

Machinery of Government for Safe Drinking Water in Ontario

Discussion Paper

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This draft paper has been prepared as a background document for the Walkerton Inquiry. It is intended to generate and inform discussion about the safety of drinking water among parties with standing, relevant experts, and the public. It does not represent the findings, views or recommendations of the Commissioner. Written comments in response to the paper are welcome and will form part of the public record of the Inquiry. They should be submitted to:

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Purpose and Structure of the Report

1. On 13 June 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
2. The purpose of this paper is to provide the Commissioner with the following:
 - a) A comprehensive overview and evaluation of the way in which the Government of Ontario is organized and functions with particular respect to the provision and management of water, and its relationship with provincial agencies, municipalities and others engaged in the provision of safe drinking water.
 - b) A review of machinery of government principles and practices that need to be kept in mind in assessing existing arrangements and in developing proposals for the future.
 - c) A framework for identifying policy requirements and consequential institutions and processes to give effect to the government's responsibilities for safe drinking water.
3. Part I of the report defines water management in public policy terms. It discusses the way in which water policy has evolved in Ontario, and gives a brief overview of responsibilities at the federal, provincial and municipal levels.
4. Part II describes the institutions at the provincial and municipal levels that have responsibilities that affect the provision of safe drinking water to Ontario residents, their statutory authorities, policy functions and program and administrative roles.
5. Part III describes the prescribed processes followed by these institutions in providing safe drinking water: it examines the decision-making processes of the government and the

¹ O.C. 1170/2000.

regulatory processes that underpin water operations. Note Parts II and III were submitted to the Government of Ontario (Cabinet Office) to check the accuracy of this factual material.

6. Part IV of the report evaluates the strengths and weaknesses of the government's policies, institutions and processes for fulfilling its obligations for safe drinking water.
7. Part V deals with principles of sound governance to guide future water administration in Ontario. This is a discussion of control and accountability and how the application of the principles of government organization affects the fulfilment of the government's responsibilities.
8. Part VI provides a policy and organizational framework for assessing possible future arrangements bearing in mind current practices, principles of good governance and practices in other jurisdictions.
9. This paper is 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 considered primarily in the light of the impact of the government's policies on the way in which they carry out their roles in the provision of safe drinking water.

Part I: Drinking Water Management and Public Policy

10. This part of the report describes the role played by water in the relationship between the citizen and the state. It discusses how the provision of safe drinking water has been and is dealt with by the various levels of government in Canada, and the general constitutional and practical considerations that determine who does what.

Water and Governments

11. Procuring safe supplies of water is fundamental to life and one of the underpinnings of organized social, economic and political relationships among human beings. It is, however, only in relatively recent times that governments have played a significant role in overseeing the provision of safe drinking water.
12. Privately owned water systems were installed in 19th 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 fire fighting.² The rest of Ontario's population lived in rural areas, and drew their water principally from individual shallow wells. Contamination of city and rural water supplies was commonplace until after the First World War. Typhoid fever claimed 1378 victims in Ottawa as recently as 1912.
13. From the earliest days, the linkage between sewage treatment and potable water was recognized, if not 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 The statute created the Provincial Board of Health, which was responsible for the safety of drinking water, using 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 The same year the province enacted legislation, *The Municipal Waterworks Act, 1882*, that permitted the establishment of municipally owned and funded water utilities.⁵
14. Although the *Provincial Board of Health Act* gave considerable executive authority to a provincial agency, as a practical matter responsibility for water quality remained largely at the local level because the Board did not have the financial resources to overcome the

² See "Drinking Water", *Information, Ministry of the Environment*, summer 1990.

³ Jamie Benidickson, "Ontario Water Quality, Public Health, and the Law, 1880-1930", p.115.

⁴ Ontario Sewer and Watermain Construction Association, "Drinking Water Management in Ontario: A Brief History", January 2001, p. 2.

⁵ Neil B. Freeman, *Ontario's Water Industry: Models of the 21st Century: A Report Prepared for the Ontario Municipal Water Association*, April 1996, p. 35.

resistance of municipal councils to costly proposals for avoiding contamination of water supplies.⁶

15. 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 was established, the Pollution Control Board, to investigate and prosecute polluters. In 1953 this Board adopted Objectives for Water Quality in Ontario. The Ontario Water Resources Commission superseded the Board in 1956.⁸
16. The Commission was granted powers over all aspects of the development and provision of water and sewage services, including extensive financial powers.⁹ It was given powers to appoint and employ its own staff. Its substantive powers were considerable, and the origins of many of today's functions are clearly visible. The Commission's powers included:
 - a) Supervision of all ground and surface waters in Ontario used as a source of water supply.¹⁰
 - b) Control of all aspects of the use of water for public purposes.¹¹
 - c) Construction and operation of 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
 - d) The licensing of well drillers.¹⁴

⁶ Jamie Benidickson, "Ontario Water Quality....", pp. 131-133.

⁷ Jamie Benidickson, "The Development of Water Supply and Sewage Infrastructure in Ontario", December 2000, p. 29.

⁸ Jamie Benidickson, "The Development of Water Supply and Sewage Infrastructure in Ontario", December 2000, p. 61ff.

⁹ Sections 21, 39-45, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

¹⁰ Section 16, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

¹¹ Section 16, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

¹² Section 16 and 17, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

¹³ Section 39, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88. This provision was made palatable by the generous financial arrangements that the Commission entered into with its clients.

¹⁴ Section 29, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

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- e) Approval of the construction, renovation and financing of water and sewage works by municipalities or others.¹⁵
 - f) Imposition on owners of water and sewage facilities of reporting requirements and standards of maintenance.¹⁶
 - g) 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
17. The Commission exercised its powers without intervention from any minister. The minister responsible, in this case any minister designated for the purpose, had no general powers of direction. He or she was to receive an annual report for tabling in the legislature "...containing such information as the Minister may require."¹⁸ The minister designated under the Act was usually the minister responsible for health.¹⁹
18. The Commission, and later the Ministry of the Environment, set standards for water quality, and supervised implementation through a system of financing, licensing, certification, monitoring, inspection, investigation and enforcement. Nonetheless, the local jurisdiction of medical officers of health continues to this day, principally in respect of biological threats to public health.
19. The creation successively of the Ontario Water Resources Commission (1956) and the Ministry of the Environment (1971/72) marked important realignment of responsibilities for the provision of safe drinking water to Ontario residents.
20. First, 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 Ontario Water Resources Commission was the vehicle for this expansion. 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.
21. Second, beginning around 1970, the general emphasis on environmental concerns introduced new considerations into the management of water resources in general and

¹⁵ Section 30, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

¹⁶ Sections 30 and 31, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

¹⁷ Section 38, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

¹⁸ Section 7, *The Ontario Water Resources Commission Act, 1957*, Statutes of the Province of Ontario, Third Session of the Twenty-Fifth Legislature of Ontario, Chapter 88.

¹⁹ See Ontario Sewer and Watermain Construction Association, "Drinking Water Management in Ontario: A Brief History", January 2001, p. 3.

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 agreed by the government that applies to the activities of other ministries with responsibilities in such matters as agriculture, municipal affairs and health.

22. In addition, the new Ministry absorbed the Water Resources Commission in 1972. This 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
23. These two developments may also be seen as part of the general growth of the role of the state in the post-war 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 that brought with it the application of more uniform standards of water quality, and later through the development of a licensing and certification system that emphasised the chemical as well as the biological aspects of healthy water.
24. 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 the reduction in financial and human resources to carry out the now traditional roles of government.
25. For water management, fewer resources had two immediate consequences: first, 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 provided hitherto by the Ministry of the Environment and the Ministry of Health were either shifted to the private sector or reduced and placed on a cost-recovery basis.
26. The impact of these developments was made more acute by the dependence of many municipalities on infrastructure and operating subsidies that had permitted them to charge less than cost to their customers. 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, *Ontario's Water Industry*, 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 impact on "normal farm practices".

Federal Role

27. The federal government has little formal involvement in the provision of drinking water to Ontario's residents. It has an informal role through the establishment in cooperation with the provinces of Canada's Drinking Water Guidelines, which form the voluntary basis of the water standards, objectives and – rarely – regulations that the provinces promulgate to govern the provision of safe drinking water throughout Canada.²² Ontario is one of the few provinces to set out its standards in the form of mandatory regulations – itself a post-Walkerton development.²³
28. The formal federal role in respect to water derives principally from its constitutional power over the fishery under Section 91.12 dealing with the “Sea Coast and Inland Fisheries”. The federal *Fisheries Act* provides measures to counter degradation of the fish habitat and these powers are available to help protect the supply of surface and ground waters. 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”.
29. For many years the federal responsibility for the inland fishery was delegated to the provinces, but in the unfriendly and climate of 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
30. 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*. These Acts set out important regulatory regimes that have the potential to impact 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.
31. 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 water and sewage developments on federal lands are not regulated by the provincial government.²⁵ The provincial government has also taken the position that “...since they are under federal jurisdiction, First Nations are not eligible...” for provincial

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 (ODWOs) as regulations, only Québec and Alberta took formal measures to enforce the implementation of the Canadian Drinking Water Quality Guidelines. In Alberta, for example, the Environmental Protection Agency uses the guidelines to regulate water works and establish standards for their operation. Note too that Ontario and Québec are the only provinces that routinely monitor drinking water quality. See: Ministry of the Environment, *Drinking Water in Ontario* (Toronto: Queen's Printer, 2000), p. 17.

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

²⁵ Smith Lyons to Commission Counsel, Schedule 1, 12 March 2001.

assistance for water infrastructure.²⁶ This is somewhat anomalous 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.

32. 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. Mostly obviously this was manifested through its international jurisdiction (with the United States) over the Great Lakes. But it was also apparent in the development of its science base (at the time quite strong) 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 of voluntary national drinking water standards. The Canada Centre for Inland Water and 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.
33. 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 in 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. The federal Department of Agriculture has funded programs to manage animal wastes in the province. These programs have helped to improve drinking water quality, but they are a manifestation of willingness to spend federal taxpayers money rather than the exercise of federal jurisdiction.
34. As a practical matter, however, the federal government has not exercised its constitutional powers or its ownership of land in ways that significantly affects the provision of drinking water to Ontario's residents. Nor has the federal government made much use of its now diminished science capability 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, therefore, a significant player in existing arrangements for the provision and management of safe drinking water to residents of Ontario.

Provincial Role

35. The way in which the provincial role has evolved is set out at the beginning of this part of the paper. The current role is examined in detail in the balance of the paper. It is sufficient here to note that the role is pervasive because all local affairs are the constitutional responsibility of the province. Much is delegated to municipalities and to local public utility commissions. The province remains responsible for public health and for the protection of the environment within the province. These two responsibilities provide the basis of its role in the provision and management of drinking water.

²⁶ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 6, Smith Lyons to Commission Counsel, 9 February 2001.

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36. It should be noted, however, that during the 1990s the province's accumulated debt and annual deficits caused a significant change in the relationship with municipalities. Initiatives such as the "Common Sense Revolution", "Who Does What", 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, 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.²⁷

Municipal Role

37. Municipalities are the unit of local government in the province. All local government, including county, regional and upper and lower tier government, is 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 local public utilities commissions, which may be established by municipalities. Municipalities are affected not only by provincial regulation of water and sewage development and operations, but also by extensive statutory provisions that deal with environmental assessment, land use planning and public health.
38. Currently, municipalities and other local institutions such as utilities commissions are the owners and often the operators of water and sewage facilities. They are required to act within a framework of the statutes and regulations provided by the province.
39. Municipalities are responsible for the funding of 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 such debt through special user levies (water rates).²⁸ When the Ontario Water Resources Commission began to operate in the latter half of the 1950s, municipalities were introduced to grants and loans for water and sewage infrastructure. These subventions were widely available, designed to ensure that burgeoning development in southern Ontario would not be impeded by inadequate water infrastructure.²⁹
40. Loans from the Ontario Water Resources Commission offered an attractive alternative to floating municipal debentures because of improved interest rates and longer repayment periods. Alternatively, municipalities could arrange for the Commission to own and operate water and sewage facilities, leaving the municipality responsible only for the annual costs

²⁷ For a detailed review of the impact of these initiatives on drinking water arrangements in Ontario, see Andrew Sancton and Teresa Janik, "Provincial-Local Relations and Drinking Water in Ontario" a paper prepared for the Walkerton Inquiry, 19 February 2001. See also paragraph 127ff.

²⁸ See paragraph 190.

²⁹ Andrew Sancton and Teresa Janik, "Provincial-Local Relations and Drinking Water in Ontario", 19 February 2001, pp. 7-10.

of maintenance and repair and a longer-term commitment to acquire ownership.³⁰ By the late 1960s, the Commission was offering smaller municipalities grants to cover as much as 85% of the capital costs of water and sewage infrastructure.³¹ Between the birth of the Ontario Water Resources Commission and the end of the 1982/83 fiscal year when the province shifted from grants to loans for water infrastructure, it is estimated that \$2.04 billion was spent by the three levels of government on water and sewer infrastructure in Ontario.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 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 provide assistance to smaller municipalities to rehabilitate the systems built with provincial grants over the preceding 25 to 30 years.³⁴

41. 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.

Trends

42. This brief overview provides some key points worth bearing in mind for the rest of this report:
- a) Until the mid-1950s, municipalities financed water and sewage development without provincial assistance. This changed because of the need to ensure adequate facilities to support urbanization.
 - b) 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 of water and sewage facilities.
 - c) The reliance on provincial subsidies instead of charging real costs to customers has not served the objectives of conservation or economic efficiency.

³⁰ Ontario Sewer and Watermain Construction Association, “Drinking Water Management in Ontario: A Brief History”, January 2001, p. 4.

³¹ Ontario Sewer and Watermain Construction Association, “Drinking Water Management in Ontario: A Brief History”, January 2001, p. 5.

³² Ontario Sewer and Watermain Construction Association, “Drinking Water Management in Ontario: A Brief History”, January 2001, p. 8.

³³ Ontario Sewer and Watermain Construction Association, “Conservation, Preservation, Restoration: A Nine Step CPR Plan for Ontario’s Water and Sewage Systems”, January 2001, p. 3.

³⁴ The Ministry of the Environment administered « Lifelines » 1987-1992. 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 is to flow through a component program under the general authority of Ontario SuperBuild Corporation. See paragraph 151ff.

- d) Until the 1970s, the province focused its regime for drinking water control on public health considerations.
- e) 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.
- f) By the 1990s budgetary restrictions and aging water and sewage infrastructure converged.
- g) Federal jurisdiction over lands and for fish habitat and the wider aspects of the environment provide an unrealized potential for a more prominent federal role in relation to safe drinking water.
- h) Similarly, provincial jurisdiction over resources and the environment provides an unrealized potential for a watershed approach to the overall management of drinking water resources.

Part II: Mandates and Institutions for Safe Drinking Water

43. This part of the report describes the roles and responsibilities at the provincial and municipal level of the institutions that affect the provision of safe drinking water in Ontario. It begins with an overview of the way in which the provincial government is organized and does business. It describes the particular duties and functions of the ministries and agencies that deal with water, and the institutions and processes used to coordinate activities – such as water – that span several ministries and agencies. The report reviews the general relationship between Ontario's municipalities and the provincial government, and the particular relationships in respect of water management. It also considers the roles of other agencies, including public utilities commissions.
44. Note Parts II and III of the report were submitted to the Cabinet Office for comment in order to ensure factual accuracy. 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 may take account of the overall organization and processes of the provincial government. In their comments of these parts, the Cabinet Office has 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.³⁵

45. The reader will, therefore, want to bear in mind that the description provided here is of current arrangements, designed principally to assist the Commissioner in making recommendations for the future.

³⁵ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 2, Smith Lyons to Commission Counsel, 9 February 2001.

The Government of Ontario

46. 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.

Ministers

47. 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 powers assigned to them and to officials who are subject to their direction. They *answer* to the legislature for the exercise of powers assigned to others; generally these are arm's-length agencies carrying out quasi-judicial, regulatory, commercial, granting or other activities deemed inappropriate to be subject to ministerial direction and control.³⁶ In constitutional terms, these arrangements describe the "individual responsibility" of ministers, and 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.

The Cabinet

48. Ontario's system of ministerial government also demonstrates 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 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 to provide for the continuation of the government of the province through the Lieutenant-Governor-in-Council, which is the formal executive, consisting of the Queen's representative advised by the Executive Council (i.e. the members of the Cabinet).
49. It will be noted that 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 provides a 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.
50. The Cabinet is organized to reflect its policy, political, management and formal responsibilities. Currently there are nine standing committees of the Cabinet. The Cabinet generally oversees the work of a series of policy committees dealing with health and social services, education, economic development and natural resources, justice and intergovernmental affairs. In February 2001, a new committee for the environment was established. The strategic policy of the government is supervised by the Priorities, Policy

³⁶ For an explanation of the italicized terms see paragraph 341.

and Communications Board, chaired by the Premier. As a rule, the chairs of the Cabinet's policy committees sit on this Board.

51. 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.
52. 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.
53. As of the shuffle announced on 8 February 2001, there were twenty-four ministers in the Cabinet supported by nineteen Parliamentary Assistants. In the Ontario system, some (currently 4) Parliamentary Assistants are members of one or other of the policy committees of the Cabinet. The membership of Cabinet committees provides a general guide to the various sectors of activity presided over by the provincial government, although as in any Cabinet sectors overlap and 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.

Priorities, Policy and
Communications Board

The 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 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 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 (& Minister Responsible for Children and Minister Responsible for Francophone Affairs) Minister of Health and Long-Term Care Minister of Citizenship (& Minister Responsible for Seniors) Associate Minister of Health Minister of Consumer and Business Services and Minister of Correctional Services Parliamentary Assistant – Economic Development and Trade

Education Committee	Minister of Labour – Chair Minister of Community and Social Services (& Minister Responsible for Children and Minister Responsible for Francophone Affairs) – Vice-Chair Minister of Transportation Minister of Training, College and Universities (& Minister Responsible for Women’s Issues) Minister of Education (& Government House Leader)
Economic and Resource Committee	Minister of Finance & 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 & Minister of Correctional Services Minister of Energy, Science and Technology Minister of Environment
Justice and Intergovernmental Affairs Committee	Minister of Education (& 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 (& Minister Responsible for Native Affairs) Parliamentary Assistant – Natural Resources Parliamentary Assistant – Training, Colleges and Universities

Environment Committee	Minister of 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

54. The Environment Committee is new as of the Cabinet shuffle on 8 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.

Central Agencies

55. The Government of Ontario has several “central agencies” that are charged with supporting the process whereby ministers are able to present a united position on matters before the government. Three such agencies are generally found in all governments following the Westminster model: they are the Cabinet Office, the Management Board Secretariat and the Ministry of Finance. In addition, the Government of Ontario regards the Ontario SuperBuild Corporation as a central agency in its own right.³⁷

Cabinet Office and Premier’s Office

56. Ontario’s Cabinet is led and organized by the Premier who is both head of government and leader of the governing party. For these functions the Premier and the Cabinet receive support from both public service and political organizations. These are, respectively, 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, head these organizations, and they and their organizations work in close harmony in providing the Premier and the Cabinet with policy and political advice.
57. While the Premier’s Office is a political organization with essentially unofficial duties, the Cabinet Office fulfils a variety of essential public service functions. The Secretary of the Cabinet, who is normally a senior career public servant and the leader of the deputy minister community, heads the Cabinet Office. It is organized to fulfill the following duties:
- a) **Organization of Cabinet Business.** The Cabinet Office provides administrative support to the Cabinet and its committees, organizing meetings and maintaining

³⁷ “Responses/Comments on ... Preliminary Report on Machinery of Government”, p. 1, Smith Lyons to Commission Counsel, 9 February 2001.

records. This includes maintenance of the records necessary for the formal decisions of the Lieutenant-Governor-in-Council.

