on Local Service

Realignment). Hence it has to be recognized that decisions in the last several years involved Cabinet committees and Cabinet Committee members of the day, which were not necessarily the same as the structure and process outlined in the report.[36]

2.1 The Government of Ontario

Under the *Constitution Act, 1867*, the province of Ontario is governed in accordance with the general constitutional provisions attaching to a representative parliamentary democracy. Similar in principle to Westminster-style responsible government, governance in Ontario depends on the responsibility of ministers of the Crown in right of the province to the legislature of Ontario.

2.1.1 Ministers

In such a system the legislature assigns powers within its constitutional sphere of competence to ministers and other office holders. Ministers are *accountable* for the exercise of the powers assigned to them and to officials who are subject to their direction. They also *answer* to the legislature for the exercise of powers assigned to others; generally these are arm's-length agencies carrying out activities of a quasi-judicial, regulatory, commercial, granting, or other nature deemed inappropriate to be subject to ministerial direction and control.[37]

In constitutional terms, these arrangements describe the "individual responsibility" of ministers; they form the bedrock of the organization of any system of ministerial government, providing the framework of ministries and agencies that make up the overall government system.

2.1.2 Cabinet

Ontario's system of ministerial government also embodies the other fundamental constitutional principle of Westminster-style government: the collective responsibility of ministers to the legislature. Ministers, working together under the leadership of the premier in the Cabinet, must find ways to exercise their

---

[36] Smith Lyons, 2001b.

[37] For a discussion of the distinction between "accountable" and "answerable," see section 5.2.

individual responsibilities in a manner that will be supported by all ministers. Only in this way is the Cabinet able to maintain the support of a majority of the legislature and thereby provide for the continuation of the government through the formal executive, the Lieutenant-Governor-in-Council, which consists of the Queen's representative advised by the Executive Council (i.e., the members of the Cabinet).

Thus, ministers are constitutionally charged with ensuring that they work together to develop a common policy that will be put to the legislature or to the lieutenant governor as the agreed position of the Cabinet as a whole. This duty is the constitutional basis for arrangements designed to bring about such agreement. The most important such arrangement is the institution of the Cabinet, but it is by no means the only institutional means of promoting unity among ministers.

The organization of the Cabinet reflects its policy, political, management, and formal responsibilities. The Cabinet generally oversees the work of a series of policy committees that deal with health and social services, education, economic development and natural resources, justice, and intergovernmental affairs. Currently there are nine standing committees, including the new committee for the environment established in February of 2001.

The Priorities, Policy and Communications Board (prior to 1999, the Priorities and Policy Board), which is chaired by the premier, supervises the overall strategic policy of the government. As a rule, the chairs of all the Cabinet's policy committees sit on this board.

The Management Board of Cabinet supervises the day-to-day administration of government; it is a statutory body with formal executive responsibilities under the *Management Board of Cabinet Act* and various other statutes, notably the *Treasury Board Act* in respect of financial matters. The Privatization and SuperBuild Committee has control of the province's capital expenditures and related policies, for which purposes it exercises the relevant statutory powers of the Management Board.

The Statutory Business Committee handles the formal business of the Executive Council. This includes approval of regulations to be issued by the lieutenant-governor-in-council, as well as detailed review of legislation for which policy approval has been given by the Cabinet.

The Environment Committee was created in February 2001. It is not known how the mandate of this committee will relate to that of the Economic and Resource Committee, which hitherto has been the policy committee that dealt with issues related to the provision of safe drinking water.

As of the shuffle announced on February 8, 2001, there are 24 ministers in the Cabinet supported by 19 parliamentary assistants. Some Ontario parliamentary assistants (currently 4) are members of one or other of the policy committees of the Cabinet. The membership of Cabinet committees (see table 2.1) provides a general guide to the various sectors of activity presided over by the provincial government – although, as in any Cabinet, sectors overlap and the membership of a given committee may sometimes have more to do with personality, talent, and political considerations (such as regional representation) than portfolio responsibilities. An effort is made to select chairs for policy committees who are not also lead ministers for the relevant policy sectors.

2.1.3 Central Agencies

The Government of Ontario has several "central agencies" charged with supporting the process whereby ministers present a united position on matters before the government. Three such agencies are generally found in all governments following the Westminster model: the Cabinet Office, the Management Board Secretariat, and the Ministry of Finance. The Government of Ontario also regards the Ontario SuperBuild Corporation as a central agency in its own right.[38]

Cabinet Office and Premier's Office Ontario's Cabinet is led and organized by the premier, who is both head of government and leader of the governing party. The premier and the Cabinet receive support for these functions from both the Cabinet Office and the Premier's Office. The premier's chief policy and political advisers, the secretary of the Cabinet and the chief of staff respectively, head these organizations, which work in close harmony to provide the premier and the Cabinet with policy and political advice.

While the Premier's Office is a political organization with essentially unofficial duties, the Cabinet Office fulfills a variety of essential public service functions.

---

[38] Smith Lyons, 2001b, p. 1.

Table 2.1 Ontario Cabinet Committees and Their Membership, as of February 8, 2001

Priorities, Policy and Communications Board
Premier – Chair
Minister of Finance and Deputy Premier
Minister of Education (and Government House Leader)
Minister of Municipal Affairs and Housing
Minister of Economic Development and Trade
Minister of Consumer and Business Services and Minister of Correctional Services
Minister of Labour
Chair of the Management Board of Cabinet
Minister of the Environment

Management Board of Cabinet
Chair of the Management Board of Cabinet
Minister of Finance and Deputy Premier – Vice-Chair
Minister of Community and Social Services (and Minister Responsible for Children and Minister Responsible for Francophone Affairs)
Minister of Health and Long-Term Care
Minister without Portfolio (Chief Government Whip and Deputy Government House Leader)
Minister of Natural Resources
Minister of the Environment

Statutory Business Committee
Attorney General (and Minister Responsible for Native Affairs) – Chair
Parliamentary Assistant to the Minister of Community and Social Services – Vice-Chair
Minister of Training, Colleges and Universities (and Minister Responsible for Women's Issues)
Minister of Intergovernmental Affairs
Minister of Tourism, Culture and Recreation
Minister of Citizenship (and Minister Responsible for Seniors)
Associate Minister of Health
Minister without Portfolio (Chief Government Whip and Deputy Government House Leader)

Privatization and SuperBuild Committee
Minister of Finance and Deputy Premier – Chair
Minister of Municipal Affairs and Housing – Vice-Chair
Minister of Transportation
Minister of Tourism, Culture and Recreation
Associate Minister of Health
Minister of Economic Development and Trade
Chair of the Management Board of Cabinet
Minister of Energy, Science and Technology

Health and Social Services Committee
Minister of Natural Resources – Chair
Minister of Intergovernmental Affairs – Vice-Chair
Minister of Community and Social Services (and Minister Responsible for Children and Minister Responsible for Francophone Affairs)
Minister of Health and Long-Term Care
Minister of Citizenship (and Minister Responsible for Seniors)
Associate Minister of Health
Minister of Consumer and Business Services and Minister of Correctional Services
Parliamentary Assistant to the Minister of Economic Development and Trade

Education Committee
Minister of Labour – Chair
Minister of Community and Social Services (and Minister Responsible for Children and Minister Responsible for Francophone Affairs) – Vice-Chair
Minister of Transportation
Minister of Training, College and Universities (and Minister Responsible for Women's Issues)
Minister of Education (and Government House Leader)

Economic and Resource Committee
Minister of Finance and Deputy Premier – Chair
Minister of Natural Resources – Vice-Chair
Minister of Transportation
Minister of Agriculture, Food and Rural Affairs
Minister of Tourism, Culture and Recreation
Minister of Northern Development and Mines
Minister of Economic Development and Trade
Minister of Consumer and Business Affairs and Minister of Correctional Services
Minister of Energy, Science and Technology
Minister of the Environment

Justice and Intergovernmental Affairs Committee
Minister of Education (and Government House Leader) – Chair
Minister of Intergovernmental Affairs – Vice-Chair
Minister of Municipal Affairs and Housing
Minister of Consumer and Business Affairs & Minister of Correctional Services
Solicitor General
Attorney General (and Minister Responsible for Native Affairs)
Parliamentary Assistant to the Minister of Natural Resources
Parliamentary Assistant to the Minister of Training, Colleges and Universities

Environment Committee
Minister of the Environment – Chair
Minister of Natural Resources – Vice-Chair
Minister of Transportation
Minister of Agriculture, Food and Rural Affairs
Minister of Intergovernmental Affairs
Minister of Municipal Affairs and Housing
Minister of Northern Development and Mines
Minister of Economic Development and Trade
Minister of Energy, Science and Technology

Its head, the secretary of the Cabinet, is normally a senior career public servant and the leader of the deputy minister community. The Cabinet Office has the following duties:

- *organization of cabinet business.* The Cabinet Office provides administrative support to the Cabinet and its committees, organizing meetings and maintaining records. This function includes maintaining the records necessary for the formal decisions of the lieutenant-governor-in-council.

- *provision of policy advice.* The Cabinet Office provides the premier and the chairs of Cabinet committees with policy advice, and organizes the presentation of issues for consideration by ministers at meetings of the various Cabinet committees (and, as required, of the Cabinet itself). This latter collective briefing function is carried out in conjunction with the officials of the minister(s) sponsoring the particular issue. The committees are served by secretariats in the Cabinet Office, which work with ministries and agencies to ensure that the necessary preparatory work of identifying issues and options has been carried out so it can be presented to the ministers involved for final decision. The policy functions of the Cabinet Office are under the direction of a dedicated deputy minister.

- *issues management.* The Cabinet Office is the focal point for coordinating the management of issues and critical events. Using its network of linkages with ministries and agencies, and the Cabinet Secretary's leadership functions, the Office endeavours to support the premier and ministers on all important matters. Every second week, the Secretary of the Cabinet chairs a meeting of deputy ministers to review key files in depth, to identify emerging issues, and to review the management of ongoing events.

- *government organization and human resources leadership.* The Ontario Cabinet Office itself describes this function thus:

  > Through the Ontario Public Service Restructuring Secretariat and the Centre for Leadership, the Cabinet Office provides support in the development and selection of senior officials, and advice to the Secretary to the Cabinet and the Premier on matters of public service restructuring – i.e., government organization, program realignments and cultural change. The Centre for Leadership is the focal point for the development of the executive leadership of the Ontario Public Service. The organizational and senior personnel functions of the

> Cabinet Office are under the direction of a dedicated deputy minister.[39]

- *direction of communications.* The Cabinet Office provides a focal point for the strategic direction of government communications: "Cabinet Office works closely with the Premier's Office in providing corporate direction to Ministry Communications Branches. Ministry Communications Branches receive line directions from their own deputies."[40] This Cabinet Office function is also under the direction of a dedicated deputy minister.

Management Board Secretariat The Management Board Secretariat supports the Management Board of Cabinet. The Cabinet Office has provided the following description of the duties of the Board and its Secretariat:

> MBS [the Management Board Secretariat] in support of MBC [the Management Board of Cabinet], creates and implements strategies for effective accountable management of government resources (money, people, land, buildings, technologies and information) across all ministries. MBC reviews, and makes decisions and recommendations to Cabinet and the Premier on each ministry's annual business plan and its operating budget. MBC, with advice from MBS, also reviews and makes recommendations to Cabinet on any request from ministries for any change in resources (addition and reduction) to those that are allocated to the ministries at the beginning of each fiscal year. MBS reviews the requests to determine if the proposals are consistent with the fiscal framework and policy agenda. However, MBS and MBC do not review the proposal for [sic] checking the accuracy of the information provided in ministries' submissions. MBS and MBC rely on reasonable assertions made by ministries in their submissions.
>
> MBS sets the management policies, guidelines and accountability framework for all ministries. While there is not a formal process to evaluate ministries' program activities, ministries have to report to MBC on the performance measures and outcomes of their core businesses and programs as part of the annual business plans, as the

---

[39] Ibid., p. 2.
[40] Smith Lyons, 2001c, [untitled], Submission to Commission Counsel, The Walkerton Inquiry [author's files], March 2.

> way to hold ministries accountable for meeting performance targets. MBC also routinely requests ministries to report back on the outcome and performance measures as new programs are approved.
>
> While Cabinet Office takes the lead in providing advice to various policy committees on policy proposals, staff from both MBS and Ministry of Finance provide input to Cabinet Office on the fiscal considerations as well as program design issues. PPCB [the Priorities, Policy and Communications Board] and Cabinet policy committees establish initial direction on strategic policy issues; MBC [makes] decisions on the financial, workforce, and operational implications associated with the policy initiatives. So while there [are] no dedicated policy resources in MBS, there is a clear and established linkage between policy and resources management considerations. [41]

In summary, the board and its secretariat are responsible for management standards throughout the public service in Ontario and for the management of the flow of resources for the ongoing operations of the government.[42] The board is also the government's employer, and as such oversees all collective bargaining. The board and the secretariat are not systematically involved in evaluating the program activities of ministries and agencies, nor do they have policy resources. However, the secretariat shares a common financial database with the Ministry of Finance, which has the policy resources to analyze proposed new expenditures and policies, and provides input to the Cabinet Office's policy evaluation process as described above.

The secretary of the Board of Management is also the chairman of Ontario's Public Service Commission. The powers of the commission are, in turn, delegated to the secretary. This arrangement combines the staffing and employment functions in a single agency. The board also has formal responsibility for approving organizational changes within ministries, but this power has been delegated to a committee of officials (the Executive Development Committee). This committee is chaired by the secretary of the Cabinet and includes the secretary of the Management Board and several deputy ministers chosen on the basis of their portfolios and experience.

---

[41] Smith Lyons, 2001b, pp. 2–3.

[42] *Management Board of Cabinet Act*, RSO 1990, c. M.1, s. 3; and *Treasury Board Act, 1991,* SO 1991, c. 14, s. 6.

The Management Board of Cabinet and its secretariat have responsibility for the establishment, mandates, and the administrative regimes that govern provincial agencies.[43] The authority to propose new agencies rests with ministers, who are required to seek the approval of the Management Board; the board's decisions, in turn, are "confirmed or varied" by the Cabinet.[44] In support of these powers, the Secretary to the Management Board advises the board on "… matters of an agency's appropriateness, function, alternatives and implications, and on related links with government vision and priorities and with ministry business plans and allocations …"[45]

Ministry of Finance The Ministry of Finance supports the government through the development of fiscal, economic, and taxation policies. Since 1993, it has also administered Ontario's tax statutes and tax assistance programs. Its policy functions affect all ministries and agencies – and municipalities, although it relies on the Ministry of Municipal Affairs and Housing to collect and assess data dealing with municipal revenues and expenditures.[46]

The ministry controls funding for new programming and oversees the general fiscal impact of the government on the provincial economy. Its Fiscal and Financial Policy Division, Office of Economic Policy, and Office of the Budget and Taxation together provide a sophisticated analytical capacity unique among the central agencies. They enable the ministry to play an important role in the development of policy and in reviewing the effectiveness of existing programs.

The ministry has had an important impact on water management in the province through successive programs tailored to providing capital funding for water and sewage infrastructure. In the past, these programs were administered by the Ministry of the Environment, the Ontario Clean Water Agency, and, before them, the Ontario Water Resources Commission. The Ministry of Finance played an important role in designing the cost-recovery mandate of the Ontario Clean Water Agency, and today it is home to the Ontario SuperBuild Corporation, which oversees the policy-development and decision-making processes for all capital expenditures funded by the province, including

---

[43] For more detail, see the discussion of the Agency Establishment and Accountability Directive in section 2.2.1.
[44] Smith Lyons, 2001b, p. 3.
[45] Ontario, Management Board Secretariat, 2000a, *Agency Establishment and Accountability Directive* (Toronto: Queen's Printer for Ontario), p. 16.
[46] Smith Lyons, 2001b, p. 4.

its share of the costs of new water and sewage facilities.[47] The ministry also oversees the financial arrangements of provincial agencies. [48]

The Minister of Finance and his officials play a pivotal role in the decision-making system. The minister is a member of the Priorities, Policy and Communications Board, vice-chair of the Management Board, and chair of the Privatization and SuperBuild Committee.[49]

2.1.4 The Decision-Making Process

Ontario's central agencies maintain a system of formal and informal inter-ministerial coordination and consultation. Matters of political or financial significance must come to the Cabinet for discussion and approval. The central agencies work with ministries and agencies to ensure adequate preparation of issues so that ministers understand the decisions being sought and have an overview of the consequences of proposed actions.

Proposals for new policies and programs are generally considered in detail by one of the policy committees of the Cabinet. Such proposals normally form part of the program developed by the Priorities, Policy and Communications Board to fulfill the government's election commitments. Other initiatives are only considered with the prior agreement of the Cabinet Office following consultation with the premier or his office.

New policies and programs – indeed, all policy changes – are the subject of detailed inter-ministerial discussion among officials; any proposals involving significant new expenditures must be worked out with the policy staff of the Ministry of Finance. The finalized proposal is put forward in a "Cabinet submission," which is signed by the deputy minister(s) as well as the sponsoring minister(s). If the initiative is being proposed to one of the policy committees of the Cabinet, it is presented, usually in the form of a slide deck, by officials of the ministries concerned; presentations to the Priorities, Policy and Communications Board are generally made by the staff of the Cabinet Office.

---

[47] For details, see the discussion of the Ontario SuperBuild Corporation in section 2.2.3.
[48] *Financial Administration Act,* RSO 1990, c. F.12.
[49] Note that the Priorities, Policy and Communications Board has no vice-chair.

Once a proposed measure has been approved by a policy committee it is referred to the Cabinet for final approval, either directly or via the Priorities, Policy and Communications Board. Once a final decision has been made by Cabinet, the Management Board of Cabinet considers and approves detailed measures for funding and administrating the new initiative, although its staff (and sometimes the Management Board itself) will have already been consulted during the Cabinet-committee stage of the decision-making process. In cases where there has been such prior consideration by the Management Board, the conclusions of the board and of the relevant policy committee are presented to the Cabinet together in a combined "minute." In any event, the Management Board is provided with the minutes of all policy committee deliberations. Note too that the chairs or vice-chairs of the Cabinet's policy committee normally sit as members of the Management Board, providing an additional measure of coordination.

The government has pointed out that decisions of the Management Board and of the Cabinet Committee on Privatization and SuperBuild (which formally exercises certain Management Board powers) are referred to the Cabinet for confirmation or variation in exactly the same way as the decisions and recommendations of the Priorities, Policy and Communications Board of Cabinet and of the standing policy committees: "Cabinet has the ability to comment on or revisit all Committee decisions. No action is taken on [a] Committee's items until after Cabinet review."[50]

The Statutory Business Committee of the Cabinet reviews all proposed legislation and regulations. In the case of legislation and some regulations, this step follows policy consideration by the Cabinet and its policy committees. Often, however, regulations are routine and are not subject to policy or program discussions in the Cabinet or its committees.

Since 2000, policy and programs involving any capital expenditures (new and previously approved) have been referred to the Privatization and SuperBuild Committee. The government has provided the following description of the formal arrangements supporting this development:

> In 2000, Management Board of Cabinet's [MBC's] statutory authority over approval of capital expenditures was delegated to members of the Cabinet Committee on Privatization and SuperBuild. The Cabinet

[50] Smith Lyons, 2001b, p. 5.

> Committee does not exercise the statutory authorities of MBC. Those have been delegated to the members sitting as the Cabinet Committee. The determinations of the Cabinet Committee on Privatization and SuperBuild are recommendations to Cabinet. Cabinet exercises authority to approve such recommendations. The statutory authority of Cabinet over such determinations is actual approval not informal approval.[51]

On reviewing this section of the revised draft report, the government offered the following description of the decision-making process:

> New policies and programs are developed through a Cabinet Submission process. The majority of such submissions are developed by line ministries. While the Ministry of Finance is generally called upon by the Cabinet Office to comment on fiscal aspects of arm's-length submissions, it is only involved in the policy/program development side if there are significant fiscal and/or economic implications.
>
> Submissions are signed by the deputy minister(s) and ministers(s) directly responsible for preparing the submission. The minister(s) sign(s) to indicate that this is the recommendation he/she/they is/are making to Cabinet. The deputy minister(s) sign(s) to indicate that the submission faithfully reflects the direction of the minister(s) and that the analysis is accurate and complete.
>
> Each submission includes an "Inter-Ministry Consultation Record" indicating which other ministries have been consulted in the process, and whether or not they are in agreement with the submission's analysis or recommendations. Ministries present their submissions to the appropriate Policy Committee of Cabinet for ministerial review. Where the Minister of Finance is a member of the Policy Committee, Ministry of Finance staff will provide the Minister with a briefing note summarizing and commenting on the submission and its recommendations.[52]

The government has noted with respect to the role of central agencies generally:

---

[51] Ibid.
[52] Smith Lyons, 2001a, pp. 2–3.

> All central agencies work together to both challenge and assist ministries with the development of comprehensive policy proposals and resource submissions to ensure that all ministries' proposals are consistent and fully integrated with respect to policy, fiscal, operational and communications considerations.
>
> Cabinet Office leads the policy review; Management Board Secretariat evaluates the resource requirements, including financial, human resource, I&IT and realty requirements; Ministry of Finance considers the impact to the fiscal plan; and SuperBuild reviews any capital components. Every central agency has a portfolio analyst/ policy advisor with sectoral expertise assigned to every ministry.
>
> Collectively, these agencies ensure a ministry's proposal is well considered without unnecessarily duplicating the expertise of the other central agency partners. Consequently, there is an effective and efficient challenge capacity within central agencies to ensure that sound proposals are put forward by ministries for Cabinet decision-making.[53]

2.1.5 Ministries

The Ontario government is organized into ministries, which reflect the roles and responsibilities of individual ministers. In addition, as previously noted, some functions are assigned to agencies, some of which are under active ministerial direction and some of which are not.

The ministers and ministries with responsibilities relevant to this discussion of water are as follows:

- the Ministry of Natural Resources,
- the Ministry of the Environment,
- the Ministry of Health and Long-Term Care,
- the Ministry of Agriculture, Food and Rural Affairs, and
- the Ministry of Municipal Affairs and Housing.

The government has suggested that the Ministry of Finance should be included in this list because of the presence within it of the Ontario SuperBuild

---

[53] Ibid., p. 14.

Corporation. However, since this corporation at least appears to be not part of the ministry but, formally, a separate body, described by the government as "an agency of the Ministry of Finance," it is treated below, in section 2.2.[54]

Other ministers and their officials play incidental roles in the government's handling of drinking water. These include the Minister of Northern Development and Mines, and the Attorney General (and Minister responsible for Native Affairs). Both, for example, are involved in programs involving financing for the renewal of infrastructure, including the Northern Heritage Fund and the Ontario Small Towns and Rural Initiative (OSTAR) program for smaller communities.[55] In addition, the Ministry of Transport has responsibility for highway drainage, which can have an impact on groundwater.

Ministry of Natural Resources The Ministry of Natural Resources is "… the steward of Ontario's provincial parks, forests, fisheries, wildlife, mineral aggregates, petroleum resources and the Crown lands and waters that make up 87 per cent of the province."[56] This ministry is primarily concerned with forest, fish, and wildlife management; provincial parks; and the preservation of natural areas. It also regulates the construction and maintenance of dams on Ontario's rivers and streams.

The ministry is the leading government organization for programs dealing with drought and low water levels; flood forecasting, warning and emergency response; watershed management; dams and water control infrastructure; the use of water for hydroelectric power; water diversions, transfers, and withdrawals; and, in conjunction with the Ministry of the Environment, water conservation. It works closely with local conservation authorities. The ministry derives its authority over water primarily from the *Lakes and Rivers Improvement Act.*

The Ministry of Natural Resources is currently taking steps to develop databases to assist in the effective management of water requirements. In cooperation with the Ministry of the Environment, it is working on a groundwater-monitoring network and other measures to increase the amount of available information about the state of the province's groundwaters. At present, there exists no inventory of groundwaters in the province.

---

[54] Ibid., pp. 1, 5.

[55] For more details about OSTAR, see the discussion of the Ontario SuperBuild Corporation in section 2.2.3.

[56] Ontario, Ministry of Natural Resources, 2000, *Beyond 2000: Strategic Directions* (Toronto: Queen's Printer for Ontario, 2000), foreword.

Although there is a general understanding that Natural Resources is concerned with water quantity and Environment with water quality, under the *Ontario Water Resources Act* responsibility for surface waters and groundwaters rests with the Ministry of the Environment (discussed below).

The Ministry of Natural Resources, working with local conservation authorities, looks at water resource management from the point of view of protection and preservation of water supplies. It is concerned with the watershed and with the overall place of water in the ecosystem. Although this ministry's mandate suggests that it is the logical starting point in the chain of legislative, policy, and management instruments available to ensure the effective and sustainable use of Ontario's immense water resources, it is not in fact a significant player in the provision of safe drinking water.[57]

The government does not appear to share this conclusion. In its comments on the revised draft report of this paper, it has noted:

> In keeping with its mission of ecological sustainability. The MNR [Ministry of Natural Resources] views management of the hydrological system from an ecosystem perspective. Safe drinking water (whether from ground or surface water sources) is dependent on environmentally sustainable land use practices. In not acknowledging this premise, the paper undervalues the essential role played by MNR. MNR's role in management of water is based in legislation (e.g. Public Lands Act, Lakes and Rivers Improvement Act, Conservation Authorities Act, sections of the Fisheries Act), is further developed in policy (e.g. Water Efficiency Strategy, various policy statements under the Planning Act, Watershed Planning Guidelines, etc.), in international agreements that the ministry leads on behalf of Ontario (e.g. SGLFMP, Great Lakes Charter) and culminates in ecosystem based program delivery (e.g. Private Land Stewardship, sustainable forest management, Conservation Land Tax Incentive Program, Managed Forest Incentive Program, Natural Areas Protection Program, etc.). MNR's approach

[57] In 1998, the KPMG Centre for Government prepared a report for the Ministry of the Environment and the Ministry of Natural Resources that proposed a relatively minor clarification in the mandates of the ministries involving transferring responsibility for permits to take water from Environment to Natural Resources; the consultants believed this would establish more clearly the "quality versus quantity" distinction between the mandates of the two institutions. KPMG, 1998, "A Review of Water Management Practices in the Ontario Government," Unpublished report, September 25 (Toronto), p. 57.

to integrated ecosystem management is supported by inclusion of water management responsibilities.

MNR has played a leadership role and holds a positive track record in areas such as wetland protection and restoration, riparian zone buffers, shoreline management, and fish ecology. References in the report to these water-related ecosystem components and other critical areas, such as forest management and its impact on water supplies and cleanliness, would have drawn attention to the importance placed on an integrated ecosystem approach as highlighted in the MNR vision of sustainable development and mission of ecological sustainability.

In mentioning watersheds and conservation authorities (CAs), the report does not convey the leading role that MNR and the CAs have played in developing watershed management and planning. MNR has a series of technical guidelines and other tools that address watershed management. Conservation authorities have authored hundreds of existing plans.

MNR plays a leading role in international and inter-provincial water management. MNR is the lead ministry on water quantity and fish ecology on the Great Lakes and is represented on the international bodies such as the Great Lakes Fishery Commission, the International Joint Commission boards, and the Great Lakes Commission and Great Lakes Governors groups. MNR is the representative on the bodies that manage water on the Quebec and Manitoba borders.

The paper does not report on the range of activities that the MNR leads through partnerships with stakeholders such as the water power industry, Ducks Unlimited, conservation authorities and others. MNR also has a stewardship program, which supports many community-based programs that assist in protecting surface and ground water quality.

In discussing information management the report indicates the ministry is moving forward in developing organized databases to assist in effective management of water requirements. However, an important contribution to information management, consistent with MNR's approach, is the ministry's leadership in the establishment of integrated information systems, such as the Natural Resource Values

> Information System, Land Information Ontario, the Water Resources Information Project or the surface water-monitoring network.
>
> While the report makes reference to key areas of MNR responsibility such as low water management and water power, it does not acknowledge that these are the very areas where the government has taken successful measures such as the Water Response 2000 or the waterpower new business relationship.
>
> Much of the future for environmental management can be modeled on successful MNR initiatives related to knowledge management, watershed and ecosystems (wetlands, riparian zones, habitat, etc.) management, community stewardship and partnership building.[58]

Ministry of the Environment The Ministry of the Environment is the key player in the management of the drinking water system. This department (as ministries were then called) was created in 1971, and in 1972 took on the functions of the Ontario Water Resources Commission. As previously outlined, the commission, created in the mid-1950s, was at the time the vehicle for building and supervising Ontario's physical plant for water and sewage treatment.[59] The other key components of the new ministry were drawn from the former Department of Health, particularly the air and waste management and pesticides control sections.[60] Eventually the new ministry's operational functions were decentralized, moving from Toronto to a series of regional and district offices: "Thus policy making, financing, and administrative functions remained centralized, while operations and technical services of the former OWRC moved out to the Regional and District officers."[61]

The Ministry of the Environment administers the two pieces of legislation with most impact on the quality of drinking water: the *Ontario Water Resources Act* and the *Environmental Protection Act*. The particular provisions of these acts are discussed in more detail later in this report.[62] Briefly, the ministry approves requests to take water, and licenses well contractors and technicians as well as the construction of water and sewage treatment facilities. It sets standards for water quality and enforces its acts through a system of licences,

---

[58] Smith Lyons 2001a, pp. 3–4.
[59] See section 1.1.
[60] OSWCA, 2001a, p. 7.
[61] Ibid., p. 8.
[62] See sections 3.2 and 3.3.

certification, monitoring, and inspection. Where necessary, it may impose measures to ensure compliance, initiate prosecutions, and seek court orders to prevent damage.

Until 1985, "… the primary focus … was providing clean drinking water and sewage treatment through the funding of water and sewage infrastructure and operation of facilities." Although clean water remained a priority, after 1985 the emphasis shifted more to environmental assessment, waste management and reduction, and the development and enforcement under the *Environmental Protection Act* of the Municipal/Industrial Strategy for Abatement (MISA) regulations.[63] These regulations are the ministry's principal vehicle for "… reducing water pollution from industries that discharge directly into Ontario's lakes and rivers." The MISA regulations cover nine industrial sectors; they do not apply to municipal water and sewage treatment facilities.

The ministry is also responsible for the Provincial Water Quality Objectives, which establish acceptable standards for water quality and quantity to protect aquatic ecosystems.[64] However, these activities do not directly relate to drinking water, which is regulated under the *Ontario Water Resources Act.*

The *Ontario Water Resources Act* empowers the Ministry of the Environment (in the persons of directors designated by the minister under the act) 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."[65] The act provides for extensive regulation-making power (in the hands of the Cabinet) regarding standards for water quality, standards for constructing and maintaining wells, the licensing of well contractors and well technicians, and various fees.[66] Those designated as directors for the purposes of the *Ontario Water Resources Act* issue permits, certificates, and "orders" to enforce the terms of both this Act and the *Environmental Protection Act.* In addition, provincial officers (also designated under the act) have peace officer powers and may, therefore, use "… such force as is reasonably necessary …" to

---

[63] Ontario, Ministry of the Environment, Corporate Management Branch [1996?] "Historical Analysis of Ministry of the Environment and Energy Estimates, 1985–1995," Unpublished report (Toronto), p. 1.

[64] See Ministry of the Environment, 1999, *Water Management Policies, Guidelines and Provincial Water Quality Objectives,* revised edition (Toronto: the ministry).

[65] *Ontario Water Resources Act*, s. 10.