- b) **Policy Advice.** The Cabinet Office provides the Premier and the chairs of Cabinet committees with policy advice, and is responsible for organizing the presentation of issues for consideration by ministers at cabinet committee. This latter collective briefing function is carried out in conjunction with the officials of the sponsoring minister(s). The committees are served by secretariats in the Cabinet Office who work with ministries and agencies to ensure that the necessary preparatory work has been carried out to identify issues and options for final decision by ministers. The policy functions of the Cabinet Office are under the direction of a dedicated deputy minister.
- c) **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 an in-depth meeting of deputy ministers to review key files, identify emerging issues and review management of on-going events.
- d) **Government Organization and Human Resources leadership.** "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."³⁸
- e) **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."³⁹ This Cabinet Office function is also under the direction of a dedicated deputy minister.

Management Board Secretariat

58. 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:

³⁸ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 2, Smith Lyons to Commission Counsel, 9 February 2001.

³⁹ Smith Lyons to Commission Counsel, 2 March 2001.

MBS [the Secretariat] in support of MBC [the Board], 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 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 and Cabinet policy committees establish initial direction on strategic policy issues, MBC will make decisions on the financial, workforce, and operational implications associated with the policy initiatives. So while there is [sic] no dedicated policy resources in MBS, there is a clear and established linkage between policy and resources management considerations.⁴⁰

59. In summary, the Board and its Secretariat are responsible for management standards throughout the public service in Ontario and the management of the flow of resources for the ongoing operations of the government.⁴¹ The Board is also the government's employer and oversees all collective bargaining. The Board and the Secretariat are not systematically involved in evaluating the program activities of ministries and agencies, nor does it have policy resources. However, the Secretariat shares a common financial database with the Ministry of Finance, which has the policy resources to analyse proposed new expenditures and policies, and provides input to the Cabinet Office's policy evaluation process as described above.
60. 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 Management Board and several deputy ministers chosen on the basis of their portfolios and experience.

⁴⁰ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 2-3, Smith Lyons to Commission Counsel, 9 February 2001.

⁴¹ Section 3, *Management Board of Cabinet Act*, Revised Statutes of Ontario, 1990, Chapter M. 1, Section 6, *Treasury Board Act*, 1991, Statutes of Ontario, 1991, Chapter 14.

61. The Board and its Secretariat have responsibility for the establishment, mandates and administrative regimes that govern provincial agencies.⁴² The authority to propose new agencies rests with ministers, who are required to seek the approval of the Management Board, whose decisions are “confirmed or varied” by the Cabinet.⁴³ In support of these powers, the Secretary to the Management Board advises 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....”⁴⁴

Ministry of Finance

62. The Ministry of Finance supports the Government through the development of fiscal, economic and taxation policies, and since 1993 it has also administered Ontario’s tax statutes and tax assistance programs. Its policy functions affect all ministries and agencies as well as municipalities, although it relies on the Ministry of Municipal Affairs and Housing to collect and assess data dealing with both the revenues as well as the expenditures of municipalities.⁴⁵
63. 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.
64. 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 by the Ontario Water Resources Commission. The Ministry of Finance played an important role in the design of 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 its share of the costs of new water and sewage facilities.⁴⁶ The Ministry also approves all financial requirements and financial powers – equity, loans, borrowing - for provincial agencies.⁴⁷

⁴² See paragraph 121ff.

⁴³ “Responses/Comments on ... Preliminary Report on Machinery of Government”, p. 3, Smith Lyons to Commission Counsel, 9 February 2001.

⁴⁴ Management Board Secretariat, “Agency Establishment & Accountability Directive” (Toronto: Queen’s Printer for Ontario, February 2000), p. 16.

⁴⁵ “Responses/Comments on ... Preliminary Report on Machinery of Government”, p. 4, Smith Lyons to Commission Counsel, 9 February 2001.

⁴⁶ See paragraph 151ff.

⁴⁷ *Financial Administration Act*, Revised Statutes of Ontario, 1990, Chapter F. 12.

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65. 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.⁴⁸

Decision-Making Process

66. The 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 will work with ministries and agencies to ensure adequate preparation of issues so that ministers will understand the decisions being sought and will have an overview of the consequences of proposed actions.
67. Proposals for new policies and program will generally be considered in detail in one of the policy committees of the Cabinet. Such proposals will normally form part of the program developed by the Priorities, Policy and Communications Board to fulfil the government's election commitments. Other initiatives will only be considered with the prior agreement of the Cabinet Office following consultation with the Premier or his Office.
68. New policies and programs – indeed all policy changes - will be the subject of detailed inter-ministerial discussion at the level of officials, and those involving significant new expenditures will be worked out with the policy staff of the Ministry of Finance. The finalized proposal will be put forward in a "Cabinet Submission", which is signed by the deputy minister(s) as well as the sponsoring minister(s). For the policy committees of the Cabinet, the presentation is made by officials of the ministries concerned; for the Priorities, Policy and Communications Board, the presentation is made by the staff of the Cabinet Office. The format is usually that of a slide deck.
69. Once a proposed measure has been approved by a policy committee it will be referred to the Cabinet for final approval and may be routed there via the Priorities, Policy and Communications Board. Detailed measures for the funding and administration of new initiatives will be considered and approved by the Management Board of Cabinet after a final decision has been made by Cabinet, although its staff (and sometimes the Board itself) will have been consulted as part of the Cabinet committee stage of the decisions-making process. In the event of prior consideration by the Management Board, the conclusions of the Board and the relevant policy committee would be presented to the Cabinet in a combined "Minute". In any event, the Management Board is provided with the minutes of 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.
70. 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 exactly as for the decisions and recommendations of the Priorities, Policy and Communications Board of Cabinet and the standing policy committees.⁴⁹ "Cabinet has the

⁴⁸ Note the Priorities, Policy and Communications Board has no vice-chair.

⁴⁹ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 4, Smith Lyons to Commission Counsel, 9 February 2001.

ability to comment or revisit all Committee decisions. No action is taken on the Committee's [sic] items until after Cabinet review."⁵⁰

71. The Statutory Business Committee of the Cabinet reviews legislation and regulations. This sometimes follows policy consideration by the Cabinet and its policy committees, which is invariably the case for legislation, but often regulations are routine and are not preceded by policy or program discussions in the Cabinet or its committees.
72. Policy and programs involving any capital expenditures (new and previously approved) are referred to the Privatization and SuperBuild Committee. With respect to the formal arrangements supporting this development, the government has provided the following description:

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

Ministries

73. The government is organized into ministries that reflect the roles and responsibilities of ministers individually. In addition, as noted, some functions are assigned to agencies some of which are under active ministerial direction and some not.
74. For the purposes of this discussion of water, the ministers and ministries with relevant responsibilities are:
- a) The Ministry of Natural Resources.
 - b) The Ministry of the Environment.
 - c) The Ministry of Health and Long-Term Care.
 - d) The Ministry of Agriculture, Food and Rural Affairs.
 - e) The Ministry of Municipal Affairs and Housing.

⁵⁰ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 5, Smith Lyons to Commission Counsel, 9 February 2001.

⁵¹ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 5, Smith Lyons to Commission Counsel, 9 February 2001.

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75. The government has suggested that the Ministry of Finance should be included in this list because of the presence within the Ministry of the Ontario SuperBuild Corporation. However, since the Corporation at least appears not to be part of the Ministry, is formally a separate body and is described by the government as “an agency of the Ministry of Finance”, it is treated later in Part II under the heading of agencies.⁵²
76. Other ministers and their officials play incidental roles in respect of water. These include the Ministers of Northern Development and Mines and the Attorney General and Minister responsible for Native Affairs. Both, for example, are involved in the delivery programs for the financing of the renewal of infrastructure, including the Northern Heritage Fund and the OSTAR program for smaller communities.⁵³ In addition, the Ministry of Transport has responsibility for highway drainage, which can have an impact on ground waters.

Ministry of Natural Resources

77. 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.”⁵⁴ The Ministry is concerned mostly 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.
78. The Ministry has the lead for programs to deal with drought and low water levels; flood forecasting, warning and emergency response; watershed management; dams and water control infrastructure; use of water for hydroelectric power; water diversions, transfers and withdrawals; and water conservation in conjunction with the Ministry of the Environment. The Ministry derives its authority primarily from the *Lakes and Rivers Improvement Act*, and it works closely with local conservation authorities.
79. The Ministry of Natural Resources is taking steps to develop organized databases to assist in the effective management of water requirements. In co-operation with the Ministry of the Environment, it is working on a groundwater-monitoring network and other measures to improve information about the state of the province’s groundwaters. There is, however, no inventory of groundwaters in the province.
80. Although there is a general dictum that Natural Resources is concerned with water quantity and Environment with water quality, under the *Ontario Water Resources Act* responsibility for surface and ground waters rests with the Minister of the Environment.⁵⁸

⁵² “Responses/Comments on ... Preliminary Report on Machinery of Government”, pp. 1, 5, Smith Lyons to Commission Counsel, 9 February 2001.

⁵³ See paragraph 151ff.

⁵⁴ Ministry of Natural Resources, *Beyond 2000: Strategic Directions* (Toronto: Queen’s Printer for Ontario, 2000), Foreword.

⁵⁵ Association of Municipalities of Ontario, *AMO Municipal Action Plan: Protecting Ontario’s Water*, June 2000, p. 2.

⁵⁶ Association of Municipalities of Ontario, *AMO Municipal Action Plan: Protecting Ontario’s Water*, June 2000, p. 3.

⁵⁷ See paragraph 87.

⁵⁸ See paragraph 87.

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81. The Ministry, working with local conservation authorities, is concerned with 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 the Ministry's mandate suggests that it is the logical starting point in the chain of legislative, policy and management instruments available for the effective and sustainable use of Ontario's immense water resources, the Ministry is not a significant player in the provision of safe drinking water.⁵⁹

Ministry of the Environment

82. The Ministry of the Environment is the key player in the management of the drinking water system. The Department (as ministries were then called) was created in 1971 and in 1972 took on the functions of the Ontario Water Resources Commission. It will be recalled that the Commission, created in the mid-1950s, was the vehicle for building and supervising Ontario's physical plant for water and sewage treatment.⁶⁰ 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.⁶¹ Eventually the new Ministry's operational functions were decentralized 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."⁶²
83. The Ministry 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 in the section of this report that describes the administrative and enforcement processes for ensuring water quality.⁶³ Briefly the Ministry approves the taking of water, and licences well contractors and technicians and the construction of water and sewage treatment facilities. It sets standards for water quality and enforces its Acts through a system of licences, certification, monitoring, inspection, and where necessary it may impose measures to ensure compliance, initiate prosecutions, and seek court orders to prevent damage.
84. 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

⁵⁹ In 1998 the KPMG Centre for Government prepared a report for the Ministry of the Environment and the Ministry of Natural Resources. It proposed a relatively minor clarification in the mandates of the ministries by 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, "A Review of Water Management Practices in the Ontario Government", 25 September 1998, p. 57.

⁶⁰ See paragraph 16ff.

⁶¹ Ontario Sewer and Watermain Construction Association, "Drinking Water Management in Ontario: A Brief History", January 2001, p. 7.

⁶² Ontario Sewer and Watermain Construction Association, "Drinking Water Management in Ontario: A Brief History", January 2001, p. 8.

⁶³ See paragraph 213ff.

Strategy for Abatement” (MISA) regulation.⁶⁴ This is its principal vehicle for “...reducing water pollution from industries that discharge directly into Ontario’s lakes and rivers.”

85. The MISA regulation covers nine industrial sectors and does not apply to municipal water and sewage treatment facilities. The Ministry is also responsible for Provincial Water Quality Objectives, which establish acceptable standards for water quality and quantity to protect aquatic ecosystems.⁶⁵ However, these activities do not directly relate to drinking water, which is regulated under the *Ontario Water Resources Act*.
86. The *Ontario Water Resources Act* empowers the Ministry (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.”⁶⁶ The Act provides for extensive regulation making power (in the hands of the Cabinet) respecting licensing, standards of water quality, standards of construction and maintenance of wells, licensing of well contractors and well technicians, and various fees.⁶⁷ Directors for the purposes of the Act issue permits and certificates and “orders” to enforce the terms of the Act and the Environmental Protection Act. In addition, Directors have peace officer powers and may, therefore, use “... such force as is reasonably necessary...” to carry out orders issued under the Act.⁶⁸ The Minister and Directors may cause action to be taken by the Ministry where they believe an operator cannot or will not comply.⁶⁹ Persons served by the Ministry with administrative penalties may appeal to the Environmental Review Tribunal (formerly the Environmental Appeal Board).⁷⁰
87. For the purposes of the Act, the Minister has “...the supervision of all surface waters and ground waters in Ontario” and may inspect such waters for pollution.⁷¹ This provision was enacted in 1970; it had the effect (at least in principle) of consolidating in the Ministry of the Environment responsibility for all water, not just drinking water.⁷² The Ministry is the lead agency for dealing with the federal government on matters related to the restoration of the ecosystem of the Great Lakes. The Ministry interprets its mandate to include improving the “...management of surface water and groundwater quantity to ensure the sustainability of the resources....”⁷³

⁶⁴ Ministry of the Environment, Corporate Management Branch, “Historical Analysis of Ministry of the Environment and Energy Estimates, 1985-1995”, p. 1.

⁶⁵ See Ministry of the Environment, *Water Management Policies, Guidelines and Provincial Water Quality Objectives*, 1994, revised 1999.

⁶⁶ Section 10, *Ontario Water Resources Act*.

⁶⁷ Section 75ff, *Ontario Water Resources Act*. Note Regulation 435/93 provides a detailed regime for the classification and licensing of water and sewage works.

⁶⁸ Section 22, *Ontario Water Resources Act*.

⁶⁹ Section 80ff, *Ontario Water Resources Act*.

⁷⁰ Section 106ff, *Ontario Water Resources Act*.

⁷¹ Section 29, *Ontario Water Resources Act*.

⁷² Neil B. Freeman, *Ontario’s Water Industry: Models of the 21st Century: A Report Prepared for the Ontario Municipal Water Association*, April 1996, p. 91.

⁷³ Ministry of the Environment, “Minister’s Briefing Binder”, March 2000, p.10.

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88. Until the early 1990s – for almost twenty years – the Ministry both operated parts and regulated all of Ontario's drinking water system. The government notes that this changed in 1993 because of concern that the Ministry should not be regulating its own operations.⁷⁴ The Ministry's operational functions were spun off to a new organization, the Ontario Clean Water Agency (OCWA).⁷⁵ This was not a return to the days of the Water Resources Commission for a number of reasons, including the prospect that OCWA would compete with the private sector. Moreover, the Agency did not have the financial resources of the Commission, nor its autonomy.⁷⁶
89. The Ministry is organized into three substantive divisions and one corporate services division, each headed by an assistant deputy minister. Two of the substantive divisions are headquarters-based and deal respectively with policy and planning, and science and standards. The third, the operations division, is the delivery arm of the Ministry.

Integrated Environmental Planning Division

90. 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. It is organized on functional lines that include a Water Policy Branch.

Environmental Sciences and Standards Division

91. 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.

Operations Division

92. The Operations Division is based largely in the regions; with five regional and 22 district offices. The division also maintains headquarters functions 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 24/7 Spills Action Centre.
93. 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 the branch and the Legal Services Branch represent the Ministry and the government at environmental assessment hearings.

⁷⁴ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 9, Smith Lyons to Commission Counsel, 9 February 2001.

⁷⁵ See paragraph 136ff.

⁷⁶ See paragraph 15ff.

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

Budget

95. Owing to changes in government organization, it is apparently not possible to compare operating budgets from the period 1994-1995 (when the ministry included responsibility for energy) and the current period.⁷⁷ Similar considerations apply to capital funding owing to changes in mandate for the ministry, OCWA and SuperBuild as well as the temporary nature of funding arrangements such as the Ministry's Provincial Water Protection Fund.⁷⁸
96. The ministry has, however, asserted that cuts in its operating budget during the mid to late 1990s had minimal impact on the investigation and enforcement functions. The impact on inspections was more significant.⁷⁹
97. Further information concerning the ministry's budget is required.⁸⁰

Ministry of Health and Long-Term Care

98. The Ministry of Health and Long-Term Care is the organizational descendant of the Provincial Board of Health, which it replaced during the 1930s. The Ministry administers the *Health Promotion and Protection Act*, which provides a framework within which public health is administered at the local (i.e. municipal) level.
99. The 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.⁸³ Currently, there are 37 such units in the province.⁸⁴ Each unit is presided over by a board of health which oversees the provision of community sanitation, control of infectious diseases, health promotion programs, family counselling and planning, health services to infants, pregnant women and the elderly, disease screening programs, tobacco use prevention, nutrition services, collection and analysis of epidemiological data

⁷⁷ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 10, Smith Lyons to Commission Counsel, 9 February 2001.

⁷⁸ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 10 Smith Lyons to Commission Counsel, 9 February 2001.

⁷⁹ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 1, 5, Smith Lyons to Commission Counsel, 9 February 2001.

⁸⁰ For further discussion of the budget see paragraph 265.

⁸¹ Ministry of the Environment, "Approvals Functions", October, 1998, pp. 17-18.

⁸² See paragraph 151ff.

⁸³ Section 96, *Health Protection and Promotion Act*.

⁸⁴ Ten of these are part of regional municipal government or major new municipalities (Toronto and Ottawa).

and other services as may be prescribed by the provincial government by regulation.⁸⁵ The units are directed by local medical officers of health and act independently of the municipality and the province, although the latter sets the regulatory framework within which the boards operate and provides advice. Both levels of government provide resources.⁸⁶ Medical officers of health are required by statute to report cases of specified diseases and deaths from such diseases to the Ministry.⁸⁷

100. A majority of the members of the board is appointed by the municipality and the remainder by the provincial government.⁸⁸ Medical officers of health and associate medical officers of health are appointed by the boards of health subject to the approval of the Minister of Health, and may only be removed with the Minister's approval and a 2/3rds majority of the members of the local health board.⁸⁹ The Ministry provides professional guidance (but not direction) for medical officers of health through the Chief Medical Officer of Health, although the Minister has the authority to issue directions if circumstances warrant and may in specific circumstances delegate this authority to the Chief Medical Officer of Health. The latter is an officer of the Ministry, who since 1990 has also held the position of Director of the Public Health Branch.
101. 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."⁹⁰ 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, and this two-hatted role is said to work without difficulty.
102. Under the 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."⁹¹ This odd wording is little clarified by noting that a guideline is not a regulation within the meaning of the *Regulations Act*. The Ministry operates public health laboratories, which under the Act are subject to the Minister's direction.⁹²
103. The Act provides that:

⁸⁵ Section 5, *Health Protection and Promotion Act*.

⁸⁶ Municipalities provide for the normal budgets of the health units, but receive grants of up to 50% from the province.

⁸⁷ Section 31, *Health Protection and Promotion Act*.

⁸⁸ Section 49, *Health Protection and Promotion Act*.

⁸⁹ Sections 64 and 66, *Health Protection and Promotion Act*. Revised Statutes of Ontario, 1990, Ch. H.7.

⁹⁰ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 12, Smith Lyons to Commission Counsel, 9 February 2001.

⁹¹ Section 7, *Health Protection and Promotion Act*.

⁹² Section 79, *Health Protection and Promotion Act*.

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 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.⁹³

104. The Act empowers medical officers of health to issue orders to remedy conditions they consider constitute health hazards requiring specific remedial measures.⁹⁴
105. The relationship between the Ministry of Health and the Ministry of the Environment is an important element in the effective operation of the overall system for the provision of safe drinking water. The Ministry participates in the development of the drinking water objectives (now the Drinking Water Protection Regulation). The staff of the Ministry worked closely with the staff of the Ministry of the Environment in the development of the Drinking Water Protection Regulation in August 2000. Under the Regulation, the local health unit is to be notified (by the owner and by the testing laboratory) of any biological threat to the safety of drinking water in order that the medical officer of health may make appropriate orders using the powers granted by the *Health Promotion and Protection Act*.⁹⁵
106. The Ministry does not monitor water quality, but its laboratories will test water quality at the request of the medical officer of health or operators and owners. The Ministry provides advice to the Ministry of the Environment about water quality through a technical committee of the Ministry dealing with microbiology.

Ministry of Agriculture, Food and Rural Affairs

107. The Ministry in its current form was established in 1994, but it has roots stretching back to pre-Confederation times. Its mandate has been modified from time to time, mostly recently in 1994 to take account of the development needs of small rural municipalities where the local economy is still geared largely to agricultural production. The Ministry, fittingly headquartered in Guelph, administers numerous Acts, ranging from grains, to bees, to beef, to drainage.
108. The Ministry has the authority to regulate most aspects of agricultural activity, principally under the *Farming and Food Production and Protection Act*. This includes the management of animal waste.⁹⁶ Although the farming industry is subject to the *Environmental Protection Act*, that Act exempts animal wastes from its waste management requirements. It remains nonetheless a contravention of both the *Environmental Protection Act* and the *Ontario Water Resources Act* to discharge animal wastes with adverse consequences to the environment or water quality. As recently as 1998, the Ministry has

⁹³ Section 11, *Health Protection and Promotion Act*.

⁹⁴ Section 13, *Health Protection and Promotion Act*.

⁹⁵ *Regulation Made under the Ontario Water Resources Act: Drinking Water Protection*, O. Regulation 459/00, 8 August 2000, p. 9.

⁹⁶ The province's 3.4 million hogs produce as much raw sewage as the entire population of 10 million humans. See: Environmental Commissioner of Ontario, *The Protection of Ontario's Groundwater and Intensive Farming: Special Report to the Legislative Assembly of Ontario*, 27 July 2000, p. 9.

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, use of pesticides and the storage and handling of organic wastes. The Act defines a normal farm practice as one "...conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances."⁹⁷

109. The effect of this legislation is to remove normal recourse to the courts against nuisances arising from disturbances caused by "normal" farm operations. The determination of what is normal is established by an adjudicative tribunal, and the only recourse is to challenge the way in which that body has applied the law (i.e. judicial review).⁹⁸
110. The policies, regulations and programs of the Ministry of Agriculture, Food and Rural Affairs have potentially a major impact on the safety of drinking water in the province.

Ministry of Municipal Affairs and Housing

111. 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. Under the *Municipal Affairs Act*, the Ministry may inquire into "any of the affairs of a municipality" and audit its books.⁹⁹ The Ministry may also make orders, particularly in respect of financial matters, arising from the findings of these inquiries.¹⁰⁰ The *Municipal Act* and other Acts set out in great detail the precise areas in which municipalities may exercise authority.¹⁰¹ In addition, under the *Municipal Act*, the Minister may require municipalities to provide information relating to the "...efficiency and effectiveness" of a municipality's operations and may require an audit.¹⁰²
112. The Minister (through the Lieutenant-Governor-in-Council) establishes borrowing limits for municipalities for the financing of public works, including water and sewage infrastructure.¹⁰⁴ Since 1993, the Minister has assumed the power through regulation to determine the extent of a municipality's borrowing authority, a function hitherto assigned to the Ontario Municipal Board, which is an arm's-length agency.¹⁰⁵ The Ministry maintains extensive databases on municipal governments, providing it with the analytical tools to

⁹⁷ Section 1, *Farming and Food Production Protection Act*, 1998. Statutes of Ontario, 1998, Chapter 1.

⁹⁸ This is the Normal Farm Practices Protection Board. See paragraph 165.

⁹⁹ Sections 9 and 10, *Municipal Affairs Act*. Revised Statutes of Ontario, 1990, Ch. M. 46.

¹⁰⁰ Section 14, *Municipal Affairs Act*.

¹⁰¹ To take a random example, "... the council of a municipality may provide for the establishment of a counselling service to small businesses....", Section 112, *Municipal Act*.

¹⁰² Section 83.1, *Municipal Act*.

¹⁰⁴ Section 149.1.5, *Municipal Act*.

¹⁰⁵ Section 65(3)(d), *Ontario Municipal Board Act* and *Debt and Financial Obligation Limits Regulation* (O. Reg. 799/94 as amended by O. Reg. 75/97 and O. Reg. 155/99).

assess municipal fiscal capacity; the regulations require that the Ministry calculate the debt limit for each municipality annually. Municipalities may take on long-term financial obligations provided they do not exceed these limits, and if they wish to, the approval of the Ontario Municipal Board must be sought.

113. Land use-planning plays potentially an important role in safeguarding surface and ground waters. The *Planning Act* requires that most municipalities develop official plans for the areas covered by the municipality. Until 1996 the Minister of Municipal Affairs and Housing had the power to prescribe the contents of such plans.¹⁰⁶ Since then, in most cases the approval authority has been delegated to the municipalities. Where approval authority rests with the Minister, the Ministry has become the focal point for any comment (including any ministry or agency) concerning the official plan. Where the municipality is the approval authority, the Ministry is the funnel for such comment to the municipality.
114. In addition, since 1997 the Ministry has been responsible for regulations governing smaller, on-site septic systems, leaving responsibility for larger and communal systems with the Ministry of the Environment.¹⁰⁷ However, since the Ministry of the Environment had already delegated 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 smaller municipalities were now authorized 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.
115. Overall, the Ministry sees its role primarily as setting 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."¹⁰⁸

Agencies

116. In most Westminster systems, certain types of government activity are carried out in organizations separate from ministerial departments and often at arms length from government.¹⁰⁹ Ontario has a variety of such agencies, several of which have a role or potential impact on the safety of drinking water in the province. The relevant agencies are:
- a) The Ontario Clean Water Agency.
 - b) The Ontario Superbuild Corporation.
 - c) The Ontario Financing Authority.

¹⁰⁶ Section 16, *Planning Act*. Revised Statutes of Ontario, Ch. P.13.

¹⁰⁷ The relevant provisions were transferred from the *Environmental Protection Act* to the *Building Code Act*, 1992.

¹⁰⁸ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 16, Smith Lyons to Commission Counsel, 9 February 2001.

¹⁰⁹ See paragraphs 122, 356.

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- d) The Ontario Municipal Board.
 - e) The Normal Farm Practices Protection Board.
 - f) The Environmental Commissioner.
 - g) The Environmental Review Tribunal.
117. Not all of these Agencies have significant 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 has a minor role, although that was not always the case.¹¹⁰

Relationship Between the Government and Provincial Agencies in Ontario

118. The machinery of government in Ontario for the governance of agencies has two aspects of particular current interest. These are the role of the Management Board of Cabinet in the establishment and accountability arrangements for agencies, and the initiatives to provide for "Alternative Service Delivery", which rely in part on the use of agencies for the delivery of administrative services.¹¹¹
119. In the Ontario system, the Premier decides the number and mandates of ministers. Proposals for new agencies (as distinct from ministries) are included in policy submissions from ministers to the Cabinet. These are reviewed by the Management Board of Cabinet, and will be 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 apply the Management Board's directive dealing with the establishment and accountability provisions for agencies.
120. The provincial government has undertaken an extensive program of restructuring of the Ontario Public Service. This program began in 1995 and continues. An important feature is the development of alternative ways of delivering services. Many governments have taken initiatives on these lines since the mid-1980s, and they are grouped under the general heading of Alternative Service Delivery (ASD). An important element of ASD is the use of various types of agencies (as distinct from departments or ministries) to deliver programs. Ontario has been a strong proponent of ASD.

Agency Establishment and Accountability Directive

121. This recent directive sets out the powers and relationship to government of agencies of almost every description.¹¹²

¹¹⁰ See paragraph 111.

¹¹¹ For comment on these matters see paragraph 318ff.

¹¹² Management Board Secretariat, "Agency Establishment & Accountability Directive" (Toronto: Queen's Printer for Ontario, February 2000). The Directive does not extend to the agencies that report to the Assembly: The Provincial

122. The directive is built on the principle that in Ontario all “Provincially-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.”¹¹³ The directive sets out a classification of agencies as follows: Advisory, Regulatory, Adjudicative, Operational Service, Operational Enterprise, Crown Foundation, Trust Agency. The breadth of the range of functions included sweeps up almost all provincial agencies, whose characteristics 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,
- 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.¹¹⁴

123. 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. The directive requires that all agencies, except those that are strictly advisory, develop a memorandum of understanding with its “responsible” minister. Such memoranda must be approved by the Management Board of Cabinet in respect of a regulatory agency with a governing board, an Operational Service or an Operational Enterprise.¹¹⁵ 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.”¹¹⁶

124. The scope of such 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

Auditor, the Environmental Commissioner, the Office of the Assembly, the Ombudsman, the Integrity Commissioner, and the Information and Privacy Commissioner.

¹¹³ Management Board Secretariat, “Agency Establishment & Accountability Directive” (Toronto: Queen’s Printer for Ontario, February 2000), p. 3.

¹¹⁴ Management Board Secretariat, “Agency Establishment & Accountability Directive” (Toronto: Queen’s Printer for Ontario, February 2000), p. 4.

¹¹⁵ Management Board Secretariat, “Agency Establishment & Accountability Directive” (Toronto: Queen’s Printer for Ontario, February 2000), p. 9.

¹¹⁶ Management Board Secretariat, “Agency Establishment & Accountability Directive” (Toronto: Queen’s Printer for Ontario, February 2000), p. 11.

- information systems
- reporting and reports
- corporate plan and planning
- budgeting and financial systems
- human resources and human resource systems.

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.¹¹⁷

125. 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)".¹¹⁸ 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...."¹¹⁹
126. Although the directive acknowledges the primacy to be attached to an agency's "constituting instrument" – i.e., legislation, regulation or order-in-council,¹²⁰ the preponderance of direction and detailed instruction is such that in Ontario agencies are considered to be "accountable to the government".¹²¹

Alternative Service Delivery

127. 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" introduced by the Progressive Conservative administration elected first in the summer of 1995. Among the initiatives was the development of new approaches to the delivery of services.
128. The key initiative was known as "Alternative Service Delivery", which 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

¹¹⁷ Management Board Secretariat, "Agency Establishment & Accountability Directive" (Toronto: Queen's Printer for Ontario, February 2000), p. 12.

¹¹⁸ Management Board Secretariat, "Agency Establishment & Accountability Directive" (Toronto: Queen's Printer for Ontario, February 2000), p. 14.

¹¹⁹ Management Board Secretariat, "Agency Establishment & Accountability Directive" (Toronto: Queen's Printer for Ontario, February 2000), p. 16.

¹²⁰ Management Board Secretariat, "Agency Establishment & Accountability Directive" (Toronto: Queen's Printer for Ontario, February 2000), pp. 1, 7.

¹²¹ Management Board Secretariat, "Agency Establishment & Accountability Directive" (Toronto: Queen's Printer for Ontario, February 2000), p. 1.

of the “new public management”. The central ideas were to let market forces play a much greater role in the provision of traditional public services, and to reserve to government the policy and directing role that determines the services to be provided.¹²²

129. “Alternative Service Delivery” has taken on many forms in its implementation. The new approach has involved the creation of autonomous administrative agencies with sharply defined service delivery mandates, new partnerships between governments and non-governmental organizations, leaseback arrangements with the private sector operators and outright privatization of services. The new approach has at times relied heavily on the technique of self-regulation.¹²³
130. There have been approximately 75 initiatives linked to ASD since 1995, and the program continues. This has included the establishment and restructuring of various provincial agencies, whose relationship with 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.¹²⁴
131. The re-mandating of the Ontario Clean Water Agency in 1997 (to remove it from ownership of facilities), and its recent classification as an Operational Enterprise should be considered in this wider context of Alternative Service Delivery. The future of the Agency, including its existence, was reviewed by the Agencies, Boards and Commissions (ABC) Task Force Review in 1996,¹²⁵ and by the Office of Privatization in 1998.¹²⁶ The 1997 changes placed greater emphasis on the Agency's potential to compete with others for the operation of water and sewage facilities by encouraging the transfer of plant ownership and indebtedness to municipalities.¹²⁷
132. The Alternative Service Delivery program had a direct impact on relevant operations of the Ministry of the Environment. As noted above, in 1997 amendments permitted the “devolution” of inspections, approval and enforcement activities related to smaller septic systems from the Ministry to municipalities.¹²⁸ Between late 1997 and early 1999, the Ministry was actively engaged in examining the possibilities of applying “Alternative Service Delivery to the Communal Water Program”. The proposal was summarized as follows:

¹²² This was the “steering versus rowing” thesis articulated by David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Addison-Wesley, 1992).

¹²³ The range of possibilities is set out in a 1996 government publication: Management Board Secretariat, “Alternative Service Delivery Framework”, May 1996.

¹²⁴ Cabinet Office, Ontario Public Service Restructuring Secretariat, *Transforming Public Service for the 21st Century*, April 2000, pp. 71, 73.

¹²⁵ See: Ministry of Environment and Energy, “Response to ABC Government Task Force Review: Operational Agencies”, [1996]. [Inqdocno 1017709]

¹²⁶ See Ontario Office of Privatization, *Review of the Ontario Clean Water Agency*, Final Report, November 1998.

¹²⁷ See paragraph 140.

¹²⁸ *Alternative Service Delivery in the Ontario Public Sector*, August 1999, p. 42. Also see paragraph 114

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 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 [sic] 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, academic research groups, governments, and non-government organizations.¹²⁹

133. The proposal was later put to the Minister 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.¹³⁰

134. 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.¹³¹ No mention was made of this program in the documents dealing with the Alternative Service Delivery proposal.

Ontario Clean Water Agency

135. Ontario's municipalities own the province's water and sewage services. Most of the larger municipalities, representing 75% of the market, operate such facilities themselves or through public utilities commissions. The remaining 25% is composed of municipalities that contract out water and sewage operations. The Ontario Clean Water Agency has most of this market.¹³²

¹²⁹ [Operations Division, Ministry of the Environment], "Proposal for Alternative Service Delivery – Communal Water Works: A Monitored Self-Management Approach", 25 November 1997, pp. 3-4. [Inqdocno: 1007828]

¹³⁰ "Alternative Service Delivery for the Communal Water Program", 15 March 1999. [Inqdocno: 1014550]

¹³¹ See paragraph 224ff.

¹³² For details see paragraph 137.

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136. The Ontario Clean Water Agency (OCWA) was established by the *Capital Investment Plan Act* of 1993.¹³³ It 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 re-named Ontario Realty Corporation, these agencies were part of the Government's "...capital investment plan for Ontario under which the Government, municipalities and other public bodies, and the private sector will work together to make significant investments in the province's infrastructure."¹³⁴
137. The Agency assumed the operational and funding functions in respect of water and sewage of the Ministry of the Environment. As a result of subsequent legislation (*Municipal Water and Sewage Transfer Act, 1997*), the Agency was mandated to transfer ownership of water and sewage facilities to municipalities together with outstanding indebtedness. In 1996, OCWA's function as administrator of capital assistance programs for water and sewage facilities was transferred to the Ministry of the Environment.¹³⁵ This action was complemented by the transfer of ownership of facilities to municipalities that began following the passage of the 1997 legislation.
138. 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."¹³⁶ The Act empowers the Ministry of the Environment to inspect and issue orders to ensure compliance with licences, permits and approvals given under its terms.¹³⁷ OCWA's contracts are "full-service partnership" contracts, where the Agency supplies all labour and management, pays all expenses for operations and maintenance, and guarantees performance and regulatory compliance.
139. OCWA today is an operator of water and sewage works, competing with municipalities and the private sector to provide such services. It has 95% of the market for municipalities that choose to outsource the operation of such facilities; the remaining 5% is operated by the private sector.¹³⁸ OCWA also provides project management services to municipalities seeking technical advice on planning, design and construction of new and upgraded water and sewage treatment facilities.
140. At the end of 2000, the Agency operated 161 water treatment and 233 sewage facilities for more than 200 municipalities. The agency does not usually operate water distribution or sewage collection systems. 222 of its 383 contracts are with small municipalities and are worth less than \$100,000 annually. Financial support for water and sewage infrastructure is no longer provided through the Agency, although it still provides short term financing at commercial rates for any amounts outstanding for capital works at year-end.¹³⁹ Because of

¹³³ *Capital Investment Plan Act, 1993*. Statutes of Ontario, 1993, Chapter 23.

¹³⁴ "Preamble", *Capital Investment Plan Act, 1993*.

¹³⁵ Ontario Sewer and Watermain Construction Association, "Drinking Water Management in Ontario: A Brief History", January 2001, p. 9.

¹³⁶ Sections 10 and 12, *Ontario Water Resources Act*.

¹³⁷ Sections 15 and 16, *Ontario Water Resources Act*.

¹³⁸ The principal contractor was Philip Utilities, whose contract has been taken over by Azurix.

¹³⁹ See paragraph 151ff.

this and because of the transfer of ownership of facilities and associated debt to municipalities since 1997, its loan portfolio of \$608 million in 1993 is now in the order of \$54M. Overall the Agency operates with an excess of revenue over costs in the range of two to four percent on an operating budget of approximately \$100M.¹⁴⁰ 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.

141. 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 judgement against OCWA from the Consolidated Revenue Fund.¹⁴¹ In short, OCWA is backed by the province's financial guarantee.
142. 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..."¹⁴² 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 Corporation's operations.¹⁴³
143. 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 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. The Minister recommends the appointment of the Chief Executive Officer of OCWA, and he or she has a role in recommending appointments to its Board of Directors. The Agency is "... managed by its board of directors".¹⁴⁴ That board is composed of four serving deputy ministers or their alternates, and includes the Deputy Minister of the Environment.
144. The Agency describes its mission as "...to provide arm's-length delivery of water and wastewater treatment services which previously had been provided by the Ministry."¹⁴⁵ The mandates and governance of Ontario's agencies is subject to a combination of specific legislative provision and directives set out by the Management Board of Cabinet, as discussed above.¹⁴⁶
145. 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

¹⁴⁰ Ontario Clean Water Agency, "Presentation to Board of Directors SuperBuild Corporation", 11 December 2000.

¹⁴¹ Sections 2 and 24, *Capital Investment Plan Act, 1993*.

¹⁴² "Responses/Comments on ... Preliminary Report on Machinery of Government", p.18, Smith Lyons to Commission Counsel, 9 February 2001.

¹⁴³ Section 14, *Capital Investment Plan Act, 1993*.

¹⁴⁴ Section 5, *Capital Investment Plan Act, 1993*.

¹⁴⁵ Ontario Clean Water Agency, "Presentation to Board of Directors SuperBuild Corporation", 11 December 2000.

¹⁴⁶ See paragraph Off.

the development of draft regulations. The Agency also provides information to the Ministry about its operations.

146. Under the Agency Establishment and Accountability Directive, OCWA is classified as an Operational Enterprise (formerly a Schedule IV agency).¹⁴⁷ Generally, this provides such agencies with several important administrative authorities; it may:
- a) Set fees and retain revenues subject to variation by the Minister of Finance¹⁴⁸, to whom it is required to report annually in addition to the Minister of the Environment.¹⁴⁹
 - b) Invest, borrow and make loans for purposes consistent with its mandate.
 - c) (Potentially) Staff and set conditions of employment for its workforce.
 - d) Enter into partnerships and establish subsidiaries subject to certain approvals.
147. The government notes that the staffing and employment authorities have not been extended to OCWA, whose staff remain employees of the Ontario Public Service in accordance with the Agency's original "Memorandum of Understanding with the Ministry".¹⁵⁰
148. OCWA is subject to the generally applicable powers of oversight exercised by the Management Board of Cabinet and its Secretary, the Minister of Finance and the Deputy Minister of Finance and 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 the Memorandum is to be renewed and revised as necessary.¹⁵¹
149. OCWA's current Memorandum of Understanding was executed in March 1994. Certain provisions of the Memorandum have lapsed because of changes in legislation and because of changes in administrative authorities provided by the Management Board of Cabinet. The Minister's powers are set out as follows:

The Minister

The Minister shall:

¹⁴⁷ Province of Ontario, Management Board Secretariat, "List of Classified Provincial Agencies (agencies as of 2000-01-20)", March 2000, p. 9.

¹⁴⁸ Management Board Secretariat, "Agency Establishment and Accountability Directive", 2000, p. 24.

¹⁴⁹ Section 14.1 *Capital Investment Plan Act*, 1993.

¹⁵⁰ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 17, 18, Smith Lyons to Commission Counsel, 9 February 2001.