[66] *Ontario Water Resources Act*, s. 75ff. Note that Regulation 435/93 provides a detailed regime for the classification and licensing of water and sewage works.

carry out directors' orders issued under the act.[67] The minister and directors may cause action to be taken by the Ministry of the Environment where they believe an operator cannot or will not comply with the provisions of the act.[68] Anyone served by the ministry with administrative penalties may appeal to the Environmental Review Tribunal (formerly the Environmental Appeal Board).[69]

For the purposes of the act, the minister has "… the supervision of all surface waters and ground waters in Ontario" and may inspect these waters for signs of pollution.[70] This provision was first enacted in 1957; it had the effect (at least in principle) of consolidating in the Ministry of the Environment responsibility for all water, not just drinking water.[71] This ministry is the lead agency for dealing with the federal government on matters related to the restoration of the ecosystem of the Great Lakes. Its own interpretation of its mandate includes improving the "… management of surface water and groundwater quantity to ensure the sustainability of the resources …"[72]

Until the early 1990s – for almost 20 years – the Ministry of the Environment regulated Ontario's drinking water system and operated parts of it. The government notes that this situation changed in 1993 because of concern that the ministry should not be regulating its own operations.[73] The operational functions were spun off to a new organization, the Ontario Clean Water Agency.[74] This was not a return to the days of the Water Resources Commission, however, for a number of reasons, including the prospect that the agency would compete with the private sector. Moreover, the Ontario Clean Water Agency had neither the financial resources nor the autonomy that the commission had enjoyed.[75]

The Ministry of the Environment is organized into three substantive divisions and one corporate services division, each headed by an assistant deputy minister. Two of the substantive divisions are based at the ministry's headquarters and

---

[67] *Ontario Water Resources Act,* s. 22.
[68] *Ontario Water Resources Act,* s. 80ff.
[69] *Ontario Water Resources Act,* s.106.
[70] *Ontario Water Resources Act*, s. 29.
[71] Freeman, p. 91.
[72] Ontario, Ministry of the Environment, 2000d, "Minister's Briefing Binder," Unpublished document, March, p. 10.
[73] Smith Lyons, 2001b, p. 9.
[74] For more details, see section 2.2.2.
[75] The commission's role is discussed in part 1.

deal, respectively, with policy and planning, and science and standards. The third, the operations division, is the delivery arm of the ministry and as such has bases in several of the province's regions.

The Integrated Environmental Planning Division provides policy and planning advice and conducts the ministry's relations with the federal government and other governments. To carry out this mandate it works closely with the other divisions in the ministry. Its organization is based on function and includes a Water Policy Branch.

The Environmental Sciences and Standards Division provides the ministry with the science base from which it develops standards and monitoring programs. It has four branches: Environmental Monitoring and Reporting; Standards Development; Laboratory Services; and Environmental Partnerships. The division operates the ministry's one remaining laboratory, which is thought by the ministry to be one of the top water analysis laboratories in the world.

The Operations Division has 5 regional and 22 district offices. This division also maintains functions at the ministry headquarters for environmental assessments and approvals, including the issuing of certificates of approval. Permits and most orders are issued in the regions. The Investigations and Enforcement Branch is present both in the regions and at headquarters. The division also operates a Spills Action Centre that is on call 24 hours a day, 7 days a week.

The Environmental Assessment and Approvals Branch issues permits, licences, and certificates of approval under the *Ontario Water Resources Act*, the *Environmental Protection Act,* the *Environmental Assessment Act* and the *Pesticides Act.* Staff of both this branch and the Legal Services Branch represent the ministry and the government at environmental assessment hearings.

The Investigations and Enforcement Branch investigates suspected violations identified by regional and district staff, and undertakes both industrial-sector and province-wide investigations. It has recently received approval for a new capacity to undertake special investigations. This branch is engaged in the entire range of the ministry's responsibilities, including drinking water quality.

Budget Owing to changes in government organization, it is apparently not possible to compare operating budgets for the Ministry of the Environment from the period 1994/95 (when the ministry included responsibility for energy)

with those of the current period.[76] Similar considerations apply to capital funding owing to changes in the mandates of the ministry, the Ontario Clean Water Agency, and the Ontario SuperBuild Corporation, as well as to the temporary nature of some funding arrangements, such as the Provincial Water Protection Fund.[77]

The ministry has, however, asserted that cuts in its operating budget during the mid- to late 1990s had minimal impact on its investigation and enforcement functions. The impact on inspections was more significant.[78]

Further information concerning the ministry's budget is required.[79]

Ministry of Health and Long-Term Care The Ministry of Health and Long-Term Care is the organizational descendant of the Provincial Board of Health, which it replaced during the 1930s. This ministry administers the *Health Promotion and Protection Act*, which provides a framework for delivering public health services at the local (i.e., municipal) level.

This act establishes "health units" as the organizational basis for the provision of public health services. A health unit is any area of the province so designated by the lieutenant-governor-in-council.[80] Currently, there are 37 such units in the province.[81] Each unit is presided over by a board of health, which oversees the provision of the following:

- community sanitation,
- infectious disease control,
- health promotion programs,
- family counselling and planning,
- health services to infants, pregnant women, and the elderly,
- disease screening programs,
- tobacco use prevention,
- nutrition services,

---

[76] Smith Lyons, 2001b, p. 10.
[77] Ibid.
[78] Ibid., pp. 1, 5.
[79] The budget is further discussed in section 4.1.3.
[80] *Health Protection and Promotion Act*, s. 96.
[81] Ten of these are part of regional municipal governments or major new municipalities (Toronto and Ottawa).

- collection and analysis of epidemiological data, and
- other services as may be prescribed by the provincial government by regulation.[82]

The units are directed by local medical officers of health, who are required by statute to report cases of specified diseases and deaths from such diseases to the ministry.[83] Health units act independently of the municipality in which they are located and of the province, although the latter provides advice and sets the regulatory framework within which the boards operate. Both levels of government provide resources for health units.[84]

The government has provided the following description of the relationship between provincial authorities, boards of health, and medical officers of health:

> Generally speaking, a majority of the members of the board is appointed by the municipality and the remainder by the provincial government. (section 49(1) of the *Health Protection and Promotion Act* "HPPA"). Boards of health are differently constituted in the case of a regional municipality, a regional corporation or a city that has the powers, rights and duties of a local board of health or in the case of the County of Oxford (section 49(9)(c) of the HPPA). Medical officers of health and associate medical officers of health are appointed by the boards subject to the approval of the Minister and may only be removed with the Minister's approval and a 2/3rds majority of the members of the local health board. (sections 64 and 66, HPPA). While the Ministry may provide professional guidance to medical officers of health through the Chief Medical Officer of Health, the Minister has the authority to issue directions if circumstances warrant or may authorize the Chief Medical Officer of Health to do so (section 86.3, of the HPPA). The latter is an officer of the Ministry and a statutory official who since 1987 has also held the position of Director of the Public Health Branch.[85]

---

[82] *Health Protection and Promotion Act,* s. 5.
[83] Ibid., s. 31.
[84] Municipalities provide for the normal budgets of the health units, but receive grants of up to 50% from the province.
[85] Smith Lyons, 2001a, pp. 5–6.

The Chief Medical Officer of Health performs statutory duties under the *Health Promotion and Protection Act*, for most of which purposes he or she acts independently of the Minister of Health and the deputy minister, although the government notes that "…all powers and duties are delegated to him/her from the Minister."[86] This independence is used in emergency situations to act quickly, usually through advice to medical officers of health on the ground. As a result, the Chief Medical Officer of Health has a significant public profile. As Director of the Public Health Branch, the same individual is subordinate to the deputy and the Minister in the normal way. This two-hatted role is said to work without difficulty.

Under the *Health Promotion and Protection Act* the Minister of Health "… may publish guidelines for the provision of mandatory health programs and services and every board of health shall comply with the published guidelines."[87] This odd wording is little clarified by noting that a guideline is not a regulation within the meaning of the *Regulations Act*. In its commentary on the revised draft of this paper, the government has provided this explanation of the use of the term "guidelines":

> While the guidelines are not regulations within the meaning of the *Regulations Act*, they are legislative instruments and are enforceable against the boards of health. The guidelines are contained within the *Mandatory Health Programs and Services Guidelines – December 1997* and set out the requirements and standards for public health programs and services across the province. Every board of health is required under the HPPA to provide or ensure the provision of health programs and services in accordance with the provisions of the Act, the regulations and the guidelines (section 82, 83 of the HPPA).[88]

The ministry also operates public health laboratories, which, under the *Health Promotion and Protection Act,* are subject to the minister's direction.[89]

The act states as follows:

> Where a complaint is made to a board of health or a medical officer of health that a health hazard related to occupational or environmental

---

[86] Smith Lyons, 2001b, p. 12.
[87] *Health Protection and Promotion Act*, s. 7.
[88] Smith Lyons, 2001a, p. 6.
[89] *Health Protection and Promotion Act,* s. 79.

> health exists in the health unit served by the board of health or the medical officer of health, the medical officer of health shall notify the ministry of the Government of Ontario that has primary responsibility in the matter and, in consultation with the ministry, the medical officer of health shall investigate the complaint to determine whether the health hazard exists or does not exist.[90]

The act empowers medical officers of health to issue orders to remedy conditions they consider constitute health hazards requiring specific remedial measures.[91]

The relationship between the Ministry of Health and the Ministry of the Environment is an important element in ensuring that the overall system for providing safe drinking water operates effectively. Staff from the Ministry of Health worked closely with the Ministry of the Environment on the development of the *Drinking Water Protection Regulation* in August 2000. Under this regulation, the local health unit is to be notified (by the owner of the water treatment facility and by the testing laboratory) of any biological threat to the safety of drinking water so that the medical officer of health can make appropriate orders under the *Health Promotion and Protection Act.*[92]

The Ministry of Health does not monitor water quality, but its laboratories will test water quality at the request of the medical officer of health or of treatment facility operators and owners. It provides advice to the Ministry of the Environment about water quality through a technical committee dealing with microbiology.

Ministry of Agriculture, Food and Rural Affairs The Ministry of Agriculture, Food and Rural Affairs was established in its current form in 1994, but it has roots stretching back to pre-Confederation times. Its mandate has been modified from time to time, mostly recently to take account of the development needs of small rural municipalities where the local economy is still geared largely to agricultural production. This ministry, fittingly headquartered in Guelph, administers numerous acts, covering subjects ranging from grains to bees to beef to drainage.

The ministry has the authority to regulate most aspects of agricultural activity, principally under the *Farming and Food Production Protection Act 1988.* This

---

[90] *Health Protection and Promotion Act,* s. 11

[91] *Health Protection and Promotion Act,* s. 13.

[92] *Regulation Made under the Ontario Water Resources Act: Drinking Water Protection*, O. Reg. 459/00, 8 August 2000, p. 9.

mandate includes the management of animal waste.[93] Although the farming industry is subject to the *Environmental Protection Act*, the act exempts animal wastes from its waste management requirements. Note, however, that there is apparently some confusion about this exemption; in its comments on the first draft of this part of the paper, the government observed the following:

> "Agricultural waste" is exempted from Part V (waste management) of the EPA but is not exempt from the prohibitions in the EPA and OWRA – namely the prohibition against discharging a contaminant into the natural environment that causes or is likely to cause an adverse effect (EPA s. 14); and the prohibition against discharging material into any water that may impair the quality of the water (OWRA s. 30). Contraventions of these sections involving animal waste are subject to the enforcement provisions in the statute.[94]

What section 14 of the *Environmental Protection Act* says is as follows:

> 14 (1) Despite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect.
>
> *Exception*
>
> Subsection (1) does not apply, in respect of an adverse effect referred to in clause (a) of the definition of "adverse effect" in subsection 1(1), to animal wastes disposed of in accordance with normal farming practices.[95]

As recently as 1998, the ministry has sponsored legislation to further strengthen the rights of farmers when facing complaints from neighbours concerning odour, dust, flies, light, smoke, noise, and vibration in respect of a comprehensive range of agricultural operations, including drainage, irrigation, fertilization, the use of pesticides, and the storage and handling of organic wastes. The law defines a normal farm practice as one "… conducted in a manner consistent

---

[93] The province's 3.4 million hogs produce as much raw sewage as the entire population of 10 million humans. See Ontario, Office of the Environmental Commissioner, 2000, *The Protection of Ontario's Groundwater and Intensive Farming*, Special report to the Legislative Assembly of Ontario (Toronto: July 27), p. 9.

[94] Smith Lyons to Commission Counsel, 2001b, p. 13.

[95] *Environmental Protection Act*, RSO 1990, c. E-19, s. 14.

with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances."[96]

The effect of this legislation is to remove the possibility of normal recourse to the courts against nuisances arising from disturbances caused by normal farm operations. What constitutes "normal" is established by an adjudicative tribunal; and the only recourse against disturbances caused by agricultural activities, therefore, is to challenge the way in which that body has applied the law (i.e., judicial review).[97]

Because of the potential of farming operations to affect groundwater, the policies, regulations, and programs of the Ministry of Agriculture, Food and Rural Affairs have the potential for a major impact on the safety of drinking water in the province.

Ministry of Municipal Affairs and Housing The Ministry of Municipal Affairs and Housing has general responsibility for the administration of municipal legislation, of which there is a great deal. In general, municipalities exercise the powers conferred on them subject to certain powers that may be exercised by the minister of Municipal Affairs and Housing. Under the *Municipal Affairs Act*, this ministry may inquire into "any of the affairs of a municipality" and audit its books.[98] The ministry may also make orders, particularly in respect of financial matters, arising from the findings of such inquiries.[99] The *Municipal Act*, among others, sets out in great detail the precise areas in which municipalities may exercise authority.[100] In addition, under this act, the minister may require a municipality to provide information relating to the "… efficiency and effectiveness" of its operations and may require an audit.[101]

The minister (through the Lieutenant-Governor-in-Council) establishes borrowing limits for municipalities for the financing of public works, including water and sewage infrastructure.[102] In 1993, the minister assumed the power, through regulation, to determine the extent of a municipality's borrowing authority, a function that had hitherto belonged to the Ontario Municipal

---

[96] *Farming and Food Production Protection Act, 1988,* SO, c. 1, s. 1.
[97] For more detail, see the discussion of this tribunal (called the Normal Farm Practices Protection Board), in section 2.2.6.
[98] *Municipal Affairs Act*, RSO 1990, c. M.46. ss. 9, 10.
[99] *Ibid.*, s. 14.
[100] To take a random example: "… the council of a municipality may provide for the establishment of a counselling service to small businesses …," *Municipal Act*, s. 112.
[101] *Municipal Act,* s. 83.1.
[102] *Municipal Act*, s. 149.1.5.

Board, which is an arm's-length agency.[103] The regulations require that the ministry calculate the debt limit for each municipality annually; it maintains extensive databases on municipal governments, which provide the analytical tools necessary for assessing municipal fiscal capacity. Municipalities may take on long-term financial obligations provided they do not exceed these limits without the approval of the Ontario Municipal Board.

Land-use planning plays a potentially important role in safeguarding both surface water and groundwater. The *Planning Act* requires that most municipalities develop official plans for the areas they govern. Until 1996 the minister of Municipal Affairs and Housing had the power to prescribe the contents of these plans.[104] Since then, in most cases approval authority has been delegated to the municipalities. Where approval authority rests with the province, the Ministry of Municipal Affairs and Housing has become the focal point for any comments (including those from any provincial ministry or agency) concerning the official plan. Where the municipality is the approval authority, the ministry funnels these comments to the municipality.

In addition, since 1997 the ministry of Municipal Affairs and Housing has been responsible for regulations governing smaller, on-site septic systems, leaving responsibility for larger and communal systems with the Ministry of the Environment.[105] However, since the Ministry of the Environment had already delegated the enforcement of the relevant provisions of the *Environmental Protection Act* dealing with smaller systems to boards of health, upper-tier municipalities, and conservation authorities, and since the new legislation allowed smaller municipalities to enter into agreements with these bodies to enforce the regulations on their behalf, the effect of the change in 1997 was to pass responsibility from the Ministry of the Environment to municipalities.

Overall, the ministry sees its role primarily as one of setting the frameworks within which municipalities carry out their statutory responsibilities. Therefore, although the minister's powers are formidable, their use is exceptional, "… reflecting a recognition that municipalities are democratically elected, self-governing, law-making, taxing and service delivery governments."[106]

---

[103] *Ontario Municipal Board Act,* s. 65(3)(d), and *Debt and Financial Obligation Limits Regulation* (O. Reg. 799/94 as amended by O. Reg. 75/97 and O. Reg. 155/99).
[104] *Planning Act,* RSO, c. P.13., s. 16.
[105] The relevant provisions were transferred from the *Environmental Protection Act* to the *Building Code Act, 1992.*
[106] Smith Lyons, 2001b, p. 16.

2.2 Agencies

In most Westminster systems, certain types of government activity are carried out in organizations separate from ministerial departments, often at arm's length from the government.[107] Ontario has a variety of such agencies, several of which have a role in guaranteeing or a potential impact on the safety of drinking water in the province. The relevant agencies are as follows:

- the Ontario Clean Water Agency,
- the Ontario SuperBuild Corporation,
- the Ontario Financing Authority,
- the Ontario Municipal Board,
- the Normal Farm Practices Protection Board,
- the Environmental Commissioner, and
- the Environmental Review Tribunal.

Not all of these agencies have a significant actual impact on water and sewage on Ontario. For example, the Ontario Financial Authority has a potential, but little-used, role in advising municipalities on the management of debt and investments. The Ontario Municipal Board also has a minor role, although this was not always the case.[108]

2.2.1 Relationship between the Government and Provincial Agencies in Ontario

The machinery of government in Ontario for the governance of agencies has two aspects of particular interest to this report: first, the role of the Management Board of Cabinet in the establishment of agencies and in their accountability arrangements; and second, the initiatives to provide for "alternative service delivery," which rely in part on the use of agencies for the delivery of administrative services.

In the Ontario system, the premier decides on the number of ministers, and on their mandates. Proposals for new agencies, however (as distinct from ministries), are included in policy submissions from ministers to the Cabinet.

---

[107] For a definition of "agency," see the discussion of the Agency Establishment and Accountability Directive, below. The characteristics of arm's-length agencies are outlined under "Agency Responsibility" in section 5.6.

[108] See the discussion of the Ministry of Municipal Affairs and Housing, above.

These are reviewed by the Management Board of Cabinet, and subject to legislation where powers are to be assigned and exercised. Such proposals are reviewed by the Management Board Secretariat, which works with the sponsoring ministry to establish the agency and put appropriate accountability provisions in place.

The provincial government has undertaken an extensive program of restructuring the Ontario Public Service. One important feature of this program, which began in 1995 and continues today, is the development of alternative ways of delivering services. Many governments worldwide have taken initiatives along these lines since the mid-1980s; they are grouped under the general heading of alternative service delivery. An important element of alternative service delivery is the use of various types of agencies (as distinct from government departments or ministries) to deliver programs. Ontario has been a strong proponent of such initiatives.

The Agency Establishment and Accountability Directive This recent provincial government directive sets out the powers of provincial agencies of almost every description and their relationship to the government.[109]

The directive is based on the principle that in Ontario all "[p]rovincially established agencies are accountable to the government for using public resources efficiently and effectively to carry out their mandates as established by their respective constituting instruments."[110] It classifies agencies under the following categories: advisory, regulatory, adjudicative, operational service, operational enterprise, Crown foundation, and trust. The broad range of functions covered by the directive includes those exercised by almost all provincial agencies.

The characteristics of an agency are defined as follows:

> 'Agency' means a provincial government organization (may be known as an agency, board, commission, corporation, etc.):
>
> - which is established by the government but is not part of a ministry,

[109] Ontario, Management Board Secretariat, 2000a. This directive does not extend to the agencies that report to the assembly: the Offices of the Provincial Auditor, the Environmental Commissioner, the Assembly, the Ombudsman, the Integrity Commissioner, and the Information and Privacy Commissioner.

[110] Ibid., p. 3.

- which is accountable to the government,
- to which the government appoints the majority of appointees, and
- to which the government has assigned, delegated, etc. authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service.[111]

The directive recognizes the need for some agencies to be independent of government, but at the same time it treats all agencies as accountable to the government. It requires that all agencies, except those that are strictly advisory, develop a memorandum of understanding with their "responsible" ministers. This memorandum must be approved by the Management Board of Cabinet if the agency is a regulatory agency with a governing board, an operational service, or an operational enterprise.[112] All agencies are subject to periodic review "initiated at the discretion and direction of either MBC [Management Board of Cabinet] or the Minister. In requiring a review, MBC or the Minister will determine the timing and responsibility for conducting the review, the roles of the Chair [of the agency] and Deputy Minister [of the relevant ministry], and how any other parties would be involved."[113]

The scope of these reviews is extensive:

> MBC or the Minister may direct that such a review cover the following matters (although the review may not be limited to these matters):
>
> - agency mandate
> - aims and objectives
> - performance measurement system
> - impact on clients, stakeholders and/or public
> - organizational structure
> - management systems
> - information systems
> - reporting and reports
> - corporate plan and planning
> - budgeting and financial systems
> - human resources and human resource systems.

[111] Ibid., p. 4.
[112] Ibid., p. 9.
[113] Ibid., p. 11.

> The results of the periodic review may include option(s) for mandate changes, consolidation, privatization and termination. The review will be submitted for further action and decision to MBC or the Minister depending on who directed the review to occur. For any review requested by the Minister, the Minister will submit to MBC for approval any recommendations which the Minister may make in respect of the agency.[114]

Ministers, for example, are required "… when appropriate or necessary, [to] take action or direct/recommend that corrective action be taken in respect of any agency's mandate for operations (but this does not include action in relation to an adjudicated decision by an agency)."[115] Deputy ministers are tasked by the directive

> … to establish a framework for reviewing and assessing agencies' business plans and other reports; to advise the Minister on agencies' documents submitted to the Minister of the review and/or approval …; to undertake reviews directed by the Minister …; to monitor agencies on behalf of the Minister while respecting their authority, and where warranted to identify needs for corrective action and recommend to the Minister ways of resolving issues …[116]

Although the directive acknowledges the primacy to be attached to an agency's "constituting instrument" – i.e., legislation, regulation or order-in-council[117] – the preponderance of direction and detailed instruction is such that in Ontario agencies are considered to be "accountable to the government."[118]

Alternative Service Delivery During the 1990s the provincial government undertook extensive reforms of the provincial public service. This was driven partly by the provincial deficit, and partly by the "common-sense revolution" movement introduced by the Progressive Conservative administration, which was first elected in the summer of 1995.

The key initiative of this movement was the development of new approaches to the delivery of services, known as "alternative service delivery." These

---

[114] Ibid., p. 12.
[115] Ibid., p. 14.
[116] Ibid., p. 16.
[117] Ibid., pp. 1, 7.
[118] Ibid., p. 1.

approaches grew out of ideas about "reinventing government" and "getting government right" that originated with private sector management experts and were adapted to the public sector under the general label of the "new public management." The central ideas of this initiative were to give market forces a much greater role in the provision of traditional public services, and to reserve the policy and directing role for government.[119]

Alternative service delivery has been implemented in various forms. These include the creation of autonomous administrative agencies with sharply defined service-delivery mandates, new partnerships between governments and non-governmental organizations, leaseback arrangements with private sector operators, and outright privatization of services. The government's approach to alternative service delivery has at times relied heavily on the technique of self-regulation.[120] There have been approximately 75 initiatives linked to alternative service delivery since 1995, and the program continues in 2001.

Many of these initiatives have involved the establishment or restructuring of provincial agencies. The relationship between these agencies and the government is described as follows: "Government delegates service delivery to a scheduled agency operating at arm's length from the ongoing operations of the government, but maintains control over the agency."[121]

In the context of the move toward alternative service delivery, the Ontario Clean Water Agency was given a new mandate in 1997; its facility ownership functions were removed and it was classified as an operational enterprise. The future of the agency, including the question of whether or not it should continue to exist, was reviewed by the Agencies, Boards and Commissions (ABC) Task Force Review in 1996,[122] and by the Office of Privatization in 1998.[123] As discussed below, the 1997 changes placed greater emphasis on the agency's potential to compete with

---

[119] This was the "steering versus rowing" thesis articulated by David Osborne and Ted Gaebler, 1992, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Addison-Wesley).

[120] The range of possibilities is set out in a 1996 government publication: Ontario, Management Board Secretariat, 1996, *Alternative Service Delivery Framework* (Toronto: the secretariat).

[121] Ontario, Cabinet Office, Public Service Restructuring Secretariat, 2000, *Transforming Public Service for the 21st Century-* (Toronto: Ontario Cabinet Office), pp. 71, 73.

[122] See Ontario, Ministry of Environment and Energy [1996], "Response to ABC Government Task Force Review: Operational Agencies," Unpublished document [Walkerton Inquiry archives, Inqdocno. 1017709].

[123] See Ontario, Office of Privatization, 1998, *Review of the Ontario Clean Water Agency: Final Report* (Toronto: November), unpublished report.

others for the operation of water and sewage facilities by encouraging the transfer of plant ownership and indebtedness to municipalities.

The alternative service delivery program also had a direct impact on relevant operations of the Ministry of the Environment. As noted above, in 1997, amendments to the *Environmental Protection Act* permitted the "devolution" of inspections, approval, and enforcement activities related to smaller septic systems from the ministry to municipalities.[124] Between late 1997 and early 1999, the ministry was actively engaged in examining the possibilities of applying the principles of alternative service delivery to the communal water program. The proposal was summarized as follows:

> It is vital that any program dedicated to communal water works recognizes that it is the owner, *not* the regulator, who is accountable for the provision of safe drinking water to consumers. In the past, too many of the Ministry of the Environment's funding, monitoring, and inspection initiatives have resulted in our taking it upon ourselves to assume the owner's role of demonstrating conformance [sic] with safe drinking water standards, reporting upon non-compliance of those standards, and maintaining water quality records for access by the public. In the past, the MOE [Ministry of the Environment] undertook laboratory analyses, evaluated the results of those analyses, and even collected samples for the owners of communal water works. This proposed Alternative Service Delivery (ASD) seeks to redress this error in accountability.
>
> It is proposed that the MOE enter into a partnership with an independent agency, association, or consortium that would collect annual performance reports from all communal water works owners (municipal and private). The independent agency, association, or consortium would enter performance information into a database from which an annual report would be compiled that documents the state of the province's communal water works. The costs borne by the agency, association or consortium in administrating this non-inspection driven program would be recovered by charging an accreditation fee to the owners of communal drinking water works and through the sale of performance data to engineering consultants,

---

[124] Ontario, Public Service Restructuring Secretariat, 1999, *Alternative Service Delivery in the Ontario Public Sector*, unpublished document, August [author's files], p. 42.

> academic research groups, governments, and non-government organizations.[125]

The proposal was later put to the Minister of the Environment in the following terms:

> The Alternative Service Delivery proposes that the Province of Ontario change the way in which it evaluates "compliance" at communal water works from the current system focussing on resource intensive inspection of water works servicing municipalities to a monitored self-management system where there is recognition that all communal water works owners (municipal and private) are responsible for documenting that water supplied to consumers is safe to drink. The proposal stresses that it is the owner, not the regulator, who is accountable for the provision of safe drinking water.[126]

Although the proposal does not appear to have been acted on, there is some similarity between its substance (i.e., surveillance by owners and operators) and the Drinking Water Surveillance Program, which began in 1986 and continues today.[127] No mention was made of this program in government documents dealing with alternative service delivery.

2.2.2 Ontario Clean Water Agency

Ontario's municipalities own the province's water and sewage services. Most of the larger municipalities, representing 75% of the market, operate these facilities themselves or through public utilities commissions. The remaining 25% is composed of municipalities that contract out water and sewage operations, mostly to the Ontario Clean Water Agency (OCWA).

OCWA was established by the *Capital Investment Plan Act* of 1993[128] as part of the government's "… capital investment plan for Ontario under which the

---

[125] [Ontario, Ministry of the Environment, Operations Division], 1997, "Proposal for Alternative Service Delivery – Communal Water Works: A Monitored Self-Management Approach," November 25, pp. 3–4, [Walkerton Inquiry archives, Inqdocno. 1007828].
[126] [Ontario, Ministry of the Environment], 1999, "Alternative Service Delivery for the Communal Water Program," unpublished document, March 15.
[127] See section 3.3.2.
[128] *Capital Investment Plan Act*, SO 1993, c. 23.

Government, municipalities and other public bodies, and the private sector will work together to make significant investments in the province's infrastructure."[129]

OCWA assumed the functions related to the operation and funding of water and sewage systems that had formerly belonged to the Ministry of the Environment. As a result of subsequent legislation (the *Municipal Water and Sewage Transfer Act, 1997*), the minister was mandated to transfer ownership of those water and sewage facilities in OCWA's possession, together with any outstanding indebtedness associated with them, to municipalities. In 1996, OCWA's function as administrator of capital assistance programs for water and sewage facilities was transferred to the Ministry of the Environment.[130] This action was complemented by the transfer of ownership of facilities to municipalities that began following the passage of the 1997 legislation. OCWA is empowered to enter into agreements with municipalities for the provision of water and sewage services, and in such circumstances to exercise any statutory powers given to municipalities in respect of the "… establishment, construction, maintenance or operation of water works or sewage works."[131] The Ministry of the Environment is empowered to inspect water and sewage facilities and issue orders to ensure compliance with any licences, permits, and approvals given under its terms.[132] OCWA's contracts are full-service partnership contracts – i.e., the agency supplies all labour and management, pays all expenses for operations and maintenance, and guarantees performance and regulatory compliance.

Today OCWA competes with municipalities and the private sector as an operator of water and sewage works. It enjoys a 95% market share among municipalities that choose to outsource the operation of such facilities; the remaining 5% of facilities are operated by the private sector.[133] OCWA also provides project management services to municipalities seeking technical advice

---

[129] Ibid., preamble. OCWA was one of three agencies established by that legislation, the others being the Ontario Financing Authority and the Ontario Transportation Capital Corporation. Together with the renamed Ontario Realty Corporation, these agencies were part of the provincial government's "capital investment plan for Ontario under which the Government, municipalities, and the private sector will work together to make significant investments in the province's infrastructure."

[130] OSWCA, 2001a, p. 9.

[131] *Ontario Water Resources Act,* ss. 10, 12.

[132] *Ontario Water Resources Act,* ss. 15, 16.

[133] The principal private sector contractor was Philip Utilities; its contract has since been taken over by Azurix.

on planning, designing, and constructing new and upgraded water and sewage treatment facilities.

At the end of 2000, OCWA operated 161 water treatment and 233 sewage treatment facilities for more than 200 municipalities. The agency does not usually operate water distribution or sewage collection systems. Of its 383 contracts, 222 are with small municipalities and are worth less than $100,000 each annually. OCWA no longer provides financial support for water and sewage infrastructure, although it still provides short-term financing at commercial rates for any amounts outstanding for capital works at year-end.[134] Because of this policy, and because of the transfer of ownership of facilities and their associated debts to municipalities that has been ongoing since 1997, the agency's loan portfolio, which was $608 million in 1993, is now on the order of $54 million. Overall, the agency operates with an excess of revenue over costs in the range of 2–4% on an operating budget of approximately $100 million.[135] It should, however, be noted that as a public corporation OCWA enjoys certain advantages over its competitors: it pays no corporate taxes; it is exempt from collecting GST on the fees it charges; and its clients generally do not require it to post performance bonds.

In addition, OCWA is an agent of Her Majesty, unless it chooses specifically not to be for the purposes of any of its contracts, securities, or other financial instruments. As an agent of Her Majesty, should the agency be found financially liable, the government is committed to paying the amount of any judgment against OCWA from the Consolidated Revenue Fund.[136] In short, OCWA is backed by the province's financial guarantee.

The government notes that because "… the Minister of the Environment is responsible for OCWA … the Agency operates under the close supervision of the Ministry of the Environment …"[137] In addition, the agency submits an annual report to the Minister of Finance, and the Ministry of Finance has the authority to order payment of any surpluses earned as a result of the agency's operations.[138]

Under the *Capital Investment Plan Act, 1993*, the *Ontario Water Resources Act*, and the *Municipal Water and Sewage Transfer Act, 1997*, the Minister of the

---

[134] See the discussion of the Ontario SuperBuild Corporation, section 2.2.3, below.
[135] Ontario Clean Water Agency, 2000, "Presentation to Board of Directors SuperBuild Corporation," unpublished document, December 11.
[136] *Capital Investment Plan Act, 1993*, ss. 2, 24.
[137] Smith Lyons, 2001b, p.18.
[138] *Capital Investment Plan Act, 1993*, s. 14.

Environment exercises broad powers of direction in respect of the agency. The minister is responsible for the administration of these acts and has numerous powers specifically enumerated. He or she recommends the appointment of the chief executive officer of OCWA, and has a role in recommending appointments to its board of directors. The agency is "… managed by its board of directors."[139] That board is composed of four serving deputy ministers or their alternates, and includes the deputy minister of the Environment. OCWA describes its mission as "… to provide arm's-length delivery of water and wastewater treatment services which previously had been provided by the [Environment] Ministry."[140] The mandates and governance of Ontario's agencies are subject to a combination of specific legislative provision and directives set out by the Management Board of Cabinet, as discussed above.