¹⁵¹ Management Board Secretariat, "Agency Establishment and Accountability Directive", 2000, p. 8.

- (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 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....¹⁵²

150. The roles of the Board of Directors, its Chair and the 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...."¹⁵³ 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".¹⁵⁴ 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...."¹⁵⁵

Ontario SuperBuild Corporation

151. 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 the system."¹⁵⁶ The

¹⁵² "Memorandum of Understanding Between the Minister of the Environment and Energy and Ontario Clean Water Agency", 31 March 1994, section 3.1.

¹⁵³ "Memorandum of Understanding Between the Minister of the Environment and Energy and Ontario Clean Water Agency", 31 March 1994, section 3.2.

¹⁵⁴ "Memorandum of Understanding Between the Minister of the Environment and Energy and Ontario Clean Water Agency", 31 March 1994, section 3.3.

¹⁵⁵ "Memorandum of Understanding Between the Minister of the Environment and Energy and Ontario Clean Water Agency", 31 March 1994, section 3.4.

¹⁵⁶ Ministry of Finance, News Release, "Board of Superbuild Corporation Announced", 9 February 2000.

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 (\$88B out of a total of \$200B).¹⁵⁷

152. The Corporation has been promised five-year funding in the amount of \$10B 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.¹⁵⁸ 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 30% to 50% of the total costs of a given initiative, with the balance flowing from other sources. The Corporation sees itself as "...a catalyst for investment."¹⁵⁹
153. The Corporation has established a subsidiary initiative to help fund infrastructure capital expenditures in smaller municipalities. This program, the Ontario Small Towns and Rural Initiative (OSTAR), 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 at its disposal, of which some \$240 million has been set aside for public health and safety priorities, including water and sewage works and bridges.¹⁶⁰
154. Although no projects have yet been funded, it has been agreed that capital works necessary to comply with the new Drinking Water Protection Regulation will be funded. 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, being designed to deal with immediate requirements. It is perhaps worth noting that it is estimated that \$9.1 billion is needed to rehabilitate Ontario's water and sewage systems.¹⁶¹
155. 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.¹⁶² It was also for smaller municipalities and was administered by the Environment Ministry in consultation with the Ministry of Finance and other ministries.

¹⁵⁷ SuperBuild, *Building Ontario's Future: A SuperBuild Progress Report*, December 2000, 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: "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 19, Smith Lyons to Commission Counsel, 9 February 2001).

¹⁵⁸ Ministry of Finance, News Release, "Ontario Investing \$2.1 Billion in Infrastructure", *2000 Ontario Budget*, 2 May 2000.

¹⁵⁹ SuperBuild, *Building Ontario's Future: A SuperBuild Progress Report*, December 2000, p. 6.

¹⁶⁰ SuperBuild, "Ontario Small Town and Rural Development (OSTAR) Infrastructure Program: Round 1: Public Health and Safety, Application Guidebook", August 2000, p. 2.

¹⁶¹ Association of Municipalities of Ontario, *AMO Municipal Action Plan: Protecting Ontario's Water*, June 2000, p. 4.

¹⁶² "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 20, Smith Lyons to Commission Counsel, 9 February 2001.

156. 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 under OSTAR. 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 existing borrowing authorities and revenue from water rates.¹⁶⁴
157. The 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.¹⁶⁵ The Corporation describes itself as "...an agency of the Ministry of Finance and reports directly to the ... Minister of Finance...."¹⁶⁶ Notwithstanding this reporting relationship and the consequent direct responsibility of the Minister of Finance, the structure of the Corporation is corporate, with a Chairman 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."¹⁶⁷ It is listed as an Operational Enterprise for the purposes of the Management Board's Agency Establishment and Accountability Directive.¹⁶⁸
158. As a practical matter, the Board is advisory rather than executive, and has recently been described as such in a progress report.¹⁶⁹ The Chief Executive Officer reports to the Minister of Finance and 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.

Ontario Financing Authority

159. This is a provincial agency that operates under the close supervision of the Ministry of Finance, whose Deputy Minister is the Chair of its 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.¹⁷⁰ The Board, for example, "...reports to the Minister."¹⁷¹ The Authority, formerly a Schedule IV

¹⁶³ Ontario SuperBuild Corporation, "Ontario Small Town and Rural Development (OSTAR) Infrastructure Program: Round 1: Public Health and Safety: Application Guidebook", August 2000, p. 2.

¹⁶⁴ Ontario SuperBuild Corporation, "Ontario Small Town and Rural Development (OSTAR) Infrastructure Program: Round 1: Public Health and Safety: Application Guidebook", August 2000, p. 2.

¹⁶⁵ See paragraph 55.

¹⁶⁶ Superbuild Corporation, "Frequently Asked Questions", 8 August 2000, www.superbuild.gov.on.ca.

¹⁶⁷ Superbuild Corporation, "Frequently Asked Questions".

¹⁶⁸ Management Board Secretariat, *List of Classified Provincial Agencies*, p. 9.

¹⁶⁹ SuperBuild, "Building Ontario's Future: A SuperBuild Progress Report", December 2000, p. 5.

¹⁷⁰ The Agency was established under the *Capital Investment Plan Act*, 1993, Statutes of Ontario, 1993, Chapter 23.

¹⁷¹ "Corporate Governance", Ontario Financing Authority, www.ofina.on.ca.

agency, is now listed as an Operational Enterprise, with governance arrangements similar to the Ontario Clean Water Agency.¹⁷²

160. The 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:
- (a) assisting public bodies and the Province of Ontario to borrow and invest money, developing and carrying out financing 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.¹⁷³
161. 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.

Ontario Municipal Board

162. The Ontario Municipal Board was established in the 1890s to oversee municipalities. Its role has changed very significantly over the intervening years, and particularly since the realignment of services between the provincial and municipal levels 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.
163. Prior to 1993, the Board approved all borrowings by municipalities.¹⁷⁹ 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

¹⁷² Province of Ontario, Management Board Secretariat, "List of Classified Provincial Agencies (agencies as of 2000-01-20)", March 2000, p. 9.

¹⁷³ Section 30, *Capital Investment Plan Act*, 1993, Statutes of Ontario, 1993, Chapter 23.

¹⁷⁴ Management Board Secretariat, "List of Classified Provincial Agencies", March 2000, p. 12. The list places the Board under the Minister of Municipal Affairs and Housing.

¹⁷⁵ Sections 10, 13 and 14, *Municipal Act*. Revised Statutes of Ontario, 1990, Chapter M.45.

¹⁷⁶ Sections 14 and 15, *Municipal Act*.

¹⁷⁷ Section 64, *Municipal Act*.

¹⁷⁸ Section 54, *Ontario Municipal Board Act*, and Section 148 of the *Municipal Act*.

¹⁷⁹ See paragraph 111.

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 to 600 animal units (1200 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.¹⁸⁰

164. The 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.

Normal Farm Practices Protection Board

165. This Board exists to referee the provisions of the *Farming and Food Production Protection Act*.¹⁸¹ The Board is empowered:

- (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.¹⁸²

166. 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.

....

No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation."¹⁸³

167. The effect is to 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

¹⁸⁰ "OMB rules in West Perth's favor in terms of zoning bylaw", *Mitchell Advocate*, 26 July 2000.

¹⁸¹ See paragraph 108.

¹⁸² Section 4, *Farming and Food Protection Act*, 1998. Statutes of Ontario, 1998, Chapter 1.

¹⁸³ Sections 2 & 6, *Farming and Food Protection Act*, 1998. Statutes of Ontario, 1998, Chapter 1.

*Environmental Protection Act, the Pesticides Act, the Health Protection and Promotion Act, and the Ontario Water Resources Act.*¹⁸⁴

168. The Board is subject to the directives of the Board of Management, being classified as an adjudicative agency.¹⁸⁵ The members, including the chair, are appointed by the Minister of Agriculture, Food and Rural Affairs and may be members of the Ontario Public Service.

169. 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.¹⁸⁶

170. 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.¹⁸⁷

Environmental Commissioner

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

172. The Environmental Commissioner's office is established under the *Environmental Bill of Rights*. 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.¹⁸⁸

173. The Commissioner is appointed by the Lieutenant-Governor-in-Council following an address from the legislature, and may only be removed with its approval, which provides 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.¹⁸⁹ These provisions are similar to those applying to the Provincial Auditor.¹⁹⁰

¹⁸⁴ Section 2, *Farming and Food Protection Act, 1998*. Statutes of Ontario, 1998, Chapter 1.

¹⁸⁵ Management Board Secretariat, *List of Classified Agencies*, March 2000, p. 5.

¹⁸⁶ Section 9, *Farming and Food Protection Act, 1998*. Statutes of Ontario, 1998, Chapter 1.

¹⁸⁷ Ministry of Agriculture, Food and Rural Affairs, “Minister's Directive to the Normal Farm Practices Protection Board”, 26 June 2000. www.gov.on.ca/OMAFRA

¹⁸⁸ See paragraph 121.

¹⁸⁹ Sections 54 and 55, *Environmental Bill of Rights, 1993*. Statutes of Ontario, 1993, Chapter 28.

¹⁹⁰ Sections 20 and 29, *Audit Act*. Revised Statutes of Ontario, 1990, Chapter A. 35.

174. The *Environmental Bill of Rights, 1993* applies to thirteen government ministries and agencies, requiring them to register plans that could have environmental impacts in order that citizens are aware and have an opportunity to present concerns at an independent environmental assessment.¹⁹¹ Note, however, that the Act does not apply to the Ministry of Finance or the Cabinet Office, but it does cover the Management Board Secretariat, which requires affected ministries to reflect its “Statement of Environmental Values” in their annual business plans.¹⁹²
175. 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.¹⁹³

Environmental Review Tribunal

176. The 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.
177. The Review Tribunal recently replaced the Environmental Assessment and Environmental Appeal Boards. The Tribunal, which is composed of not fewer than five members appointed by the Minister of the Environment, is classified as an adjudicative agency, and is subject to the Management Board’s agency establishment and accountability directive.¹⁹⁴
178. With respect to its environmental assessment role, the Tribunal holds hearings under the *Environmental Assessment Act*. These decisions of the Tribunal are not subject to appeal and may not be judicially reviewed unless they are patently unreasonable.¹⁹⁵ 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.
179. 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*.

¹⁹¹ “... notices are placed on the Environmental Registry administered by the EBR Office of the Ministry of the Environment.” “Responses/Comments on ... Preliminary Report on Machinery of Government”, pp. 22, Smith Lyons to Commission Counsel, 9 February 2001.

¹⁹² The ministries are: 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.

¹⁹³ See paragraphs 240, 315.

¹⁹⁴ Management Board Secretariat, “List of Classified Provincial Agencies”, March 2000, p. 9.

¹⁹⁵ Section 23.1, *Environmental Assessment Act as amended by Bill 119 (Environmental Review Tribunal Act)*.

¹⁹⁶ Section 23.1, *Environmental Assessment Act as amended by Bill 119 (Environmental Review Tribunal Act)*.

The Tribunal determines under the *Environmental Bills of Rights* whether to grant leave for an application to appeal decisions 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.

180. 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.¹⁹⁷

Local Government

181. 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.¹⁹⁹ 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.²⁰⁰
182. 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 service is provided by an upper tier municipality or its commission; and some services may be under the responsibility of a lower tier municipality. Sometimes several – but not all – lower tier municipalities may share services provided directly or through a commission.

Municipalities

183. 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:
- a) Upper-tier: any county, regional municipality, district municipality and the County of Oxford.
 - b) Single tier: any city, town, township, or village that does not form part of an upper tier municipality.

¹⁹⁷ Section 144, *Environmental Protection Act*, Revised Statutes of Ontario, Chapter e. 19, 1990.

¹⁹⁸ Management Board Secretariat, "List of Classified Provincial Agencies", March 2000, p. 9.

¹⁹⁹ See paragraphs 37ff, 112ff.

²⁰⁰ Generally on the role of local institutions, see: Andrew Sancton and Teresa Janik, "Provincial-Local Relations and Drinking Water in Ontario", 19 February 2001; Freeman, *Ontario's Water Industry*.

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- c) Lower tier: any city, town, township or village that forms part of an upper tier municipality.
184. During the past few years the structure of local government in Ontario has changed significantly. The number of municipalities was reduced from 815 to 447 between 1996 and the beginning of 2001. On the basis of legislation passed in 1996²⁰¹, 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.
185. In 1997 there were 627 municipal water works in Ontario serving 82% of the population. Ground water supplied 399 of these plants, and surface water the rest.²⁰² Note also:
- a) 17 major water works provided water for 65% of Ontarians.
- b) 74% of water works provided services to communities of 3300 or fewer people.
186. In 1997, municipalities and their agents owned 77% of these water works, OCWA 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."²⁰³
187. 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. This is particularly the case in the financing of facilities, where government policy can affect pricing, competition, and ability to raise capital.

²⁰¹ *Savings and Restructuring Act 1996*, "Schedule M: Amendments to the Municipal Act and Various Other Statutes Related to Municipalities, Conservation Authorities and Transportation".

²⁰² The statistics relating to water facilities are drawn from *Drinking Water in Ontario: A summary Report 1993-1997*, Ministry of the Environment (Toronto: Queen's Printer for Ontario, 2000).

²⁰³ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 25, Smith Lyons to Commission Counsel, 9 February 2001.

Public Utilities Commissions

188. 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.
189. In 1990, of a total of 834 municipalities, 124 relied on public or water utility commissions to operate water facilities. By 2001, as a result of municipal amalgamations and the spinning off of electrical utilities, of a total of 447 municipalities, only 15 continued to use commissions to operate water facilities.²¹¹
190. The Commissions are rooted in the *Municipal Waterworks Act, 1882*, which was designed to encourage the orderly development and operation of water facilities. 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.²¹² In 1943, amendments to the *Municipal Act* permitted the levying of water rates as an alternative to financing infrastructure from municipal property taxes.²¹³ 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.
191. Although separate corporate bodies, the commissions are creatures of 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 commissions. 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* (which in many cases have been sold to Hydro One, the province’s new monopoly power

²⁰⁴ Not used.

²⁰⁵ Not used

²⁰⁶ Not used.

²⁰⁷ Not used.

²⁰⁸ Not used.

²⁰⁹ Not used.

²¹⁰ Not used.

²¹¹ Andrew Sancton and Teresa Janik, “Provincial-Local Relations and Drinking Water in Ontario” a paper prepared for the Walkerton Inquiry, 19 February 2001, p. 26.

²¹² See Ontario Sewer and Watermain Construction Association, “Drinking Water Management in Ontario: A Brief History”, January 2001, p. 1.

²¹³ Ontario Sewer and Watermain Construction Association, “Drinking Water Management in Ontario: A Brief History”, January 2001, p. 3.

transmission company) has accelerated the trend towards abolishing the commissions and transferring water management to municipal works departments.

Conservation Authorities

192. 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 thirty-six conservation authorities in Ontario. The province establishes them and municipalities appoint the members. They are financed through user and other fees, municipal levies and provincial grants, although the latter have been declining.²¹⁵ The authorities may be territorially contiguous with municipalities, or may straddle parts of two or more municipalities.
193. The principal function of the 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 use of water control structures.²¹⁶
194. Some conservation authorities have programs related to water quality management, such as technical studies of watersheds. Some work with municipalities to sponsor and fund quality and quantity studies of surface and ground waters.

²¹⁴ See Freeman, *Ontario's Water Industry: A Report Prepared for the Ontario Municipal Water Association*, pp. 52-53.

²¹⁵ 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. See: The Grand River Conservation Authority, "Who Pays for our Programs?", www.grandriver.on.ca

²¹⁶ Section 23, *Conservation Authorities Act*, R.S.O. 1990, c. C-27.

Part III: Processes for Safe Drinking Water

195. This part of the report draws together the roles and responsibilities of the institutions described in Part II to provide a description of the overall process for providing safe drinking water to Ontario residents. The process has the following components: policy development, including new legislation and regulations, new programs and funding arrangements; the procedures followed to authorize the development and processing of water resources; and quality control processes, encompassing monitoring, inspection, investigation and enforcement.
196. 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.

Policy Process

197. "Policy is rather like an elephant, you recognize it when you see it, but cannot easily define it."²¹⁷ It is well to bear in mind this useful axiom in distinguishing between the policy, program and operational functions of government, and to exercise an appropriate degree of caution in setting out distinctions. Generally speaking, however, significant legislation, the identification of priority activities and new programs are recognizable as policy, 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 require a significant commitment of resources. Note, however, that in Ontario "...even housekeeping and routine matters are still considered matters of policy."²¹⁸
198. Sometimes new policies spring from the campaign commitments of the government; sometimes they arise from program and operational difficulties that require remedies of the character described here and which constitute policy.
199. Change in drinking water policy in Ontario involves the institutions and decision-making machinery described in Part II of this report. The operation of this machinery depends on the successful integration of a series of processes that link together policy making, finance 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.

²¹⁷ Edward, Lord Bridges, "The Relationship Between Ministers and the Permanent Departmental Head", *Canadian Public Administration*, vol. viii, no. 3, 1964.

²¹⁸ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 27, Smith Lyons to Commission Counsel, 9 February 2001.

Legislation, Programs and Regulations

200. Changes in legislation, or significant new regulations, such as the Drinking Water Protection Regulation adopted in August 2000, either emanates from the government's priorities or results 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 for ultimate decision by the Cabinet.²¹⁹

Ontario Water Directors' Committee

201. 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. This is chaired by the Director, Land and Waters Branch of the Ministry of Natural Resources, and includes Directors with responsibilities for water policy from the following ministries: Agriculture, Food and Rural Affairs, Municipal Affairs and Housing, and Environment.²²⁰ The committee is mandated to coordinate provincial water management activities.²²¹

Assistant Deputy Ministers' Committee on Land and Resource Use

202. The Directors' committee reports to and is tasked by a committee of Assistant Deputy Ministers (ADM), which is chaired rotationally. Currently the chair is the Agriculture and Rural Affairs ADM. Membership includes ADMs from 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 resource ministries, focusing on policy and program development that affects land and resource use planning as well as infrastructure.

Local Government and Resource Deputies' Committee

203. The ADM committee in turn reports to a standing committee of Deputy Ministers dealing with local government and natural resources. This committee meets weekly, alternating its chair and agenda between local 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).
204. This committee reviews proposed cabinet submissions, and directs 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

²¹⁹ Note, some regulation making authority rests in the hands of the Minister without reference to the Lieutenant-Governor-in-Council.

²²⁰ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 27, Smith Lyons to Commission Counsel, 9 February 2001.

²²¹ Ministries of Environment and Natural Resources, "Cabinet Submission: Provincial Water Management Framework", January 2000, p. 14.

necessary. The Cabinet Office consults with the Premier's Office to determine whether the issue is ripe for consideration.

205. Together these committees are responsible for "...integrating policy and coordinating activities within the resource cluster of ministries".²²² The Government has described this hierarchy of committees as "... An internal multi-ministry accountability framework...."²²³

Cabinet Process

206. 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 (to be followed by routine Cabinet approval). A matter that reflects the government's priorities or other high profile political matter might be routed to the Priorities, Policy and Communications Board. Generally speaking, however, new policy would be referred to the relevant policy committee of the Cabinet. In the past, this has usually been the Economic and Resource for matters related to water; in future it will presumably be the Environment committee announced in February 2000. Following consideration in the policy committee, it would be reported either directly to the Cabinet or to the Priorities, Policy and Communications Board for ultimate approval by the Cabinet.
207. 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 Cabinet committee and Cabinet. In some circumstances, SuperBuild is also consulted. Following approval by the Cabinet, the Management Board approves detailed resource and administrative aspects of the initiative.

Funding for New Water Infrastructure

208. Proposals for new capital spending are handled somewhat differently. Currently all proposed new provincial capital expenditures are reviewed by the Ontario SuperBuild Corporation. The Corporation has established a program known as Ontario Small Town and Rural Development (OSTAR), whose administration is carried out by the Ministry of Agriculture, Food and Rural Affairs in cooperation with the Ministry of Municipal Affairs and Housing.²²⁴
209. The OSTAR program is in its start up phase. Municipalities are asked to make application directly to SuperBuild, which will then consult the "technical staff" in the relevant ministries about the particular applications.²²⁵ The funding is to be provided from the monies under the control of SuperBuild voted to the Ministry of Agriculture, Food and Rural Affairs.

²²² Ministries of Environment and Natural Resources, "Cabinet Submission: Provincial Water Management Framework", January 2000, p. 25.

²²³ Ministries of Environment and Natural Resources, "Cabinet Submission: Provincial Water Management Framework", January 2000, p. 3.

²²⁴ See paragraphs 158, 208.

²²⁵ Ontario SuperBuild Corporation, "Ontario Small Town and Rural Development (OSTAR) Infrastructure Program: Round 1: Public Health and Safety: Application Guidebook", August 2000, p. 6.

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.²²⁶ The committee's decisions will be subject to Cabinet ratification in the normal way.

210. The Superbuild recommendations are to be based on six criteria, including need, 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."²²⁷
211. 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."²²⁸ Indeed, since the wind up of the Ontario Water Resources Commission in the early 1970s, funding for water infrastructure has been handled through a series of *ad hoc*, short-term programs.²²⁹
212. Although approval for new capital expenditure funded at least in part by the province requires Cabinet approval, funding itself is integral to 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 line senior 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.

Authorization Processes

213. There are two principal catalysts for the installation of new water and sewer facilities or the upgrading of existing sources, treatment facilities and distribution networks: these are the requirements of municipal expansion, and the need to upgrade facilities to meet regulatory standards imposed by the Ministry of the Environment.
214. In either case, the municipality (where relevant in cooperation with its public utilities commission) 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

²²⁶ See paragraph 53.

²²⁷ Ontario SuperBuild Corporation, "Ontario Small Town and Rural Development (OSTAR) Infrastructure Program: Round 1: Public Health and Safety: Application Guidebook", August 2000, p. 4.

²²⁸ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 30, Smith Lyons to Commission Counsel, 9 February 2001.

²²⁹ For a list of the "...province's schemes for financial assistance to municipal water-supply systems during the period 1969-1993..." See Andrew Sancton and Teresa Janik, "Provincial-Local Relations and Drinking Water in Ontario" a paper prepared for the Walkerton Inquiry, 19 February 2001, p. 12, Table 1.

provided the appropriate compliance orders to give priority to such construction.²³⁰ Municipalities may also turn to the Ontario Clean Water Agency to advise on requirements, manage design and construction and even operate municipally owned treatment facilities.

215. The process for approving new water facilities (including alteration, extension and replacement of 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”.

Permits to Take Water

216. The water procurement process begins with an application to the Ministry of the Environment for a permit to draw surface or ground water. 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*.²³¹ These permits 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.²³² 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*.²³³

Certificates of Approval

217. The Ministry 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.”²³⁴ In the case of a water works, the 50,000 litre per day capability applies. Both water and sewage works are 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,²³⁵ including health standards approved by the local medical officer of health.²³⁶
218. 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

²³⁰ Ontario SuperBuild Corporation, “Ontario Small Town and Rural Development (OSTAR) Infrastructure Program: Round 1: Public Health and Safety: Application Guidebook”, August 2000, pp.2-3.

²³¹ Section 34, *Ontario Water Resources Act*, Revised Statutes of Ontario, Chapter O.40.

²³² *Ontario Water Resources Act: Wells*, R.R.O. 1990, Reg. 903.

²³³ See paragraph 171ff.

²³⁴ “Responses/Comments on ... Preliminary Report on Machinery of Government”, pp. 29, Smith Lyons to Commission Counsel, 9 February 2001.

²³⁵ Sections 52 and 53, *Ontario Water Resources Act*, Revised Statutes of Ontario, Chapter O.40.

²³⁶ Section 6, “Drinking Water Protection”, O. Regulation 459/00, 8 August 2000.

completed and the plant is ready to enter production. The approvals reflect the requirements 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."²³⁷ Municipalities are required to make their test results available to the public.²³⁸

219. Regulation 435/93 under the *Ontario Water Resources Act* deals with the classification of facilities and the licensing of operators.²⁴⁰ 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 principally related to competence and incidences of pollution or endangering public health.
220. 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. Operators-in-charge are responsible for maintaining proper records of monitoring and sampling activities and other operations of the facilities; they are also to ensure the maintenance of operating equipment.

Compliance and Enforcement Processes

Monitoring

222. Under the *Ontario Water Resources Act*, the operating authority of a water works capable of supplying more than 50,000 litres per day or that services 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.²⁴⁷

²³⁷ Ministry of the Environment, Business Plan 2000-2001, Message from the Minister, p. 2.

²³⁸ Section 10 – 12, "Drinking Water Protection", O. Regulation 459/00, 8 August 2000.

²³⁹ *Ontario Water Resources Act: Water Works and Sewage Works*, O. Reg. 435/93.

²⁴⁰ *Ontario Water Resources Act: Water Works and Sewage Works*, O. Reg. 435/93.

²⁴¹ *Ontario Water Resources Act: Wells*, R.R.O. 1990, Reg. 903.

²⁴² Ministry of the Environment, Business Plan 2000-2001, Message from the Minister, p. 2.

²⁴³ Ministry of the Environment, Business Plan 2000-2001, Message from the Minister, p. 2.

²⁴⁴ Ministry of the Environment, Business Plan 2000-2001, Message from the Minister, p. 2.

²⁴⁵ Sections 52 and 53, *Ontario Water Resources Act*, Revised Statutes of Ontario, Chapter O.40.

²⁴⁶ Section 6, "Drinking Water Protection", O. Regulation 459/00, 8 August 2000.

²⁴⁷ Section 7, "Drinking Water Protection", O. Regulation 459/00, 8 August 2000.

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223. The Regulation sets out requirements for the notification of the Ministry of the Environment, the local medical officer of health and the owner of the facility in the event of adverse test results, and describes in detail what these are.

Voluntary Surveillance

224. The Ministry of the Environment also gathers information through the Drinking Water Surveillance Program, a voluntary arrangement which began in 1986 and now covers 88% of the population. The extensive testing 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 analysed at the Ministry's remaining laboratory. Adverse results are reported to the operator who is requested to report back to the Ministry on remedial action taken.²⁴⁸
225. The Surveillance 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.²⁴⁹

Inspection, Investigation and Enforcement

226. The Ministry has a program of inspection and monitoring carried out 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.²⁵⁰
227. 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, or requiring a municipality to take over a small waterworks facility or to hire a suitable operator to ensure remedial action is taken. For matters of biological contamination not covered by the *Environmental Protection Act* or the *Ontario Water Resources Act*, it relies on the powers exercised by medical officers of health under the *Health Promotion and Protection Act*.²⁵¹
228. The Drinking Water protection Regulation sets out in detail the procedures to be followed by laboratories and owners if water shows specified adverse water quality results. The

²⁴⁸ Ministry of the Environment, "Drinking Water in Ontario: A Summary Report 1993-1997" (Queen's Printer for Ontario, 2000), p. 12.

²⁴⁹ Ministry of the Environment, "Drinking Water in Ontario: A Summary Report 1993-1997" (Queen's Printer for Ontario, 2000), p. 16.

²⁵⁰ News Release, "Environment ministry completes inspection of 645 water treatment plants", Ministry of the Environment, 21 December 2000.

²⁵¹ See paragraph 98ff.

medical officer of health and the Ministry of the Environment must be notified immediately by telephone on a 24/7 basis, and this must be followed up in writing within 24 hours.²⁵² 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*.

229. 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.

²⁵² Section 8, *Drinking Water Protection Regulation*, O. Regulation 459/00, 8 August 2000.

Part IV: Institutions and Processes Evaluated

230. This part of the report comments on the strengths and weaknesses of the institutions and processes described in Parts II and III, which are strictly factual, designed to provide a guide to the anatomy of provincial and municipal arrangements for water management. This part of the report deals with the effectiveness of those arrangements in supporting the government's responsibility for safe drinking water.
231. The comments are organized around two subjects: the 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.

Adequacy of Current Arrangements for Safe Drinking Water

232. The arrangements for supporting the government's responsibilities for safe drinking water lacks coherence principally because of the absence of policy, the weakness of the mandate and resources of the ministry (Environment) with lead responsibility, the inadequacy of central agency support in coordinating the activities of ministries and agencies with related responsibilities, and the absence of financial policies to deal effectively with the long-term need for infrastructure development and replacement. None of these are stand alone problems. As will become apparent from the discussion, they need to be addressed collectively through the development of a coherent policy that will enable the government to fulfil its responsibilities effectively and efficiently over the long term.
233. 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.

Observers' Comments

234. The conclusion that current arrangements lack coherence is supported by a cross-section of experienced observers of how the government fulfils 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.²⁵³

235. The Ontario Municipal Water Association has similar views about the lack of coherence in the management of the waterworks industry. It has urged the province to develop uniform policies and practices to govern the operation of waterworks throughout the province. The Association has noted "... the problems in the municipal waterworks industry can be attributed to the multitude of government agencies dealing with waterworks matters on a piecemeal basis without establishing an overall plan for the industry."²⁵⁴ 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."²⁵⁵
236. 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."²⁵⁶ Even the government has recognized that "... a more comprehensive, integrated and coordinated approach is needed for policy and program development and service delivery."²⁵⁷
237. 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.²⁵⁸
238. The problem of an unfocused, non-strategic, piecemeal approach to water has been recognised for many years – indeed since the loss of the old Ontario Water Resources Commission began to be felt in the 1980s.

²⁵³ Association of Municipalities of Ontario, *AMO Municipal Action Plan: Protecting Ontario's Water*, June 2000, p. 6.

²⁵⁴ Ontario Municipal Water Association, "Steps Towards a Better Water Future".

²⁵⁵ Association of Municipalities of Ontario, *AMO Municipal Action Plan: Protecting Ontario's Water*, June 2000, p. 8.

²⁵⁶ P. McCulloch and P. Muldoon, *A Sustainable Water Strategy for Ontario* (Toronto: Canadian Environmental Law Association, 1999), cited in Ontario Sewer and Watermain Construction Association, "Conservation, Preservation, Restoration: A Nine Step CPR Plan for Ontario's Water and Sewage Systems", January 2001, p. 10.

²⁵⁷ Ministries of Environment and Natural Resources, "Cabinet Submission: Provincial Water Management Framework", January 2000, p. 3.

²⁵⁸ KPMG, "A Review of Water Management Practices in the Ontario Government", 25 September 1998, p. 24.

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 others, provide comprehensive province-wide 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, 1990.²⁵⁹

Scope of Drinking Water Policy

239. Ontario’s arrangements for the governance of safe drinking water are concentrated on the role of the Ministry of the Environment. As noted at various points in this discussion, drinking water depends on 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 play at best a peripheral role in the provision of safe drinking water.

240. Moreover, the activities of other ministries, notably Natural Resources and Agriculture, Food and Rural Affairs, take place in a policy vacuum, where coordination with others 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. 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 about its effectiveness in developing data jointly with the Ministry of the Environment about the flow of aquifers and ground waters generally.²⁶⁰

241. The mandate of the Minister of the Environment to supervise all surface and ground waters in Ontario also seems to have found little practical expression.²⁶¹ 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.”²⁶² An expert appearing before the inquiry has observed:

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....²⁶³

242. A comprehensive approach to safe drinking water should include 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.

²⁵⁹ Ontario Sewer and Watermain Construction Association, “Conservation, Preservation, Restoration: A Nine Step CPR Plan for Ontario’s Water and Sewage Systems”, January 2001, p. 10.

²⁶⁰ See paragraph 79.

²⁶¹ See paragraph 87.

²⁶² Environmental Commission of Ontario, “Ontario’s Permits to Take Water and the Protection of Ontario’s Water Resources”, brief to the Walkerton Inquiry, January 2001, p. ii.

²⁶³ Prof. K.W.F. Howard, testimony before the Walkerton Inquiry, 16 October 2000.

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243. Conservation authorities represent another under-utilized resource in effective water management. They provide municipalities with a means of participating actively in the development and preservation of water resources that ultimately impact on the quantity and quality of drinking water. The authorities, and through them municipalities, should be part of an overall provincial strategy for the management of drinking water.
244. 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".²⁶⁴ Similarly, the decision of the Ministry of Municipal Affairs and Housing in contesting 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 policy framework setting policy objectives and defining organizational mandates for giving effect to the policy.²⁶⁵
245. The Ministry of Agriculture, Food and Rural Affairs has been criticized for a grudging recognition of the importance of environmental considerations. Although among the ministries 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 its business plan. Since that time, the ministry has taken steps to give more importance to the environment. It has been noted:
- 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.²⁶⁶
246. The particulars of such criticism are no doubt open to debate. The broader point, however, is that a Cabinet approved strategic plan for the management of drinking water resources would require all relevant ministries to take account of the strategy in their policies and programming. Similarly, a broader mandate for the Ministry of the Environment to consider the protection of the watershed as the basis of safe drinking water policy would provide a solid basis for the Ministry's leadership in developing and implementing such a strategic plan.

²⁶⁴ See paragraph 108.

²⁶⁵ See paragraph 163.

²⁶⁶ The Ontario Centre for Sustainability, "Missing Values 2000: Ontario's Failure to Plan for a Healthy Environment", September 2000, pp. 2-3.

The Ministry of the Environment

247. The Ministry of the Environment has not shown itself capable of providing the necessary strategic thinking. Nor has it the influence at Queen's Park to be heard as the severe reductions in its budget and consequent loss of expertise demonstrate. The concern about the Ministry is shared by many observers. 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 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.²⁶⁷

248. The budget reductions, staff cuts, loss of technical expertise and institutional memory - and resulting declines in inspection, monitoring and enforcement activities - have attracted a good deal of criticism.²⁶⁸ The Association of Municipalities of Ontario has noted:

... 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.²⁶⁹

249. The reduction in the Ministry's resources has weakened its research capability 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 to for routine water testing does not appear to be a good use of resources.²⁷⁰ 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.

250. 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, has noted:

... 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.

²⁶⁷ Ontario Municipal Water Association, "The Ministry of the Environment", 2 October 2000.

²⁶⁸ See: Office of the Provincial Auditor of Ontario, "Special Report on Accountability and Value for Money", November 2000, Ministry of the Environment, Operations Division, Section 3.06. www.gov.on.ca/opa.

²⁶⁹ Association of Municipalities of Ontario, *AMO Municipal Action Plan: Protecting Ontario's Water*, June 2000, p. 8.

²⁷⁰ See paragraph 224.

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.²⁷¹

251. The same report has 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."²⁷²
252. 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.²⁷³ The Ministry has some 220,000 certificates outstanding, and adds about 8,000 new certificates each year. In the circumstances it is "... impractical for ministry staff to closely monitor all site operators for compliance with the conditions of their approvals."²⁷⁴ "...inspections of municipal water treatment plants declined by over half, from over 400 to about 190 per year, over the past five years."²⁷⁵ The Auditor was also critical of the lack of plans and criteria to guide the selections of sites that would be inspected.
253. The Auditor's comments about the Ministry's shortcomings extend to its enforcement activities, where he has been critical of the Ministry's 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.²⁷⁶
254. The Ministry's response to this criticism was to note that it has increased the number of field orders from an average of 20 to 90 per month. There was, however, no comment about an overall strategy to balance compliance and enforcement activities, or the steps taken to increase preventive measures as part of a broader strategy for improved compliance.²⁷⁷

²⁷¹ Executive Resources Group, "Managing the Environment: A Review of Best Practices", commissioned by the government of Ontario, January 2001, p. 118.

²⁷² Executive Resources Group, "Managing the Environment: A Review of Best Practices", commissioned by the government of Ontario, January 2001, p. 200.

²⁷³ Office of the Provincial Auditor, "Ministry of the Environment: Operations Division", *Special Report: Accountability and Value for Money*, 3.06, www.gov.on.ca/opa.

²⁷⁴ Office of the Provincial Auditor, "Ministry of the Environment: Operations Division", *Special Report: Accountability and Value for Money*, 3.06, www.gov.on.ca/opa.

²⁷⁵ Office of the Provincial Auditor, "Ministry of the Environment: Operations Division", *Special Report: Accountability and Value for Money*, 3.06, www.gov.on.ca/opa.

²⁷⁶ Office of the Provincial Auditor, "Ministry of the Environment: Operations Division", *Special Report: Accountability and Value for Money*, 3.06, www.gov.on.ca/opa.

²⁷⁷ See paragraph 263.

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255. Aside from criticisms about policy and resources, there is a more fundamental question to be asked about the Ministry of the Environment: does the environment-based mandate of the Ministry add to or detract from its capacity to regulate effectively the provision of safe drinking water? Would the regulatory function be fulfilled better in another ministry or an arm's-length agency?
256. A recent study has concluded that the Ministry remains the most appropriate vehicle for providing the focal point for the province's responsibilities for the environment, presumably including safe drinking water. The 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 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.²⁷⁸
257. At this point, it is worth noting that for whatever reason the Ministry appears to know relatively little about the state of the province's drinking water facilities. Recently SuperBuild 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.²⁷⁹
258. The Ministry appears anxious about not being implicated in responsibility for operational problems in areas that it regulates. Perhaps on account of budget constraints, the Ministry 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."²⁸⁰ Similarly, 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.²⁸¹
259. 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 the changes in the *Planning Act* made in 1996 empowering many municipalities to approve their own official plans and removing the right of all ministries other than the Ministry of Municipal Affairs and Housing to appeal municipal planning decisions to the Ontario Municipal Board.²⁸² 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.²⁸³ These changes, together with the one-

²⁷⁸ Executive Resource Group, "Managing the Environment: A Review of Best Practices", commissioned by the government of Ontario, January 2001, p. 39.

²⁷⁹ Ministry of Finance, Ontario SuperBuild Corporation, Request for proposal (eight of them), 26 January 2001

²⁸⁰ See paragraph 132.

²⁸¹ See paragraph 114.

²⁸² See paragraph 113.

²⁸³ Dennis H. Wood, *The Planning Act: A Sourcebook*, 4th edn. (Toronto: Carswell, n.d.), p. 4.

window planning service where the province is the 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.²⁸⁴

260. 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 Affairs and Housing, from being public bodies and thus, having the right of appeal given in various section of the *Planning Act*....²⁸⁵

261. 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.²⁸⁶ This is borne out by the Drinking Water Protection Regulation, which places the onus for ensuring water treatment, testing, reporting and publicizing of results as well as corrective action on the owners of facilities. The Regulation is noticeably deficient with respect to any obligations of the regulator.²⁸⁷ 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.²⁸⁸
262. 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 through planning for the long-term development and safeguarding of available water resources.²⁸⁹ A better approach is for both levels of government to accept responsibility, providing greater assurance to the citizen that the public interest is in fact being safeguarded.²⁹⁰ There is besides a constitutional responsibility attaching to the province that cannot be set aside on the ground that municipalities are governed by democratic institutions.²⁹¹
263. 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

²⁸⁴ Dennis H. Wood, *The Planning Act: A Sourcebook*, 4th edn. (Toronto: Carswell, n.d.), pp. 2-11.

²⁸⁵ Dennis H. Wood, *The Planning Act: A Sourcebook*, 4th edn. (Toronto: Carswell, n.d.), p. 4.

²⁸⁶ See paragraphs 115, 98ff.

²⁸⁷ *Drinking Water Protection Regulation*, O. Regulation 459/00, 8 August 2000.

²⁸⁸ It is noteworthy that the equivalent British regulation spells out in detail the conditions attaching to the exercise of the regulator's powers; the Ontario regulation leaves these matters to the "opinion" of the Director under the *Ontario Water Resources Act*. See: Section 4,5,7 & *passim* "Water Supply Quality Regulations 1989, as amended...." Compare with Sections 2, 5 & *passim* of the Drinking Water Protection Regulation.

²⁸⁹ KPMG, "A Review of Water Management Practices in the Ontario Government", 25 September 1998, p. 22.

²⁹⁰ Andrew Sancton and Teresa Janik, "Provincial-Local Relations and Drinking Water in Ontario", 19 February 2001, p. 28.

²⁹¹ See paragraph 115.