Both the agency and the ministry are conscious of the ministry's role as the regulator. The agency has no policy role, but it is consulted periodically by the ministry in the course of the development of draft regulations. The agency also provides information to the ministry about its operations.

Under the Agency Establishment and Accountability Directive, OCWA is classified as an "operational enterprise" (formerly a "Schedule IV agency").[141] Generally, this classification provides such an agency with several important administrative authorities; it may

- set fees and retain revenues subject to variation by the Minister of Finance[142], to whom it is required to report annually in addition to the Minister of the Environment;[143]
- invest, borrow, and make loans for purposes consistent with its mandate;
- (potentially) staff and set conditions of employment for its workforce; and
- enter into partnerships and establish subsidiaries subject to certain approvals.

The government notes that the staffing and employment authorities have not been extended to OCWA, whose staff remain employees of the Ontario Public

---

[139] *Capital Investment Plan Act, 1993*, s. 5.
[140] Ontario Clean Water Agency.
[141] Ontario, Management Board Secretariat, 2000b, "List of Classified Provincial Agencies (Agencies as of 2000-01-20)," unpublished document, March, p. 9.
[142] Ontario, Management Board Secretariat, 2000a, p. 24.
[143] *Capital Investment Plan Act, 1993*, s. 14.1.

Service in accordance with the agency's original Memorandum of Understanding with the ministry.[144]

OCWA is subject to the generally applicable powers of oversight exercised by the Management Board of Cabinet and its secretary, the minister of Finance, the deputy minister of Finance, the minister responsible, and his or her deputy minister (for OCWA, the minister and deputy minister of the Environment). It submits its business plan annually to the minister of the Environment and once every three years to the Management Board of Cabinet. In addition, as an operational enterprise, OCWA is required to enter into a "memorandum of understanding" with the minister of the Environment for a period of five years, after which time it is to be renewed and revised as necessary.[145]

OCWA's current memorandum of understanding was executed in March 1994. Certain provisions of the memorandum have lapsed because of changes both in legislation and in the administrative authorities provided by the Management Board of Cabinet. The minister's powers are set out as follows:

> The Minister shall:
>
> (a) recommend approval of nominees to the Board of Directors for the Agency;
>
> (b) work with the Public Appointments Secretariat to recommend a suitable candidate for the position of Chief Executive Officer for the Agency, to the Lieutenant-Governor-in-Council;
>
> (c) assume accountability for the activities of the Agency at Cabinet or any of its committees as required;
>
> (d) communicate through the Chair, overall provincial policies, procedures and directives that shall guide the Board in the achievement of the objectives of the Agency;
>
> (e) review and approve the Agency's annual report and business plan (for the purposes of the Agency the business plan fulfils

[144] Smith Lyons, 2001b, pp. 17, 18.
[145] Ontario, Management Board, 2000a, p. 8.

> the corporate plan requirements of Management Board) in consultation with the Board of Directors, and recommend the plans for approval of Treasury Board and the Secretary of Management Board….
>
> (f) The Minister shall review in-year changes to the business plan submitted by the Board and then seek approval by Treasury Board to effect them;
>
> (g) The Minister, in consultation with the Agency's Board, shall ensure that there is no unnecessary duplication of comparable Agency activities with those of the Ministry;
>
> (h) undertake periodic assessments of the Agency's performance;
>
> (i) carry out financial planning responsibilities …[146]

The roles of the board of directors, its chair, and the agency's chief executive officer set out in the memorandum further reinforce the general requirement that the agency operate subject to ministerial direction. The chair, for example, is to "… ensure that the Agency operates in accordance with applicable government policies …" and to "… provide any information on the Agency's activities requested by the Minister …"[147] The Board of Directors is "… responsible to the Minister for the management of the affairs and business of the Agency …" and is required to "… seek policy direction from the government."[148] The chief executive officer is required to "… manage activities of the Agency in accordance with: government directions provided by the Minister, directions from the Board, the approved annual business plan and the Agency's by-laws …"[149]

2.2.3 Ontario SuperBuild Corporation

The SuperBuild initiative was announced in the province's 1999 budget, and the corporation's board was appointed in February 2000. Its purpose is to "… consolidate infrastructure spending that has previously been scattered across

---

[146] Ontario, 1994, "Memorandum of Understanding between the Minister of the Environment and Energy and Ontario Clean Water Agency," March 31, section 3.1.
[147] Ibid., section 3.2.
[148] Ibid., section 3.3.
[149] Ibid., section 3.4.

the system."[150] The corporation advises the Cabinet Committee on Privatization and SuperBuild, which is chaired by the minister of Finance, on infrastructure policy and spending for all ministries and agencies, and provincially funded municipal infrastructure. The program is the centrepiece of the government's plans for systematically renewing its share of the province's aging infrastructure stock ($88 billion out of a total of $200 billion).[151]

The SuperBuild Corporation (often referred to as simply "SuperBuild") has been promised five-year funding in the amount of $10 billion from the province, which is expected to be matched by contributions from transfer partners (e.g., municipalities, hospitals, colleges, and universities), federal infrastructure programming, and private sector investments.[152] The SuperBuild initiative is designed to find new ways of financing infrastructure of all sorts. Its objective is to use its funding as a way of leveraging funds from the province's partners and from the federal and private sectors. It hopes to ensure that provincial funding accounts for no more than a portion of the total costs of a given initiative, with the balance flowing from other sources. The corporation sees itself as "… a catalyst for investment."[153]

SuperBuild has established a subsidiary initiative to help fund infrastructure capital expenditures in smaller municipalities. This program, the Ontario Small Towns and Rural (OSTAR) initiative, is administered from the Ministry of Agriculture, Food and Rural Affairs and has been funded for a five-year period. The program has $600 million, $400 million to address infrastructure and $200 million for rural economic development. Of the $600 million, $240 million has been set aside for public health and safety priorities, including water and sewage works and bridges. [154]

Although no projects have yet been funded, it has been agreed that this initiative will fund capital works necessary to comply with the new *Drinking Water*

---

[150] Ontario, Ministry of Finance, 2000a, "Board of SuperBuild Corporation Announced," Press release, (Toronto: February).

[151] Ontario, SuperBuild Corporation, 2000a, *Building Ontario's Future: A SuperBuild Progress Report*, December (Toronto: the corporation), p. 7. The $88 billion includes both facilities owned by the province and those by its "traditional transfer partners" – municipalities, hospitals, and so on (see Smith Lyons, 2001b, p. 19).

[152] Ontario, Ministry of Finance, 2000b, "Ontario Investing $2.1 Billion in Infrastructure," Press release, May 2.

[153] Ontario, SuperBuild, 2000a, p. 6.

[154] Ontario, SuperBuild, 2000c, *Ontario Small Town and Rural Development (OSTAR) Infrastructure Program: Round 1 – Public Health and Safety, Application Guidebook* (Toronto: the corporation), p. 2.

Protection Regulation. Funding will not be provided for infrastructure other than water unless the municipality is in compliance with the *Drinking Water Protection Regulation*, or commits itself to paying for any necessary improvements to satisfy the regulation's requirements. The program is not permanent, but is designed to deal with immediate requirements. It is perhaps worth noting that an estimated $9.1 billion is needed to rehabilitate Ontario's water and sewage systems.[155] There is a degree of uncertainty and controversy about this number, which has prompted SuperBuild to undertake the compilation of a comprehensive database of capital assets in the public sector.[156]

The SuperBuild OSTAR program superseded the Ministry of the Environment's Provincial Water Protection Fund, which was announced in the provincial budget for 1997. This was a "time-limited, one-time" program.[157] It was also aimed at smaller municipalities and was administered by the environment ministry in consultation with the Ministry of Finance and other ministries.

The OSTAR program is not available to Ontario's nine largest urban areas (not all of which are single municipalities), although municipalities within these areas of fewer than 100,000 persons are eligible. The Greater Toronto area, the City of Hamilton, the Region of Waterloo, the City of Ottawa, the City of Greater Sudbury, the Niagara Region, the City of Thunder Bay, the City of London, and the City of Windsor may be eligible for some infrastructure funding under SuperBuild's Millennium Partnerships initiative ($1 billion), but in principle they are expected to finance new plant using their existing borrowing authority and revenue from water rates.[158]

The SuperBuild Corporation was created by regulation under the *Ontario Economic Development Corporations Act*. It is in practice a fourth central agency, working closely with the Ministry of Finance.[159] The corporation describes itself as "… an agency of the Ministry of Finance and reports directly to the … Minister of Finance…"[160] Notwithstanding this reporting relationship and the

---

[155] Association of Municipalities of Ontario [AMO], 2000, *AMO Municipal Action Plan: Protecting Ontario's Water*, June, p. 4.
[156] See Ontario, Ministry of Finance, 2001b, "SuperBuild Policies and Priorities," Budget Paper (Toronto: May), p. 11.
[157] Smith Lyons, 2001b, p. 20.
[158] Ontario, SuperBuild, 2000c, p. 2.
[159] For a discussion of the other three, see section 2.1.3.
[160] Ontario, SuperBuild Corporation, 2000b, "Frequently Asked Questions" [online], (August 8), [cited spring 2002], <www.superbuild.gov.on.ca>.

consequent direct responsibility of the minister of Finance, the structure of the corporation is corporate, with a chair and board of directors as well as a president and chief executive officer. "The Board of Directors report [sic] directly to the Minister of Finance."[161] It is listed as an operational enterprise for the purposes of the Management Board's Agency Establishment and Accountability Directive.[162]

As a practical matter, the corporation's board is advisory rather than executive, and has recently been described as such in a progress report.[163] Its chief executive officer reports to the minister of Finance and to the premier, providing support to the Cabinet Committee on Privatization and SuperBuild, which has formal authority delegated to it from the Management Board of Cabinet for approval of all capital spending.

2.2.4 Ontario Financing Authority

This is a provincial agency that operates under the close supervision of the Ministry of Finance; the deputy minister of Finance chairs the authority's board of directors. Like many other provincial agencies, the Financing Authority is set up at arm's length from the government but is subject to close direction by the minister responsible and his or her officials.[164] The Financing Authority's board, for example, "… reports to the Minister."[165] The authority, formerly a Schedule IV agency, is now listed as an operational enterprise, with governance arrangements similar to those of OCWA.[166]

The Financing Authority provides borrowing and debt management services for the Province of Ontario, in much the same way as the Bank of Canada acts as fiscal agent for the federal minister of Finance. It is responsible for the following:

> (a) assisting public bodies and the Province of Ontario to borrow and invest money, developing and carrying out financing

---

[161] Ibid.
[162] Ontario, Management Board, 2000b, p. 9.
[163] Ontario, SuperBuild, 2000a, p. 5.
[164] The agency was established under the *Capital Investment Plan Act, 1993*, Statutes of Ontario, 1993, Chapter 23.
[165] Ontario, Financing Authority, 2001, "Corporate Governance" [online], [cited January, 2001], <www.ofina.on.ca>.
[166] Ontario, Management Board, 2000b, p. 9.

programs, issuing securities, managing cash, currency and other financial risks, and providing such other financial services as are considered advantageous to the Province or any public body; and

(b) operating, as agent for the Minister of Finance, either directly or through its authorized agents, offices as provided under the *Province of Ontario Savings Office Act* and regulations thereunder, and offering such services to the public as the Minister may direct.[167]

Notwithstanding the breadth of its statutory mandate, the authority is concerned principally with the placement of the province's accumulated debt. It does not act on behalf of municipalities, which have authority to issue debt instruments on their own subject to borrowing limits imposed by the Ministry of Municipal Affairs and Housing in consultation with the Ministry of Finance. Note the Ministry of Municipal Affairs maintains data on expenditures, while the Ministry of Finance collects information on income from local rates and fees.

2.2.5 Ontario Municipal Board

The Ontario Municipal Board was established in the 1890s to oversee municipalities. Its role has changed significantly over the intervening years, and particularly since the realignment of services between the provincial and municipal levels of government during the 1990s. Once deeply involved in regulating municipal affairs, particularly with respect to municipal finances and debt levels, the board's functions have been concentrated increasingly on its role as an arbitrator between municipalities and parties affected by municipal decisions and activities.

Prior to 1993, the Ontario Municipal Board approved all borrowings by municipalities.[168] Now most municipal borrowing takes place within the limits of authority approved by the minister of Municipal Affairs and Housing. These limits are revised periodically by the ministry, and the board retains a (seldom called upon) role in approving borrowings beyond the limits. Occasionally the board is called on to arbitrate planning disputes that affect the quality of drinking water. A recent example occurred in Perth County, where the West Perth township council passed a zoning by-law limiting the size of livestock operations

---

[167] *Capital Investment Plan Act, 1993*, SO 1993, c. 23, s. 30.
[168] See under "Ministry of Municipal Affairs and Housing" in section 2.1.5.

to 600 animal units (1,200 beef cattle) and stipulating the intensity and location of manure-spreading activities. The by-law 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 by-law, and it bolstered its case by demonstrating that existing regulations were not adequately enforced. The board upheld the validity of the by-law.[169]

The Ontario Municipal Board is classified as an adjudicative agency and is subject to the Management Board of Cabinet's Establishment and Accountability Directive. It falls under the responsibility of the Attorney General.

2.2.6 Normal Farm Practices Protection Board

This board exists to referee the provisions of the *Farming and Food Production Protection Act.*[170] The Normal Farm Practices Protection Board is empowered as follows:

> (a) to inquire into and resolve a dispute respecting an agricultural operation and to determine what constitutes a normal farm practice; and
>
> (b) to make the necessary inquiries and orders to ensure compliance with its decisions.[171]

The act provides a range of protection for farming operations:

> A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.
>
> No court shall issue an injunction or other order that prohibits a farmer from carrying on the agricultural operation because it causes or creates a disturbance.
>
> […]

---

[169] "OMB rules in West Perth's favor in terms of zoning bylaw," 2000, *Mitchell Advocate*, July 26.
[170] See under "Ministry of Agriculture, Food and Rural Affairs" in section 2.1.5.
[171] *Farming and Food Production Protection Act,* SO 1998, c. 1 s. 4.

> No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation.[172]

These regulations provide farmers with a measure of protection against restrictive by-laws adopted by municipalities and potential civil actions by individuals and groups. Note, however, that the act does not protect farmers who have charges pending under the *Environmental Protection Act,* the *Pesticides Act,* the *Health Protection and Promotion Act,* and the *Ontario Water Resources Act.*[173]

The Normal Farm Practices Protection Board is subject to the directives of the Board of Management, being classified as an adjudicative agency.[174] Its members, including the chair, are appointed by the minister of Agriculture, Food and Rural Affairs; they may be members of the Ontario Public Service.

Although the board has its own statutory mandate, it is also subject to general ministerial direction:

> The Minister may issue directives, guidelines or policy statements in relation to agricultural operations or normal farm practices and the Board's decisions under this Act must be consistent with these directives, guidelines or policy statements.[175]

The minister used this directive power in June 2000 to require the board to recognize the validity of interim by-laws passed by municipalities to control storage and use of farm manure.[176]

2.2.7 Environmental Commissioner

The Environmental Commissioner helps citizens to prepare complaints, reviews compliance by ministries with environmental commitments, and reports to the legislature on any matter of environmental concern.

---

[172] Ibid., ss. 2, 6.
[173] Ibid., s. 2.
[174] Ontario, Management Board, 2000b, p. 5.
[175] Section 9, *Farming and Food Protection Act, 1998.* Statutes of Ontario, 1998, Chapter 1.
[176] Ontario, Ministry of Agriculture, Food and Rural Affairs, 2000, "Minister's Directive to the Normal Farm Practices Protection Board," June 26 [online], [cited spring 2001], <www.gov.on.ca/OMAFRA>.

The Environmental Commissioner's office is established under the *Environmental Bill of Rights, 1993.* Under the Ontario system, the Environmental Commissioner is – like the Provincial Auditor – formally an "officer of the assembly" and has not even pro forma attachment to any minister. The office is not, therefore, subject to the Management Board directive dealing with accountability for agencies.[177]

The commissioner is appointed by the Lieutenant-Governor-in-Council following an address from the legislature, and may only be removed with its approval; the commissioner thus has virtual tenure for the duration of the five-year term, which is renewable. The commissioner's budget is determined by the Board of Internal Economy, which also oversees the exercise of the commissioner's powers to staff and set terms of employment.[178] These provisions are similar to those that apply to the Provincial Auditor.[179]

The *Environmental Bill of Rights* applies to 13 government ministries and agencies, requiring them to register plans known as Statements of Environmental Values (SEVs). Ministries are required to consider these statements in making decisions. For certain statutory provisions, a citizen may appeal a decision on a variety of grounds including inconsistency with the relevant ministry's SEV.[180] The *Environmental Bill of Rights* does not apply to the Ministry of Finance or the Cabinet Office, although it does cover the Management Board Secretariat, which requires affected ministries to reflect their SEVs in their annual business plans.[181]

Directors' orders under the *Ontario Water Resources Act* and the *Environmental Protection Act* are subject to review. When the Ministry of the Environment was developing the *Drinking Water Protection Regulation* in the summer of 2000, it sought public input through the Environmental Registry administered by the Ministry of the Environment. The Environmental Commissioner has reported regularly on matters related to water quality in the province.[182]

---

[177] The Agency Establishment and Accountability Directive – see section 2.2.1.
[178] *Environmental Bill of Rights,* SO 1993, c. 28, ss. 54, 55.
[179] *Audit Act*, RSO 1990, c. A.35, ss. 20, 29.
[180] "… notices are placed on the Environmental Registry administered by the EBR Office of the Ministry of the Environment." Smith Lyons, 2001b, p. 22.
[181] The ministries are as follows: Agriculture, Food and Rural Affairs; Citizenship, Culture and Recreation; Consumer and Commercial Relations; Economic Development and Trade; Energy, Science and Technology; Environment; Health and Long-Term Care; Labour; Management Board Secretariat; Municipal Affairs and Housing; Natural Resources; Northern Development and Mines; and Transportation.
[182] For more detail, see "Policy Development" under section 4.2.4.

2.2.8 Environmental Review Tribunal

The Environmental Review Tribunal has an impact on drinking water in Ontario in two ways: it conducts hearings to assess the environmental impact of major projects, and it hears appeals against certain decisions made by the Ministry of the Environment.

The Review Tribunal recently replaced the Environmental Assessment and Environmental Appeal Boards. The tribunal, which is composed of not fewer than five members appointed on the recommendation of the premier, is classified as an adjudicative agency, and is subject to the Management Board's Agency Establishment and Accountability Directive.[183]

With respect to its environmental assessment role, the tribunal holds hearings under the *Environmental Assessment Act.* Its decisions are not subject to appeal and may not be judicially reviewed unless they are patently unreasonable.[184] Fast-track procedures (the "Class EA" process) apply to many municipal projects, including water and sewage treatment facilities, where standardized assessment criteria may be applied without the need for a comprehensive review of all aspects of the proposal.

In its appeals function, the tribunal hears appeals from decisions made under the *Environmental Protection Act*, the *Ontario Water Resources Act,* and the *Pesticides Act*. It determines, under the *Environmental Bills of Rights,* whether or not to grant leave for an application to appeal any decision made by directors of the Ministry of the Environment pursuant to their powers under the *Environmental Protection Act*, the *Ontario Water Resources Act*, and the *Pesticides Act*. This includes a director's decision to issue a permit to take water.

The tribunal may confirm, alter, or revoke the action of a director of the Ministry of the Environment under the *Environmental Protection Act,* the *Ontario Water Resources Act,* or the *Pesticides Act*. However, these decisions may be appealed to the Ontario Divisional Court on a question of law or to the minister of the Environment on a question of fact, and the minister has the power to confirm, alter, or revoke the tribunal's decisions.[185]

---

[183] Ontario, Management Board, 2000b, p. 9.
[184] *Environmental Assessment Act as amended by Bill 119 (Environmental Review Tribunal Act),* s. 23.1.
[185] *Environmental Protection Act,* RSO 1990, c. 19, s. 144.

2.3 Local Government

The general role of municipalities, the history of their involvement in the provision of safe drinking water, and their relationship with the provincial government have already been described.[186] This section provides some basic information about the structuring of municipalities, the functions of public utilities commissions and conservation authorities, and the role of these institutions in relation to safe drinking water. [187]

It should be noted that the arrangements at the local level for providing water and sewage services vary considerably. Some are provided directly by municipalities, some by public utilities commissions, and some by commissions that provide water but not sewage services. In some cases one or more services are provided by an upper-tier municipality; and some services may be under the responsibility of a lower-tier municipality or its utilities commission. Sometimes several – but not all – lower-tier municipalities may share services provided directly or through a commission.

2.3.1 Municipalities

Local government is built around the legal concept of the municipality, which is any geographic area whose inhabitants are incorporated. Municipalities are tiered as follows:

- *upper tier* – any county, regional municipality, or district municipality, and the County of Oxford;

- *single tier* – any city, town, township, or village that does not form part of an upper-tier municipality; and

- *lower tier* – any city, town, township, or village that forms part of an upper-tier municipality.

During the past few years the structure of local government in Ontario has changed significantly. The number of municipalities was reduced from 815 to

---

[186] See section 1.1.3 of this report; also "Ministry of Municipal Affairs and Housing" under section 2.1.5.

[187] On the role of local institutions generally, see Sancton and Janik, 2002; also Freeman, 1996.

447 between 1996 and the beginning of 2001. On the basis of legislation passed in 1996,[188] the province and municipalities are in the process of simplifying and flattening the overall structure of local government, reducing the number of town councils and their size. In the same period, the number of local elected officials was reduced from 4,586 to 2,804.

In 1997, there were 627 municipal waterworks in Ontario serving 82% of the population. Groundwater supplied 399 of these plants, and surface water the rest.[189] Note also the following statistics:

- just 17 major waterworks provided water for 65% of Ontarians; and
- some 74% of waterworks provided services to communities of 3,300 or fewer people.

In 1997, municipalities owned 77% of these waterworks, OCWA owned 19%, and the remainder were privately owned or in the hands of various other public bodies. By the end of 2000, OCWA had cut its ownership to less than 2%, and it intends "… to fully divest itself of these waterworks in the near future."[190]

As owners – and often operators – of water and sewage facilities, municipalities have a major interest in the way in which the provincial government carries out its responsibility for the provision of safe drinking water. Their interest is particularly strong in the financing of facilities, where government policy can affect pricing, competition, and the ability to raise capital.

2.3.2 Public Utilities Commissions

Public utilities commissions have become relatively insignificant players in the provision of safe drinking water. There are essentially three models for the provision of water and sewer services: regional and other large municipalities that own and operate the facilities; other (generally smaller) municipalities that rely on OCWA and a few private sector operators; and other small municipalities that have established commissions to operate their facilities.

---

[188] *Savings and Restructuring Act, 1996,* schedule M ("Amendments to the Municipal Act and Various Other Statutes Related to Municipalities, Conservation Authorities and Transportation").
[189] The statistics relating to water facilities are drawn from Ontario, Environment, 2000b.
[190] Smith Lyons, 2001b, p. 25.

In 1990, of a total of 834 municipalities in Ontario, 124 relied on public or water utility commissions to operate their water facilities. By 2001, municipal amalgamations had reduced the total municipalities in the province to 447; only 15 of these continued to use commissions to operate water facilities.[191]

The commissions are rooted in the *Municipal Water-works Act, 1882,* which was designed to encourage the orderly development and operation of water facilities in Ontario. The legislation provided authority to municipalities to take on debt (paid for by property taxes) for water infrastructure without increasing the direct liability of the province.[192] In 1943, amendments to the *Municipal Act* permitted the levying of water rates as an alternative to financing infrastructure from municipal property taxes.[193] The *Public Utilities Act,* first enacted in 1912, the *Municipal Act,* and the *Regional Municipalities Act* variously empower municipalities and public utilities commissions to establish, maintain, and operate water and sewage works.

Although they are separate corporate bodies, the commissions are creatures of their municipalities. Under the *Savings and Restructuring Act 1996*, municipalities were given greater flexibility and autonomy to decide whether to retain utility commissions: for example, municipalities are no longer required to hold a plebiscite before dissolving a commission.

Originally, utility commissions provided a wide range of services; in more recent years, they have tended to concentrate on water, sewage, and electricity. The decision of the provincial government to require municipalities to "commercialize" local electric utilities by turning them into corporations under the *Ontario Business Corporations Act* (corporations that, in many cases, have been sold to Hydro One, the province's new monopoly power transmission company) has accelerated the trend towards abolishing the commissions and transferring control of what's left – primarily water and sewage management – to the direct control of municipal works departments.

---

[191] Sancton and Janik, p. 26.
[192] See OSWCA, 2001a, p. 1.
[193] Ibid., p. 3.

2.3.3 Conservation Authorities

Conservation authorities manage the watershed and provide lands and wetlands for recreation and wildlife, for which purposes they may acquire lands and build structures such as reservoirs and dams. There are 36 conservation authorities in Ontario. The province establishes them and municipalities appoint their members. They are financed through user and other fees, municipal levies, and provincial grants, although the latter have been declining.[194] The authorities may be territorially contiguous with municipalities, or may straddle parts of two or more municipalities.

The principal water-related function of conservation authorities is the control of potential flood damage. They play no specific role in the development or management of safe drinking water, their overriding concern being with quantity rather than quality of water. Their normal channel of contact with the province is through the Ministry of Natural Resources, which exercises various powers of approval and may override the authorities' statutory powers in respect of flood control operations and the use of water-control structures.[195]

Some conservation authorities have programs related to water quality management, such as technical studies of watersheds. Some also work with municipalities to sponsor and fund quality and quantity studies of surface water and groundwater.

3 Processes for Providing Safe Drinking Water

This part of the report draws together the roles and responsibilities of the institutions described in part 2 to provide a description of the overall process for providing safe drinking water to Ontario residents. This process has the following components: policy development, including new legislation and regulations, new programs, and funding arrangements; procedures for authorizing the development and processing of water resources; and quality control processes, which encompass monitoring, inspection, investigation, and enforcement.

---

[194] In 1999, for example, the Grand River Conservation Authority reported 61% from self-generated sources, 30% from municipal levies, and 9% from provincial grants. In 1988, 40% of the authority's funding came from provincial transfers. In the case of the Halton Region Conservation Authority, in 1998 3.2% of its funding came from the province. (Grand River Conservation Authority, "Who Pays for our Programs?" [online], [cited spring 2001], <www.grandriver.on.ca>).

[195] *Conservation Authorities Act,* RSO 1990, c. C.27, s. 23.

Note that the processes described are those currently in use as a framework for the provision of safe drinking water. They do not include consideration of the quantity or quality of the province's ground and surface waters because the province does not manage the provision of drinking water from that perspective.

3.1 Policy Process

"Policy is rather like an elephant, you recognize it when you see it, but cannot easily define it."[196] It is well to bear in mind this useful axiom in distinguishing among the policy, program, and operational functions of government. It is also well to exercise an appropriate degree of caution in setting out distinctions. Generally speaking, however, enacting significant legislation, identifying priority activities, and implementing new programs are recognizable as policy activities, although crisis management and emergency regulations may also engage the policy process. In substantive terms, new policy usually involves matters that are politically sensitive, that engage the priorities of the government, or that require a significant commitment of resources. Note, however, that "… even housekeeping and routine matters are still considered matters of policy" by the Ontario government.[197]

Sometimes new policies spring from the campaign commitments of the government; sometimes they arise from program and operational difficulties, unforeseen events, third party representations, and ongoing reviews that require remedies of the kind described here, which constitute policy.

Change in drinking water policy in Ontario involves the institutions and decision-making machinery described in part 2 of this report. The operation of this machinery depends on the successful integration of a series of processes that link together policy making, financial and operational requirements, and experience. New approaches depend on a combination of inter-ministry and agency coordination, cooperation with municipalities and other local institutions, and consultation with the public at large and other stakeholders.

---

[196] Edward, Lord Bridges, 1964, "The relationship between ministers and the permanent departmental head," *Canadian Public Administration*, vol. 8, no. 3.

[197] Smith Lyons, 2001b, p. 27.

3.1.1 Legislation, Programs, and Regulations

Changes in legislation, or significant new regulations, such as the *Drinking Water Protection Regulation* adopted in August 2000, result either from the government's priorities or from a pressing operational need. Either way, the process engages officials in the Ministry of the Environment as catalysts for the development of new policy proposals to be ultimately decided upon by the Cabinet.[198]

Ontario Water Directors' Committee The deliberative process is carried forward by a series of committees, beginning at the level of the directors in the ministries concerned. A Directors' Water Policy Committee has been in existence since late 1999. Chaired by the director of the Land and Waters Branch of the Ministry of Natural Resources, it includes directors with responsibilities for water policy from the following ministries: Agriculture, Food and Rural Affairs; Municipal Affairs and Housing; and Environment.[199] The committee's mandate is to coordinate provincial water management activities.[200]

Assistant Deputy Ministers' Committee on Land and Resource Use The Directors' Water Policy Committee reports to and is tasked by a committee of assistant deputy ministers (ADMs), and is chaired rotationally. Currently, the chair is the Agriculture and Rural Affairs ADM. The committee's membership includes ADMs from the following ministries: Environment; Tourism; Natural Resources; Northern Development and Mines; Consumer and Commercial Relations; Municipal Affairs and Housing; Economic Development and Trade; Energy, Science, and Technology; Transport; and Intergovernmental Affairs – as well as representatives from the Cabinet Office and the Ontario Native Affairs Secretariat. The committee brings together the cluster of ministries that relate to resources; its focus is on policy and program development that affects land and resource use planning.

Local Government and Resource Deputies' Committee The ADM committee reports from time to time on relevant matters[201] to a standing committee of deputy ministers that deals with local government and natural resources. This committee meets weekly, alternating its chair and agenda between local

---

[198] Note that some regulation-making authority rests in the hands of the minister without reference to the Lieutenant-Governor-in-Council.

[199] Smith Lyons, 2001b, p. 27.

[200] Ontario, Ministries of the Environment and of Natural Resources, 2000, "Provincial Water Management Framework," Submission to Cabinet, January, p. 14.

[201] Smith Lyons, 2001a, p. 8.

government (chaired by the deputy minister of Municipal Affairs and Housing) and the management of natural resources (chaired by the deputy minister of Natural Resources).

This committee comments on matters that may become Cabinet submissions[202] and suggests refinements and consultations that may be necessary to develop a satisfactory submission. The deputies most concerned and their ADMs work with the Cabinet Office and other agencies as necessary to carry out this task. The Cabinet Office consults with the Premier's Office to determine whether a particular issue is ripe for consideration.

Together these committees are responsible for "…integrating policy and coordinating activities within the resource cluster of ministries."[203] The government has described this hierarchy of committees as "… [an] internal multi-ministry accountability framework…."[204]

3.1.2 Cabinet Process

The Cabinet Office determines how an issue is handled within the decision-making system. A purely routine matter – such as a new or changed regulation – may be routed directly to the Statutory Business Committee of the Cabinet (where it is generally followed by routine Cabinet approval). A matter that reflects the government's priorities or another high-profile political matter might be routed to the Priorities, Policy and Communications Board. Generally speaking, however, new policy is referred to the relevant policy committee of the Cabinet. In the past, this has usually been the Economic and Resource committee for matters related to water; in future it will presumably be the Environment committee announced in February 2000. After a matter has been considered in the policy committee, it is reported either directly to the Cabinet or to the Priorities, Policy and Communications Board for ultimate approval by the Cabinet.

If the matter requires the commitment of new funds, the Ministry of Finance and the Management Board Secretariat will have been consulted and their views incorporated into the submission to the appropriate Cabinet committee and to the Cabinet. In some circumstances, SuperBuild is also consulted.

---

[202] Ibid.
[203] Ontario, Environment and Natural Resources, p. 25.
[204] Ibid., p. 3.

Following the approval of an initiative by the Cabinet, the Management Board approves its detailed resource and administrative aspects.

Funding for New Water Infrastructure Proposals for new capital spending is handled somewhat differently. Currently, all proposed new provincial capital expenditures are reviewed by the Ontario SuperBuild Corporation. As mentioned in part 2, the corporation has established a program known as Ontario Small Town and Rural Development (OSTAR), which is administered by the Ministry of Agriculture, Food and Rural Affairs in cooperation with the Ministry of Municipal Affairs and Housing.[205]

The OSTAR program is in its start-up phase. Municipalities are asked to apply directly to SuperBuild, which will then consult the technical staff in the relevant ministries about the particular application.[206] The funding is to be provided from the monies under the control of SuperBuild voted to the Ministry of Agriculture, Food and Rural Affairs. Decisions about project funding are to be made by the Cabinet Committee on Privatization and SuperBuild on the recommendation of the SuperBuild Corporation following consultation with the Ministry of Finance and with the Ministries of Agriculture, Food and Rural Affairs and Municipal Affairs and Housing. The committee's decisions will be subject to Cabinet ratification in the normal way.