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.²⁹² In such circumstances, the Ministry would be well placed to develop networks of expertise with operators and outside experts designed to abate threats to health and the environment.

264. The consequences of the Ministry's shortcomings are evident in the results of the recently completed inspections of all water treatment facilities.²⁹³

An inspection blitz, ordered by MOE 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.²⁹⁴

265. It will be recalled that the government was unable to provide comparative data on reductions in the budget of the Ministry of the Environment during the 1990s.²⁹⁵ 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, the Ministry's 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.²⁹⁶

266. The data from the Provincial Auditor's special report provides an insight into the extent of reductions and their impact in particular on inspections.²⁹⁷ In the absence of data from the government, the 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:

²⁹² For more on such an approach see: National Health and Medical Research Council /Agriculture and Resource Management Council of Australia and New Zealand, "Framework for Management of Drinking Water Quality: A Preventive Strategy from Catchment to Consumer: Targeted Industry Consultation", 5 February 2001.

²⁹³ See paragraph 226.

²⁹⁴ Ontario Sewer and Watermain Construction Association, "Drinking Water Management in Ontario: A Brief History", January 2001, p. 11.

²⁹⁵ See paragraph 95.

²⁹⁶ See Canadian Institute for Environmental Law and Policy, *Ontario's Environment and the Common Sense Revolution: A Fifth Year Report* (Toronto, 2000), pp 13-14; and Ministry of Finance, *2000 Budget*, 2 May 2000, Budget Paper B, pp. 54-55.

²⁹⁷ See paragraph 252.

Since the advent of the Common Sense Revolution, MOE budgets have been cut by about 60 percent. 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 than \$150 million. For 2000-1, the Ontario budget shows \$158 million for operations and \$65 million of capital expenditures. Budget cuts to the MNR are significant. In the budget plan 2000-01, capital expenditures for the MNR are \$376 million, a decrease of \$82 million or 18 percent 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 percent of levels before the provincial reduction in operating grants in 1995.²⁹⁸

267. As noted in Part II, it is difficult to make such comparisons because of changes in organization, mandates and programs.²⁹⁹ For example, the figures cited above do not take account of the shift of capital spending from OCWA to the Ministry of the Environment and now to SuperBuild Corporation. It is evident, however, that very significant cuts have occurred with adverse consequences for the capacity of the government to fulfil its environmental responsibilities in general and its duty respecting clean drinking water in particular.
268. 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 entire approach to the provision of safe drinking water. As matters now stand, the government is vulnerable because this Ministry is inadequate for the task.

Funding

269. 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 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."³⁰⁰
270. One consequence of these distortions is the gradual decay of water and sewage infrastructure. Build 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.

²⁹⁸ Canadian Environmental Law Association, "The top 10 things wrong with environmental protection under the Common Sense Revolution", *Intervenor*, July –December 2000, pp. 9-12. www.cela.ca/Intervenor.

²⁹⁹ See paragraph 95

³⁰⁰ Ontario Sewer and Watermain Construction Association, "Drinking Water Management in Ontario: A Brief History", January 2001, p. 11.

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271. 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.
272. Appropriately, there is a debate about whether the province ought to be subsidizing water infrastructure, and more particularly there is a view that users ought to pay the cost of the water they use rather than passing the real costs to the provincial or municipal budget, creating distortions, perverse incentives and inattention to efficiency. As a practical matter, however, the province has provided such subsidies through a variety of programs, including the current OSTAR initiative under SuperBuild. As noted, the government does not want these programs to be seen as permanent or constituting any sort of entitlement.³⁰¹
273. While it may be reasonable to reject the idea of entitlement, more is required. Currently, “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.
274. More importantly, the province needs policies and programs that would encourage municipalities to pool resources and seek both economies and improved facilities flowing from critical masses of infrastructure facilities.³⁰² 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. Fewer, larger operators would also change the character of regulatory oversight, placing more emphasis on certification of suppliers and preventive measures. A comprehensive drinking water policy should be able to array options to achieve such outcomes in the overall context of the province’s arrangements for providing safe drinking water to its residents.
275. As discussed below, funding is a relevant consideration in designing institutions and processes for management.³⁰³ In reviewing current arrangements, it is interesting that public utilities commissions have been allowed to fade as institutions whose original purpose was to ensure adequate attention to the provision of water treatment facilities, particularly for smaller municipalities. It is argued,³⁰⁴ that a separate utilities commission is better placed to protect the funding available for treatment facilities and their operation, notwithstanding that under the *Public Utilities Act* surplus funds raised from water rates and

³⁰¹ See paragraph 211.

³⁰² This was one of the reasons for the creation of the Ontario Water Resources Commission in 1956. Andrew Sancton and Teresa Janik, “Provincial-Local Relations and Drinking Water in Ontario” a paper prepared for the Walkerton Inquiry, 19 February 2001, p. 8.

³⁰³ See paragraph 468ff.

³⁰⁴ See Neil Freeman, “Ontario’s Water Utilities: Governance Models; A report Prepared for the Ontario Municipal Water Association (OMWA)”, 19 December 1997, pp. 8-11.

other commission revenue form part of the general funds of the municipality.³⁰⁵ There are concerns that the works departments of small municipalities lack the management and other skills to operate water facilities and satisfy the various regulatory requirements.³⁰⁶ The demise of the commissions is another example where action has preceded systematic thought about the consequences for a needed – but absent – policy for the overall management of drinking water in the province.

276. 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 could be acute in cases where the province thinks 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.³⁰⁷ A strategic approach to water policy in the province would include 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.³⁰⁸

Federal Co-operation

277. The review of institutions and processes in Parts II and III suggests that the federal government has little practical impact on the provision of drinking water in Ontario. The federal government contributes a scientific expertise to the formulation of drinking water guidelines, its environmental legislation has potential impact on Ontario's ecosystem, and by providing infrastructure funding it contributes to the financing of drinking water and sewage treatment facilities.
278. 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.
279. 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 the province's laws of general application, including the *Ontario Water Resources Act*, apply; but as a practical matter 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

³⁰⁵ Section 35, *Public Utilities Act*.

³⁰⁶ See paragraph 262.

³⁰⁷ See paragraph 162ff.

³⁰⁸ Section 25, *Conservation Authorities Act*, R.S.O. 1990, c. C-27.

pays for all such works, although the province has from time to time provided technical expertise and even built facilities.³⁰⁹

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

The Private Sector

281. The absence of a policy framework also had detrimental consequences for private sector operators despite the government's express policy in favour of private providers for public services. The absence of a clear position on the economics of supplying and paying for drinking water makes it difficult for the private sector to commit resources to make participation in water and sewage operations truly viable. This is not only a matter of a free and fair marketplace, it is also relevant to the development and maintenance of expertise in drinking water operations. The development of the private sector is also hampered by the anomalous position of OCWA.³¹⁰

Governance in Ontario

282. 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.
283. Part II of the 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 the description of 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.

Access to the Cabinet

284. 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.³¹¹ However, certain other practices may give rise to questions about the importance attached to ministers and the central importance of their responsibility.

³⁰⁹ Smith Lyons to Commission Counsel, Schedule 1, 12 March 2001.

³¹⁰ See paragraph 324ff.

³¹¹ See paragraph 66ff.

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285. 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.³¹² As a matter of principle, the collective responsibility of ministers depends on knowing and approving the actions of their colleagues, for which purpose they need untrammelled access to bring forward the business of their portfolios. As a practical matter, without access a minister cannot get attention for the agenda of his or her ministry.
286. In the past thirty-odd years, most Westminster governance systems have come under periodic attack for over-centralization.³¹³ 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.
287. 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.³¹⁴ As a practical matter, therefore, a minister needs to be free to bring matters forward for discussion and decision by colleagues in the Cabinet.
288. Such a 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.
289. The current practice in Ontario appears to differ to some extent from the classic norm. As noted in Part II, the Premier's Office controls access to the decision-making system on the basis of agreed priorities arising from election commitments.³¹⁵ Obviously unforeseen events and emergencies arise that must be dealt with by the Cabinet, but the existence of criteria raises a doubt about the ability of a minister to exercise the right to bring a matter to his 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.

Cabinet Process

290. 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 fulfils statutory functions and is, therefore, more than a committee of the

³¹² See paragraph 47ff.

³¹³ For Australian, British and Canadian comment about this see: Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (London: Victor Gollancz, 1995); G.W. Jones, "Prime Ministers' Departments Really Create Problems: A Rejoinder to Patrick Weller", *Public Administration*, Vol. 61, spring 1983; Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); Patrick Weller, *First Among Equals: Prime Ministers in Westminster Systems* (Sydney: George Allen & Unwin, 1985), pp. 72-103.

³¹⁴ See below paragraph 340ff for a discussion of the meaning, differences and relevant application of the terms responsibility, accountability and answerability.

³¹⁵ See paragraph 67.

Cabinet, as its style of business confirms.³¹⁶ 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 and that is quite normal.

291. 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 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 (with some ministers in the cabinet and others, clearly less influential, outside) as in the United Kingdom, or a committee that is seen as more important than the others, but nonetheless 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 their intrinsic importance. With respect to water management, it will be noted that prior to the shuffle of 8 February 2001, when the Minister of the Environment was given her own policy committee and thus a seat on the Board, none of the key ministers were members of the Priorities, Policy and Communications Board.³¹⁷
292. The second point to note is that the Cabinet 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 1991.³¹⁸ 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 acting 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. Normally, such decisions will have been preceded by appropriate Cabinet decision-making concerning the relevant policy. Prior to 1991, the practice 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.³¹⁹
293. Does this 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. Note too that in Ontario's decision-making

³¹⁶ 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 particular item. Decisions of the Board are generally – not always – made in private after the supplicants have departed.

³¹⁷ See paragraph 53.

³¹⁸ See paragraph 70ff.

³¹⁹ Bob Carman, "Comments on ...Machinery of Government for Safe Drinking Water in Ontario", 5 February 2001.

system, "...even housekeeping and routine matters are still considered to be policy" and therefore subject to Cabinet approval.³²⁰

294. The third point to note is the inclusion of several but not all Parliamentary Assistants in the standing policy committees of the Cabinet. This is no doubt good training, but it raises questions about the status of these members of the Assembly. They are treated for purposes of conflict of interest like any other backbencher, and are not therefore members of the ministry.³²¹ However, the presence of some Parliamentary Assistants at committee gives rise to a contrary appearance. It is clear that as a practical matter 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 8 February 2001, one Parliamentary Assistant has been promoted to vice-chair of a committee.³²²
295. This sort of arrangement can only give rise to confusion about roles and responsibilities. This 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.

Central Agencies

296. The Cabinet Office appears to fulfil 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 and 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 that the Cabinet Office staff briefs cabinet committees on priority proposals from ministers, instead of leaving this to ministers and their officials.
297. 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 or critical 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.³²³ 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.
298. The role of the Cabinet Office in respect of government organization and senior appointments appears to be somewhat attenuated. In its comments on Part II of this report, the government took exception to a description of the Cabinet Office as providing

³²⁰ "Responses/Comments on ... Preliminary Report on Machinery of Government", p. 27, Smith Lyons to Commission Counsel, 9 February 2001. See also paragraph 197ff.

³²¹ Section 19, *Members' Integrity Act, 1994*, Statutes of Ontario, 1994, Chapter 38.

³²² See paragraph 53.

³²³ Currently in Ottawa, the Prime Minister has a regular morning meeting with the Secretary to the Cabinet and his Chief of Staff.

“... 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.”³²⁴ 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 improved government organization for the provision of safe drinking water.

299. The Cabinet Office has established a special relationship with ministries in respect of government communications. As noted in Part II, 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 deputy. 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, however, abnormal for the Cabinet Office to have a directing relationship with staff inside ministries. Whatever advantages it may offer in terms of avoiding mistakes and providing strategic direction and a close linkage between the Premier's Office and communications' units in ministries, such an arrangement is unmindful of the responsibilities of ministers or the legal powers, duties and functions of deputy ministers. This arrangement 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.
300. 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.
301. 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, policy capacity in central agencies can be highly effective in challenging ministries to explain proposals in policy rather than operational terms. This does not depend on the establishment of formal priorities and objectives; it is simply a matter of developing and deploying a dozen or so analysts with sufficient sectoral expertise to assist ministry staff to 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 incremental changes to programs.³²⁵
302. As discussed in Part II, the Secretary of the Board of Management is also the Chairman of Ontario's Public Service Commission and exercises most of the powers of the

³²⁴ See paragraph 57.d) for the version of this text following revision on the basis of the government's comments.

³²⁵ See paragraph 313.

Commission.³²⁶ The 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. It leaves Ontario open to the politicization of the public service that is no antithetical to the Westminster ideal, but which 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 fifteen years experience with *ad hoc* arrangements.³²⁷

303. The Ministry of Finance is perhaps the key central agency in the Ontario government. It has spearheaded the province's realignment of functions with the municipal level as well as tax policies designed to grow the province's economy. The Ministry played an important role in the design in 1993, re-mandating in 1997 and privatization review in 1998 of the Ontario Clean Water Agency.³²⁸ Its recent SuperBuild initiative demonstrates the Ministry's interest in more strategic thinking across the government as a whole.
304. The status of SuperBuild is also worth comment. SuperBuild is formally a corporation established pursuant to statute with a board of directors, which is charged with management of the corporation.³²⁹ In practice, the board is advisory and is described as such.³³⁰ Moreover, the agency 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.³³¹ The mandate of SuperBuild 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.
305. 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. It is, for example, regrettable that there is no official description of the government's decision-making system, principles of government organization or the role of the Cabinet Office available for the purposes of a study such as this.³³²

³²⁶ See paragraph 60.

³²⁷ Note that the current proposals of the government for amendments to the *Public Service Act* do not include reference to this matter. See: Management Board Secretariat, "The Ontario Public Service in the 21st Century: Discussion Paper on the *Public Service Act*", March 2000.

³²⁸ Note that the role of the Ministry in the creation of OCWA appears to have been a good deal more important than the description in Part II suggests. See paragraph 88.

³²⁹ See paragraph 151ff.

³³⁰ See paragraph 158.

³³¹ See paragraph 55.

³³² 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 Website.

306. 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 OCWA and the discouragement of public utilities commissions are taken 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.

Ministries

Establishment of Ministries

307. It was noted that the Premier decides the number and mandates of ministries and ministers.³³³ The government considers this to be a matter of common law prerogative, although it is also provided for in the *Executive Council Act*.³³⁴ 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.³³⁵ 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.³³⁶ The result is that today there are many ministries that have no institutional basis in statute: (including for matters related to safe drinking water), Agriculture, Food and Rural Affairs, Health and Long-Term Care, and the Ministry of Finance itself.
308. The flexibility provided by these arrangements is enviable; providing the advantage of enabling the government to respond quickly and efficiently to new organizational requirements, without having to resort to elaborate and somewhat unsatisfactory administrative means to cobble together temporary arrangements pending the passage of legislation. This is an important feature of machinery of government in Ontario.
309. 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.³³⁷ 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.³³⁸

³³³ See paragraph 119.

³³⁴ Section 2, *Executive Council Act*, Revised Statutes of Ontario, 1990, Chapter E. 25.

³³⁵ Smith Lyons to Commission Counsel, 2 March 2001.

³³⁶ Smith Lyons to Commission Counsel, 2 March 2001. Indeed, the use of legislation in the 1970s extended to the creation of a cabinet committee: the Policy and Priorities Board. See paragraph 291.

³³⁷ Among the unlegislated ministries: Ministry of Health and Long-Term Care; Ministry of Municipal Affairs and Housing; Ministry of Agriculture, Food and Rural Affairs; Ministry of Consumer and Business Services; Ministry of Tourism, Culture and Recreation.

³³⁸ See paragraphs 367, 394.

Program Legislation

310. 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: the minister “...shall preside over and have charge of the Ministry.”³³⁹ 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 in length, and this is typical, not exceptional. The *Municipal Act* rivals the length of the federal *Income Tax Act*.
311. The length and detail of Ontario's statutes reflects two relevant points. First, the practice in Ontario of using statutes 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, the practice of amending statutes piecemeal to deal with particular matters as they arise.
312. The mandating of officials in Ontario's statutes not only produces detailed statutes, but it also creates a degree of duplication and overlap with the powers of ministers. The detail is necessitated by the need to be precise about the empowerment of officials; which contrasts with the more normal statutory provision of general powers 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.³⁴⁰
313. The detail in the 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.³⁴¹
314. This 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.

³³⁹ See Section 3, *Ministry of the Environment Act*, Revised Statutes of Ontario, 1990, Chapter M.24.

³⁴⁰ See, for example, the provisions set out in Section 5, *Ontario Water Resources Act*.

³⁴¹ 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.” Management Board Secretariat, “The Ontario Public Service in the 21st Century: Discussion Paper on the *Public Service Act*”, March 2000, p. 2.

Policy Development

315. 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 ground waters. 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.³⁴² 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.³⁴³

316. 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.³⁴⁴ In respect of water, even within government, the documents available cannot be said to have provided ministers with an adequate overview of policy directions and choices.³⁴⁵
317. Lack of attention to policy and strategic direction leads to overlap, confusion and 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 re-thinking of purposes and objectives and the codified enumeration of powers, duties and functions.

Agencies

318. The government's relationship with provincial agencies was discussed at some length in Part II of this report. There are several points to be noted.
319. 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

³⁴² Environmental Commissioner of Ontario, *The Protection of Ontario's Groundwater and Intensive Farming: Special Report to the Legislative Assembly of Ontario*, 27 July 2000, p. 3.

³⁴³ Environmental Commissioner of Ontario, *The Protection of Ontario's Groundwater and Intensive Farming: Special Report to the Legislative Assembly of Ontario*, 27 July 2000, p. 6.

³⁴⁴ Ontario Public Service Restructuring Secretariat, Cabinet Office, *Transforming Public Service for the 21st Century: An Ontario Perspective*, April 2000.

³⁴⁵ See for example a recent Cabinet Submission, "Provincial Water Management Framework", Ministries of Environment and Natural Resources, January 2000. Inqdocno: 1038133.

minister may be said to have a veto but not a power of initiation.³⁴⁶ It would be unusual if the Premier did not enjoy the same privilege.

320. The practice has the potential to strengthen the responsibilities of ministers provided agencies do not cause dissent within the ministry; with some ministers thinking their interests are being somehow undermined as a result of such initiatives. 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 Ontario Clean Water Agency had been established at the initiative of the Minister of Finance without the Premier realizing and agreeing to the consequent change in the mandate of the Minister of the Environment.³⁴⁷
321. There is a degree of ambivalence about the meaning of independence and arm's-length, as is demonstrated throughout the Management Board's Agency Establishment and Accountability Directive. Agencies may describe themselves as being at arms length and yet subject to ministerial direction, a view supported by the Cabinet Office.³⁴⁸ 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.³⁴⁹
322. 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 for the government to seek to provide direction to arm's-length agencies other than that provided for by statute.
323. The reference in the Agency Establishment and Accountability Directive to agencies being "established by the government"³⁵⁰ 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,

³⁴⁶ The federal government provides an example of the prime minister 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 principle of what is proposed and the way in which it should be implemented, 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.

³⁴⁷ See paragraph 136ff.

³⁴⁸ See paragraphs 144, 130.

³⁴⁹ See paragraph 157.

³⁵⁰ See paragraph 122.

the clearest examples of which are the Provincial Auditor and the Environmental Commissioner.³⁵¹

324. In the context of drinking water, these confused arrangements may be seen in respect of three of the agencies discussed in this report.

- a) OCWA was created principally because of the appearance of a conflict of interest within the Ministry of the Environment, which both owned and operated water and sewage facilities for which it was also the regulator. Today, OCWA is under the direct responsibility of the Ministry of the Environment, it has the Deputy Minister of the Environment on its Board of Directors (one of four deputy ministers on he 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.³⁵²
- b) SuperBuild Corporation 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 also reports to the Minister (of Finance).³⁵³
- c) 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.³⁵⁴ 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.³⁵⁵

Note that the Minister's authority is not limited to directives, even general directives. The Board must exercise its powers under the statute in accordance with the Minister's "directives, guidelines or policy statements in relation to agricultural operations or normal farm practices". This is a sweeping assertion of ministerial authority that can only blur, it not eradicate, the Board's accountability for the powers granted under the statute.