The Superbuild recommendations are to be based on six criteria, including need, the technical and financial quality of the planned project, cost efficiency, other sources of funding, and the "adequacy of the municipality's long-term capital asset management plan for the project, including plans to recover the full operating and capital costs through water and sewer service charges where appropriate."[207]

It should not be thought "… that before SuperBuild, funding was available on demand. It was not so then and it is not so now. All earlier programs had specific criteria and operated within specific timeframes."[208] Indeed, since the wind up of the Ontario Water Resources Commission in the early 1970s, funding for water infrastructure has been handled though a series of ad hoc, short-term programs.[209]

---

[205] See the end of section 2.2.3.
[206] Ontario, SuperBuild, 2000c, p. 6.
[207] Ibid., p. 4.
[208] Smith Lyons, 2001b, p. 30.
[209] For a list of the "…province's schemes for financial assistance to municipal water-supply systems during the period 1969–1993…" see Sancton and Janik 2002, table 1.1.

Although approval for new capital expenditure funded at least in part by the province requires Cabinet approval, funding is also of course, an integral part of the operations of the province's system for the provision and management of safe drinking water. The policy and funding processes are political in character (i.e., they require decisions by ministers and the cabinet with the advice of central agencies and senior line officials), whereas water operations are built around regulatory and enforcement processes that are prescribed by law and generally carried out without reference to the policy and other political processes of government.

3.2 Authorization Processes

There are two principal catalysts for installing new water and sewer facilities or upgrading existing sources, treatment facilities, and distribution networks: the requirements of municipal expansion and the need to meet regulatory standards imposed by the Ministry of the Environment.

In either case, the municipality (in cooperation with its public utilities commission where relevant) is responsible for planning water and sewage requirements. If the facilities are needed to comply with the *Drinking Water Protection Regulation*, the ministry will have provided the appropriate compliance orders to give priority to such construction.[210] Municipalities may also turn to the Ontario Clean Water Agency (OCWA) to advise on requirements, manage design and construction, and even operate municipally owned treatment facilities.

The process for approving new water facilities (including altering, extending, and replacing existing facilities) is governed by the *Ontario Water Resources Act.* This statute and related regulations and guidelines are administered by the Ministry of the Environment through its statutorily designated directors.

3.2.1 Permits to Take Water

The water procurement process begins with an application to the Ministry of the Environment for a permit to draw either surface water or groundwater. Any proposal for a facility capable of drawing 50,000 or more litres of water a day requires a permit under the *Ontario Water Resources Act.*[211] These permits

---

[210] Ontario, SuperBuild, 2000c, pp. 2–3.
[211] *Ontario Water Resources Act*, RSO, c. O.40, s. 34.

are granted pursuant to the statutory authority bestowed on a director of the Ministry of the Environment. Regulation 1990/903 governs the construction of wells and the licensing of contractors and technicians.[212] The regulation deals with all aspects of well construction, water-flow testing, and safeguards against contamination; it deals also with procedures for sealing dry and abandoned wells. Decisions to grant permits are subject to review and challenge under Ontario's environmental processes, including the notification and public consultation provisions of the *Environmental Bill of Rights*.[213]

3.2.2 Certificates of Approval

The Ministry of the Environment also approves the construction of water and sewage works – including distribution systems – under sections 52 and 53 of the *Ontario Water Resources Act*, for which purposes engineers and the ministry's "Director" apply "… various guidelines, policies and good engineering principles to the applications."[214] In the case of a waterworks, the 50,000-litre-per-day capability cut-off applies. Both water and sewage works may be subject to environmental assessment and appeal procedures. The approvals stipulate the conditions that must be met in order for a facility to be granted a certificate of approval. These conditions set out the standards that must be met by the operators of the facilities,[215] including health standards approved by the local medical officer of health.[216]

The ministry works with the municipality to ensure that the design specifications will be adequate to qualify for a certificate of approval once construction or renovation has been completed and the plant is ready to enter production. The approval process reflects the provisions of the *Drinking Water Protection Regulation*, which now requires that municipalities use "… accredited laboratories and advise the ministry if they are changing the facility that is testing their water."[217] Municipalities are also required to make their test results available to the public.[218]

---

[212] *Ontario Water Resources Act: Wells*, RRO 1990, O. Reg. 903.
[213] See section 2.2.7.
[214] Smith Lyons, 2001b, p. 29.
[215] *Ontario Water Resources Act,* RSO, c. O.40, ss. 52, 53.
[216] "Drinking Water Protection," O. Reg. 459/00, August 8, 2000, s. 6.
[217] Ontario, Ministry of the Environment, 2000a, *Business Plan 2000–2001* (Toronto: the ministry), p. 2.
[218] "Drinking Water Protection," O. Reg. 459/00, 8 August 2000, ss. 10–12.

Regulation 435/93 under the *Ontario Water Resources Act* deals with the classification of facilities and the licensing of operators.[219] It divides facilities into four classes covering, respectively, wastewater collection and treatment and water distribution and treatment. Each facility is classified by a director of the ministry and is issued a certificate of classification. Each type of facility is supported by a system of operators' licences granted by the director following attainment of the qualifications set out in the regulation; licences may also be revoked on specified grounds, which are principally related to incompetence and to incidences of pollution or endangering public health.

The operators' licences are the backbone of the operating standards set out in the regulation. Owners are responsible for ensuring that operators are properly licensed for the facility in question and are required to provide 40 hours of training per year to each operator. The operators in charge are responsible for maintaining proper records of monitoring and sampling activities and other operations of their facilities; they are also to ensure the maintenance of operating equipment.

3.3 Compliance and Enforcement Processes

3.3.1 Monitoring

Under the *Ontario Water Resources Act*, the owner of a waterworks capable of supplying more than 50,000 litres per day or servicing more than five private residences is required to monitor the quality of water to ensure that it meets the requirements of the *Drinking Water Protection Regulation.*[220]

The regulation sets out requirements for notifying the Ministry of the Environment, the local medical officer of health, and the owner of the facility in the event of adverse test results, which are defined in detail.

3.3.2 Voluntary Surveillance

The Ministry of the Environment also gathers information through the Drinking Water Surveillance Program, a voluntary arrangement that began in 1986 and now covers the water consumed by 88% of the population. The extensive testing

---

[219] *Ontario Water Resources Act: Water Works and Sewage Works,* O. Reg. 435/93.
[220] *Drinking Water Protection Regulation,* O. Reg. 459/00, August 8, 2000, s. 7.

under this program (between 1993 and 1997 over 650,000 tests were carried out) has resulted in 99.98% compliance with the Drinking Water Objectives. As of March 1999, 159 of the province's 645 waterworks participated in the program. The operators collect water samples, natural and treated, on a regular basis (two to six times a year) and the samples are analyzed at the ministry's remaining laboratory. Adverse results are reported to the operator, who is requested to report back to the ministry regarding what remedial action was taken.[221]

This program is overseen by a committee made up of representatives of the ministry's Laboratory Services, Standards Development, and Water Policy branches as well as the Operations Division, together with a representative from the Ministry of Health.[222]

3.3.3 Inspection, Investigation, and Enforcement

The Ministry of the Environment carries out a program of inspection and monitoring through its five regional offices. Inspection is regarded as an "abatement" function, i.e., a means of helping to ensure compliance without resorting to investigation and enforcement. Abatement activities are separate from but functionally linked to the ministry's investigative and enforcement activities. The ministry has recently completed inspections of all municipal waterworks in the province, which represents an important enhancement of operational activity.[223]

The ministry's directors and provincial officers have extensive powers to require compliance and, if necessary, to enforce the provisions of its statutes. These include the ability to order the closure of facilities, to require a municipality to take over a small waterworks facility, or to hire a suitable operator to ensure that remedial action is taken. For matters of biological contamination not covered by the *Environmental Protection Act* or the *Ontario Water Resources Act*, the ministry relies on the powers exercised by medical officers of health under the *Health Promotion and Protection Act.*[224]

---

[221] Ontario, Environment, 2000b, p. 12.
[222] Ibid., p. 16.
[223] Ontario, Ministry of the Environment, 2000c, "Environment ministry completes inspection of 645 water treatment plants," press release (Toronto: December 21).
[224] For more on the administration of this act, see the discussion of the Ministry of Health and Long-Term Care under section 2.1.5.

The *Drinking Water Protection Regulation* sets out in detail the procedures to be followed by laboratories and owners in response to specified adverse water quality results. The medical officer of health and the Ministry of the Environment must be notified immediately by telephone on a 24-hour, 7-day basis, and this notification must be followed up in writing within 24 hours.[225] The medical officer of health and the ministry must then take action in accordance with the provisions of the *Health Protection and Promotion Act*, the *Environmental Protection Act,* and the *Ontario Water Resources Act*.

The inspection and enforcement functions are distinct at their extremes, but they overlap significantly as the process of abatement gives way to that of enforcement. There is debate about where and how to draw the line between seeking compliance and enforcing binding undertakings and statutory prohibitions.

4 Institutions and Processes Evaluated

This part of the report comments on the strengths and weaknesses of the institutions and processes described in parts 2 and 3. The two preceding parts are strictly factual, designed to provide a guide to the anatomy of provincial and municipal arrangements for water management. This part evaluates the effectiveness of those arrangements in supporting the government's responsibility for providing safe drinking water to Ontario residents.

The comments are organized around two subjects: the specific institutions and processes that deal with drinking water policy, regulation, funding, and operations; and the more general approach of the government to the decision-making process, the role of central agencies, and the treatment of such machinery-of-government issues as accountability, delegation, ministerial direction, and the roles and relationships of ministries and agencies.

4.1 Adequacy of Current Arrangements for Safe Drinking Water

The arrangements supporting the government's responsibility for providing safe drinking water lack coherence. The principal reasons for this situation are the absence of policy, the weakness of the mandate and resources of the ministry

[225] *Drinking Water Protection Regulation,* O. Reg. 459/00, August 8, 2000, s. 8.

with lead responsibility (Environment), the inadequacy of central-agency support in coordinating the activities of ministries and agencies with related responsibilities, and the absence of financial policies for dealing effectively with the long-term need for infrastructure development and replacement. None of these is a stand-alone problem. As will become apparent later in this discussion, they need to be addressed collectively through the development of a coherent policy that will enable the government to fulfill its responsibilities effectively and efficiently over the long term.

It is important to bear in mind that organizational arrangements cannot take the place of sound policies and adequate resourcing. They can enhance or degrade the way in which policy is made and operations carried out; they can provide for the assignment of clear responsibilities and accountabilities; but they cannot substitute for clear priorities, sensible objectives, and sound leadership.

4.1.1 Observers' Comments

The conclusion that current arrangements lack coherence is supported by a cross-section of experienced observers of how the government fulfills its responsibilities to provide effective policy, institutions, and processes. Consider, for example, the views of the Association of Municipalities of Ontario:

> … the lines of responsibility have become blurred over the years. Shifts in responsibilities have played a part. Changes in who sets policy, who finances, who implements and who enforces have contributed to a lack of clarity.
>
> Another look needs to be taken at responsibilities for water to make sure they make sense. Governments need to ensure that there is clear authority in place and the tools needed to do the job are matched up with the responsibility to get the job done. All too frequently, responsibility and authority diverge.[226]

The Ontario Municipal Water Association has similar views about the lack of coherence in the management of the waterworks industry: "… the problems in the municipal waterworks industry can be attributed to the multitude of

---

[226] Association of Municipalities of Ontario [AMO], 2000, *AMO Municipal Action Plan: Protecting Ontario's Water*, (Toronto: AMO, June), p. 6.

government agencies dealing with waterworks matters on a piecemeal basis without establishing an overall plan for the industry."[227] It has urged the province to develop uniform policies and practices to govern the operation of waterworks throughout the province. The Association of Municipalities wants a water protection policy with "… comprehensive water protection legislation that departs from the current unfocused approach to decision-making and the current array of policies and programs aimed at alleviating specific problems."[228]

The Canadian Environmental Law Association has characterized the government's approach to its drinking water responsibilities as ad hoc, resulting in "… a hodgepodge of policies aimed at alleviating specific problems as they arise instead of an integrated and comprehensive water policy that provides consistent guidance to all public decision-makers and stresses the protection of water."[229] Even the government has recognized that "… a more comprehensive, integrated and coordinated approach is needed for policy and program development and service delivery."[230]

A consultant's study has noted:

> The Ontario government does not have a strategic framework for water management. Rather, water management activities are governed by a web of legislation, regulations, policy statements, and activities throughout the various ministries involved in water management.[231]

The problem of an unfocused, non-strategic, piecemeal approach to water has been recognized for many years – indeed, since the loss of the old Ontario Water Resources Commission began to be felt in the 1980s:

> By the late 1980s, partly in recognition of the fragmentation under which water policies and planning were suffering, the provincial government began conceptual development of a self-financing "super agency" to, among other goals, provide comprehensive province-wide

---

[227] Ontario Municipal Water Association, [n.d.], Steps towards a Better Water Future, Unpublished report, [Peterborough, Ont.].
[228] AMO, 2000, p. 8.
[229] P. McCulloch and P. Muldoon, 1999, *A Sustainable Water Strategy for Ontario* (Toronto: Canadian Environmental Law Association), cited in Ontario Sewer and Watermain Construction Association [OSWCA], 2000, *Conservation, Preservation, Restoration: A Nine-Step CPR Plan for Ontario's Water and Sewage Systems* (Toronto: OSWCA, January), p. 10.
[230] Ontario, Environment and Natural Resources, p. 3.
[231] KPMG, 1924, p. 24.

> planning on a watershed basis in order to promote effective and efficient municipal servicing. The provincial government went so far as to announce the new agency in the provincial budget of April 24, 1990.[232]

Ultimately, however, this initiative was not pursued.

4.1.2 Scope of Drinking Water Policy

The Ministry of the Environment is at the centre of Ontario's arrangements for the governance of safe drinking water. As noted at various points in this discussion, however, the provision of drinking water is also affected by many areas outside the scope of this ministry – broader issues of water quantity and the role of water in the overall ecosystem.These aspects of the government's mandate in respect of water have thus far played at best a peripheral role in its arrangements for the provision of safe drinking water.

The activities of other ministries, notably Natural Resources and Agriculture, Food and Rural Affairs, take place in a policy vacuum; any coordination with other ministries, such as Environment, is transactional, without reference to shared, strategic objectives designed to preserve the quantity and improve the safety of water supplies in general and drinking water in particular. Furthermore, the Ministry of Natural Resources' mandate concerning water quantity does not appear to be pursued with a great deal of vigour. Despite good intentions, there is, for example, considerable doubt as to how effectively this ministry is accomplishing its joint project with the Ministry of the Environment to develop data about the flow of aquifers, and about groundwaters generally.[233]

The mandate of the minister of the Environment to supervise all surface waters and groundwaters in Ontario also seems to have found little practical expression.[234] In a recent report, the environmental commissioner has noted that the Ministry of the Environment staff "… are issuing permits for new water takings without access to fully complete or accurate information on existing water takings."[235] An expert appearing before the Inquiry has observed:

---

[232] OSWCA, 2001b, p. 10.
[233] See the discussion of the Ministry of Natural Resources under section 2.1.5.
[234] This mandate is outlined in detail in the discussion of the Ministry of the Environment under section 2.1.5.
[235] Ontario, Office of the Environmental Commissioner, "Ontario's Permits to Take Water and the Protection of Ontario's Water Resources," brief to the Walkerton Inquiry, January, p. ii.

> Most parts of the world which use groundwater extensively manage the water; in Ontario unfortunately we don't manage water. The degree of management extends simply to issuing permits to take water and to me issuing permits to take water is a little bit like me writing cheques on my bank account when I don't know how much money is coming in …[236]

A comprehensive approach to safe drinking water should include either a much greater and more integrated role for the Ministry of Natural Resources or a shift of mandate and resources to the Ministry of the Environment – or a combination of the two.

Conservation authorities represent another underused resource for effective water management. They provide municipalities with a means of participating actively in the development and preservation of water resources that ultimately affect the quantity and quality of drinking water. These authorities, and through them municipalities, should be part of an overall provincial strategy for managing drinking water.

The Ministry of Agriculture, Food and Rural Affairs is also engaged in activities that should be integrated into an overall framework for the protection of drinking water in the province. In the absence of such a framework, the ministry's natural course is to promote the short-term needs of agriculture producers in the province, as it did in 1998 when it sponsored increased protection for "normal farm practices."[237] Similarly, the decision of the Ministry of Municipal Affairs and Housing to contest the West Perth by-law restricting certain farming operations before the Ontario Municipal Board would properly have benefited from prior review in the context of a government-wide water policy framework. Such a framework would both set policy objectives and define organizational mandates for giving effect to the policy.[238]

The Ministry of Agriculture, Food and Rural Affairs has been criticized for showing only a grudging recognition of the importance of environmental considerations. Although this ministry is among those required to develop a "Statement of Environmental Values" under the *Environmental Bill of Rights*, it is only since 1998 that the ministry has made mention of this statement in

---

[236] Prof. K.W.F. Howard, 2000, testimony before the Walkerton Inquiry, 16 October [online], [cited spring 2001], <www.walkertoninquiry.com>.
[237] See the discussion of the Ministry of Agriculture, Food and Rural affairs under section 2.1.5.
[238] See section 2.2.5.

its business plan. Since that time, the ministry has taken steps to give more importance to the environment. One report described this change thus far:

> The four-year, $90 million Healthy Futures for Ontario Agriculture provides funding for promoting best management practices and the recently proposed standards for agricultural operations will set a benchmark for manure management and provide for municipal enforcement. However, the analysis of the ministry's [business] plan still shows an overwhelming emphasis on rural development, reducing red-tape, and investment in the agri-food sector. The development ethic runs deep, and is evident in the absence of any environmental performance measures, the lack of attention to the protection of prime farmland and the absence of environmental, ethical and social considerations in the ministry's support of food biotechnology.[239]

The particulars of such criticisms are no doubt open to debate. The broader point, however, is that a Cabinet-approved strategic plan for the management of drinking water resources is needed, one that would require all relevant ministries to take account of the strategy in their policies and programming. Giving the Ministry of the Environment a broader mandate to consider the protection of the watershed as the basis of safe drinking water policy would provide a solid basis for that ministry to lead the development and implementation of such a strategic plan.

4.1.3 The Ministry of the Environment

The Ministry of the Environment has not shown itself capable of providing the necessary strategic thinking to spearhead such a plan, however. Nor does it have sufficient influence at Queen's Park, as the severe reductions in its budget and its consequent loss of expertise demonstrate. Many observers are concerned about the situation at this ministry. Consider, for example, the views of the Ontario Municipal Water Association:

> The Ministry of the Environment was once a highly respected effective ministry with a focus and strong thrust in keeping with its

---

[239] The Ontario Centre for Sustainability, 2000, *Missing Values 2000: Ontario's Failure to Plan for a Healthy Environment* (Toronto: the centre, September), pp. 2–3 [online], [cited January 27, 2002], <www.web.ca/ocs>.

> mandate as a protector of the Environment. It was respected as a leader in environmental matters not only within Canada but internationally as well.
>
> Today the Ministry of the Environment is viewed by many as a largely ineffective understaffed shell of its former self, which lacks the support of the powerful elite in the premier's office whose view of environmental matters appear[s] to be reflected in the ministry's continuous reduction in manpower and resources (a junior ministry).
>
> The Ministry has for the most part lost the confidence of the water authorities it deals with and in short is considered a sad reflection of its once respected self.[240]

The budget reductions and staff cuts have led to a loss of technical expertise and institutional memory; the resulting declines in inspection, monitoring, and enforcement activities have attracted a good deal of criticism.[241] The Association of Municipalities of Ontario has noted that "… the Ministry of the Environment must take steps to re-establish its expertise in the drinking water and wastewater fields. It needs to restore its leadership role in sharing information with municipalities, the public and other stakeholders."[242]

The reduction in the ministry's resources has weakened its capability for research, particularly for high-order research in support of policy and regulation (as distinct from routine production functions). The use of the ministry's remaining laboratory for routine water testing does not appear to be a good use of resources.[243] That kind of industrial-type testing could be done commercially, leaving the ministry's laboratory freer to concentrate on research into such matters as treatment processes, measurement techniques, health hazards, and disinfection and its by-products.

Without good research, and informed access to external research, policy development cannot function well. A recent report by the government's own management consultant, Valerie Gibbons, included the following observation:

---

[240] Ontario Municipal Water Association, 2000, *The Ministry of the Environment*, unpublished report, October 2 [Peterborough, Ont.].
[241] See Ontario, Office of the Provincial Auditor, 2000, "Ministry of the Environment: Operations Division," section 3.06 in *Special Report on Accountability and Value for Money*, November [online], [cited spring 2001], <www.gov.on.ca/opa>.
[242] AMO, p. 8.
[243] See section 3.3.2.

> … the general trend in Ontario and elsewhere towards a devaluing of the legitimate role of the public service to build a strong internal and external knowledge creation, analysis, and synthesis capacity and to demonstrate leadership in the creation and dissemination of knowledge and information.
>
> This devaluation had been partly characterized by the steady erosion of historic links to the research community, including academic and other research organizations, to the point that such links are almost non-existent today. In its ideal form, this capacity would involve both internal and external sources and encompass a wide range of public issues, including, but not limited to, any particular government's agenda.[244]

The same report noted that "… the Ministry has systematically addressed neither the requirements for a strategic approach to policy development, nor the development of the policy function as a professional discipline within public sector management and administration."[245]

The provincial auditor has been specific in his criticisms of many aspects of the ministry's regulatory functions. He has noted a significant reduction in the inspection of water facilities as a result of budget cuts affecting the ministry. Between 1996 and 2000 the staff of the Operations Division was reduced by 25%, resulting in a 34% decline in the number of inspections.[246] The ministry has some 220,000 certificates outstanding, and adds about 8,000 new certificates each year. "Over time, there have been many amendments to legislation and ministry policies and guidelines. These have resulted in more stringent conditions attached to certificates of approval that require greater accountability and due care by the owner or operator of a facility."[247] In the circumstances it is "… impractical for ministry staff to closely monitor all site operators for compliance with the conditions of their approvals," the auditor noted, going on to note that "… inspections of municipal water treatment plants declined by over half, from over 400 to about 190 per year, over the past five years."[248] The auditor was also critical of the lack of plans and criteria to guide the selection of sites to be inspected.

---

[244] Executive Resources Group, 2001, *Managing the Environment: A Review of Best Practices*, report commissioned by the Government of Ontario ([Toronto:] January), p. 118.
[245] Executive Resources Group, p. 200.
[246] Ontario, Auditor.
[247] Ibid.
[248] Ibid.

The auditor's criticisms of the ministry's shortcomings extend to its enforcement policies: "Ministry guidelines … allowed environmental officers the discretion to use voluntary measures even in cases of significant or repeat violations and in cases where corrective action had not been taken on a timely basis."[249]

The ministry's response to this criticism was to note that it has increased the number of field orders from an average of 20 per month to 90. It did not, however, mention an overall strategy to balance compliance and enforcement activities, or any steps taken to increase preventive measures as part of a broader strategy for improved compliance.[250]

Aside from criticisms about policy and resources, there is a more fundamental question to be asked about the Ministry of the Environment: does its environment-based mandate add to or detract from its capacity to regulate effectively the provision of safe drinking water? Would the regulatory function be fulfilled better by another ministry or an arm's-length agency?

A recent study has concluded that the Ministry of the Environment remains the most appropriate focal point for the province's responsibilities for the environment, presumably including safe drinking water. This endorsement is, however, conditional on the development of a much more strategic approach involving an array of ministries and agencies:

> … we would not characterize the overall direction of MOE [the Ministry of the Environment] and environmental protection in Ontario as leading. Although building blocks are in place in a number of areas, overall the impression is one of a somewhat piecemeal approach. It is also apparent to us that Ontario is not only behind the progress being made in other jurisdictions in terms of the *strategic shifts* identified earlier, but also that the *gap continues to widen.* Our assessment is that without a concerted and strategic effort on the part of the Government and the Ministry, the stated goal of establishing Ontario as a model for others may not be realizable.[251]

At this point, it is worth noting that, whatever the reason, the ministry appears to know relatively little about the state of the province's drinking water facilities.

---

[249] Ibid.
[250] See later in this section for more on this point.
[251] Executive Resource Group, p. 39.

Recently the SuperBuild Corporation put out requests for proposals for consultants to go out and count the most basic things one would need for a rational approach to asset management.[252]

The ministry appears anxious not to be held responsible for operational problems in areas that it regulates. Perhaps on account of budget constraints, it has been actively engaged in the pursuit of initiatives that emphasise that the owner, *not* the regulator, "… is accountable for the provision of safe drinking water to consumers."[253] For example, the ministry took the initiative in the later 1990s to pass responsibility for smaller septic tank installations to municipalities via the Ministry of Municipal Affairs and Housing.[254]

This reluctance to become fully engaged is also evident in the attitude of other ministries, such as Municipal Affairs and Housing and (to a lesser extent) Health and Long-Term Care. Note, for example, the 1996 changes to the *Planning Act*, which removed the right of all ministries other than the Ministry of Municipal Affairs and Housing to appeal municipal planning decisions to the Ontario Municipal Board.[255] At the same time, the province dropped the requirement that municipalities ensure that planning decisions "be consistent with" the government's "policy statements" under the act.[256] These changes, together with the new one-window planning service with the province as approval authority, has meant that the Ministry of the Environment is no longer involved in reviewing municipal planning decisions, although it does provide guidelines for matters related to water and sewage services.[257]

The streamlining of the planning process was designed in part to limit the opportunity for the government's own agencies to launch appeals against planned municipal initiatives. This was achieved – ingeniously – as follows:

> The objective of limiting agencies' appeal rights was accomplished by giving rights of appeal only to "public bodies" and then by excluding all the ministries of the government, except the Ministry of Municipal

---

[252] Ontario, Ministry of Finance, 2001, "Ontario SuperBuild Corporation: Request for proposal" (Eight separate RFPs) (Toronto: January 26).
[253] See the discussion of alternative service delivery under section 2.2.1.
[254] See the discussion of this ministry's role under section 2.1.5.
[255] Ibid.
[256] Dennis H. Wood, 2000, *The Planning Act: A Sourcebook*, 4th ed. (Toronto: Carswell), p. 4.
[257] Wood, pp. 2–11.

> Affairs and Housing, from being public bodies and thus, having the right of appeal given in various section of the *Planning Act*.…[258]

The government's explanation for this approach is the following:

> Granting MMAH sole authority to appeal municipal decisions to the OMB enables the Ministry to coordinate provincial intervention. MMAH plays a coordinating role in accordance with an appeals protocol that has been developed with other ministries. In fact, a majority of appeals are undertaken by MMAH on behalf of other ministries. Where MMAH is the approval authority, a one-window service is in place for provincial input, review and approval. The one-window planning service is another example of coordination of provincial policy implementation. MOE is very much involved in the review of official plans, but it comments to MMAH, who then coordinates these comments with other ministries comments. The approval by MMAH is based on balancing the concerns of all affected agencies.[259]

There is a view in the ministries that their responsibility is to establish a regulatory framework within which municipalities will be held to account for results.[260] This is borne out by the *Drinking Water Protection Regulation*, which places the onus for water treatment and testing, as well as for reporting and publicizing test results and any necessary corrective action, on the owners of facilities. The regulation is noticeably deficient with respect to any obligations of the regulator.[261] Notwithstanding that these are spelled out in statute, it would seem reasonable for the regulation to note that the regulator is also obliged to take responsibility for setting standards and enforcing this and related regulations.[262]

On this point, the government has offered the following comment:

---

[258] Wood, p. 4.

[259] Smith Lyons, 2001a, p. 9.

[260] See the final paragraph in the discussion of the Ministry of Municipal Affairs and Housing under section 2.1.5.

[261] *Drinking Water Protection Regulation,* O. Reg. 459/00, August 8, 2000.

[262] It is noteworthy that the equivalent British regulation spells out in detail the conditions attaching to the exercise of the regulator's powers, while the Ontario regulation leaves these matters to the "opinion" of the director under the *Ontario Water Resources Act*. See *Water Supply Quality Regulations, 1989* [as amended ….], ss. 4,5,7 and *passim*. Compare with the Ontario *Drinking Water Protection Regulation*, ss. 2, 5, and *passim*.

> There is no point in repeating in a regulation legal rules that are already established by statute. Besides being redundant, repeating legal rules that already exist could lead to confusion in interpretation if there are subtle differences between the language of the original rules and the language of the repeated rules. There may also be questions of statutory authority, since you can only make regulations if they are specifically authorized by statute. Legislative counsel wouldn't normally draft a statute to include regulation-making powers to deal with subjects that they think are already fully dealt with in the statute.[263]

It should also be recognized that the regulator is not merely developing and applying standards. The regulator is the government of the province, which has a broader duty to ensure that citizens are well served, particularly in matters of public health and safety. In the view of some, not all municipalities have the skills to manage drinking water effectively by applying the regulations, or to plan for the long-term development and safeguarding of available water resources.[264] A better approach would be for both levels of government to accept responsibility for this area, providing greater assurance to the citizen that the public interest is in fact being safeguarded.[265] There is, besides, a constitutional responsibility attaching to the province that cannot be set aside on the grounds that municipalities are governed by democratic institutions.

The government, and the Ministry of the Environment in particular, need to rethink their approach to regulation. Not only is more sharing required, but, in the context of a coherent policy for drinking water safety, the ministry's regulatory role should be focused as much on the joint development of preventive, standards-based methodologies as on the responsibilities of owners and operators. This would be a good deal more realistic if the ministry had the resources to develop policies that would encourage fewer, larger operators, enabling it to concentrate enforcement resources on serious or repeat violators.[266] In such circumstances, the ministry would be well placed to develop contacts

---

[263] Smith Lyons, 2001a, p. 10.
[264] KPMG, p. 22.
[265] Sancton and Janik, p. 28.
[266] For more on this approach, see Australia, National Health and Medical Research Council/ Agriculture and Resource Management Council of Australia and New Zealand [NHMRC/ARMC], Coordinating Group, 2001, *Framework for Management of Drinking Water Quality: A Preventive Strategy from Catchment to Consumer* (Canberra: Australian Government Printing Services), [also available online: <www.nhmrc.gov.au/publications/synopses/eh19syn.htm>].

with operators and outside experts, forming networks of expertise designed to abate threats to health and the environment.

The consequences of the ministry's shortcomings are evident in the results of the recently completed inspections of all water treatment facilities:[267]

> An inspection blitz, ordered by MOE [Ministry of the Environment] following the Walkerton tragedy, found deficiencies in over half (357) of the province's 645 water treatment facilities. The four most common water treatment plant deficiencies were: (1) insufficient bacteriological or chemical testing; (2) inadequate maintenance of disinfection equipment; (3) non-compliance with minimal treatment guidelines; and (4) inadequate operator training.[268]

As mentioned earlier, the government was unable to provide comparative data on reductions in the budget of the Ministry of the Environment during the 1990s.[269] However, the Ministry of Finance's budget papers show that between 1994/95 and 2000/01 the operating expenditures for the Ministry of the Environment declined by 39%, from $258 million to $158 million. In the same period, its capital expenditures, including the Water Protection Fund, which began in 1998/99, declined by 76%, from $271 million to $65 million, although in 1999/00 the total capital expenditure was $167 million.[270]

The data from the provincial auditor's special report provides an insight into the extent of reductions and, in particular, their impact on inspections.[271] In the absence of data from the government, this paper relies on the provincial auditor's data and notes that many other commentators have voiced concern about the scope and depth in reductions in environmental expenditures by the provincial government. For example:

> Since the advent of the Common Sense Revolution, MOE [Ministry of the Environment] budgets have been cut by about 60%. The May 2000 budget continued the trend. In 1994, the ministry had an operating budget of almost $400 million and a capital budget of more

---

[267] See section 3.3.3.
[268] OSWCA, 2001a, p. 11.
[269] See the discussion of the budget under section 2.1.5.
[270] See Canadian Institute for Environmental Law and Policy, 2000, pp. 13–14; and Ontario, Ministry of Finance, 2000c, *2000 Budget*, May 2, Budget Paper B, pp. 54–55.
[271] The auditor's comments regarding the Ministry of the Environment are discussed in section 4.1.3.