325. With respect to 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...."³⁵⁶ 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.

³⁵¹ See paragraph 171ff. The others are the Chief Election Officer, the Ombudsman, the Integrity Commissioner, and the Information and Privacy Commissioner.

³⁵² See paragraph 135

³⁵³ See paragraphs 55, 151.

³⁵⁴ See paragraph 165ff.

³⁵⁵ Section 9.1 *Farming and Food Production and Protection Act, 1997*.

³⁵⁶ See paragraph 142.

It is quite normal for a minister to have statutory relationship with an agency that has no formal relationship with the department or ministry that supports the minister. In the case of the Ministry of the Environment, it is in fact inappropriate for the Ministry to have a supervisory relationship with an entity that was separated from the Ministry in order to avoid even the appearance of a conflict of interest.

326. A further institutional comment about OCWA is relevant. It is said to be structured to compete fairly with the private sector, but this is manifestly not the case since it has a variety of commercial advantages, not the least of which is its financial backing from the province's treasury.³⁵⁷ 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.
327. The appropriate relationship between ministers and arm's-length bodies is discussed in Part V of this report.³⁵⁸ 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.

Delegation

328. Attention is drawn to the 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, the powers of the Public Service Commission are exercised by a committee chaired by the Secretary to the Cabinet and the Management Board Secretariat as a result of delegation.³⁵⁹
329. It is also seen specifically in respect of infrastructure spending (including funding of water and sewage works) where the powers of the Management Board of Cabinet are formally exercised by *the members*³⁶⁰ of the Cabinet Committee on Privatization and SuperBuild supported by the Ministry of Finance and the SuperBuild Corporation. (Note too that in turn ministries have lost control of capital budgets, even though the funds may continue to be carried in a ministry's vote.)
330. Delegations should be consistent and clear. Delegation of 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.³⁶¹ Delegation of the statutory powers of a formal

³⁵⁷ See paragraphs 140, 141.

³⁵⁸ See paragraph 355.

³⁵⁹ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 3, Smith Lyons to Commission Counsel, 9 February 2001.

³⁶⁰ "Responses/Comments on ... Preliminary Report on Machinery of Government", pp. 5, Smith Lyons to Commission Counsel, 9 February 2001.

³⁶¹ This is one of the roots of the modern concept of individual ministerial responsibility. See The Privy Council Office. *Responsibility in the Constitution* (Ottawa: Minister of Supply and Services, 1993), p. 23.

committee of the Executive Council to the members of a committee of the Cabinet recognizes the informal character of the Cabinet and its committees and could be said to offend somewhat less the principle of assigning powers to individuals rather than corporations.

331. The government makes extensive use of delegations of all sorts. Delegation of powers has played a central role in the province's "Alternative Service Delivery" initiatives.³⁶² In some cases, delegation may be unavoidable.³⁶³ But in general the drawback of such arrangements is that they weaken accountability.³⁶⁴ When powers, duties and functions, and in consequence responsibility and accountability are shared, delegated and reassigned, the risk is that their diffusion will make it difficult to be certain about who – if anyone – is really in charge.

Downsizing

332. In reviewing governance in Ontario, the outside observer is struck by 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 towards the Ontario public service. In her annual report for 1997-1998, 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.³⁶⁵

333. In her final report for 1998/99, the then 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.

...

³⁶² 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*, Statutes of Ontario, 1996, Chapter 19. There is currently a proposal to amend the *Public Service Act* to permit deputy ministers to delegate their staffing authorities to persons outside of their own ministry in order to permit "...cross-ministry integration of service delivery within the OPS, as well as partnership arrangements"; see: Management Board Secretariat, "The Ontario Public Service in the 21st Century: Discussion Paper on the *Public Service Act*", March 2000, p. 5.

³⁶³ See paragraph 113.

³⁶⁴ "New public management" theory asserts a different view that supports the use of delegation as an element in its advocacy of separating administrative and political accountability, which it sees as an essential element of improved public services. See Peter Aucoin, *The New Public Management: Canada in Comparative Perspective* (Montreal: Institute for Research on Public Policy, 1995), pp.

³⁶⁵ Ombudsman Ontario, *Annual Report 1997/98*, p. 2.

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.³⁶⁶

334. 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 observed:

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 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.³⁶⁷

Conclusion

335. 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. Lack of precision in the assignment of powers, subordination of ministers to inappropriate central direction, the enunciation of conflicting regimes for the governance of agencies, extensive use of delegation, and general imprecision about institutional arrangements suggest inadequate attention to matters of governance.

³⁶⁶ Ombudsman Ontario, *Annual Report 1998-99*, pp. 3, 4.

³⁶⁷ Executive Resources Group, "Managing the Environment: A Review of Best Practices", commissioned by the government of Ontario, January 2001, p. 41.

Part V: Machinery of Government Principles

Importance of Clarity in Roles, Responsibilities and Relationships

336. 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 concentrate on the importance of clearly identifying roles and responsibilities, the assignment of authorities, and the design of structures and processes that will achieve the policy objectives sought.
337. The principles are built 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.
338. Whether services are provided directly by the minister's department or ministry, or by an arm's-length agency or 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, the private sector or to non-governmental organizations.
339. 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.

Responsibility, Accountability and Answerability

340. Discussion of organizational arrangements in the public sector inevitably raises questions about the use and control of power. The relationships among ministers, officials, the legislature and the public are discussed in terms of responsibility, accountability and answerability.
341. 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:
- a) *Responsibility* refers to:

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- i) The constitutional relationship of ministers to the legislature in our system of “responsible government”.
 - ii) The assignment and exercise of powers of the state by elected and non-elected officials.
 - b) *Accountability* refers to:
 - i) 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.
 - ii) The relationship of officials to office holders, whose delegated powers they exercise.
 - c) *Answerability* refers to:
 - i) 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.
 - ii) 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.³⁶⁸

Transparency

- 342. 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.
- 343. OCWA and SuperBuild 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 of all sorts 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.

³⁶⁸ See: Nicholas d’Ombrain, “Alternative Service Delivery: Governance Management and Practice”, in *Change, Governance and Public Management* (Ottawa: KPMG and Public Policy Forum, May 2000), pp. 154-155.

344. 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.³⁶⁹ A corporation cannot compete fairly with the private sector unless it is properly designated as a commercial entity entirely free of the protection offered by the taxpayer.³⁷⁰ A board of directors that reports to a minister cannot have “responsibility” for the management of a corporate body.³⁷¹ A corporation that acts as a body corporate with an executive board of directors cannot be a central agency, working at the heart of a system of responsible government.³⁷²

Assignment of Powers

345. 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 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.

Responsibilities of Ministers

346. Ministers are responsible to the legislature in two dimensions:
- a) They have a formal responsibility for the powers conferred on them.
 - b) 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.

Formal Responsibilities of Ministers

347. 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. 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 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

³⁶⁹ See paragraph 169.

³⁷⁰ See paragraph 141.

³⁷¹ See paragraph 157.

³⁷² See paragraph 55.

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.

Conventional Responsibilities of Ministers

348. Ministers are not accountable – in the sense described above³⁷³ – 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 above – to the legislature for the activities of these bodies.
349. 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 (ministry in Ontario) officials.
350. The conventional responsibility of ministers for arm's-length bodies encompasses the following:
- a) 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.
 - b) 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.
 - c) 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).
351. In addition, ministers almost always exercise certain formal powers in respect of arms length agencies. With few exceptions these would include:
- a) The right to recommend (to the Lieutenant-Governor-in-Council) the appointment of board members including the chair and the chief executive officer.
 - b) The right to receive and table in the legislature an annual report.
 - c) The adoption of regulations within the minister's statutory authority.

³⁷³ See paragraph 341.

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352. Ministers may also have formal authority under statute to exercise defined powers. These might include:
- a) The right to request a special study and report.
 - b) Defined powers to review specified types of decisions taken by the agency.
 - c) General powers of policy direction provided they are exercised formally and publicly. This 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.
353. 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 would expect to be informed by the head of the agency of the remedial measures being taken, and if necessary to use powers of appointment and legislative amendment to act independently of the agency.
354. 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.

Agency Responsibility

355. 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.
356. 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 has one or more of the following characteristics:
- a) Regulation in the public interest or the apportioning of some public good (e.g. licensing of broadcasting; electricity pricing; preservation of competition).
 - b) Granting of public funds to individuals and organizations based on professional criteria (e.g. arts funding; research grants).
 - c) Provision of independent advice to government on any matter of public policy.

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- d) Operation of program activities in a commercial environment (e.g., public utilities, public broadcasting, some strategic industries, mail services).
357. Agencies that are not at arm's-length from ministers may also be established. These might include organizations that provide support to businesses or whose activities are largely administrative, such as tax collection. These bodies are usually set up with a significant degree of administrative autonomy, but subject to day-to-day direction from ministers without the need to resort to formal directives.
358. 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. Arm's-length and administrative autonomy are not necessarily synonymous. Many Alternative Service Delivery Agencies are fully under the direction of ministers, and are often branches of the department or ministry, but they may be free from many of the normal administrative controls that apply to a ministry.
359. 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.
360. 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 ministerial direction. It is not appropriate to create boards of directors for agencies that are subject to general ministerial direction. In such cases, 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.
361. 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 modeled. In the private sector, the board represents the shareholders, and its chair is the vehicle for communicating shareholder concern to the management of the corporation. In the public sector, the minister is the "shareholder" and he or she generally has no need of an intermediary board or chair to represent shareholder 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.
362. 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 impact on clients. The chair of a board can provide the minister with an independent assessment of the agency's performance.

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363. The mandates of boards and chairs should be clear, and they should have the authority to carry out the duties assigned 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.
364. It is an error to create boards for the reason that they may give an organization a business-like, private sector aura if the reality is that they are 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.
365. As noted earlier, OCWA and SuperBuild are both corporate bodies with executive boards that are under the direction of ministers. This is inappropriate for the reasons discussed above.
366. Given the importance of regulation and enforcement in the provision of safe drinking water, it is useful to note that regulatory activities are generally placed at arm's-length from government where they require supervision and decision-making by adjudicative tribunals. 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*.³⁷⁴ Exceptionally, single person regulators may be set at arm's-length from ministers, but they generally fulfil investigative functions and their “decisions” if challenged are subject to review by a separate tribunal.³⁷⁵

Municipalities and Local Institutions

367. 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, or to take powers of audit and 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 extensive use of powers of delegation with the result that they have no practical means (i.e. resources and expertise) of ensuring that authorities granted to them by the legislature are being effectively and appropriately exercised by their delegates.

Legislative and Administrative Framework

368. 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:

³⁷⁴ See paragraph 176.

³⁷⁵ For example the federal Competition Commissioner.

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- a) Clear statement of purpose; what is the object of the legislation?
 - b) Precise statutory authorities – powers, duties and functions – clearly assigned to ministers, arm's-length agencies and subordinate governments.
 - c) Appropriate assignment of powers: e.g., regulatory powers of an adjudicative nature should generally be exercised at arm's-length from ministers and ministries.
 - d) Provision for exercise of powers by more than one minister where necessary.
 - e) Routine delegations of responsibility to persons outside of the ministry should be avoided; they confuse accountability and leave ministers in the position of having responsibility without the means of ensuring it is exercised properly.
 - f) 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.
 - g) Common law redress regarding negligence, nuisance, failure of due diligence or fiduciary obligation ought not to be curtailed by legislation except in the presence of a compelling public interest.
 - h) Legislative auditors should be free to apply their mandates.
 - i) The minister responsible for the legislation should have a power of enquiry into the operations of any person or body empowered by the legislation – i.e., regulators, owners, operators.
 - j) 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.
 - k) Provision should be made for appeals of decisions made by regulators.

369. In addition administrative arrangements should provide for:

- a) Adequate means - human, financial and expert - to permit the effective execution of assigned authorities.
- b) Adequate reporting and information systems – for ministers and for others with supervisory responsibilities.
- c) Adequate machinery to ensure effective coordination of horizontal responsibilities and issues.

- d) Adequate machinery to identify and resolve conflicting mandates and significant disagreements where several bodies are required to exercise separate powers in a coordinated way.
- e) 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.

Part VI: A Policy and Organizational Framework for Providing Safe Drinking Water

370. This part of the report sets out a framework for the management of the government's responsibilities for the provision of safe drinking water. Building on machinery of government principles, 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.
371. 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 framework sets out the role of government in respect of safe drinking water, and then considers the organizational arrangements necessary or suitable for giving effect to that role.
372. In its sum, the framework must provide for a coherent system for the management of 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 judgements reached about past performance and future prospects.
373. 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.

The Role of Government

374. For these purposes the role of the provincial government has four dimensions:
- a) The functional responsibilities of government for the provision of safe drinking water.
 - b) The processes necessary for the coherent operation of the overall system for the management of safe drinking water.
 - c) The scope of government responsibilities and activities that bear on the provision of safe drinking water.
 - d) The provincial government's relationship with the federal government and the province's municipalities.

Functions

375. Governments fulfill functions that reflect the character of their responsibilities. These usually fall into one or more of the following categories:
- a) **Policy:** Governments require a capacity to identify the character and scope of their responsibilities and the means of carrying them into effect. This is the policy function, which must be present within government and capable of providing the coordination necessary to fulfil government-wide responsibilities and to develop appropriate legislation.
 - b) **Regulation:** 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 a capability to enforce the law.
 - c) **Operational Programs:** Used here to mean the delivery of services to citizens. This requires governments to design and deliver programs such as the building, maintenance and ownership of water and sewage facilities.
 - d) **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.
376. 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 US model of the investor-owned utility that actually owns pipes in the ground is absent. And, although the make-up of the sector is likely to continue to change, the duty of the province to erect a policy and regulatory framework, suitable under any ownership alternatives, will not.
377. 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 government, and some, such as regulation and enforcement, may be of greater or lesser importance depending on how water services are structured.

Policy Capability

378. The provincial government is responsible for the design of the system to provide safe drinking water to Ontario's residents. This requires a policy capability to determine the scope of activity required and the particular arrangements necessary to give effect to the government's responsibilities.

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379. The actual scope of activity necessary to fulfil the government's responsibility is discussed below.³⁷⁶ 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 to organize the Cabinet decision-making system to provide for adequate co-ordination of policy development across the ministries involved.
380. This policy capacity is essential for the government to 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:
- a) The substantive scope of the government's responsibility for drinking water.
 - b) The adequacy of the legislation and regulation necessary to support the responsibility.
 - c) The extent to which the government's responsibility should extend beyond policy, legislation and regulation to operational matters.
 - d) 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.
381. 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, arm's-length and other agencies, 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.
382. Ontario needs a policy framework for ensuring 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.³⁷⁷

³⁷⁶ See paragraphs 407, 425ff.

³⁷⁷ See paragraph 437ff.

Regulatory Responsibility

383. The province has a clear duty to regulate the provision of drinking water, for which purposes it needs 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 the provision of resources adequate to the task.
384. 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.³⁷⁸ 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 impinge on 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. This suggests that drinking water suppliers – like testing laboratories - should be certified in accordance with strict, prescribed standards.
385. Any system for fulfilling the province's responsibilities must provide for regulation and enforcement.

Operational Programs

386. Operational programs are a means that permit government to deliver services directly. Depending on their nature, they may be seen as either an essential function of the state, or they may be merely desirable, superfluous or even unfair by creating marketplace distortions. On the one hand, 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. On the other, a commercial service, readily available from the private sector, would not be considered essential and might constitute unfair competition depending on the specific advantage provided by state ownership.
387. 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.
388. 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.

³⁷⁸ See paragraph 455.

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389. The provincial government's interest in Alternative Service Delivery provides one set of means of ensuring the provision of services without the necessary involvement of 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

390. 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, providing a means to advance the public interest without involving the government in operational activities.
391. 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, there is a body of informed 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.
392. Whatever the future may be for traditional 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.

Processes

393. In addition to the functions that government needs to provide for as part of its overall responsibility for safe drinking water, government also needs to provide management tools that are important 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

394. 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.
395. 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.

396. 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 there should be periodic audits of their results. This includes private sector suppliers of drinking water, whose contracts should reflect such requirements.
397. 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 some adaptation to Canada’s constitutional arrangements might be set in place reflecting the requirement of the US federal *Clean Water Act* that each state report annually to the Environmental Protection Agency on regulatory violations and provide notice of such reports to the public.³⁷⁹
398. 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.
399. The need for transparency is an important factor to be considered in institutional design. 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 by ministers in the cabinet. Independence from government is an important condition for transparency.

Crisis Management

400. When problems occur, particularly those related to public health, the public expects the government to be able to respond quickly and decisively. Apart from the immediate authority provided to public health officials, there is a need to be able to respond to the short and long-term consequences of what has gone wrong. Such responses were required at Walkerton and included the prompt provision of bottled water, the application of operational expertise and financial resources to overhaul Walkerton’s water treatment and distribution system, and also longer term solutions – part two of the current public inquiry.
401. 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 giving effect to the government’s responsibility for safe drinking water.
402. In considering organizational options, and in particular the possibility of placing regulatory an enforcement responsibility in an arm’s-length agency, it should be borne in mind that the use of an agency to coordinate responses to crises is unlikely to work well. It is probable that the public would expect a minister to be seen to be in charge, which would be impractical since the minister would not control the necessary levers now in the hands of

³⁷⁹ See: United States: Environmental Protection Agency, “How Safe is my Drinking Water?”, www.epa.gov

an agency beyond his 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

403. 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 between ministries, with stakeholders and within the central machinery of government supporting the policy and financial decision-making system.
404. Coordination is of particular importance to the extent that the management system for safe drinking water is decentralized among ministries, agencies, municipalities and the private sector. Note, however, that coordination cannot exist satisfactorily in a policy vacuum: policy frameworks 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.
405. Successful coordination is a sound indicator that the management system is based on a coherent approach to the sector in question. Among other things, this means that the government has a firm grip on how to fulfil its responsibility for safe drinking water, including the scope of the responsibility and the organizational means of giving effect to it.
406. If the regulatory and enforcement functions were to be spun off into a separate agency, it should be recognized that 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 on a consistent basis from the government 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 with the SuperBuild Corporation, which would not be able to work as closely with an arm's-length agency as with an in-house ministry.

Scope

407. The provincial government also has choices about the scope as well as the character of its responsibility for safe drinking water. Within its constitutional jurisdiction, the province has responsibility 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.
408. Safe drinking water is managed from the perspective of environmental protection and public health. It is not managed from the wider policy perspective of resources conservation, agricultural development, and municipal and rural development. These elements may be present from time to time in decision-making about drinking water, but they are not part of an integrated policy approach. An integrated policy approach would ensure through organization, legislation and coordinated decision-making that the safety of drinking water would be supported by all these activities.

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409. Decisions about the scope of activities necessary to support safe drinking water have implications for the organization of government.

Relationships with other Governments

410. Beyond the responsibilities of the provincial government, the federal government also has important responsibilities respecting some aspects of safe drinking water in the province. In addition, there are some general guidelines worth enunciating that need to be observed in the province's dealings with municipalities.

The Federal Government

411. The role of the federal government in the development of drinking water guidelines and related scientific expertise has been discussed.³⁸⁰ Two other aspects of federal involvement are relevant to the way in which the province approaches its responsibilities and organization for drinking water: federal jurisdiction for important aspects of the environment that affect drinking water; and federal jurisdiction and responsibility for first nations reserves and other federal lands in the province.

Federal Environmental Responsibilities

412. Given that the federal government has jurisdiction over the inland fishery and over larger issues affecting the environment,³⁸¹ it has an important role in respect of the province's responsibility for the conservation and use of the province's natural resources, including water. To the extent that 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 becomes apparent.
413. A concerted effort on the part of the province to develop accurate data on the quantity and quality of surface and ground waters will require that the federal government become more active in exercising its responsibilities for aquatic habitats and inter-provincial and public health and safety environmental issues.
414. New mechanisms for coordination with the federal government may be required.