> than $150 million. For 2000/01, the Ontario budget shows $158 million for operations and $65 million of capital expenditures. Budget cuts to the MNR [Ministry of Natural Resources] are significant. In the budget plan 2000/01, capital expenditures for the MNR are $376 million, a decrease of $82 million or 18% for the $458 million in the interim 1999/2000 budget. Staff in the MNR has been cut almost in half from 6,639 in 1995 to 3,380 in 2000. Many conservation authorities have been forced to delay and scale back programs because of limited funding and staff. Conservation authority staffing is at 50–75% of levels before the provincial reduction in operating grants in 1995.[272]

As noted in part 2, it is difficult to make such comparisons because of changes in the organization, mandates, and programs of government organizations.[273] For example, the figures cited above do not take account of the shift of capital spending from the OCWA to the Ministry of the Environment and now to the SuperBuild Corporation. It is evident, however, that very significant cuts have occurred, with adverse consequences for the capacity of the government to fulfill its environmental responsibilities in general and its duty respecting clean drinking water in particular.

The Ministry of the Environment is not equipped to support the government's responsibilities for safe drinking water. It has neither the resources nor the expertise to carry out its existing mandate. Whichever organization takes the lead role on behalf of the government in the future will need the capacity to rethink the government's entire approach to providing safe drinking water. As matters now stand, the government is vulnerable because this ministry is inadequate for the task.

4.1.4 Funding

Ontario's municipalities received generous treatment from the province through the Ontario Water Resources Commission. Grants, cheap loans, and paternalistic ownership and operational arrangements shielded consumers from

---

[272] Canadian Environmental Law Association, 2000, "The top 10 things wrong with environmental protection under the Common Sense Revolution," *Intervenor* (July–December), pp. 9–12, <www.cela.ca/Intervenor>.

[273] See the discussion of the budget under section 2.2.5.

the true costs of water facilities. One consequence is that consumers have become accustomed to unrealistic water rates: "The unintended impact of years of low rates has meant that municipal attempts to raise water rates to cover the costs of infrastructure rehabilitation is sometimes met with local opposition."[274]

One consequence of these distortions is the gradual decay of water and sewage infrastructure. Built mostly in the 1960s and 1970s with provincial subsidies of various kinds, this physical plant is now wearing out. The government is reluctant to pay the costs of upgrading.

Funding for municipal water infrastructure is a sometime affair that appears to be generally unsatisfactory. For at least the last ten years – and perhaps since the switch in emphasis from the provision of safe drinking water to protection against environmental pollution during the 1970s – the province has slipped into an ad hoc approach to the funding of water infrastructure, particularly for smaller municipalities.

The government has commented as follows:

> Provincial support for operations and capital has varied. In particular, smaller municipalities have consistently received higher levels of support under available programs reflecting ability-to-pay considerations.
>
> The government disburses funding pursuant to set criteria and not on an ad hoc basis. For example, under OSTAR, 6 criteria will be used to evaluate proposals:
>
> 1. need for the project;
> 2. technical quality and innovative features of the project;
> 3. cost-efficiency of the proposed infrastructure;
> 4. partner contributions;
> 5. quality of the financial plan for the project; and
> 6. adequacy of the municipality's long-term capital asset management plan for the project, including plans to recover the full operating and capital costs through water and sewer service charges where appropriate.[275]

---

[274] OSWCA, 2001a, p. 11.
[275] Smith Lyons, 2001a, p. 10.

Appropriately, a debate is underway among interested parties about whether or not the province ought to be subsidizing water infrastructure. More particularly, some observers are proposing that users ought to pay the real cost of the water they use rather than passing them to the province or municipality, creating distortions, perverse incentives, and inattention to efficiency. In practice, however, the province has provided, and continues to provide, such subsidies through a variety of programs, including the current OSTAR initiative under SuperBuild. As noted earlier, however, the government does not want these programs to be seen as permanent or as constituting any sort of entitlement.[276]

While it may be reasonable to reject the idea that municipalities are entitled to subsidized water, more is required. Currently, that "more" is being provided through SuperBuild's partnership financial support, which is merely the latest iteration of the ad hoc approach to the problem of infrastructure financing. A framework for drinking water policy needs to address the financing question in a more satisfactory and lasting manner. Subsidies generally create disincentives to efficiency and distort marketplace decisions. But they may have a role in water policy provided their impact is understood, and measures are set in place to minimize the usual attendant dislocations: in case of real inability to pay for safe drinking water on the part of individuals or municipalities, some form of equalization or income subsidy could be considered.

More importantly, the province needs policies and programs that would encourage municipalities to pool resources and seek both the economies and the improved facilities that result from reaching a critical mass of infrastructure facilities.[277] The development of a truly competitive market, based on real-cost pricing, is one means of providing up-to-date facilities. Another is to develop a public agency similar to the Ontario Water Resources Commission. A move toward fewer, larger operators would also change the character of regulatory oversight, placing more emphasis on the certification of suppliers and on preventive measures. A comprehensive drinking water policy should be able to provide options for achieving these outcomes in the overall context of the province's arrangements for providing safe drinking water to its residents.

Under the current arrangements, public utilities commissions, institutions with the original purpose of ensuring adequate attention to the provision of water

---

[276] See the discussion of funding for new water infrastructure under section 3.1.2.

[277] This was one of the reasons for the creation of the Ontario Water Resources Commission in 1956. Sancton and Janik.

treatment facilities, particularly for smaller municipalities, have been allowed to fade almost into oblivion. As discussed below, funding is an important consideration in designing institutions and processes for management;[278] it is argued by some[279] that a separate utilities commission is better placed to protect the funding available for treatment facilities and their operation, notwithstanding the fact that under the *Public Utilities Act* surplus funds raised from water rates and other commission revenue form part of the general funds of the municipality.[280] There are also concerns that the works departments of small municipalities lack the management and other skills to operate water facilities in accordance with the various regulatory requirements.[281] The demise of the commissions is another example of action preceding systematic thought about the consequences in the absence of a needed policy for the overall management of drinking water in the province.

As long as the province is providing subsidies, consideration might also be given to developing some means of arbitrating disputes between the province and municipalities over the financial capacity of particular municipalities to fund necessary water and sewage infrastructure. The need for such subsidies may be acute in cases where a municipality has neglected water and sewage facilities in favour of other needs. This might be an appropriate role of the Ontario Municipal Board, whose role as a regulator and overseer of municipalities has atrophied.[282] A strategic approach to water policy in the province would include an examination of whether this historic board could play a useful role here, as, for example, it plays in arbitrating disputes between municipalities over the apportioning of benefits arising from the work of conservation authorities.[283]

4.1.5 Federal Cooperation

The review of institutions and processes in parts 2 and 3 of this report suggests that the federal government has little practical impact on the provision of drinking water in Ontario. However, it contributes scientific expertise to the formulation

---

[278] See section 6.2.4.
[279] See Freeman, pp. 8–11.
[280] *Public Utilities Act*, s. 35.
[281] There is also the issue, discussed further in section 4.1.3, of the province's having broader responsibilities than those of a regulator.
[282] See section 2.2.5.
[283] *Conservation Authorities Act,* RSO 1990, c. C-27, s. 25.

of drinking water guidelines; its environmental legislation has potential impact on Ontario's ecosystem; and, by providing infrastructure funding, it helps to finance facilities for both sewage treatment and drinking water.

The federal government has significant responsibilities and jurisdiction over lands in Ontario. Mostly obviously this relates to its responsibilities for Native peoples on Indian reserves, which must be supplied with safe drinking water and sewage treatment facilities. There are other areas of federal jurisdiction that require similar services: military bases, national parks, and specialized research facilities.

It is not clear who is responsible for overseeing the provision of water and sewer services to these federal facilities. In the absence of federal law, it may be presumed that in principle the province's laws of general application, including the *Ontario Water Resources Act,* apply; but in practice they do not. Water and sewage facilities on federal lands, including reserves and military bases, are not regulated by the province (although here, as in many other aspects of public responsibility, the federal government follows provincial standards), nor are orders issued or prosecutions undertaken. The federal government pays for all such works, although the province has from time to time provided technical expertise and even built facilities.[284]

This is an aspect of drinking water management that needs to be addressed as part of a strategic water policy for the province. It cannot be handled by the province alone. Formulating this part of the plan will require cooperation from the federal government, and, in the case of native peoples, input from communities on reserves.

4.1.6 The Private Sector

The absence of a policy framework has also had detrimental consequences for private sector operators despite the government's express policy of favouring private providers for public services. The absence of a clear government policy on the economics of supplying and paying for drinking water makes it difficult for private sector firms to determine whether or not committing resources necessary to participate in water and sewage operations is a viable long-term investment. In this context it is, however, encouraging to note SuperBuild's

[284] Smith Lyons, 2001d, sched. 1.

initiative to develop a "… long-term water and sewer infrastructure investment and financing strategy" that is to evaluate "… the options and implications of moving towards full cost recovery for water and sewer services."[285] Note too that the difficulties arising from the absence of clear government policy are compounded for the private sector by the anomalous position of the OCWA.[286]

4.2 Governance in Ontario

The provision of safe drinking water depends on the integrity of the policy and operational processes adopted by the provincial government. It is, therefore, germane to consider the way in which the provincial government develops policy, organizes its business, deals with arm's-length bodies, and generally approaches its responsibility for sound governance.

Part 2 of this report described Ontario as having a Westminster-style system of representative, democratic, responsible government based on the responsibility of ministers to the assembly. This proposition is supported by several elements of the system, including the assignment of duties to ministers individually, the cabinet process for ensuring collective responsibility, and the supporting and coordinating roles of ministries and central agencies.

4.2.1 Access to the Cabinet

Generally speaking, governance arrangements in Ontario place considerable emphasis on the importance of establishing and maintaining collective responsibility. The procedure whereby every committee decision, including those of the Management Board and the Statutory Business Committee, are reported orally to the Cabinet, is worth noting.[287] However, certain other practices give rise to questions about the importance attached to ministers and the central importance of their responsibility.

The ability of a minister to place a matter before his or her colleagues for discussion and decision is fundamental to the ideal of ministerial responsibility.[288] As a matter of principle, the collective responsibility of ministers

[285] Ontario, Finance, 2001b, p. 26.
[286] See section 4.2.5.
[287] See section 2.1.4.
[288] See section 2.1.1.

depends on knowing and approving the actions of their colleagues, for which purpose they need access to Cabinet in order to bring forward the business of their portfolios. In practice, without such access a minister cannot get attention for the agenda of his or her ministry.

In the past 30-odd years, most Westminster governance systems have come under periodic attack for over-centralization.[289] This criticism is often linked to arguments about the changing role and, indeed, status of prime ministers and premiers. These first ministers have undoubtedly become the principal focus of media attention, and the classic idea of *primus inter pares* is now generally seen as outmoded.

While this is no doubt true, it is also the case that first ministers are not presidential executives. The powers of the province are vested by the assembly in ministers or unelected officials, and it is ministers who are accountable and answerable for their use.[290] As a practical matter, therefore, a minister needs to be free to bring matters forward for discussion and decision by colleagues in the Cabinet.

This right, while fundamental, is not to be exercised frivolously or without adequate consultation and preparation. Ministry officials and their central agency counterparts need to ensure that the homework is done, and that issues and alternatives are clearly identified before laying claim to the time and attention of the Cabinet and its committees.

The current practice in Ontario appears to differ to some extent from the norm. As noted earlier, the Premier's Office controls access to the decision-making system on the basis of agreed-upon priorities arising from election commitments.[291] Obviously, unforeseen events and emergencies arise that must be dealt with by the Cabinet, but the existence of criteria raises some doubt about the ability of a minister to exercise the right to bring a matter to his

---

[289] For Australian, British, and Canadian comment about this, see Peter Hennessy, 1995, *The Hidden Wiring: Unearthing the British Constitution* (London: Victor Gollancz); G.W. Jones, 1983, "Prime ministers' departments really create problems: A rejoinder to Patrick Weller," *Public Administration*, vol. 61 (spring); Donald J. Savoie, 1999, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press); Patrick Weller,1985, *First among Equals: Prime Ministers in Westminster Systems* (Sydney, Australia: George Allen & Unwin), pp. 72–103.
[290] See section 5.2 for a discussion of the meanings of the terms "responsibility," "accountability," and "answerability," as well as the differences among them and the relevant application of each.
[291] See section 2.1.4.

colleagues for information or decision. In such circumstances, a minister outside of the inner circle may not be able to exercise his or her responsibilities effectively.

The government has offered the following comments about access to the Cabinet:

> The Premier's Office does not control access to the decision-making system. Each Cabinet agenda has time set aside for Ministers to raise issues and matters that they feel are important. In the event of conflict, the ultimate arbiter of what gets onto the Cabinet agenda is the Secretary of the Cabinet (who is also Clerk of the Executive Council). She makes her decisions based on a number of factors that include relevance to the program determined by the PPCB, urgency, needs of good government, and public interest.
>
> The government also has many other processes (e.g. business planning and other types of planning exercises) for Ministers to bring forward issues and business relevant to their portfolios for consideration and decision-making.[292]

4.2.2 Cabinet Process

Three other matters respecting the Cabinet process are worth mention. First, the significance of the term "board" as distinct from "committee" for the Priorities, Policy and Communications Board of Cabinet is unclear. The Management Board is properly so termed because it fulfills statutory functions and is, therefore, more than a committee of the Cabinet, as its style of business confirms.[293] The same cannot be said for the Priorities, Policy and Communications Board, although it may be so styled as a way of indicating that, in its own fashion, it is more important than other committees of the Cabinet, which no doubt is the case; that is quite normal.

The origins of the Priorities, Policy and Communications Board are found in the Policy and Priorities Board created by the Davis administration in 1972. This

---

[292] Smith Lyons, 2001a, p. 11.

[293] The members of the Management Board sit on one side of the table and supplicant (i.e., requesting) ministers and their officials sit across from them to make their case; "supplicant" ministers attend only for their own items. Decisions of the Board are generally – not always – made in private after the supplicants have departed.

committee was created by statute and operated as a board, which is to say that non-member ministers were treated as supplicants, or outsiders. This is an oddity of governance in Ontario: in most other Westminster systems, there is either a two-tier Cabinet as in the United Kingdom (with some ministers in the cabinet and others, clearly less influential, outside it), or a committee that is seen as more important than the others, but nonetheless still a committee (as in Ottawa prior to 1993/94). The terminology does not matter, but it is important that the Priorities, Policy and Communications Board of Cabinet functions with due respect for non-member ministers, so as not to give rise to perceptions that the more influential ministers can get higher priority attached to their issues regardless of the issues' intrinsic importance. Note that, prior to the shuffle of February 8, 2001, when the Minister of the Environment was given her own policy committee and thus a seat on the Board, none of the ministers key to the area of water management were members of the Priorities, Policy and Communications Board.

The government has provided the following comment: "The Priorities, Policy and Communications Board (PPCB) reports to Cabinet and interested ministers are routinely invited to PPCB."[294]

The second point to note about the Cabinet is that it is described as the final and formal decision maker for all matters considered by its committees, including the Management Board of Cabinet – a practice that has existed since 1991.[295] It is, of course, the practice for the Cabinet to be the final decision maker in any matter affecting collective responsibility. The Cabinet is never a formal decision maker – that is the function of the lieutenant-governor, who acts on the advice of the Executive Council or of individual ministers. It is, however, unusual for the Cabinet to be asked to approve formally the decisions of a statutory body with executive authority such as the Management Board of Cabinet. Under most systems, such decisions are preceded by appropriate Cabinet decision making concerning the relevant policy. Prior to 1991, the practice in Ontario was more consistent with custom elsewhere regarding the decisions of statutory committees; one former Secretary both of the Cabinet and to the Management Board has recalled the relationship as follows: "Cabinet had the authority to send items back to Management Board for review. It had no authority to approve Management Board decisions. The Minutes of Management Board were on the agenda of Cabinet for information."[296]

---

[294] Smith Lyons, 2001a, p. 11.

[295] See section 2.1.4.

[296] Bob Carman, 2001, "Comments on … *Machinery of Government for Safe Drinking Water in Ontario*," Unpublished comments on draft of this paper [author's files], February 5.

Does this change matter? It does if the current system is operating in such a way that everything is filtered through the Cabinet and therefore through the Premier's Office. It would matter because it would provide evidence that the decision-making system has become highly centralized and perhaps overly politicized. Remember, too, that in Ontario's decision-making system, "… even housekeeping and routine matters are still considered to be policy" and therefore subject to Cabinet approval.[297]

The government has commented as follows:

> Cabinet committees review and recommend policy prior to items, with financial implications, going to MBC. Generally, MBC decisions come forward to Cabinet for review in the context of the relevant policy recommendations. This is to ensure that policy, fiscal and operational decisions are integrated and consistent. This practice is not intended to sub-ordinate MBC, but rather to uphold the collective responsibility of Cabinet and ensure integrated decision-making.
>
> The Premier's Office is an advisory, not a decision-making body. The Premier's Office, with Cabinet Office, does review material coming before Cabinet, and provides advice to the Premier, but has no authority to block or "filter" Cabinet decisions, or items going to Cabinet.
>
> The term 'politicized' is not explained. Does the author suggest that, in making decisions, ministers ought not to take into account a wide variety of factors and criteria, some of which might be labeled "political"? Does the author suggest that there is a bright-line test that can be used to demarcate between decisions based on good policy and decisions based on good politics? To the contrary, many would argue that the supposed dichotomy between sound policy and good politics is false.[298]

The third point to note about Ontario's Cabinet is that several, but not all, parliamentary assistants are included in its standing policy committees. This is no doubt good training, but it raises questions about the status of these members of the assembly. For purposes of avoiding conflict of interest they are treated

---

[297] Smith Lyons, 2001b, p. 27. See also the beginning of section 3.1.
[298] Smith Lyons, 2001a, p. 11.

like any other backbenchers, and are not therefore members of the ministry.[299] However, their presence on the committee gives rise to a contrary appearance. It is clear that, in practice, they must be bound by collective responsibility, since they are present at – and even participating in – the Cabinet deliberations of ministers. Indeed, as of the Cabinet shuffle of February 8, 2001, one parliamentary assistant has been promoted to vice-chair of a committee.[300]

This sort of arrangement can only give rise to confusion about roles and responsibilities. Such confusion is undesirable in itself, but it also degrades the distinctiveness that attaches to the responsibilities of ministers and their role as the executive government of the province.

The government has commented as follows:

> This is not unique to this government. The 1990–95 and 1985–90 governments appointed parliamentary assistants to Cabinet committees. This practice may also have been followed prior to 1985.
>
> Parliamentary assistants are members of the executive branch of government. They are appointed under the Executive Council Act. As parliamentary assistants, they are responsible to the Lieutenant Governor in Council, who appoints them and may prescribe their duties.
>
> They are sworn to confidentiality.
>
> Just as ministers, parliamentary assistants are paid by the government (not by the Legislative Assembly) for their executive (as opposed to legislative) duties.
>
> Just as a minister who breaks with government policy, a parliamentary assistant who opposes the government would have to resign as a parliamentary assistant.
>
> The Premier sends "mandate letters" to parliamentary assistants, making clear their responsibilities.

---

[299] *Members' Integrity Act, 1994*, SO 1994, c. 38, s. 19.
[300] See table 1 in section 2.1.2.

> Note that Parliamentary Assistants do not attend Cabinet, where the ultimate decision is made.[301]

When asked to clarify this information by providing a list of the membership of the ministry, the government replied: "We are uncertain as to what you mean by, 'membership of a ministry.' If you could qualify what your intention is, we would be glad to answer."[302]

4.2.3 Central Agencies

The Cabinet Office appears to fulfill many of the functions that are generally found in similar organizations elsewhere. The Secretary of the Cabinet supports the premier in the organization and operation of the Cabinet process; he or she also provides some support in matters of government organization and the selection and development of deputy ministers. The role of the Cabinet Office in providing ministers with access to the Cabinet has been noted, and in itself is quite normal. It is less normal, however, that the Cabinet Office staff briefs cabinet committees on priority proposals from ministers instead of leaving this to ministers and their officials.

Cabinet secretaries in some Westminster systems have evolved into deputy ministers to the first minister, and cabinet offices into departments – or ministries – serving the first minister. Perhaps this is also the case in Ontario, although the premier and his political staff appear to play the main role in the management of important day-to-day issues. The normal practice is for the first minister to meet regularly with his or her chief civil service and political advisers to review all relevant government business, but for the Cabinet secretary to withdraw from discussions of a strictly partisan nature.[303] Such meetings are important in ensuring that the first minister has ready access to advice that takes adequate account of administrative as well as political considerations.

The government has commented:

---

[301] Smith Lyons, 2001a, p. 12.

[302] Smith Lyons, 2001e [untitled], Submission to Associate Commission Counsel, The Walkerton Inquiry [author's files], October 29.

[303] Currently in Ottawa, the Prime Minister has a regular morning meeting with the Secretary to the Cabinet and his Chief of Staff.

> A clear division of responsibility exists in Ontario between the management of political issues and management of the operations of government. The Premier's Office staff provides advice. Execution of the Premier's decisions and all operational matters are the responsibility of the professional public service. Even when some aspect of government operations results in a political issue, responsibility for the resolution of the operational issue – be it day-to-day or longer-term – still rests squarely with the Secretary of the Cabinet and/or her senior officials.[304]

The role of the Cabinet Office in respect of government organization and senior appointments appears to be somewhat attenuated. In its comments on part 2 of this report, the government took exception to a description of the Cabinet Office as providing "… support to the Premier and to ministers in the development and selection of senior officials and members of boards and agencies, and advice to the Premier on matters of government organization at the macro level – i.e., number and mandates of ministers and ministries."[305] If it is to be inferred that the Cabinet Office does not advise the premier on the number and mandate of ministers and ministries, this is a gap in its responsibilities that is worth noting in any discussion of improving government organization for the provision of safe drinking water.

The government has provided the following comment:

> The Deputy Minister of Ontario Public Service Restructuring and Associate Secretary of the Cabinet, Centre for Leadership leads two related functions that support public service transformation and build executive leadership capacity.
>
> The Ontario Public Service Restructuring Secretariat (OPSRS) supports the Secretary of the Cabinet and provides advice on matters of public service restructuring to ensure performance effectiveness and efficiency. This has included, developing models and alternatives regarding government organization, program realignments, cultural change, and ministry mandates. However, the selection of ministers

---

[304] "Ministry Comments on … Final Report on Machinery of Government," Smith Lyons to Commission Counsel, 2 August 2001, p. 12.

[305] A revised version of this text, amended on the basis of the government's comments, is cited in the bullet list of Cabinet Office responsibilities under section 2.1.3.

> and their specific portfolios or duties rests solely with the Premier and is outside the scope of this advisory role.
>
> The Centre for Leadership is the focal point for the development of executive leadership of the Ontario Public Service. Specifically, the CFL provides:
>
> 1. strategic planning and advice on senior management group human resource issues to the Secretary of the Cabinet and the Premier;
> 2. executive human resources services;
> 3. executive education, training and development; and
> 4. deputy minister administration.
>
> The CFL supports and works with the Executive Development Committee, a committee of seven deputies, chaired by the Secretary of the Cabinet who's [sic] role is to provide direction to and oversee decisions regarding senior management.[306]

The Cabinet Office has established a special relationship with ministries in respect of government communications. As noted in part 2, the Cabinet Office directs communications units in ministries and agencies throughout the provincial government, and the heads of the units answer to a deputy minister in the Cabinet Office as well as to their own line deputies. This is an unusual arrangement. Government communications lie at the intersection of politics and administration, and they are the subject of much effort to find the right balance between political direction and professional execution. It is abnormal for the Cabinet Office to have a directing relationship with staff inside ministries. Whatever advantages it may offer in terms of avoiding mistakes, providing strategic direction, and creating a close link between the Premier's Office and communications' units in ministries, this arrangement is unmindful of the responsibilities of ministers or the legal powers, duties, and functions of deputy ministers. It also gives rise to more general concerns about the centralization of decision making in the Ontario government, and may indicate that the responsibilities of ministers are not treated with appropriate weight.

The government's comments follow:

---

[306] Smith Lyons, 2001a, p. 13.

> This model is not unique to Ontario. It has been adopted by other provinces.
>
> Communications directors report dually to the line deputy and the Cabinet Office deputy in a co-operative, rather than hierarchical arrangement. Communications directors are not more or less responsible to Cabinet Office than they are to their own DMs and Ministers. Rather, they are also responsible to Cabinet Office. The report also fails to acknowledge that similar models have been, or are being, implemented for a number of functions across the OPS (e.g. legal, auditing, IT), and are part of a more effective approach to government administration in general.[307]

The Management Board Secretariat plays a classic role as the comptroller of government, setting management standards and overseeing the expenditure of funds in conjunction with the Ministry of Finance. It does not have a policy capability and is not, therefore, in a position to evaluate program effectiveness or to provide a counterbalance to the policy capacity of the Ministry of Finance. Together with the Cabinet Office, the secretariat ought to have a challenge capacity, one that forces ministries to provide comprehensive policy rationales and frameworks for particular proposals.

It should be noted that an effective challenge capacity does not need to be based on formal programs for effectiveness evaluation. Indeed, in Ontario as elsewhere, such programs as "managing by results" and "managing by objectives" have promised much and delivered little. However, locating policy capacity in central agencies can be a highly effective way to challenge ministries to explain proposals in policy terms rather than operational ones. Such an arrangement does not require establishing formal priorities and objectives; it is simply a matter of developing and deploying a dozen or so analysts with sufficient sectoral expertise to help ministry staff see the policy dimensions of their program activities. The absence of this capacity is a weakness that may explain in part the evident difficulties that the ministries concerned with drinking water have had in developing and implementing framework policies, as distinct from making incremental changes to programs.[308]

---

[307] Ibid.

[308] See the discussion of program legislation under section 4.3.4.

As discussed in part 2, the secretary of the Board of Management is also the chair of Ontario's Public Service Commission and exercises most of the powers of the commission.[309] This arrangement, which was accomplished by cross appointments and delegation of authority between appointees with multiple duties, dates from the 1980s and has never been confirmed by the legislature through statute. The effect is to give the government an efficient and effective means of managing its human resources. It does not, however, satisfy the intent of having an independent, arm's-length commission to oversee staffing in the Ontario Public Service, notwithstanding the existence under the commission of a grievance board that cannot be overridden by the commission. Ontario is thus left open to the politicization of the public service that is so antithetical to the Westminster ideal, but has become the norm in some other provinces. Whatever the merits of these arrangements, it seems important enough to the overall functioning of the Ontario Public Service to warrant statutory confirmation (and transparency) after 15 years of ad hoc arrangements.[310]

The government has commented:

> While it is true that operational and administrative support to the Civil Service Commission is currently provided through the Management Board Secretariat and the Centre for Leadership, the Civil Service Commission continues to meet regularly and to exercise its various statutory powers and functions related to human resources management under the *Public Service Act,* particularly in respect of senior levels of the Ontario Public Service. It also continues to exercise regulation-making authority under the Act. The provision of support to the Commission by these organizations is necessary because the Commission does not maintain a separate bureaucracy.
>
> The codification by statute of the administrative support structure is not legally necessary in order to achieve transparency, and would serve primarily to reduce flexibility in reorganizing the administrative support structure at any time in the future. The author acknowledges the benefits of this structure when he states that *"The effect is to give the Government an efficient and effective means of managing its human resources."*

---

[309] See the discussion of the Management Board Secretariat under section 2.1.3.

[310] Note that the government's current proposals for amendments to the *Public Service Act* do not include reference to this matter. See Ontario, Management Board Secretariat, 2000c, *The Ontario Public Service in the 21st Century: Discussion Paper on the* Public Service Act (Toronto: the secretariat, March).

The Lieutenant Governor in Council appoints members of the Commission through Order-in-Council under subsection 2(1) of the *Public Service Act.* In recent years, the Civil Service Commission has consisted of three "permanent" members: the Chair (who is also the Secretary of Management Board of Cabinet and the Deputy Minister of Management Board Secretariat), the Secretary of Cabinet and the Associate Secretary of Cabinet responsible for the Centre of Leadership; and approximately five other deputy ministers appointed for one-year terms. The appointment as Commissioners of these senior public servants, who are not permitted to engage in most forms of political activity under Part III of the *Public Service Act* and who are not political partisans, promotes neutrality in the Ontario Public Service. The fact that the Chair is also the Secretary of Management Board of Cabinet and Deputy Minister of Management Board Secretariat is organizationally efficient and consistent with the principle of neutrality since each of these positions is strictly apolitical.

There is no evidence that here [*sic*] is or has been any politicization of the public service. Indeed, all the evidence is that the civil service's professionalism and non-partisan neutrality has been fostered and protected since 1995.

It should be noted that the Commission has, under section 24 of the Act, delegated the power to recruit qualified personnel, except at the most senior levels, to all deputy ministers so that ministries can effectively recruit their own personnel in accordance with applicable human resources policies (e.g., hiring on basis of merit as set out in Management Board of Cabinet's Equal Opportunity and Staffing Operating Policies) and their own operational requirements. The fact that most staffing decisions are made at the ministry level further reduces any risk of politicization of the Ontario Public Service.

Certain of the Commission's powers and functions are, however, subject to approval of the Lieutenant Governor in Council. Such powers or functions consist of recommending salary ranges for each classification where such ranges are not determined through collective bargaining under section 4(b) of the *Public Service Act;* the paying of special termination allowances under section 84 of Regulation 977 under the *Public Service Act*; and the making of regulations under subsection 29(1) of the Act. These powers or functions involve the

> expenditure of public funds and the making of subordinate legislation, respectively, and are matters which are appropriately subject to political control by Cabinet.[311]

The Ministry of Finance is perhaps the key central agency in the Ontario government. It has spearheaded both the province's realignment of functions with the municipal level and its implementation of tax policies designed to grow the province's economy. This ministry played an important role in the 1993 design, the 1997 re-mandating, and the 1998 privatization review of the OCWA.[312] Its recent SuperBuild initiative demonstrates the ministry's interest in more strategic thinking across the government as a whole.

The status of SuperBuild is also worth comment. This body is formally a corporation established pursuant to statute, with a board of directors charged with managing the corporation.[313] In practice, the board is advisory, and is described as such.[314] Moreover, the SuperBuild Corporation operates at the very heart of government, closely linked to the Premier's Office and the Ministry of Finance, and is described as playing the role of a central agency.[315] Its mandate no doubt makes a good deal of sense, but its organizational form is entirely inappropriate for a central agency or any other body that operates at the centre of power in a system of responsible government.

Ontario's central agencies, including the Premier's Office, keep a tight grip on the activities of the government. There is a high degree of centralization, but decision making is necessarily piecemeal because these agencies do not challenge ministers and their officials to think strategically. Nor are the agencies themselves equipped to develop and portray their own roles strategically.[316]

---

[311] Smith Lyons, 2001a, pp. 14–15.

[312] Note that the role of the ministry in the creation of the OCWA appears to have been a good deal more important than the factual description under "Ministry of the Environment" in section 2.1.5, which was commented on by the government, suggests.

[313] See the discussion of SuperBuild in section 2.2.3, which is in the part of this paper that was reviewed by the government.

[314] Again, see section 2.2.3.

[315] For a discussion of the role of central agencies, see section 2.1.3.

[316] The only official description of the role of the Cabinet Office referred to by the government after twice reviewing part 2 of this report is contained in two paragraphs within a 150-page manual designed to guide ministries through the procedures of the Cabinet decision-making system. See Smith Lyons, 2001a, p. 15; and Ontario, 1997, *The Ontario Cabinet Decision-Making System: Procedures Guide* (Toronto: May), pp. 14–15. It is also unusual in these times for there to be no description of the functions and organization of the Cabinet Office or the Premier's Office on the Government of Ontario's Web site.

One of the consequences of the weaknesses of the central agencies is seen clearly in the way in which mandates, policies, and programs have evolved more or less haphazardly in respect of drinking water. The mandate for clean drinking water is divided among several ministries and agencies; there is no comprehensive policy framework to compensate for splintered responsibilities. Initiatives such as the creation of the OCWA and the discouragement of public utilities commissions are embarked upon for narrow reasons unrelated to any drinking water strategy; and programs and operations are driven by events and reflected in detailed, non-strategic legislation and regulations.

4.2.4 Ministries

Establishment of Ministries It was noted that the premier decides the number and mandates of ministries and ministers.[317] The government considers this to be a matter of common-law prerogative, although it is also provided for in the *Executive Council Act*.[318] In any event, it is not the practice to seek legislative approval for the creation of new ministerial positions or new ministries. The government takes the view that it only needs to seek legislative approval to provide a minister with powers.[319] This permits a great deal more flexibility in matters of government organization than is available in some other Westminster jurisdictions (including Ottawa), and more flexibility than in the past in Ontario, when it was customary to create new ministries through statute even when no powers were conferred through such legislation.[320] The result is that today there are many ministries that have no institutional basis in statute, including the Ministry of Health and Long-Term Care and the Ministry of Finance.

The flexibility provided by these arrangements enables the government to respond quickly and efficiently to new organizational requirements without having to resort to elaborate and somewhat unsatisfactory administrative means of cobbling together temporary arrangements pending the passage of legislation. This is an important feature of the machinery of government in Ontario.

---

[317] See section 2.2.1.
[318] *Executive Council Act*, RSO 1990, c. E.25, s. 2.
[319] Smith Lyons, 2001c.
[320] Ibid. Indeed, the use of legislation in the 1970s extended to the creation of a Cabinet committee: the Policy and Priorities Board. See the discussion of this board under "Cabinet Process," section 4.2.2, above.

The drawback in having such easy access to these essential building blocks of government organization is the temptation to pile changes on top of one another until organizations become unwieldy, perhaps too finely tuned to transitory political trends.[321] As discussed elsewhere in this report, legislation – particularly organizational legislation – imposes a certain discipline in thinking through objects, powers, responsibility, and accountability for institutions, which is clearly desirable.[322]

Program Legislation Ministries in the Ontario government are generally organized along standard lines, with dedicated units to oversee policy, sectoral programs, and regional operations. Where governing legislation exists, it is fairly straightforward – and relatively brief, stating that the minister "… shall preside over and have charge of the Ministry."[323] The program statutes are generally much more complicated and may run to hundreds of sections. The *Ontario Water Resources Act* has 116 detailed sections, running to over 100 pages, and this is typical, not exceptional. The *Municipal Act* rivals the length of the federal *Income Tax Act*.

The length and detail of Ontario's statutes reflects two relevant points. First, statutes are used to provide detailed mandates and direction to government officials: consider, for example, the numerous references to the powers of directors and provincial officers found throughout the *Ontario Water Resources Act* and the *Environmental Protection Act.* Second, statutes are amended piecemeal to deal with particular matters as they arise.

The practice of mandating officials in Ontario's statutes not only produces detailed statutes, but it also creates a degree of duplication and overlap among the powers of ministers. The detail is necessitated by the need for precision in the empowerment of officials; under the more normal system, by contrast, general powers are awarded by statute to ministers, who may then assign duties to officials as necessary. The overlap may be seen in statutes such as the *Ontario Water Resources Act* and the *Environmental Protection Act,* which provide officials with detailed powers, duties, and functions, and at the same time place specific powers and the overall administration of the acts in the hands of the minister, together with the authority to limit the powers otherwise bestowed on officials.[324]

---

[321] Among the unlegislated ministries are the Ministry of Health and Long-Term Care; the Ministry of Municipal Affairs and Housing; the Ministry of Agriculture, Food and Rural Affairs; the Ministry of Consumer and Business Services; the Ministry of Tourism, Culture and Recreation.

[322] See sections 5.7 and 6.1.2.

[323] See *Ministry of the Environment Act*, RSO 1990, c. M.24, s. 3.

[324] See, for example, the provisions set out in the *Ontario Water Resources Act*, s. 5.

The detail in Ontario's statutes may be characterized as a hodgepodge of reactions to historical events. The consequence is that the statutes often read more like (badly organized) procedural manuals. The intent of the legislation is seldom clear, and it can be a Herculean task to determine the exact scope of the powers of any particular individual, or all of the elements that may bear in particular situations. Only the expert may negotiate a path through this jungle with any confidence.[325]

This situation is a shortcoming of some significance. Statutes are not procedural manuals. They ought to be accessible and they should have clear strategic intent. They assign the powers of the province under the Constitution and should be organized and presented in a way that can be read and understood by the informed citizen – or the newly appointed office holder. Statutes should be as concise as possible, purposes and objectives should be articulated clearly, and powers, duties, and functions assigned precisely.

Policy Development The complexity and disorganization of the statutes reflects inadequate attention to policy in the ministries and central agencies of the provincial government. The Environmental Commissioner's Office has been active throughout the 1990s in reviewing the adequacy of the government's measures for protecting the province's groundwaters. In a special report in July 2000, the commissioner noted that although the Ministry of Municipal Affairs and Housing and the Ministry of Natural Resources were "… 'active partners' with the Ministry of the Environment, which is 'developing' a groundwater strategy," no strategy had materialized.[326] In this report, the commissioner concluded:

> … the current legal and policy framework for groundwater management is best characterized as fragmented and uncoordinated. The ministries do not have a publicly recognizable strategy that spells out how priorities are to be set and how ministries can coordinate their efforts and work with all stakeholders to address the conflicting goals contained in different laws and policies.[327]

---

[325] The government has recognized this shortcoming in respect of the *Public Service Act*; the Management Board Secretariat has noted that since its inception in 1878 "The Act has been amended many times over the previous 122 years, and the result is legislation in which changes have been layered on changes, creating a 'patchwork quilt' containing unnecessary restrictions and arcane details." Ontario, Management Board, 2000c, p. 2.

[326] Ontario, Office of the Environmental Commissioner, 2000, p. 3.

[327] Ibid., p. 6.

There are few documents available that explain the policy framework within which the government functions. There is no description of the role of the central agencies. There is no landmark document on water, and generally few White Papers. Recently, new ground was broken with a Cabinet Office document on the restructuring of the Ontario Public Service, but this is the exception that proves the rule.[328] In respect of water, even within the government, the documents available cannot be said to provide ministers with an adequate overview of policy directions and choices.[329]

Lack of attention to policy and strategic direction leads to an overlap in powers, to general confusion, and to a lack of clarity about who does what. Statutes that reflect more and more the accretion of remedies to past errors are no substitute for the periodic rethinking of purposes and objectives and the codified enumeration of powers, duties, and functions.

4.2.5 Agencies

The government's relationship with provincial agencies was discussed at some length in part 2 of this report. There are several noteworthy points that arise from this review.

At the most general level, it is interesting that the responsibility for initiatives to establish new agencies rests with individual ministers and the Management Board of Cabinet rather than with the premier. This contrasts with practice in the federal government, but is generally consistent with practice in other Westminster-style systems where the prime minister may be said to have a veto but not a power of initiation.[330] It would be unusual if the premier did not enjoy the same privilege.

---

[328] Ontario, Cabinet, Public Service Restructuring, 2000.

[329] See, for example, Ontario, Environment and Natural Resources.

[330] The federal government provides an example of the prime minister's actively controlling the creation of new agencies, and indeed any changes in the machinery of government. Ministers may propose new organizations, but it is the Secretary to the Cabinet and the Privy Council Office staff that undertake the analysis and advise the prime minister both on the principles behind a proposal and on its implementation, including such matters as the degree of ministerial responsibility, the application of arm's-length principles, and the nature of the administrative regime to be applied to the proposed entity. In the past, the Privy Council Office has provided detailed drafting instructions for the preparation of necessary legislation, and it advises the prime minister on mandates, powers, and any relevant instructions that may be issued to ministers and officials.

This practice has the potential to strengthen the responsibilities of ministers, provided that the agencies thus created do not cause dissent within the ministry, leading some ministers to think that their interests are being somehow undermined. It is certainly important to ensure that the mandates of new agencies do not interfere with those of existing organizations. It would, for example, be problematic if the OCWA had been established at the initiative of the Minister of Finance without the premier's realizing and agreeing to the consequent change in the mandate of the Ministry of the Environment.[331]

There is a degree of ambivalence about the meaning of "independence" and "arm's length" with regard to provincial government agencies, as is demonstrated throughout the Management Board's Agency Establishment and Accountability Directive. Agencies may describe themselves as being at arm's length and yet subject to ministerial direction, a view supported by the Cabinet Office.[332] Similarly, many agencies are given executive boards of directors with management authority even though the agencies are under the minister's day-to-day direction and the boards themselves report to the minister.[333]

This is messy. Either the assembly assigns powers to an arm's-length agency headed by a non-elected official (usually appointed by the government), or it gives the powers to a minister. It cannot and does not do both. It may also create an agency with powers vested in the minister. And it is entirely appropriate for the government, pursuant to statutes of general application to the administration of publicly funded bodies, to require arm's-length agencies to respect particular management standards and procedures. It is altogether different, however, for the government to seek to provide direction to arm's-length agencies other than that provided for by statute.

The reference in the Agency Establishment and Accountability Directive to agencies' being "established by the government"[334] is difficult to reconcile with the reality that most agencies are created by the legislature through the enactment of statutes on the recommendation of the government. Perhaps the choice of phrase is designed to draw a distinction between the agencies subject to the directive and those that are truly creatures of the legislature, the clearest examples

---

[331] See section 2.2.2 for details on the establishment of the OCWA.
[332] See the details on the OCWA in section 2.2.2., as well as the discussion of arm's-length agencies as a part of alternative service delivery under section 2.2.1.
[333] The Ontario SuperBuild Corporation is one example; see section 2.2.3.
[334] Cited in the discussion of this directive under section 2.2.1.

of which are the Office of the Provincial Auditor and the Office of the Environmental Commissioner.[335]

In the context of drinking water, these confused arrangements affect three of the agencies discussed in this report:

- The OCWA was created principally because of the appearance of a conflict of interest within the Ministry of the Environment, which owned and operated water and sewage facilities for which it was also the regulator. Today, the OCWA is under the direct responsibility of the minister of the Environment; it has the deputy minister of the Environment on its Board of Directors (one of four deputy ministers on the board), which is also accountable to the minister, and it has a close day-to-day working relationship with the ministry. The board reports to the minister of the Environment.[336]

- The SuperBuild Corporation, as discussed above, is regarded as a fourth central agency, despite its status as a corporation established pursuant to statute with an executive board of directors drawn principally from outside of government. This board reports to the minister of Finance.[337]

- The Normal Farm Practices Protection Board, a statutory body with its mandate defined by the legislature, is subject under its act to the direction of the minister of Agriculture, Food and Rural Affairs.[338] It is perhaps instructive to cite the provision in the statute, which makes it clear that the scope for direction is unlimited: "The Minister may issue directives, guidelines or policy statements in relation to agricultural operations or normal farm practices and the Board's decisions under this Act must be consistent with these directives, guidelines or policy statements."[339]

  Note that the minister's authority is not limited to directives, or even to general directives. The board must exercise its powers under the statute in accordance with the minister's "directives, guidelines or policy statements

---

[335] See section 2.2.7 for a discussion of the Office of the Environmental Commissioner. The other agencies not subject to the directive are the Offices of the Chief Election Officer, the Ombudsman, the Integrity Commissioner, and the Information and Privacy Commissioner.
[336] See section 2.2.2.
[337] See section 2.2.3 for more on the Ontario SuperBuild Corporation, and section 2.1.3. for a discussion of central agencies in general.
[338] See section 2.2.6.
[339] *Farming and Food Production and Protection Act, 1997,* section 9.1.

> in relation to agricultural operations or normal farm practices." This is a sweeping assertion of ministerial authority that can only blur, if not eradicate, the board's accountability for the powers granted to it under statute.

As for the OCWA in particular, its relationship with the Minister of the Environment is said to be the basis for its operation "… under the close supervision of the Ministry of the Environment …"[340] This is not as it should be. The minister has a general responsibility for the agency, but this should not mean that this places the ministry in a supervisory position. It is quite normal for a minister to have a statutory relationship with an agency that has no formal relationship with the department or ministry that supports the minister. In this case, it is in fact inappropriate for the Ministry of the Environment to have a supervisory relationship with an entity that was separated from that ministry in order to avoid even the appearance of a conflict of interest.

The government has commented as follows:

> OCWA does interact with the bureaucracy within the MOE but in the appropriate sense of an operator asking questions of Ministry staff and dealing with issues that are of a regulatory nature. OCWA staff will also be in contact with Ministry staff in its role as project manager working for municipalities on capital projects. This would be no different for a private sector company in a constant working relationship with a regulator.
>
> The *Capital Investment Plan Act* talks to the *Minister* issuing directives consistent with policies issued by the Lieutenant Governor in Council (see ss. 16(2), *CIPA*). The distinction between "Ministry" and "Minister" is meaningful in a formal sense.
>
> Notwithstanding the OCWA/Minister reporting relationship, at a practical level the President of OCWA maintains an ongoing dialogue with the Deputy Minister (MOE).[341]

A further institutional comment about the OCWA is relevant. It is said to be structured to compete fairly with the private sector, but this is manifestly not the case; it has a variety of commercial advantages, not the least of which is the

---

[340] See section 2.2.2.
[341] Smith Lyons, 2001a, pp. 15–16.

financial backing of the province's treasury. Furthermore, the agency's relationship with the government makes any comparison with the private sector impossible: it does not have the independence traditionally associated with Crown corporations engaged in competitive, commercial pursuits.

The appropriate relationship between ministers and arm's-length bodies is discussed in part 5 of this report.[342] It is sufficient at this point to note that the current arrangements in Ontario blur accountability for the performance of the functions conferred on agencies, leaving both ministers and agency heads vulnerable in the event of problems.

The government has commented as follows:

> To state that the current arrangements in Ontario blur accountability between ministers and agency heads neglects the role of the implementing legislation and memorandum of understanding (MOU) which serve to define and clarify roles and responsibilities. Annual ministry and agency business plans which are mandatory and implemented as a result of the 1995 Ontario Financial Review Commission (OFRC) report, also serve to enhance accountability and performance expectations.[343]

4.2.6 Delegation

Attention should be drawn to Ontario's practice of making extensive use of powers of formal delegation to change fundamentally the way in which power is exercised. This is apparent in such general areas as the governance of the Ontario Public Service, where, as noted, such delegation has resulted in the powers of the Public Service Commission's being exercised by a committee chaired by the secretary to the Cabinet and the Management Board Secretariat.[344]

This phenomenon is also seen specifically in respect of infrastructure spending (including the funding of water and sewage works): the powers of the Management Board of Cabinet are formally exercised by the members[345] of the Cabinet Committee on Privatization and SuperBuild, supported by the Ministry

[342] See section 5.6.
[343] Smith Lyons, 2001a, p. 16.
[344] Smith Lyons, 2001b, p. 3.
[345] Ibid., p. 5.

of Finance and the SuperBuild Corporation. (Note too that in turn ministries have lost control of capital budgets, even though the capital funding may continue to be carried in a ministry's vote.)

Any delegation of power should be consistent and clear. Delegating the statutory powers of a formal committee of the Executive Council to an informal committee of officials is not good practice, if only for the well-known and historically valid reason that committees are notoriously difficult to hold to account.[346] On the other hand, delegating the statutory powers of a formal committee of the Executive Council to the members of a committee of the Cabinet offends somewhat less the principle of assigning powers to individuals rather than corporations, given the informal character of the Cabinet and its committees.

The government makes extensive use of power delegation of all sorts. The delegation of powers, for example, has played a central role in the province's alternative service delivery initiative.[347] In some cases, delegation may be unavoidable.[348] But in general, the drawback of such arrangements is that they weaken accountability.[349] When powers, duties, and functions – and, in consequence, responsibility and accountability – are shared, delegated, and reassigned, the risk is that this diffusion of responsibility will make it difficult to be certain about who – if anyone – is really in charge.

---

[346] This difficulty with the accountability of committees is one of the roots of the modern concept of individual ministerial responsibility. See Canada, Privy Council Office, 1993, *Responsibility in the Constitution* (Ottawa: Minister of Supply and Services), p. 23.

[347] See, for example, *Safety and Consumer Statutes Administration Act: An Act to provide for the delegation of the administration of certain designated statutes to designated administrative authorities and to provide for certain limitation periods in those statutes,* SO 1996, c. 19. There is currently a proposal to amend the *Public Service Act* to permit deputy ministers to delegate their staffing authorities to individuals outside their own ministries in order to permit "… cross-ministry integration of service delivery within the OPS, as well as partnership arrangements"; see Ontario, Management Board, 2000c, p. 5.

[348] For example, authority over land-use planning rests by default with the municipality, as outlined in the discussion of the Ministry of Municipal Affairs and Housing under section 2.1.5.

[349] "New public management theory," by contrast, supports the use of delegation as an element in its advocacy of separating administrative and political accountability, which proponents of this theory see as an essential element of improved public services. See Peter Aucoin, 1995, *The New Public Management: Canada in Comparative Perspective* (Montreal: Institute for Research on Public Policy).

4.2.7 Downsizing

In reviewing the governance in Ontario, the outside observer is struck by the comments of various knowledgeable participants concerning the deleterious effects on morale and capacity brought about by successive reductions in resources, and the attitude of the government toward the Ontario public service. In her annual report for 1997/98, the Ontario ombudsman noted,

> It is common for public servants to feel that neither the public nor government decision-makers appreciate their work. The continuing departure of colleagues, combined with long hours in an atmosphere of low morale, and a sense of insecurity about their own future, are not conditions that promote productivity. And no organization can easily compensate for the loss of valued institutional memory and expertise.[350]

In her final report for 1998/99, the ombudsman elaborated on her observations about the government's attitude towards the public service:

> As the province's Ombudsman, it is my job to be aware of any deficiencies in the administration of public service. From my point of view, it would not be an overstatement to say that public service administration in Ontario is in a state of crisis.
>
> […]
>
> The fact is a demonstrable lack of resources has led to an inability to provide acceptable levels of service, and senior government officials have failed to take adequate steps to address the problems.
>
> As Ombudsman I have witnessed the development of what I can only describe as an atmosphere of fear among public servants, where senior officials are afraid to question the wisdom of the government's approach for fear of reprisal or loss of reappointment. As a result, many of the values upon which the public service has historically relied, including the obligation to "speak truth to power" even when the truth is unwelcome, have been seriously undermined.[351]

---

[350] Ontario, Office of the Ombudsman, *Annual Report 1997/98* (Toronto: the office), p. 2.
[351] Ontario, Office of the Ombudsman, *Annual Report 1998/99* (Toronto: the office), pp. 3, 4.

A former deputy minister's report on the Ministry of the Environment makes similar points. Noting that the ministry had made little progress in developing and implementing a "vision" for the future, she made the following observation:

> A contributing factor has been the reality of public service in Ontario and elsewhere over the last decade or more. This reality is characterized by significant rethinking of the role of government, major restructuring of government services including redefining core businesses, and major reductions in the overall size of government. Another factor is the relatively high turnover of leadership during this time, including ministers, deputy ministers, and assistant deputy ministers. Our experience suggests that these factors combined – not only in MOE [Ministry of the Environment] but in other Ontario ministries and other jurisdictions as well – make it very difficult for any organization to focus on long range thinking and planning.[352]

4.3 Conclusion

The significance of the various points raised in this section lies less in the particular detail than in the overall message conveyed of unclear – or absent – thinking about institutions and accountability. The lack of precision in the assignment of powers, the subordination of ministers to inappropriate central direction, the enunciation of conflicting regimes for the governance of agencies, the extensive use of delegation, and the general imprecision about institutional arrangements suggest that inadequate attention is being paid to matters of governance.

5 Principles for the Machinery of Government

5.1 Importance of Clarity in Roles, Responsibilities, and Relationships

This part of the report sets out principles to guide the consideration of future arrangements for the provision of safe drinking water in Ontario. The principles focus on three areas: the importance of clearly identifying roles and responsibilities; the assignment of authority; and the design of structures and processes that will achieve the policy objectives sought.

---

[352] Executive Resources Group, p. 41.

The principles presented here are based on the assumption that, regardless of how services are provided, there are certain functions for which the government ought to be responsible and for which adequate resources need to be provided. This may mean providing a regulatory framework with necessary scientific and enforcement services; it may mean providing infrastructure funding or operational expertise; it may mean providing services directly to the public.

Whether services are provided directly by the minister's department or ministry, by an arm's-length agency, or by a lower level of government, ministers retain responsibility for the overall legislative framework within which these activities take place. They are, in short, responsible for the general policy governing the activities of arm's-length agencies. The same applies to services that are contracted to municipalities, private sector bodies, or non-governmental organizations.

Therefore, regardless of how essential services are provided, ministers and, more particularly, the premier are responsible for the overall design of the system through which services are delivered.

5.2 Responsibility, Accountability, and Answerability

Any discussion of organizational arrangements in the public sector inevitably raises questions about the use and control of power. In this section, the relationships among ministers, officials, the legislature, and the public are discussed in terms of responsibility, accountability, and answerability.

The use of these terms is not always precise; to some extent it cannot be, because the accountability of ministers is a matter of convention and practice, governed ultimately by collective responsibility, which is fundamentally political in character and operation. However, a degree of precision is possible, and it is useful at the outset of such a discussion to define what is meant by these often interchanged terms.

'Responsibility' refers to

- the constitutional relationship of ministers to the legislature in our system of "responsible government" and

- the assignment and exercise of powers of the state by elected and non-elected officials.

'Accountability' refers to

- the relationship to the legislature and its committees of office-holders, elected and non-elected, in respect of the use of powers directly conferred on them by the legislature; and

- the relationship of officials to office-holders whose delegated powers they exercise.

'Answerability' refers to

- the relationship of ministers to the legislature when providing information about the actions taken by non-elected officer-holders in whom the legislature has vested powers necessary for such actions; and

- the way in which officials of ministries, in particular deputy ministers, support the accountability of ministers, principally through appearances before committees of the legislature where they explain the policies and actions taken.[353]

5.3 Transparency

Before exploring how these basic concepts are used in designing systems of governance, it is worth noting that institutions should be structured, and mandates designed and assigned, with due respect for ensuring that what appears to be, in fact is. The current arrangements in Ontario are deficient in transparency because there is little regard for ensuring that institutions and processes work in the manner intended, or apparently intended.

The government has commented as follows:

> The criticism that the Ontario system of governance lacks transparency is at odds with the fact that the annual ministry and agency business plans are published to communicate goals and

[353] See Nicholas d'Ombrain, 2000, "Alternative service delivery: Governance management and practice," in *Change, Governance and Public Management* (Ottawa: KPMG and Public Policy Forum, May), pp. 154–55.

> priorities, and as a way of measuring performance (recommendation of the 1995 OFRC report). Many agencies seek stakeholder input on their strategic priorities which are published at the beginning of their fiscal year.[354]

The OCWA and the SuperBuild Corporation are examples of organizations that have functions and relationships with the government that are quite different from what their corporate status would suggest to the outsider. The practices of general ministerial direction and widespread delegation of authority and functions are antithetical to accountability. The views of some ministries about the responsibilities of municipalities for public health and safety in particular are inconsistent with the constitutional responsibilities of the province, and unacceptable from the viewpoint of the citizen.

The government's comments:

> At a formal level, the *Capital Investment Plan Act,* serves as OCWAs defining document and sets what it is about. OCWA has acted consistent with its statutory mandate throughout. Accountability is preserved through *CIPA* and the memorandum of understanding (between MOE and OCWA) both of which clearly set out who is accountable for what.[355]

With regard to SuperBuild, the government has also commented, "SuperBuild was not established to behave autonomously. Its agency status provides greater flexibility for it to enter into public-private partnerships or establish new innovative financing mechanisms."[356]

Transparency begins with openness about the structure, purpose, and actual role of institutions. It is the foundation of accountability. Moreover, if what you think you see is not what actually happens, the way lies open to conflicts of interest – probably unintended, perhaps even unrecognized. A regulator that is bound by guidelines and policy statements in addition to directives is not at arm's length from the government.[357] A corporation cannot compete

---

[354] Smith Lyons, 2001a, pp. 16–17.
[355] Ibid., p. 17.
[356] Ibid., p. 18.
[357] See the discussion of the Normal Farm Practices Board, section 2.2.6.

fairly with the private sector unless it is properly designated as a commercial entity entirely free of the protection offered by the taxpayer.[358] A board of directors that reports to a minister cannot have "responsibility" for the management of a corporate body.[359] A corporation that acts as a corporate body with an executive board of directors cannot be a central agency, working at the heart of a system of responsible government.[360]

The government's comments:

> Certain Ontario regulatory agencies such as the Securities Commission are clearly arms-length although bound by certain directives. The government does not intervene in its regulatory decisions.
>
> The Ontario SuperBuild Corporation is directly accountable to the Minister of Finance and functions as part of the ministry. The creation of SuperBuild was recognized by the OFRC as an example of best practices in capital planning.
>
> SuperBuild's advisory board provides advice and counsel to the Minister of Finance on the creation of new public-private partnerships, approaches to privatization and key infrastructure challenges (e.g., long-term water and sewer strategy).
>
> All provincial infrastructure policy, investment and capital planning decisions are consolidated under a single Cabinet Committee on Privatization and SuperBuild (CCOPS). SuperBuild makes recommendations to CCOPS.[361]

5.4 Assignment of Powers

The design of any system of governance must begin with the identification of the powers necessary to carry out the functions in question. The provincial assembly exists for the purpose of overseeing the use of the powers of the state assigned to the provinces under the *Constitution Act, 1867*. The legislature assigns relevant powers through statute to ministers, and to the heads and

[358] See the discussion of the province's financial guarantee of the OCWA, section 2.2.2.
[359] See the discussion of the reporting relationship of the Ontario SuperBuild Corporation, section 2.2.3.
[360] See the definition of central agencies at the beginning of section 2.1.3.
[361] Smith Lyons, 2001a, p. 17.

directors of agencies, boards, and commissions. The clarity with which these powers are identified and assigned is the key to effective accountability. Where powers are assigned to non-elected officials, the assignment (as for ministers) should be to named office-holders rather than to corporate abstractions.

5.5 Responsibilities of Ministers

Ministers are responsible to the legislature in two dimensions:

- They have a formal responsibility for the powers conferred on them.
- They have a conventional responsibility for powers conferred on non-elected officials in charge of arm's-length agencies that report to the legislature through the minister.

It is good practice to distinguish clearly in legislation between these two forms of responsibility. This is normally achieved by the way in which powers are assigned.

5.5.1 Formal Responsibilities

In the Westminster system generally, the minister is formally and legally accountable for the powers exercised by his or her department (ministry). It is normal to establish this accountability with clarity by assigning powers to ministers by virtue of the office they hold; ministers are then free to task officials to exercise particular aspects of their authority. In cases where the legislature specifically does not want a minister to exercise a particular power, it is normal for that power to be assigned directly to an official. It is not normal, although it is the practice in Ontario, to assign powers routinely to officials and at the same time provide the minister with overall powers of direction.

5.5.2 Conventional Responsibilities

Ministers are not *accountable* – in the sense described above[362] – for the activities of agencies, boards, and commissions, which have been assigned powers directly by the legislature. They are, however, *answerable* – again in the sense described

[362] See section 5.2.

above – to the legislature for the activities of these bodies.

This conventional responsibility of ministers derives from the fundamental principle of responsible government: the Crown, through the ministry, must answer to the legislature for the way in which the powers of the state are being exercised. This means all powers of the state assigned through statute, not just those conferred on ministers or their departmental officials.

The conventional responsibility of ministers for arm's-length bodies encompasses the following:

- the provision of information to the assembly in the form of responses to oral and written questions – although in doing so they should be careful not to appear to be accountable for the way in which the agency is carrying out its powers, duties, and functions;

- the approval of the agency's spending estimates – although they should normally approve operating budgets without detailed examination so as not to appear to interfere in operational matters; and

- the design and amendment (by the legislature) of the statutory framework within which the agency operates, providing thereby periodic adjustments to its purposes and objectives (i.e., policy).

In addition, ministers almost always exercise certain formal powers in respect of arm's- length agencies. With few exceptions, these include the following:

- the right to recommend (to the lieutenant-governor-in-council) the appointment of board members, including the chair and the chief executive officer;
- the right to receive and table in the legislature an annual report; and
- the adoption of regulations within the minister's statutory authority.

Ministers may also have formal authority under statute to exercise defined powers. These might include the following:

- the right to request a special study and report;
- defined powers to review specified types of decisions taken by the agency; and

- general powers of policy direction – provided they are exercised formally and publicly. This provision generally requires that direction be given pursuant to statute using an executive instrument, such as an Order in Council or a ministerial order, that must be published and may be referred to publicly by the person or body in receipt of such direction. In Westminster systems, such powers are seldom given by the legislature and rarely exercised by ministers because they are blunt instruments that attract concerns about improper interference with an independent body.

Finally, it is a conventional responsibility of ministers to use what powers they have under the statutes to deal with problems. When things go wrong, the minister expects to be informed by the head of the agency of the remedial measures being taken, and, if necessary, to use his or her powers of appointment and legislative amendment to act independently of the agency.

These are the limits of the powers of ministers and the rights of the legislature in respect of arm's-length agencies. Government directives and policies that go beyond either the statutory powers assigned to ministers (and to formal bodies such as the Management Board) or their conventional responsibilities to the legislature can only serve to muddy accountability and reduce public oversight of how the powers of the state are being exercised, and by whom.

5.6 Agency Responsibility

It follows from the above that arm's-length agencies are (or should be) independent of government within the scope of the exercise of the powers assigned to them by the legislature. The decision to establish an agency should be undertaken with care.

Arm's-length agencies are usually established because their powers are best not exercised by ministers. This generally means that the mandate of the agency includes one or more of the following activities:

- regulating in the public interest or apportioning some public good (e.g., issuing broadcast licences; pricing electricity; preserving competition);

- granting public funds to individuals and organizations based on professional criteria (e.g., arts funding; research grants);

- providing independent advice to government on any matter of public policy; and

- operating program activities in a commercial environment (e.g., public utilities, public broadcasting, some strategic industries, mail services).

Agencies that are not at arm's length from ministers may also be established. These might include organizations that provide support to businesses, or those whose activities are largely administrative, such as tax collection. These bodies are usually set up with a significant degree of administrative autonomy, but are subject to day-to-day direction from ministers without the need to resort to formal directives.

It should also be noted that agencies of all sorts, from those reporting to ministers to those fully at arm's length, may be given varying degrees of administrative autonomy. "At arm's length" and "having administrative autonomy" are not necessarily synonymous. Many alternative service delivery agencies, for example, are fully under the direction of ministers, but may be free from many of the administrative controls that normally apply to a ministry.

An agency's relationship to government is determined by the powers assigned to it by the legislature, and that assignment determines the role that the minister is expected to play in the affairs of the agency, supplemented by the conventional responsibilities that ministers are required to take for all agencies that report either to them or through them to the legislature.

The same principle applies to the roles of boards of directors that may be created as part of the enabling statute for particular agencies. That is to say that the power assigned to the boards should be clear and they should not be subject to general ministerial direction. Where an agency is subject to such direction, the chief executive officer should be answerable to the minister, and the agency's role and relationship to the minister should be analogous to that of a department or ministry. The use of a board in such circumstances will likely frustrate its members and draw its chair into operational matters that are properly the domain of the chief executive officer.

It is important to bear in mind that the boards and chairs of agencies differ fundamentally from the private sector versions on which they are modelled. In the private sector, the board represents the shareholders, and its chair is the vehicle for communicating shareholder concerns to the management of

the corporation. In the public sector, the minister is the "shareholder" and generally has no need of an intermediary board or chair to represent his or her interests to the agency's management. Thus, a board of directors in the public sector has a limited role. That role is usually largely advisory in nature, no matter what the statute may prescribe.

Nonetheless, a board can play an important role in designing management policies for agencies that are not subject to centralized administrative regimes. The board may also play a key role in overseeing an agency's operational policies, particularly as they affect clients. The chair of a board can provide the minister with an independent assessment of the agency's performance.

The mandates of the board and chair of any public sector agency should be clear, and they should have the authority to carry out the duties assigned them without being second-guessed. If there is concern that a board may be in need of guidance and subject to intervention from the minister, that is a good indicator that the function is probably not appropriate to a board structure, and should not be at arm's length from government.

It is an error to create a board in order to give an organization a businesslike, private sector "aura" if the reality is that the board is not going to be allowed to behave autonomously. The creation of an independent agency with or without a governing board must flow from a careful consideration of the functions to be performed and an understanding of the degree of appropriate ministerial intervention. The appropriateness of using an arm's-length structure must be the starting point for deciding whether to assign powers to a minister or to non-elected officials.

As noted earlier, the OCWA and SuperBuild are both corporate bodies with executive boards that are under the direction of ministers. This arrangement is inappropriate for the reasons discussed above.

Given the importance of regulation and enforcement in the provision of safe drinking water, it is useful to note that regulatory activities, where they require supervision and decision making by adjudicative tribunals, are generally placed at arm's length from government. Regulation by government departments and ministries is often subject to outside review, as is the case in Ontario for matters – including drinking water development – that are subject to the *Environmental Bill of Rights*.[363] Exceptionally, single-person regulators may

[363] See section 2.2.8.

be set at arm's-length from ministers, but they generally fulfill investigative functions, and their "decisions," if challenged, are subject to review by a separate tribunal.[364]

5.7 Municipalities and Local Institutions

The same principles can and should be applied to the assignment of powers by the legislature to municipalities and bodies such as utilities commissions and conservation authorities. It is entirely appropriate for ministers to reserve particular powers to themselves, such as the power to audit or to conduct a special review of the way in which municipalities function. It is, however, undesirable for ministers to duplicate the authority given to lower levels of government by the assembly, or to make such extensive use of powers of delegation that they have no practical means (i.e., resources and expertise) of ensuring that the authorities granted to them by the legislature are being effectively and appropriately exercised by their delegates.

5.8 Legislative and Administrative Framework

The principles of organization discussed above provide general guidance on the nature of the governance scheme that should apply to any particular government activity. A legislative framework should contain the following elements:

- a clear statement of purpose (what is the object of the legislation?);
- a precise outline of statutory authorities – powers, duties, and functions – clearly assigned to ministers, arm's-length agencies, and subordinate governments; and
- an appropriate assignment of powers, e.g., regulatory powers of an adjudicative nature should generally be exercised at arm's length from ministers and ministries.

In addition, the following principles should be respected:

- Routine delegations of responsibility to persons outside of the ministry should be avoided; they confuse accountability and leave ministers in the

[364] For example, the federal competition commissioner.

position of having responsibility without the means of ensuring it is exercised properly.

- Persons and bodies to whom powers are assigned should be provided with mechanisms in statute that will ensure public reporting of their activities and public input wherever appropriate.

- Common-law redress regarding negligence, nuisance, failure of due diligence, or fiduciary obligation ought not be curtailed by legislation except in the presence of a compelling public interest.

- Legislative auditors should be free to apply their mandates.

- The minister responsible for the legislation should have a power of inquiry into the operations of any person or body empowered by the legislation, such as regulators, owners, or operators.

- The minister should be required to review the policy underlying the legislation periodically and present the results of the review (and any proposed amendments) to the legislature.

- Provision should be made for appeals of decisions made by regulators.

Finally, administrative arrangements should provide for the following:

- adequate means – human, financial, and expert – to permit the effective execution of assigned authorities;

- adequate reporting and information systems – for ministers and for others with supervisory responsibilities;

- adequate machinery to ensure the effective coordination of horizontal responsibilities and issues;

- adequate machinery to identify and resolve conflicting mandates and significant disagreements where several bodies are required to exercise separate powers in a coordinated way; and

- avoidance of evident conflicts of interest, particularly when regulators and service providers are under the same roof, or when financial constraints influence functions – particularly regulatory ones.

6 A Policy and Organizational Framework for Providing Safe Drinking Water

This part of the report sets out a framework for the management of the government's responsibilities for providing safe drinking water. Building on the principles of machinery of government, and drawing on experience in other jurisdictions, the framework sets out the considerations that need to be borne in mind in designing a system that will adequately support the government's responsibilities while taking account of the roles of others in the provision of safe drinking water.

The framework is designed to ensure that organization follows purpose: i.e., it identifies the functions that must, or may, need to be fulfilled and then discusses the organizational options for giving effect to them. The role of government in respect of safe drinking water is first outlined, then the organizational arrangements necessary or suitable for giving effect to that role are considered.

As a whole, the framework must provide for a coherent system for managing the provision of safe drinking water. Coherence does not necessarily equate with logic or efficiency: principles of governance must be respected; the culture of institutions cannot be ignored; public expectations must be taken account of; history should be known and kept in mind. There is no such thing as a completely efficient system. Compromises must be made about competing principles, and judgments reached about past performance and future prospects.

The framework is divided into three sections: the role of government, government organization, and the coherence of the resulting system for providing safe drinking water.

6.1 The Role of Government

For these purposes the role of the provincial government has four dimensions:

- the functional responsibilities of government for the provision of safe drinking water;

- the processes necessary for the coherent operation of the overall system for managing safe drinking water;

- the scope of government responsibilities and activities that bear on the provision of safe drinking water; and

- the provincial government's relationship with the federal government and the province's municipalities.

6.1.1 Functions

Governments fulfill functions that reflect the character of their responsibilities. These usually fall into one or more of the following categories:

- *policy* – Governments need to have the capacity to identify the character and scope of their responsibilities and the means of carrying them out. This is the policy function, which must be present within government and capable of providing the coordination necessary to fulfill government-wide responsibilities and to develop appropriate legislation.

- *regulation* – Governments may have the capacity to regulate the activities of private or public bodies that bear on the health, safety, security, or economic well-being of the citizenry. A regulatory role needs to be complemented by the ability to enforce the law.

- *operational programs* – As used here, this phrase means the delivery of services to citizens. Governments must design and deliver programs such as the building, maintenance, and ownership of water and sewage facilities.

- *financial programs* – Governments may consider their responsibilities to extend to the provision of some form of financial support to private or public institutions that operate services subject to government regulation.

The water supply sector is currently a decidedly mixed enterprise. There are a variety of municipal agencies and departments, private concessionaires, and small private systems serving seasonal as well as rural users. Only the U.S. model of the investor-owned utility that actually owns pipes in the ground is absent. And, although the makeup of the sector is likely to continue to change, the duty of the province to erect a policy and regulatory framework will not; such a framework should be suitable under any ownership alternatives.

The provincial government has a range of choices concerning its role in respect of safe drinking water. Some of its responsibilities are clear in principle, such as policy development, whereas some are entirely discretionary, such as the ownership of water facilities. Others, such as financing, are less clearly responsibilities of a government, and some, such as regulation and enforcement, may be of greater or lesser importance depending on how water services are structured.

Policy The provincial government is responsible for the design of the system to provide safe drinking water to Ontario's residents. It therefore requires a policy capability – an analytical capacity to determine the scope of activity required and the particular arrangements necessary to give effect to the government's responsibilities.

The actual scope of activity necessary to fulfill the government's responsibility is discussed below.[365] Having determined what is required, it is the premier's duty to appoint and mandate ministers and ministries to carry out the necessary functions, ensure that legislation is prepared to provide them with the necessary powers, and organize the Cabinet decision-making system to provide for adequate coordination of policy development across the ministries involved.

This policy capacity is essential so that the government can determine the way in which its responsibilities for drinking water are to be fulfilled. The policy capacity will develop and continuously update the overall system for drinking water management. Without a policy capacity, represented both in ministries and in the central agencies, there can be no systematic review of the following matters:

- the substantive scope of the government's responsibility for drinking water;
- the adequacy of the legislation and regulation necessary to support this responsibility;
- the extent to which the government's responsibility should extend beyond policy, legislation, and regulation to operational matters; or
- the efficiency and effectiveness of the system for drinking water management, including the way in which the players from the government, municipal, and private sectors are fulfilling their assigned functions.

---

[365] See sections 6.1.3 and "Current Arrangements" under section 6.2.1.

In short, the policy capacity is the basis for everything that is done in respect of water management. This is a core responsibility of government; it must be under the direct authority and responsibility of ministers; and the premier must be responsible for the way in which mandates are assigned to ministers, ministries, agencies (arm's-length and otherwise), municipalities, and the private sector. The premier must also ensure that policy leadership is assigned to a particular minister and that mechanisms for coordination are established under the authority of the Cabinet Office.

Ontario needs a policy framework for ensuring that all ministries and agencies take account of the requirements for safe drinking water in their activities. That framework should be published, and it should outline the responsibilities of each ministry and agency. It should also set out the roles of central agencies, particularly the Cabinet Office, in resolving disputes and ensuring compliance with the policy. The province also needs to overhaul its legislation for drinking water safety so that it is clear, accessible, and informative. It may also be necessary to enlarge the scope of the legislation.[366]

Regulatory Responsibility The province has a clear duty to regulate the provision of drinking water, for which purposes it needs both the policy capacity to determine accountability frameworks, and the scientific capability to establish standards and effective enforcement of those standards. This means it must provide within the public sector an appropriate institutional framework to carry out those functions, and it should ensure that the resources provided are adequate to the task.

The character of the regulation required for water and sewage facilities depends largely on the government's policy regarding safe drinking water. Competition leading to fewer, larger drinking water suppliers would require a different approach from that now in place.[367] But in either case regulations should be clear, and in principle they should be mandatory. Policies and guidelines are not good enough to control activities that affect public health and safety. And guidelines that are enforced as if they are regulations are inherently unfair. The regulatory regime must include provision for enforcement, but to the extent possible the operating principle should be reliance on prevention. Thus, drinking water suppliers – like testing laboratories – should be certified in accordance with strict, prescribed standards.

---

[366] See "Mandate Options" under section 6.2.1.

[367] See the discussion of emphasizing preventive measures under "Arm's-Length or Not?" section 6.2.2.

In summary, any system for fulfilling the province's responsibilities must provide for regulation and enforcement.

Operational Programs Operational programs are those under which the government delivers services directly. Depending on their nature, they may be seen as either an essential function of the state, as merely desirable, or as superfluous or even unfair because they can create marketplace distortions. For example, the provision of national defence or police services would be considered an essential function of the state and, therefore, not amenable to being fulfilled by the private sector. However, a commercial service, readily available from the private sector, would not be considered essential, and an operational program that provided this service might constitute unfair competition depending on the specific advantage provided by state ownership.

The province has a wide range of choice about the extent of its operations in support of safe drinking water. Depending on the substantive scope of the responsibility it defines for itself, this can range from programs to monitor and protect watersheds – and even wider ecosystems – to the operation and perhaps ownership of water and sewage treatment facilities.

Provincial responsibilities of an operational character are seldom such that they must be carried out in-house. Where the responsibility clearly lies with the government, as may be the case in mapping watersheds, private contractors are well equipped to provide the necessary services at provincial, and perhaps municipal, expense. Where the responsibility is less clear, as with the operation of municipal water and sewage systems, operational programs may be provided with full cost recovery.

The provincial government's interest in alternative service delivery provides one set of means of ensuring the provision of services without necessarily involving the government in any direct way. It should be noted, however, that the existence of some operational capacity in-house, or more importantly, of expert advisory services, provides a useful window on practice, which is important for sound policy development and effective crisis management. That said, there is considerable scope for organizational innovation and flexibility in the operation of services related to safe drinking water, including drawing on the expertise of private suppliers for operations and engineering know-how.

Financial Programs Financial programs are, by definition, not operational in nature. Traditionally, they involve the use of loans or grants to help public and

private sector bodies develop services judged necessary by the provincial government. Such programs are closely allied to the policy function of government, providing a means to advance the public interest without involving the government in operational activities.

The existence of such programs in Ontario over the past 50 years suggests that successive governments have considered their obligations for the provision of safe drinking water to extend beyond policy, regulation, and cost-recovered operational programs. As discussed earlier, a number of informed observers have expressed concern that such programs have distorted the economic relationship between providers and users to the detriment of the safety of drinking water in the province. Systematic policy work by the provincial government is needed to develop alternatives to piecemeal loans and grants. SuperBuild's initiative to develop an infrastructure investment and financing strategy should make an important contribution.[368]

Whatever the future may be for the practice of giving direct financial support to municipalities for water and sewage infrastructure, there is a clear responsibility on the part of the government to develop and set in place means whereby municipalities can finance safe drinking water facilities. This is a fundamental responsibility of government, and should be a central element of any policy capability.

6.1.2 Processes

In addition to fulfilling the functions that are part of its overall responsibility for safe drinking water, the government also needs to provide the management tools that are necessary to the effective functioning of any complex public activity. These include transparent institutions and processes, effective crisis management, and coordination of the numerous players with functions to fulfill in the provision of safe drinking water.

Transparency The responsibilities of the government need to be enunciated clearly and formally. The players and their roles need to be identified. The mandates of institutions should be precise, and delegated functions and general powers of direction should be avoided. Accountability should be clear.

---

[368] Ontario, Finance, 2001b, p. 26.

Statutes need to be well organized with straightforward statements of purpose, unambiguous assignment of powers, and regular reporting requirements. Complex statutes should be revised from time to time to consolidate statements of duties and requirements for compliance. Public input should be sought.

All participants should be required to report at least annually on their activities and performance. Where appropriate, performance criteria should be set and reported on. All organizations should be required to evaluate their activities as part of their annual reporting requirements, and their results should be audited periodically. Any contracts with private sector suppliers of drinking water should reflect these requirements.

Consideration should be given to adopting a process similar to that required by the *Safe Drinking Water Act* in the United States, where drinking water suppliers must provide customers with a "consumer confidence report." In addition, Canada's constitutional arrangements might be adapted to incorporate provisions such as those of the U.S. federal *Clean Water Act* that require each state report annually to the Environmental Protection Agency on regulatory violations, and to provide notice of these reports to the public.[369]

Particularly for public organizations, transparency should extend to open relationships with the scientific community and other outsiders with expertise to contribute. Periodic policy reviews should be undertaken with the opportunity for public input and debate.

This need for transparency is an important factor that should be taken into account when an institution is designed. Arm's-length organizations generally have less difficulty with transparency than government ministries, which are more subject to partisan criticism, and are duty bound to support the position agreed upon by ministers in the cabinet. Independence from government is an important condition for transparency.

The government has commented as follows:

> Transparency in crown agencies is achieved through annual publication of business plans, MOUs, and Statements of Priorities (where applicable). The 2001 OFRC report and the recommendation for

[369] See United States, Environmental Protection Agency, "How Safe is My Drinking Water?" [online], [cited January 2001], <www.epa.gov>.

> accountability legislation and the role for "independent performance enhancement offices" will further the debate on ensuring quality of service."[370]

Crisis Management When problems occur, particularly those related to public health, the public expects the government to react quickly and decisively. Apart from the immediate authority provided to public health officials, it must be able to respond to both the short- and long-term consequences of what has gone wrong. Such responses were required at Walkerton; they included providing bottled water promptly, applying operational expertise and financial resources to overhaul the town's water treatment and distribution system, and also seeking longer-term solutions – part two of the current public inquiry.

The government must ensure that it has access to all the tools necessary for effective emergency response. This too is an important factor in the organizational design for fulfilling the government's responsibility for safe drinking water.

In considering organizational options, and in particular the possibility of assigning regulatory and enforcement responsibility to an arm's-length agency, it should be borne in mind that using an agency to coordinate responses to crises is unlikely to work well. The public generally expects a minister to be seen to be in charge, which would make using an agency for this purpose impractical since the minister would not control the necessary levers if they were placed in the hands of an arm's length agency, which should, by definition, be beyond ministerial control. From the perspective of crisis management, there can be little doubt that a ministry structure with a minister clearly in charge makes good sense.

Coordination Coordination is an essential part of any complex management system. Policy cannot be developed without coordination, and decisions cannot be taken in a policy framework without effective coordination among ministries, with stakeholders, and within the central machinery of government that supports the policy and financial decision-making system.

Coordination is particularly important in this instance, since the management system for safe drinking water is decentralized among ministries, agencies, municipalities, and the private sector. But coordination cannot exist satisfactorily

---

[370] Smith Lyons, 2001a, p. 18.

in a policy vacuum: it is policy frameworks that define the objectives, the players, and the matters in need of coordination. Machinery for coordination is of little use if the participants do not know when and how to use it.

Successful coordination is a sound indicator that a management system is based on a coherent approach to the sector in question. In this instance, among other things, it would mean that the government had a firm grip on how to fulfill its responsibility for safe drinking water, including the scope of the responsibility and the organizational means of giving effect to it.

If the regulatory and enforcement functions were spun off into a separate agency, this would complicate coordination considerably. Arm's-length agencies are invariably suspicious of efforts to coordinate their work. Indeed, the importance of ensuring that water receives more attention from the government on a consistent basis is an argument for maintaining a structure based on a regulating ministry rather than moving to an arm's-length regulator. This is particularly the case if funding is to continue to flow through the SuperBuild Corporation, which would not be able to work as closely with an arm's-length agency as with an in-house ministry.

6.1.3 Scope

The provincial government also has choices about the scope and character of its responsibility for safe drinking water. Within its constitutional jurisdiction, the province is responsible for the conservation, management, and use of its resources, and consequently it has responsibility for many aspects of environmental protection. It also is responsible for public health.

Safe drinking water is currently managed in Ontario from the perspective of environmental protection and public health. It is not managed from the wider policy perspective of resource conservation, agricultural development, and municipal and rural development. These elements may be present from time to time in decision making about drinking water, but there is no integrated policy approach. Such an approach would ensure, through organization, legislation, and coordinated decision making, that the safety of drinking water would be supported by all these activities.

In short, decisions about the scope of activities necessary to support safe drinking water have implications for the organization of government.

The government comments:

> As in the case of other jurisdictions, Ontario is moving rapidly towards a broader and more integrated approach to resource protection. There has been a growing recognition of the inter-relationship between land-use planning, regional economic development and the environment (e.g. Deputy Ministers' (DM) committees, and Smartgrowth DMs and Secretariat).
>
> The Managing the Environment report's recommendations will provide additional guidance in developing a comprehensive systemic response.
>
> The Province's long-term water and sewage infrastructure investment and financing strategy is being developed to make sure that the infrastructure required to ensure safe drinking water is available in the future.[371]

6.1.4 Relationships with Other Governments

Some aspects of the provision of safe drinking water in the province involve federal government responsibilities. In addition, there are some general guidelines worth enunciating that need to be observed in the province's dealings with municipalities.

The Federal Government The role of the federal government in the development of drinking water guidelines and related scientific expertise has been discussed.[372] Two other areas of federal involvement affect the way in which the province approaches its responsibilities with respect to drinking water. One is federal jurisdiction over some important aspects of the environment that affect drinking water; the other is the federal responsibility for First Nations reserves and other federal lands in the province.

Given that the federal government has jurisdiction over the inland fishery as well as over larger issues affecting the environment,[373] its role affects in important ways the province's responsibility for the conservation and use of natural

---

[371] Ibid., p. 19.
[372] See section 1.1.1.
[373] Ibid.

resources, including water. Since the province defines drinking water policy to include the watershed from which such water is drawn, the immediate importance of a closer relationship with the federal government is apparent.

A concerted effort on the part of the province to develop accurate data on the quantity and quality of both surface waters and groundwaters will require the federal government to become more active in exercising its responsibilities for aquatic habitats and over environmental issues that either are interprovincial in nature or relate to public health and safety. New mechanisms for coordination with the federal government may be required.

The federal government also has jurisdiction over significant tracts of land in Ontario. The current ambiguity about responsibility for drinking water in these areas needs to be addressed and clear arrangements set in place.[374] This clarification is of particular importance on First Nations reserves, where the federal government pays for facilities and applies provincial regulatory standards as a matter of practice, but which are not subject to Ontario's enforcement regime for drinking water. The same applies to military bases in the province.

New measures are required to resolve this situation.

The Province's Municipalities The province's relationship with its municipalities is complicated, confused, and full of ambiguities. Notwithstanding exercises such as the Who Does What Panel and the recent initiatives to reduce the number of municipalities and simplify their governance, the relationship, as it affects the provision of safe drinking water, is unsatisfactory.

The general stance of the province is that it sets the regulatory framework within which municipalities are responsible for the delivering of services. This arrangement may have a certain appeal on grounds of simplicity, but it ignores the province's responsibilities. It also does not reflect the actual extent of the statutes and regulations that govern municipalities; these are so detailed that they constitute not so much a framework as a blueprint for municipal conduct.

The province needs to recognize that if it is to regulate municipal behaviour it must share in the consequences of that behaviour, particularly if it sets requirements that are unrealistic given the way in which water and sewage operations are structured and financed. Perhaps more importantly, the need

---

[374] See section 4.1.5.

for detailed regulation could be reduced if services such as water and sewage could be more efficiently organized.

This goal could perhaps be achieved by pooling resources, by creating a truly competitive market that would permit greater use of private sector resources, or perhaps through subsidy programs. Indeed, the existence of the OSTAR initiative recognizes that the province has a responsibility to work with municipalities to ensure that its regulatory framework can be implemented.[375]

6.2 Organizational Consequences

The government can fulfill its responsibilities through a variety of institutions and processes. With respect to some functions it has significant options; with respect to others, it needs to ensure that principles of machinery of government are set in place and observed. For example, the government must make choices about the scope of its functions relevant to drinking water, and hence the institutions involved and the processes necessary to ensure their participation. It also faces choices about how close to government it wishes to place the regulatory function, and to what extent it will be involved in operating and financing water facilities. At the same time, however, it must ensure that it has an effective policy capability, an efficient means of coordination, and a transparent assignment of power and duties.

6.2.1 Policy

Policy is the domain of ministers and their ministries. Government departments and ministries exist in principle to support the exercise of the powers, duties, and functions assigned to ministers. Ministers are responsible above all for the policy of the government, as expressed through ministerial decisions (approved by the cabinet), legislation, and regulation. Therefore, policy support for the government regarding the provision of safe drinking water must come from organizations under the control of, and accountable to, ministers.

---

[375] The Ontario Municipal Water Association has calculated that the cost per customer of implementing the new *Drinking Water Protection Regulation* will be one to two cents per year in Toronto, $0.75 in Kingston, and as much as $1,000 for a small communal system of six homes. Max Christie, [n.d.], "What's After Walkerton?" Unpublished report for the Ontario Municipal Water Association (Peterborough).

The government has commented as follows:

> Guided by the Managing the Environment Report, the government is moving forward with a new framework for environmental protection. The change process has already begun with the establishment of the new Cabinet Committee on the Environment and the appointment of an Associate Deputy Minister to implement the new framework.[376]

Current Arrangements The policy function at present rests with the Ministry of the Environment, which has not had the mandate to develop policy much beyond its own regulatory and operational reach.[377] Not only have other ministries had little impact on drinking water policy, but the policy itself has been largely neglected.

As noted earlier, leadership is an important aspect of the policy function. It is apparent, however, that the Ministry of the Environment has not been in a position to provide leadership in this area, and the Cabinet Office has not provided coordination mechanisms.[378] Perhaps the recent establishment of a Cabinet Committee on the Environment will prompt the filling of this gap.[379]

Given the current situation, the government must make choices regarding the development and implementation of policy for safe drinking water. There are two main considerations: what minister should take lead responsibility, and what is the scope of the policy responsibility for safe drinking water?

Lead Minister Although the Minister of the Environment is referred to as the lead minister for safe drinking water, the reality is that the minister and the Ministry of the Environment are not equipped to play this role to full effect. This is partly a matter of mandate and resources, but it is also because the government has no policy framework to articulate, among other things, the roles of all the players, including the other ministries with relevant functions, and their relationship to the minister and Ministry of the Environment.

---

[376] Smith Lyons, 2001a, p. 20.
[377] See section 4.1.
[378] See the recommendations regarding policy leadership and coordination under "Policy Capability" in section 6.1.1.
[379] Ontario, Office of the Premier, "Harris Launches New, Pro-Growth Cabinet Team," Press release (Toronto: February 8).

A lead minister and ministry form an essential part of any workable policy framework. The provincial government should be working closely with municipalities and the private sector on the development of safe drinking water facilities and regulatory requirements. To do so, it needs to speak with clear leadership, if not with a single voice. The attitude toward municipalities noted earlier is perhaps in part the consequence of the government's own disorganization with respect to safe drinking water.[380]

The safety of drinking water is associated in the public's mind with the maintenance of public health in the province. As discussed earlier, under the current arrangements the Ministry of Health and Long-Term Care has a modest role in this area: it supports the development of drinking water regulations and its laboratories are used to test for microbiological contamination.[381] The principal health official involved in the safety of drinking water is the local medical officer of health. This official is independent of the ministry, although he or she generally accepts professional guidance from the chief medical officer of health, who is an officer of the ministry.[382]

The role of the Ministry of Health and Long-Term Care in Ontario as it relates to drinking water is similar to that of departments of health in several other jurisdictions. In the United Kingdom, the lead minister is the secretary of state (i.e., the senior minister in the portfolio) for Environment, Transport and the Regions. The Department of Health is home to the chief medical officer of health, who is the medical adviser to several departments, including the Department of the Environment.[383] This arrangement establishes a close relationship between the regulation of drinking water and health concerns. In the event of a health emergency, drinking water suppliers must inform the local health authorities, which have executive powers to direct water facilities in the event of threats to public health.[384]

In Australia's state of New South Wales, the minister of Land and Water Conservation is the lead minister and has a supervisory relationship with local water corporations.[385] The corporations are required to operate on business

---

[380] See under "Transparency" in section 6.1.2.
[381] See under "Ministry of Health and Long-Term Care" in section 2.1.5.
[382] Ibid.
[383] United Kingdom, Department of Health, [n.d.], "The Chief Medical Officer" [online], [cited January 2001], <www.doh.gov.uk>.
[384] *The Water Supply (Water Quality) Regulations 1989*, s. 30 (United Kingdom).
[385] See *Water Supply Authorities Act 1987* and amendments (Australia); also the objectives of the Sydney Water Corporation set out in the *Sydney Water Act 1994,* s. 21 (Australia).

principles while protecting the environment, functioning within the community in a socially responsible manner, and supporting the maintenance of public health.[386] When health emergencies occur, the minister of Land and Water Conservation must consult and follow the direction of the minister of Health, who may take executive action to deal with such emergencies, including the closure of water facilities.[387]

The states of California and New York go further, giving the lead role on drinking water safety to their health departments. These departments regulate, monitor, and enforce standards for safe drinking water. State conservation and environment agencies deal with the general management of the watershed. In California, for example, the Department of Health's Division of Drinking Water and Environmental Management "… is responsible for the inspection and regulatory oversight of approximately 8,500 public water systems to assure delivery of safe drinking water to all California consumers."[388] The division issues permits and certificates for facilities and operators; inspects; investigates; orders remedial measures; and takes enforcement action to ensure that public water systems comply with water quality standards and monitoring requirements. Similarly, in New York State the Department of Health is responsible for the application of the federal *Safe Drinking Water Act,* and the Department of Environmental Conservation deals with pollution and the management of the watershed.[389]

It is also worth recalling that, historically, the Ontario government organized its responsibilities for drinking water around its health institutions.[390] This began to change in the 1970s with the creation of a separate department dealing with environmental matters, a relatively new function of the state that in significant measure grew out of the province's institutions for drinking water management, including pollution control.

There are, therefore, two potential models for the leadership of the province's drinking water responsibilities: Environment and Health. And there are arguments for and against each option.

---

[386] See the objectives of the Sydney Water Corporation set out in the *Sydney Water Act 1994*, s. 21 (Australia).
[387] See of the *Local Government Act 1993,* ss. 57–63 (Australia).
[388] California, Department of Health Services, "Roles and Responsibilities of Government Agencies" [online], [cited January 2001], <www.dhs.ca.gov>.
[389] See New York State, Department of Health, [n.d.], "Info for Consumers" [online], [cited January 2001], <www.health.state.ny.us>; New York State, Department of Environmental Conservation, [n.d.], "Water Resources" [online], [cited January 2001], <www.dec.state.ny.us>.
[390] See the opening paragraphs of section 1.1.

The performance of the Ministry of the Environment in drinking water management is somewhat imperfect, and its inability to provide policy leadership within the government to date is notable. The Ministry of Health and Long-Term Care has no recent experience in the management of drinking water, and at the level of the ministry (as opposed to among local medical officers of health and health units) it appears to play a lesser role than its counterparts elsewhere. This ministry is, besides, already overloaded with an agenda that reflects widespread public dissatisfaction with the management of health care in the province.

The challenges facing the Ministry of Health and Long-Term Care are reason enough not to add to its burdens. Note, too, that organizational change almost always comes at a substantial price. Established organizations have distinct cultures that do not blend easily. Functions that have been carried out for many years in a particular organization often develop synergies with related functions in the same organization, as is presumably the case between water policy and operations and the other activities of the Ministry of the Environment. The reorganization of a function as important as responsibility for safe drinking water should be no more radical than is absolutely necessary.

Moreover, on the road toward the crucial goal of developing a policy framework for drinking water management that will require other ministries to actively promote safe drinking water practices, an important first step is to strengthen the drinking water mandate to include the management of the watershed.[391] For these reasons, the Ministry of the Environment should be given the mandate and the resources to take the lead in developing a comprehensive approach to drinking water management.

The government has commented as follows:

> The Ministry of the Environment is the lead ministry for drinking water responsibilities and the Minister of the Environment will lead the implementation of the new environmental protection framework in collaboration with other ministries. The government will also respond to the conclusions and recommendations of the Walkerton Inquiry. In implementing the new environmental protection framework, the government intends to work closely with municipalities and the private sector in ensuring water quality.[392]

---

[391] See under "Mandate Options" in section 6.2.1.
[392] Smith Lyons, 2001a, p. 20.

Mandate Options Policy for safe drinking water is currently limited to environmental and health concerns as defined by the institutional mandates of the relevant ministries. The environmental agenda has played the dominant role for the past 25 years; moreover, in practice, the mandate of the Ministry of the Environment does not extend to the conservation and development of water resources, and there is no policy or legislative framework that links drinking water safety to the responsibilities of the Ministry of Natural Resources or to those responsible for such matters as agricultural, rural, and municipal development.

The government should, therefore, consider enlarging the mandate of the Ministry of the Environment to include those responsibilities of the Ministry of Natural Resources that relate to conserving and developing water resources. Such an expansion of this mandate would set the stage for developing a watershed-based approach to the management of drinking water. It would also make sense to attach conservation authorities to the Minister of the Environment, giving them a direct relationship with the minister responsible for the safety of drinking water.

It is worth noting that in several other jurisdictions drinking water is treated as part of a wider responsibility for water conservation and development. In the United Kingdom the responsibility for water conservation and development is located in the Department of Environment, Transport and the Regions, which is also responsible for regulating the quality of drinking water.[393] In Australia's State of New South Wales, it is the responsibility of the Minister of Land and Water Conservation, whose department is actively engaged in the management of drinking water activities.[394] In the United States, the Environmental Protection Agency has taken an approach to its legislation for safe drinking water that is explicitly based on watersheds and drainage basins: the *Clean Water Act* protects waters that may be used for drinking. Note, however, that at least some states have divided this responsibility among several departments.[395]

A broader water mandate for the Ministry of the Environment would also make it a good deal easier to develop a comprehensive water policy for the province, which could be used by the Cabinet Office to require other ministries to factor that policy into their operations. This would apply particularly to the Ministry of Agriculture, Food and Rural Affairs and to the Ministry of Municipal Affairs

---

[393] See under "Current arrangements" section 6.2.2.
[394] See the *Sydney Water Act 1994*, s. 4 (Australia).
[395] See the discussion of California and New York under "Lead Minister" in section 6.2.1.

and Housing. The latter would be expected to take an active role in working with municipalities to ensure that their activities took account of the drinking water policy, in respect of which it would probably be wise to give the Ministry of the Environment standing as a public body under the *Planning Act*.[396]

The government comments:

> MMAH has a history of factoring in provincial policies on land use planning, developed to deal with the interests of other Ministries, when it makes decisions related to the approval of official plans. Should a comprehensive water policy be developed, the land use implications of this policy could be incorporated in a provincial policy statement under the Planning Act, which could then be considered by MMAH and other approval authorities in their decision-making on land use planning matters.[397]

6.2.2 Regulation and Enforcement

Policy is the undisputed domain of ministers advised by ministries. Regulation and enforcement, however, can be carried out either by ministers and their officials or by arm's-length bodies. As discussed earlier, the choice depends largely on the regulatory process proposed.[398]

Current Arrangements In terms of machinery of government, there is no reason for drinking water regulation and enforcement to be carried out at arm's length from the provincial government. The regulatory processes involved do not need to be presided over by an adjudicative tribunal; in fact, they would be significantly retarded if they were. Regulatory decisions made by the Ministry of the Environment may be appealed to the Environmental Review Tribunal,[399] and the environmental commissioner acts as a further check on the ministry's decisions.[400] There is, in addition, a role for the Ontario Municipal Board in the provision of safe drinking water, since land-planning decisions by municipalities could impact the quantity and quality of drinking water.[401]

---

[396] See the quotations from Dennis Wood and surrounding discussion in section 4.1.3.
[397] Smith Lyons, 2001a, p. 21.
[398] See the end of section 5.6.
[399] See under section 2.2.8.
[400] See section 2.2.7.
[401] See section 2.2.5.

In other jurisdictions, drinking water regulation is generally carried out under the direct authority of ministers. In the United Kingdom, the secretary of state for the Environment, Transport and the Regions is the regulatory authority for all matters related to the taking and quality of drinking water. The minister is advised by the Drinking Water Inspectorate, which is a branch of the minister's department. The inspectorate advises the minister on the water supply (water quality) regulations that are issued under his or her authority pursuant to the *Water Industry Act 1991*. The inspectorate enforces the regulations and takes necessary remedial action, including the prosecution of water companies "for supplying water which is unfit for human consumption."[402] The minister is advised by an arm's-length Water Regulations Advisory Committee.[403] In addition, the Environment Agency, which is not an arm's-length body but is directly responsible to the minister, licenses the taking and use of water, and generally oversees water supplies, the inland fishery, and measures for flood control.[404] There is also an economic regulator, the director of the Office of Water Services, who is independent. The office is concerned principally with the finances of water companies and the regulation of the rates charged to customers. The director has enforcement powers in respect of water companies that fail to live up to their service obligations or the financial terms of their licences.[405]

In New South Wales, the regulator is the minister of Land and Water Conservation. This minister is required to consult with the minister of Health in respect of public health matters.[406] In California and New York, federal and state drinking water requirements are under the regulatory control of the state department of health.[407]

Arm's-Length or Not? Neither principles of machinery of government nor practice elsewhere supports the need to place drinking water regulation at arm's length from the provincial government. Nor is there any reason of principle against such an arrangement. However, organizational splits between policy development and related regulatory activity are a recurring, unsolved problem of machinery of government. In principle, the functions and resources should

---

[402] United Kingdom, [n.d.], "This Is the DETR" [online], [cited January 2001], <www.detr.gov.uk>.
[403] Ibid.
[404] United Kingdom, Environment Agency, [n.d.], "About Us" [online], [cited January 2001], <www.environment-agency.gov.uk>.
[405] United Kingdom, Office of Water Services, "The Role of the Regulator" [online], [cited January 2001], <www.ofwat.gov.uk>.
[406] See under "Lead Minister" in section 6.2.1.
[407] Ibid.

be kept together; in practice, this goal is seldom achieved without at least the appearance of some loss of regulatory independence.

In Ontario, consideration might be given to placing the regulatory and enforcement functions in an arm's-length agency for three reasons: the track record of the Ministry of the Environment; the possibility of better protection for the regulatory budget; and the probability that an arm's-length arrangement would provide for greater transparency and more dialogue with clients, experts, and the public at large.

The track record of the Ministry of the Environment as a regulator has been poor. If it is to continue in this role it will require more resources, a broader policy and legislative mandate, and much better support from the central agencies and the Premier's Office. The reasons for maintaining the ministry as the regulator are set out below, but the practical lessons of the recent past are hardly encouraging.

A particular difficulty has been the vulnerability of the ministry to cuts in the regulatory budget, especially in its approvals and monitoring functions. One advantage of an arm's-length agency is that it would be better placed to argue the case against reduced funding. A government ministry cannot and should not argue publicly against the fiscal policy of the government. An arm's-length agency, particularly one with a respected board of directors, is better placed to make its case – provided it is scrupulously careful to safeguard its professionalism and non-partisan nature. This argument does not necessarily have to be a public exercise, but it could be.[408]

An arm's-length agency would also be better placed to deal with its clients and the public in a transparent way. Free from the constraints of cabinet secrecy and political solidarity, such an agency would have more open relationships across the board. An arm's-length agency would undoubtedly have greater public visibility – and perhaps more clout – than the Ministry of the Environment appears to have had, notwithstanding its "insider" status as a government ministry.

There are also disadvantages to arm's-length arrangements. These mostly have to do with the viability of what would be left of the Ministry of the Environment if the regulatory and enforcement functions were removed. The ministry would

[408] The restoration of successive cuts during the 1990s to the federal granting councils was due in part to the ability of the independent members of the councils to make the case to the government.

remain responsible for drinking water policy, but would have none of the operational expertise that comes from the regulatory and enforcement processes. It would therefore be in no position to provide leadership for the development of a more comprehensive approach to drinking water policy – or to exercise enough clout to get the central agencies to enforce such a policy on other ministries.

In addition to a broader, watershed-based mandate, the Ministry of the Environment needs to thoroughly overhaul its approach to regulation, and introduce a greater emphasis on preventive measures. Developing and applying more rigorous standards is intrinsically important, but it would also encourage the emergence of large-scale private sector operators if the government decides to encourage real competition in the operation of water and sewage facilities. In such circumstances, operators might well be expected to implement internationally established environmental, quality, and management standards that require a spectrum of measures to prevent – and, where necessary, respond effectively to – critical events.[409] Such standards are likely to be met only by large, professional organizations.

Certifying operator organizations themselves as satisfying the necessary environmental, quality, and management standards would streamline and simplify the approvals process for new and refurbished facilities. This would permit the ministry to concentrate on the integrity of the certification processes for supplier organizations. Similar arrangements might be instituted to support the development and certification of independent testing laboratories. An efficient system for certifying both supplier and testing organizations would enable the ministry to concentrate its enforcement activities on serious violations, thus encouraging all suppliers to live up to the requirements of their certification.

In order to make these developments possible, the government will have to rethink water policy, including the relationship between regulation and competition, in an integrated way – as discussed throughout this report. The Ministry of the Environment as presently constituted does not have the capacity to take the lead in rethinking government policy.

If the objective is to refocus the government's responsibilities for drinking water and to develop a more comprehensive policy that will be applied actively by

---

[409] These would be ISO 9001:1994 (Quality Systems) and ISO 14001:1996 (Environmental Management Systems). For an example of the approach required, see Australia, NHMRC/ARMC.

ministries that impact the watershed, the arguments against an arm's-length agency outweigh those in favour.

6.2.3 Operations

The realm of operations takes this discussion beyond matters that are clearly the responsibility of government. Various models exist for the operation of water and sewage facilities, and there is a good deal of controversy about the extent to which governments should be involved in the task. It is a subject as much influenced by economics and ideology as by concern for efficiency and safety. The focus here, as throughout this paper, is on the safety of drinking water.

Current Arrangements Ontario's water and sewage systems are owned by the province's municipalities. With a few exceptions, they are operated either by the municipality (or a local commission) or by the OCWA.[410] (The few exceptions are facilities operated by the private sector.) This agency is a closely held government agency under the day-to-day direction of the Ministry of the Environment.[411] It provides the provincial government with ready access to the expertise and operational capability to respond to water emergencies such as the events at Walkerton.

Other jurisdictions make use of a variety of arrangements for the operation and ownership of water and sewage facilities. As might be expected, during the 1990s there has been a trend away from government operation and ownership. In California and New York, for some time most facilities have been owned and operated either by municipalities or by the private sector. In the United Kingdom, ownership and operation have been privatized recently in an effort to raise the necessary capital to bring otherwise deplorable public facilities up to standards prescribed by the European Union.[412] In New South Wales, Australia, in the early 1990s the publicly owned water boards were turned into public corporations with boards of directors and a mandate to operate on business principles.[413]

Ownership and Operation There are advantages to keeping the ownership and operation of water facilities separate. In a competitive situation, municipalities

---

[410] See section 2.2.2.
[411] Ibid.
[412] See Elizabeth Brubaker, 2000, *Water and Wastewater Privatization in England and Wales* [unpublished draft], (Toronto: March, 12).
[413] See under "Lead Minister" in section 6.2.1.

that contract out for the operation and maintenance of facilities while retaining ownership have the advantage of being able to change operators with relative ease in the event of unsatisfactory performance. Furthermore, competition is more practical where suppliers can come and go without the complications of having to change ownership.

In Ontario, with a few exceptions (such as Hamilton and Goderich), large municipalities operate their own facilities; many smaller municipalities rely on the OCWA to operate theirs. The OCWA has been structured to compete with municipalities and the private sector in contracting to build and operate water and sewage treatment facilities – although, as outlined earlier, it has more than a competitive edge as a result of its ownership by the province.[414]

The existence of the OCWA provides the government with immediate access to the resources needed to cope with a drinking water emergency. It also provides a level of service and expertise that smaller municipalities (its main customers) cannot match. As a government agency, it offers smaller municipalities services on terms and prices unavailable from other suppliers. However, the OCWA is unlikely to be able to continue this policy in the future and remain viable unless the province is prepared to provide it with new financial resources.

6.2.4 Financing

As discussed earlier, the government has a responsibility to ensure that all municipalities, regardless of size, can afford to finance water and sewage facilities.[415] This responsibility does not necessarily mean the province must provide support from the taxpayer, although government loans and grants are one means of fulfilling it. Another way of meeting the government's obligation would be to create the circumstances in which it would be both sensible and politically feasible to fully price water and sewage services.

Current Arrangements Financial arrangements for water and sewage facilities in Ontario vary considerably. Some large municipalities use full-cost pricing; some use water charges as a means of subsidizing the municipal budget; some recover less than cost; and some do not even have the data to tell whether they are charging too little or too much for the services they provide.

---

[414] See section 2.2.2 and the end of section 4.2.5.
[415] See under "Financial Programs" in section 6.1.1.

Ontario is in the throes of launching a new program to assist smaller municipalities to renew crumbling infrastructure.[416] This is the latest of a series of ad hoc programs that followed the demise of the Ontario Water Resources Commission in the early 1970s. As noted earlier, these programs, along with the subsidies, borrowing authorities, and outright gifts of that commission, have distorted the pricing of water and sewage services in Ontario.[417]

Ontario's Funding Models The province has not adopted policies that would change the way in which water and sewage facilities are financed, such as requiring metering of usage (the government notes that "[i]nvestments in metering are being encouraged through OSTAR.")[418] and ensuring that municipalities know the true costs of the services provided. It has, therefore, little alternative but to continue to provided ad hoc financial assistance, particularly for smaller municipalities.

The province has seen several different organizational arrangements for funding water infrastructure.[419] These may be summarized as follows:

- a dedicated agency with responsibility for all aspects of water and sewage development, including regulation, science support, inspection, enforcement and financial support, together with the option to own and operate treatment facilities (i.e., the Ontario Water Resources Commission);

- a dedicated agency that provides operational expertise and (until 1996) some direct financial assistance (i.e., the Ontario Clean Water Agency);

- a government ministry that regulates, provides science support, inspects, and enforces standards, as well as providing some financing support (i.e., the Ministry of the Environment); and

- the separation of financial support from service provision and the transfer of the former to a stand-alone entity responsible for providing strategic direction for the entire provincial capital expenditure budget (i.e., the Ontario SuperBuild Corporation).

---

[416] See section 2.2.3.
[417] "Full cost accounting and full cost pricing should be adopted as the standard for water and sewage systems and services in Ontario." See OSWCA, 2001b, pp. 2–3.
[418] Smith Lyons, 2001a, p. 21.
[419] See sections 1.1 and 2.2.3, and "Funding for New Water Infrastructure" under section 3.1.2.

A review of these four models raises the issue of whether policy and regulation should be separate from funding. The Ontario Water Resources Commission model combined these activities and a good deal more, including engineering and business expertise arising from operation and sometimes ownership of the facilities.

Unlike the separation of regulation from operations, the separation of policy and regulatory expertise from funding is not supported by any principle of the machinery of government. Indeed, given that the regulator (now the Ministry of the Environment) is also responsible for policy advice, there is a good case for adding funding to its responsibilities. This case is further supported by the fact that, under the current arrangements, the funding agency (SuperBuild) relies on the technical expertise provided by the ministry.[420]

Funding is inextricably connected with public safety. The expertise on drinking water safety within the government resides principally within the Ministry of the Environment. As long as SuperBuild relies on the substantive (not just technical) advice of the ministry, there may be a net advantage to be gained from leaving funding in the hands of SuperBuild, given its financial expertise and general influence. Note, however, that the role of SuperBuild and the ministries administering the OSTAR program adds to the confusion about responsibility and leadership for the provision of clean drinking water.[421]

6.3 Conclusion

The provincial government can and should take a number of measures to ensure that it is organized in such a way as to fulfill its role in the provision and management of safe drinking water for Ontarians.

The government needs to support the designation of the Minister of the Environment as the lead minister for drinking water safety with a formal and comprehensive policy for drinking water safety that may be reflected in legislation and should be applied routinely by all affected ministries and agencies. The Cabinet Office should ensure appropriate mechanisms at the level of ministers and officials to ensure that the policy on drinking water safety is respected. The lead role should rest with the Minister of the Environment, and the ministry's mandate should be expanded to include watershed management.

---

[420] See under "Funding for New Water Infrastructure" in section 3.1.2.
[421] See sections 2.2.3, and under "Lead Minister" in section 6.2.1.

The regulation and enforcement functions should remain under the direct responsibility of the Minister of the Environment presiding over a renewed Ministry of the Environment.

The province has no need to operate any water facilities itself, but it has a clear duty to regulate those who do. In terms of the government's responsibilities, the OCWA performs two necessary functions: it provides an emergency response capability, and it has the expertise to advise municipalities on the design and construction of water and sewage facilities. If the OCWA were to be wound up or privatized, this core of advisory expertise should be transferred to the Ministry of the Environment, where it would continue to be available to municipalities and would enhance the ministry's understanding of drinking water operations.

If the OCWA is shut down, its emergency response capability will have to be replicated elsewhere at the taxpayer's expense. Larger municipalities have the capacity to provide emergency water services (as Waterloo offered to in the case of the Walkerton crisis); emergency services could perhaps be purchased from larger municipalities with water operations. Or their provision might be made part of the contractual obligations of the private sector successors to the OCWA, as operators of public water and sewage systems.[422] A comprehensive water management policy should take account of the available options for providing expertise and operational services in emergencies.

When reviewing the role played by the OCWA, it is important that the government consider whether alternative arrangements would enhance or reduce safety. To the extent that full-cost pricing promotes public safety by improving access to capital to build and renovate facilities, owners should be moving in that direction. Such a policy would improve the financial viability of the OCWA and probably attract greater interest from other potential operators.

A policy framework for safe drinking water should clearly identify the link between safety and finance. The province should consider policies that will contribute to public safety, such as encouraging full-cost pricing or providing stable funding to subsidize new facilities, particularly in smaller municipalities. If the government is to continue, through the OCWA, to operate facilities, it needs to ensure that OCWA is not encouraging smaller communities to charge

[422] There is a good analogy in the way in which the British moved land forces to the South Atlantic to participate in the Falklands War in 1982: the Ministry of Defence drew on its contracts with various shipping companies including Cunard and P&O, requisitioning some 45 ships including *RMS Queen Elizabeth II* and *SS Canberra* as troop transports.

uneconomic rents for water and sewage services. As long as users do not pay real costs, facilities will be substandard unless the province is prepared to provide financial assistance on a scale not seen since the 1960s. To the extent that this is unlikely, the current arrangement is a threat to public health.

If the province is to remain in the subsidy business, SuperBuild is in a better position to leverage funding than is the Ministry of the Environment. In the long run, however, the Ministry of the Environment, as the policy and regulatory agent for the government, ought also to administer any available infrastructure funding for water and sewage facilities.

Most importantly, however, the government needs to include coherent financial arrangements in a future policy framework for safe drinking water.

A reliable system for fulfilling the provincial government's responsibility to ensure the provision of safe drinking water must have coherence in both policy and institutions. This requires the following elements:

- a comprehensive, public drinking water policy covering all relevant substantive activities of the government, clearly outlining responsibilities and accountability for all ministries and agencies that have a connection to the safety of drinking water;

- coherent legislation that identifies responsibilities, powers, and accountabilities, and reflects public consultation and periodic comprehensive policy review;

- a lead minister and ministry with a sufficiently broad mandate to protect the sources of drinking water;

- a lead ministry with the resources to satisfactorily fulfill its four key roles: policy setter, expert advisor, regulator, and enforcer;

- a decision-making system supported by the central agencies, in particular the Cabinet Office, to ensure that the policy is adopted and respected by all relevant players;

- a sound approach to financing any infrastructure that is entrenched in the policy framework – this means either removing distortions that

interfere with full-cost pricing or implementing a system of subsidies that is closely tied to the policy and regulatory process and is under the authority of the minister responsible;

- mechanisms for appealing regulatory decisions concerning the provision of drinking water and its pricing; and

- a system of regular public reporting, evaluating, and auditing all aspects of the drinking water policy, including the performance of the lead ministry, the central agencies, and other government ministries and agencies, as well as the owners and operators of water and sewage facilities and testing laboratories.

The organization of government responsibilities for the provision of safe drinking water must work as a coherent system. Policy, expert advice, funding, regulation, enforcement, and operations all need to be linked together in a continuous cycle.

If the Ministry of the Environment is to take the lead it will require a complete overhaul. It needs experienced, senior policy staff. It needs resources for regulation, inspection, scientific study, and enforcement. It must have the consistent support of the central agencies and of the Premier's Office. Such a turnaround at the Ministry of the Environment is only possible with a major commitment from the government and the Ontario Public Service; this ministry is currently under-resourced and its staff demoralized. Historically, the ministry has had little clout and few friends within government, and it has recently lost any semblance of control of the funding lever to the SuperBuild Corporation and the Ministry of Finance.

The alternative of placing lead responsibility with the Minister of Health and Long-Term Care is not advisable for two reasons. First, the health ministry is fully occupied with the province's chronic medical care problems. Second, it is in no position to take on the broad watershed-based policy mandate that effective management of drinking water requires. Given the changes in science, public awareness, and government organization over the past 25 to 30 years, drinking water policy is properly part of the environmental agenda. Note, however, that the Ministry of Health and Long-Term Care should be playing a larger role in drinking water policy than it has been; it would figure prominently in the policy framework for safe drinking water proposed in this report.

The remaining option is to create a regulatory agency. This choice would likely reinvigorate the way in which the government's regulatory duty is carried out, and offer better long-term protection against drastic budget cuts in regulatory operations. But as an arm's-length organization, it would be farther from government and not well placed to assume a leadership role in the coordination of the overall provincial government effort.

The role of the Ministry of the Environment, stripped of its regulatory and enforcement roles, would be minor under this scenario. The ministry would be a weak policy centre lacking technical experience, and would no doubt lose its remaining scientific resources to the regulator. If the Ministry of the Environment is to continue to be the regulator, the best safeguard against degrading its capacities is full public disclosure of the results of its regulatory and enforcement activities, together with regular peer review of its technical and scientific expertise.

A total re-think of how the government can best fulfill its responsibilities is required. This thinking is better done on the basis of a clear government commitment, which is best provided by entrusting the task to an organization under the government's direct authority and subject to the leadership and priority that only the premier and the central agencies can provide.

Future arrangements to fulfill the government's responsibilities for safe drinking water should assemble in one organization, under the direct authority of a responsible minister and with the necessary support of the premier and the Cabinet Office, the policy, scientific, technical, regulatory and financial expertise required to develop and implement a government-wide policy to safeguard Ontario's drinking water.

References

Association of Municipalities of Ontario [AMO]. 2000. *AMO Municipal Action Plan: Protecting Ontario's Water*. June. Toronto: AMO.

Aucoin, Peter. 1995. *The New Public Management: Canada in Comparative Perspective.* Montreal: Institute for Research on Public Policy.

Australia. National Health and Medical Research Council/Agricultural and Resources Management Council of Australia and New Zealand. Coordinating Group. 2001. *Framework for Management of Drinking Water Quality: A Preventive Strategy from Catchment to Consumer*. Canberra: Australian Government Printing Services. [Also available online: <www.nhmrc.gov.au/publications/synopses/eh19syn.htm>].

Benidickson, Jamie. 1999. "Ontario water quality, public health and the law, 1880–1930." In Jim Phillips and Blaine Baker, eds., *Essays in the History of Canadian Law: Essays in Honour of RCB Risk.* Vol. 8. Toronto: Osgoode Society for Canadian Legal History.

———. 2002. *Water Supply and Sewage Infrastructure in Ontario*. Prepared for the Walkerton Inquiry. Toronto: Ontario Ministry of the Attorney General. Walkerton Inquiry Commissioned Paper 1. Walkerton Inquiry CD-ROM. <www.walkertoninquiry.com>.

Brubaker, Elizabeth. 2000. *Water and Wastewater Privatization in England and Wales.* Toronto: March 12. Unpublished draft.

California. Department of Health Services. 2001. "Roles and Responsibilities of Government Agencies" [online]. [Cited March 2001.] <www.dhs.ca.gov>

Canada. Privy Council Office. 1993. *Responsibility in the Constitution.* Ottawa: Minister of Supply and Services.

Canadian Environmental Law Association. 2000. "The top 10 things wrong with environmental protection under the Common Sense Revolution." *Intervenor*. July–December, pp. 9–12 [online]. [Cited March 2001.] <www.cela.ca/intervenor_archives.htm>.

Canadian Institute for Environmental Law and Policy. 2000. *Ontario's Environment and the Common Sense Revolution: A Fifth Year Report.* Toronto: The Institute.

Carman, Bob. 2001. "Comments on … Machinery of Government for Safe Drinking Water in Ontario." February 5. Unpublished comments on draft of this paper [author's files].

Christie, Max. [n.d.] "What's after Walkerton?" Unpublished report for the Ontario Municipal Water Association. Peterborough.

Edward, Lord Bridges. 1964. "The relationship between ministers and the permanent departmental head." *Canadian Public Administration.* Vol. 8, no. 3.

Executive Resources Group. 2001. *Managing the Environment: A Review of Best Practices*. Report commissioned by the government of Ontario. [Toronto:] January.

Freeman, Neil B. 1996. *Ontario's Water Industry: Models for the 21st Century*. Report prepared for the Ontario Municipal Water Association. Peterborough, Ont.

Grand River Conservation Authority. 2000. "Who Pays for Our Programs?" [online]. [Cited spring 2001.] <www.grandriver.on.ca>.

Hennessy, Peter. 1995. *The Hidden Wiring: Unearthing the British Constitution.* London: Victor Gollancz.

Howard, Prof. K.W.F. 2000. Testimony before the Walkerton Inquiry. October 16 [online]. [Cited spring 2001.] <www.walkertoninquiry.com>.

Jones, G.W. 1983. "Prime ministers' departments really create problems: A rejoinder to Patrick Weller." *Public Administration*. Vol. 61, spring.

KPMG. 1998. "A Review of Water Management Practices in the Ontario Government." Unpublished report. Toronto: September 25.

McCulloch, P., and P. Muldoon. 1999. *A Sustainable Water Strategy for Ontario.* Toronto: Canadian Environmental Law Association. Cited in Ontario Sewer and Watermain Construction Association [OSWCA] 2000. *Conservation, Preservation, Restoration: A Nine-Step CPR Plan for Ontario's Water and Sewage Systems.* Toronto: OSWCA, January.

New York State. Department of Environmental Conservation. [n.d.] "Water Resources" [online]. [Cited January 2001]. <www.dec.state.ny.us>.

———. Department of Health. [n.d.] "Info for Consumers" [online]. [Cited January 2001.] <www.health.state.ny.us>.

"OMB rules in West Perth's favor in terms of zoning bylaw." 2000. *Mitchell Advocate*. July 26.

d'Ombrain, Nicholas. 2000. "Alternative service delivery: Governance management and practice." In *Change, Governance and Public Management.* Ottawa: KPMG and Public Policy Forum, May.

Ontario. 1997. *The Ontario Cabinet Decision-Making System: Procedures Guide.* Toronto: May.

———. 1994. "Memorandum of Understanding Between the Minister of the Environment and Energy and Ontario Clean Water Agency." Toronto: March 31.

———. Cabinet Office. Public Service Restructuring Secretariat. 2000. *Transforming Public Service for the 21st Century: An Ontario Perspective*. Toronto: Ontario Cabinet Office.

Ontario Centre for Sustainability. 2000. *Missing Values 2000: Ontario's Failure to Plan for a Healthy Environment.* September. Toronto: The Centre [online]. [Cited January 27, 2002.] <www.web.ca/ocs>.

Ontario Clean Water Agency. 2000. "Presentation to Board of Directors SuperBuild Corporation." Toronto: December 11. Unpublished document.

Ontario. Financing Authority. 2001. "Corporate Governance" [online]. [Cited January, 2001.] <www.ofina.on.ca>.

Ontario. Management Board Secretariat. 1996. *Alternative Service Delivery Framework.* Toronto: the secretariat.

———. 2000a. *Agency Establishment & Accountability Directive*. Toronto: Queen's Printer for Ontario.

———. 2000b. "List of Classified Provincial Agencies (Agencies as of 2000-01-20)." March. Unpublished document.

———. 2000c. *The Ontario Public Service in the 21st Century: Discussion Paper on the* Public Service Act. Toronto: the secretariat, March.

Ontario. Ministries of the Environment and of Natural Resources. 2000. "Provincial Water Management Framework." Submission to Cabinet. January. [Walkerton Inquiry archives, Inqdocno. 1038133.]

Ontario. Ministry of Agriculture, Food and Rural Affairs. 2000. "Minister's Directive to the Normal Farm Practices Protection Board." June 26. [online]. [Cited spring 2001.] <www.gov.on.ca/OMAFRA>.

Ontario. Ministry of Environment and Energy. [1996]. "Response to ABC Government Task Force Review: Operational Agencies." Unpublished document. [Walkerton Inquiry archives, Inqdocno. 1017709.]

Ontario. Ministry of Finance. 2000a. "Board of SuperBuild Corporation Announced." Toronto: February 9. Press release.

———. 2000b. "Ontario Investing $2.1 Billion in Infrastructure." Toronto: May 2. Press release.

———. 2000c. *2000 Budget*. Toronto: Ministry of Finance. May 2.

———. 2001a. "Ontario SuperBuild Corporation: Requests for Proposal." (Eight separate RFPs.) January 26.

———. 2001b. "SuperBuild Policies and Priorities." Budget paper. May.

Ontario. Ministry of Natural Resources. 2000. *Beyond 2000: Strategic Directions.* Toronto: Queen's Printer for Ontario.

Ontario. Ministry of the Environment. 1990. "Drinking Water." *Information.* Summer.

———. 1999. "Alternative Service Delivery for the Communal Water Program." Toronto: March 15. Unpublished document.

———. 1999. *Water Management Policies, Guidelines and Provincial Water Quality Objectives.* Revised edition. Toronto: the ministry.

———. 2000a. *Business Plan 2000–2001.* Toronto: the ministry.

———. 2000b. *Drinking Water in Ontario: A Summary Report 1993–1997.* Toronto: Queen's Printer for Ontario.

———. 2000c. "Environment ministry completes inspection of 645 water treatment plants." Toronto: December 21. Press release.

———. 2000d. "Minister's Briefing Binder." Toronto: March. Unpublished document.

Ontario. Ministry of the Environment. Corporate Management Branch. [1996?]. "Historical Analysis of Ministry of the Environment and Energy Estimates, 1985–1995." Toronto. Unpublished report.

Ontario. Ministry of the Environment. Operations Division. 1997. "Proposal for Alternative Service Delivery – Communal Water Works: A Monitored Self-Management Approach." November 25. [Walkerton Inquiry archives, Inqdocno: 1007828] Unpublished document.

Ontario Municipal Water Association. [n.d.] *Steps towards a Better Water Future.* [Peterborough, Ont.] Unpublished report.

———. 2000. *The Ministry of the Environment.* [Peterborough, Ont.:] October 2. Unpublished report.

Ontario. Office of Privatization. 1998. *Review of the Ontario Clean Water Agency: Final Report.* Toronto: November. Unpublished report.

Ontario. Office of the Environmental Commissioner. 2000. *The Protection of Ontario's Groundwater and Intensive Farming.* Special report to the Legislative Assembly of Ontario. Toronto: July 27.

———. 2001. "Ontario's Permits to Take Water and the Protection of Ontario's Water Resources." Brief to the Walkerton Inquiry. January. 2001.

Ontario. Office of the Ombudsman. 1998. *Annual Report 1997/98.* Toronto. Government of Ontario. [Online]. [Cited January 27, 2002.] <www.ombudsman.on.ca/ann_reports.asp>.

———. 1999. *Annual Report 1998/99.* Toronto: Government of Ontario. [Online]. [Cited January 27, 2002.] <www.ombudsman.on.ca/ann_reports.asp>.

Ontario. Office of the Premier. 2000. *Harris Launches New, Pro-Growth Cabinet Team.* Toronto: February 8. News release.

Ontario. Office of the Provincial Auditor. 2000. "Ministry of the Environment: Operations Division." Section 3.06 in *Special Report on Accountability and Value for Money* [online]. [Cited spring 2001.] <www.gov.on.ca/opa>.

Ontario. Public Service Restructuring Secretariat. 1999. *Alternative Service Delivery in the Ontario Public Sector*. Unpublished document. August. [Author's files.] p. 42.

Ontario Sewer and Watermain Construction Association [OSWCA]. 2001a. *Drinking Water Management in Ontario: A Brief History.* Toronto: OSWCA.

———. 2001b. *Conservation, Preservation, Restoration: A Nine Step CPR Plan for Ontario's Water and Sewage Systems.* Toronto: OSWCA.

Ontario. SuperBuild Corporation. 2000a. *Building Ontario's Future: A SuperBuild Progress Report.* Toronto: the corporation, December.

———. 2000b. "Frequently Asked Questions" [online]. August 8. [Cited spring 2001.] <www.superbuild.gov.on.ca>.

———. 2000c. *Ontario Small Town and Rural Development (OSTAR) Infrastructure Program: Round 1— Public Health and Safety: Application Guidebook.* Toronto: the corporation.

"Ontario's Water Utilities: Governance Models." 1997. Report prepared for the Ontario Municipal Water Association. Peterborough: December 19. Unpublished.

Osborne, David, and Ted Gaebler. 1992. *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector.* New York: Addison-Wesley.

Savoie, Donald J. 1999. *Governing from the Centre: The Concentration of Power in Canadian Politics.* Toronto: University of Toronto Press.

Sancton, Andrew, and Teresa Janik. 2002. *Provincial-Local Relations and Drinking Water in Ontario.* Toronto: Ontario Ministry of the Attorney General. Walkerton Inquiry Commissioned Paper 3. Walkerton Inquiry CD-ROM. <www.walkertoninquiry.com>.

Smith Lyons. 2001a. "Ministry Comments on … Final Report on Machinery of Government." Submission to Commission Counsel. The Walkerton Inquiry. Papers from Parties with Standing 23. August 2. [Author's files.] [Also online <www.walkertoninquiry.com>.]

———. 2001b. "Responses/Comments on … Preliminary Report on Machinery of Government." Submission to Commission Counsel. The Walkerton Inquiry. [Author's files.] February 9.

———. 2001c. [Untitled]. Submission to Commission Counsel. The Walkerton Inquiry. [Author's files.] March 2.

———. 2001d. [Untitled]. Submission to Commission Counsel. The Walkerton Inquiry. [Author's files]. March 12.

———. 2001e. [Untitled.] Submission Associate Commission Counsel. The Walkerton Inquiry. [Author's files]. October 29.

United Kingdom. "This is the DETR"[online]. January. [Cited January 2001.] <www.detr.gov.uk>.

United Kingdom. Department of Health. [n.d.] "The Chief Medical Officer." [online]. [Cited January 2001.] <www.doh.gov.uk>.

———. Environment Agency. [n.d.] "About Us." [online]. [Cited January 2001.]. <www.environment-agency.gov.uk>.

United Kingdom. Office of Water Services. 2001. "The Role of the Regulator" [online]. [Cited January 2001.] <www.ofwat.gov.uk>.

United States. Environmental Protection Agency. "How Safe Is My Drinking Water?" [online]. [Cited January 2001.] <www.epa.gov>.

Weller, Patrick. 1985. *First among Equals: Prime Ministers in Westminster Systems.* Sydney, Australia: George Allen & Unwin.

Wood, Dennis H. 2000. *The Planning Act: A Sourcebook*. 4th ed. Toronto: Carswell.