First Nations and other Federal Lands

415. The federal government has jurisdiction over significant tracts of land in Ontario. The current ambiguity about responsibility for drinking water needs to be addressed and clear arrangements set in place.³⁸² This is of particular importance on first nations reserves, where the federal government pays for facilities, applies provincial regulatory standards as a matter of practice and which are not subject to Ontario's enforcement regime for drinking water. The same applies to military bases in the province.

³⁸⁰ See paragraph 27ff.

³⁸¹ See paragraph 27ff.

³⁸² See paragraphs 278 to 280.

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416. New measures are required to resolve this situation.

The Province's Municipalities

417. The province's relationship with its municipalities is complicated, confused and full of ambiguities. Notwithstanding exercises such as "Who Does What" and the initiatives to reduce the numbers of municipalities and simplify their governance, the relationship in respect of safe drinking water is unsatisfactory.
418. The general stance of the province is that it sets the regulatory framework within which municipalities are responsible for the delivery of services. This may have a certain appeal on grounds of simplicity, but this ignores the province's responsibilities. It also glosses over the immense detail of the statutes and regulations that govern municipalities. These constitute a blueprint for municipal conduct rather than a framework.
419. 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. But perhaps more importantly, the need for detailed regulation could be reduced if services such as water and sewage could be more efficiently organized.
420. This could perhaps be achieved through the pooling of resources or by creating a truly competitive market that would permit greater use of private sector resources, or perhaps through subsidy programs. Indeed, the existence of SuperBuild's OSTAR program recognizes that the province has a responsibility to work with municipalities to ensure that its regulatory framework can be implemented.³⁸³

Organizational Consequences

421. The government can give effect to its responsibilities through a variety of institutions and processes. In respect of some functions it has significant options; in others, it needs to ensure that principles of machinery of government are set in place and observed. For example, it has choices to make about the scope of functions relevant to drinking water and hence the institutions involved and the processes necessary to ensure their participation. It has choices about how close to government it wishes to place the regulatory function, and the extent of its involvement in the operation and financing of water facilities. At the same time, however, it must ensure that it has an effective policy capability, efficient means of coordination, and that its assignment of power and duties are transparent.

Policy

422. 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

³⁸³ 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 \$1000 for a small communal system of six homes. Max Christie, "What's After Walkerton?".

assigned to ministers. Ministers are responsible above all for the policy of the government, as expressed through decisions of ministers (approved by the cabinet), legislation and regulation. Policy support for the government in respect of safe drinking water must come from organizations under the control of, and accountable to, ministers.

Current Arrangements

423. 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.³⁸⁴ Not only have other ministries had little impact on drinking water policy, the policy itself has been largely neglected.
424. As noted earlier, leadership is an important aspect of the policy function. It is apparent that the Ministry of the Environment has not been in a position to provide this, nor has the Cabinet Office provided coordination mechanisms.³⁸⁵ Perhaps the recent establishment of a Cabinet Committee on the Environment will prompt the filling of this gap.³⁸⁶
425. Given the current situation, there are choices to be made about which ministers and ministries should be engaged in developing and implementing policy for safe drinking water. The choices involve two sets of considerations: the minister with lead responsibility; and the scope of the policy responsibility for safe drinking water.

Lead Minister

426. Although the Minister and Ministry of the Environment may be associated in the public mind with the government's drinking water responsibilities, there is no lead minister for the function. This is inevitable as long as there is no policy framework that would articulate among other things the roles of all the players, including the other ministries with relevant functions.
427. A lead minister and ministry is 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 towards municipalities noted earlier, is perhaps in part the consequence of the government's own disorganization in respect of safe drinking water.³⁸⁷
428. The safety of drinking water is associated in the public's mind with the maintenance of public health in the province. As discussed earlier, in the current arrangements the Ministry of Health and Long-Term Care has a modest role in supporting the development of drinking water regulations and through the use of its laboratories to test for microbiological

³⁸⁴ See paragraphs 232ff, 0.

³⁸⁵ See paragraph 381.

³⁸⁶ Ontario, Premier Mike Harris, News "Harris Launches New, Pro-Growth Cabinet Team", 8 February 2000.

³⁸⁷ See paragraph 394ff.

contamination.³⁸⁸ 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 does generally accept professional guidance from the Chief Medical Officer of Health, who is an officer of the Ministry.³⁸⁹

429. The role of the Ministry of Health and Long-Term Care in Ontario in respect of drinking water is similar to that of departments of health in several other jurisdictions. In the United Kingdom, the Secretary of State (i.e. the senior minister in the portfolio) for Environment, Transport and the Regions is the lead minister. 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.³⁹⁰ This establishes a close relationship between the regulation of drinking water and health concerns, and 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.³⁹¹
430. In Australia's state of New South Wales, the Minister of Land and Water Conservation is the lead minister with a supervisory relationship with local water corporations.³⁹² The corporations are required to operate on business principles while protecting the environment, functioning within the community in a socially responsible manner and supporting the maintenance of public health.³⁹³ 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.³⁹⁴
431. The states of California and New York go further and give 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 8500 public water systems to assure delivery of safe drinking water to all California consumers."³⁹⁵ 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 of the application of the federal *Safe Drinking Water*

³⁸⁸ See paragraph 98.

³⁸⁹ See paragraph 101.

³⁹⁰ Department of Health, "The Chief Medical Officer" www.doh.gov.uk

³⁹¹ Section 30, *The Water Supply (Water Quality) Regulations 1989*.

³⁹² See *Water Supply Authorities Act 1987* and amendments. Also the objectives of the Sydney Water Corporation set out in Section 21 of the *Sydney Water Act 1994*.

³⁹³ See the objectives of the Sydney Water Corporation set out in Section 21 of the *Sydney Water Act 1994*.

³⁹⁴ See Sections 57 to 63 of the *Local Government Act 1993*.

³⁹⁵ California Department of Health Services, "Roles and Responsibilities of Government Agencies", www.dhs.ca.gov

Act, and the Department of Environmental Conservation deals with pollution and the management of the watershed.³⁹⁶

432. It is also worth recalling that historically in Ontario the provincial government organized its responsibilities for drinking water around its health institutions.³⁹⁷ 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.
433. There are, therefore, two models for the leadership of the province's drinking water responsibilities: environment and health. And there are arguments for and against each option.
434. 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 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 the local medical officers of health and health units) appears to play a lesser role than counterparts elsewhere. The Ministry is, besides, already overloaded with an agenda that reflects widespread public dissatisfaction with the management of health care in the province.
435. 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. Reorganization of a function as important as responsibility for safe drinking water should be no more radical than is absolutely necessary.
436. Moreover, given the importance of developing a policy framework for drinking water management that will require other ministries actively to promote safe drinking water practices, an important first step is to strengthen the drinking water mandate to include the management of the watershed.³⁹⁸ For these reasons, the Ministry of the Environment needs to be mandated and resourced to be able to take the lead in the development of a comprehensive approach to drinking water management.

Mandate Options

437. Policy for safe drinking water is currently limited to environmental and health concerns as defined by the institutional mandates of the relevant ministries, and 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 conservation and

³⁹⁶ See New York State Department of Health, "Info for Consumers", www.health.state.ny.us; New York State Department of Environmental Conservation, "Water Resources", www.dec.state.ny.us

³⁹⁷ See paragraph 13.

³⁹⁸ See paragraph 437ff.

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.

438. It is, therefore, for consideration that the mandate of the Ministry of the Environment be enlarged to take in the responsibilities of the Ministry of Natural Resources that relate to conservation and development of water resources. Such an expansion of the mandate would set the stage for the development of an watershed-based approach to the management of drinking water. It would also be sensible 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.
439. It is worth noting that in several other jurisdictions drinking water is treated as part of a wider responsibility of 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.³⁹⁹ 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.⁴⁰⁰ In the United States, the Environmental Protection Agency has taken an explicit watershed, drainage basin approach to its legislation for safe drinking water: the *Clean Water Act* protects waters that may be used for drinking. Note, however, that at least some states have divided the responsibility.⁴⁰¹
440. 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 and Housing. With regard to the latter, note that it 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.⁴⁰²

Conclusion

441. The government needs to designate a lead minister for drinking water safety. That minister needs to be supported by an agreed policy for drinking water safety that may be reflected in legislation and should be applied routinely by all affected ministries and agencies.
442. 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.

³⁹⁹ See paragraph 446.

⁴⁰⁰ See Section 6 of the *Sydney Water Act 1994*.

⁴⁰¹ See paragraph 431.

⁴⁰² See paragraph 260.

443. The lead should be assigned to the Minister of the Environment and the Ministry's mandate should be expanded to include watershed management.

Regulation and Enforcement

444. Although policy is undoubtedly the domain of ministers advised by ministries, regulation and enforcement can either be carried out by ministers and their officials or by arm's-length bodies. As discussed earlier, the choice depends largely on the regulatory process proposed.⁴⁰³

Current Arrangements

445. There is no machinery of government 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 and would be significantly retarded if they were. Regulatory decisions by the Ministry of the Environment may be appealed to the Environmental Tribunal⁴⁰⁴, and the Environmental Commissioner acts as a further check on the Ministry's decisions.⁴⁰⁵ There is, in addition, a role for the Ontario Municipal Board in respect of land planning decisions by municipalities that could impact the quantity and quality of drinking water.⁴⁰⁶
446. 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 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."⁴⁰⁷ The Minister is advised by an arm's-length "Water Regulations Advisory Committee".⁴⁰⁸ In addition, the Environment Agency, which is not an arm's-length body and is directly responsible to the Minister, licences the taking and use of water, and generally oversees all water supplies, the inland fishery and measures for flood control.⁴⁰⁹ There is also an economic regulator, who is independent, and whose functions are discussed in the context of possible future arrangements for the operation of the drinking water system in Ontario.⁴¹⁰

⁴⁰³ See paragraph 366.

⁴⁰⁴ See paragraph 176ff.

⁴⁰⁵ See paragraph 171ff.

⁴⁰⁶ See paragraph 163.

⁴⁰⁷ "This is the DETR", www.detr.gov.uk

⁴⁰⁸ "This is the DETR", www.detr.gov.uk

⁴⁰⁹ Environment Agency, "About us", www.environment-agency.gov.uk

⁴¹⁰ See paragraph **Error! Reference source not found.**

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447. In New South Wales, the regulator is the Minister of Land and Water Conservation. The Minister is required to consult with the Minister of Health in respect of public health matters.⁴¹¹ In California and New York, federal and state drinking water requirements are under the regulatory control of the state departments of health.⁴¹²

Arm's-Length or Not?

448. 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. Note, however, that 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 be kept together; in practice, this is seldom achieved without at least the appearance of some loss of regulatory independence.
449. 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.
450. 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,⁴¹³ but the practical lessons of the recent past are hardly supportive.
451. A particular failing has been the vulnerability of the Ministry to cuts in the regulatory budget, especially in its approvals and monitoring functions. An 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-partisanship. This does not necessarily have to be a public exercise, but it could be.⁴¹⁴
452. An arm's-length agency would also be better placed to be seen to be dealing 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 status as an "insider" to government.

⁴¹¹ See paragraph 430.

⁴¹² See paragraph 431.

⁴¹³ See paragraph 453.

⁴¹⁴ 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.

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453. There are also disadvantages with 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 remain responsible for drinking water policy, but it would have none of the operational expertise that comes from the regulatory and enforcement processes. In such circumstances, the Ministry would be in no position to provide leadership for the development of a more comprehensive approach to drinking water policy, still less would it have the clout necessary to get the central agencies to enforce such a policy on other ministries.
454. 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 ministries that impact the watershed, the arguments against arm's-length outweigh those in favour.
455. In addition to a broader watershed-based mandate, the Ministry needs to thoroughly overhaul its approach to regulation with a greater emphasis on preventive measures. This is intrinsically important, but if the government decides to encourage real competition in the operation of water and sewage facilities, the emergence of large-scale private sector operators would be spurred on by the development and application of more rigorous standards. 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.⁴¹⁵ Such standards are likely to be met only by large, professional organizations.
456. Operator organizations would themselves be certified as capable of satisfying such environmental, quality and management standards, which 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 applied to support the development and certification of independent testing laboratories. An efficient system of certification of 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.
457. In order to permit such developments, 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 the government's policy.

Conclusion

458. 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.

⁴¹⁵ These would be ISO 9001:1994 (Quality Systems) and ISO 14001:1996 (Environmental Management Systems). For an example of the approach required, see National Health and Medical Research Council /Agriculture and Resource Management Council of Australia and New Zealand, "Framework for Management of Drinking Water Quality: A Preventive Strategy from Catchment to Consumer: Targeted Industry Consultation", 5 February 2001.

Operations

459. The realm of operations takes the discussion beyond matters that are clearly the responsibility of government. There are various models 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. It is a subject as much influenced by economics and ideology as concern for efficiency and safety. The focus here, as throughout the paper, is on safe drinking water.

Current Arrangements

460. Municipalities own Ontario's water and sewage systems. With a few exceptions, they are operated either by the municipality (or a local commission) or by the Ontario Clean Water Agency.⁴¹⁶ The few exceptions are facilities operated by the private sector. The Ontario Clean Water Agency is a closely held government agency under the day-to-day direction of the Ministry of the Environment.⁴¹⁷ It provides the provincial government with ready access to the expertise and operational capability used to respond to water emergencies such as Walkerton.
461. 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. This has long been the case in California and New York, where facilities are owned and operated either by municipalities or by the private sector. In the United Kingdom ownership and operation has been privatized in an effort to raise the necessary capital to bring otherwise deplorable public facilities up to standards prescribed by the European Union.⁴¹⁸ In New South Wales, in the early 1990s the publicly owned water boards were turned into public corporations with boards of directors and mandated to operate on business principles.⁴¹⁹

Ownership and Operation

462. There are advantages in keeping ownership and operation of facilities separate. In a competitive situation, municipalities 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 practicable where suppliers come and go without the complications of having to change ownership.
463. In Ontario, with few exceptions such as Hamilton and Goderich, large municipalities operate their own facilities, whereas many smaller municipalities rely on OCWA to operate theirs. OCWA has been structured to compete with municipalities and the private sector in contracting to build and operate water and sewage treatment facilities. Although, for the

⁴¹⁶ See paragraph 135ff.

⁴¹⁷ See paragraph 142.

⁴¹⁸ See Elizabeth Brubaker, "Water and Wastewater Privatization in England and Wales", Draft 12 March 2000.

⁴¹⁹ See paragraph 430.

reasons outlined earlier, it has more than a competitive edge as a result of its ownership by the province.⁴²⁰

464. The existence of OCWA provides the government with immediate access to resources 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, OCWA offers smaller municipalities services on terms and prices unavailable from other suppliers. It is, however, doubtful that OCWA will be able to continue this policy in the future and remain viable unless the province is prepared to provide new financial resources.

Conclusion

465. The province has no need to operate water facilities in the province, but it has a clear duty to regulate those who do. In terms of the government's responsibilities, OCWA performs two necessary functions: it provides an emergency response capability and it has expertise to advise municipalities on the design and construction of water and sewage facilities. If 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.
466. OCWA is not the only option for providing the province with an emergency response capability. Large municipalities have the capacity to provide emergency services, as Waterloo offered in the case of Walkerton. Nonetheless, if wound up, OCWA's emergency response capability would have to be replicated elsewhere at the taxpayer's expense. It could perhaps be purchased from larger municipalities with water operations, or perhaps from the private sector successors to OCWA, forming part of their contractual obligations as operators of public water and sewage systems.⁴²¹ A comprehensive water management policy should take account of the available options for providing expertise and operational services in emergencies.
467. From the viewpoint of drinking water safety, it is important to consider the role played by OCWA and 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 OCWA and probably attract greater interest from other potential operators.

Financing

468. As discussed earlier, the government has a responsibility to ensure that water and sewage facilities can be financed by all municipalities regardless of size.⁴²² This does not

⁴²⁰ See paragraphs 140, 141, 326.

⁴²¹ 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 a troop transports.

⁴²² See paragraph 390.

necessarily mean providing support from the provincial taxpayer, although government loans and grants are one means of fulfilling the government's obligation. It could also mean creating the circumstances in which it would both make sense and be politically feasible to fully price water and sewage services.

Current Arrangements

469. 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 have the data to tell whether they are charging too little or too much for the services provided.
470. Ontario is in the throes of launching a new program to assist smaller municipalities to renew crumbling infrastructure.⁴²³ This is the latest of a series of *ad hoc* programs that have been in existence since the winding up of the Ontario Water Resources Commission in the early 1970s. As noted, these programs, and the subsidies, borrowing authorities and outright gifts of the Commission, have distorted the pricing of water and sewage services in Ontario.⁴²⁴

Ontario's Funding Models

471. Notwithstanding the variety of practices within the province and trends elsewhere⁴²⁵, 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 and ensuring that municipalities know the true costs of the services provided. It has, therefore, little alternative but to continue with *ad hoc* financial assistance, particularly for smaller municipalities.
472. The province has experience of several different organizational arrangements for funding water infrastructure.⁴²⁶ These may be summarized as follows:
- a) Use of 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).
 - b) The use of a dedicated agency to provide operational expertise and (until 1996) some direct financial assistance (i.e., the Ontario Clean Water Agency).

⁴²³ See paragraph 151.

⁴²⁴ "Full cost accounting and full cost pricing should be adopted as the standard for water and sewage systems and services in Ontario." See Ontario Sewer and Watermain Construction Association, "Conservation, Preservation, Restoration", January 2001, pp. 2-3.

⁴²⁵ See paragraph 461.

⁴²⁶ See paragraphs 17ff, 151ff, 208.

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- c) The use of a government ministry to regulate, provide science support, inspect, and enforce standards combined with the capacity to provide some financing support (i.e., the Ministry of the Environment).
 - d) The separation of financial support and its transfer to a stand-alone entity responsible for providing strategic direction for the entire provincial capital expenditure budget (i.e., the Ontario SuperBuild Corporation).
473. These models raise 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.
474. Unlike the separation of regulation from operations, there is no principle to support the separation of policy and regulatory expertise from funding. Indeed, bearing in mind 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 is supported by the reliance of the funding agency (SuperBuild) on the technical expertise provided by the Ministry.⁴²⁷
475. Funding is integral to public safety. The expertise within the government on drinking water safety resides principally within the Ministry of the Environment. To the extent SuperBuild relies on the substantive (not just technical) advice of the Ministry of the Environment there may be a net advantage to be gained as a result of SuperBuild's financial expertise and general influence. It should, however, be noted 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.⁴²⁸

Conclusion

476. A safe drinking water policy framework should clearly identify the link between safety and finance. The province should consider policies that will contribute to public safety by encouraging full-cost pricing or by providing stable funding to subsidize new facilities particularly for smaller municipalities. If the government is to continue, through OCWA, as an operator of facilities, it needs to ensure that OCWA is not encouraging smaller communities to charge 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 this is unlikely, the current arrangement is a threat to public health.
477. 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, the government needs to include coherent financial arrangements in a future policy framework for safe drinking water.

⁴²⁷ See paragraph 209.

⁴²⁸ See paragraphs 152, 426.

Policy and Institutional Coherence

478. A reliable system for fulfilling the provincial government's responsibility to ensure the provision of safe drinking water requires:
- a) A comprehensive and public drinking water policy covering all relevant substantive activities of the government, and providing for clear responsibilities and accountability for all ministries and agencies that impact the safety of drinking water.
 - b) Coherent legislation that identifies responsibilities, powers and accountabilities, and reflects public consultation and period comprehensive policy review.
 - c) A lead minister and ministry with a sufficiently broad mandate to protect the sources of drinking water.
 - d) A lead ministry with resources to fulfil policy, expert advisory, regulatory and enforcement roles satisfactorily.
 - e) A decision-making system supported by the central agencies, in particular the Cabinet Office, to ensure that a comprehensive drinking water policy is adopted and respected by all relevant players.
 - f) A sound approach to financing necessary infrastructure that is entrenched in the policy framework. This should provide sufficient funding either by removing distortions that interfere with full-cost pricing or by a system of subsidies that is closely tied to the policy and regulatory process and is under the authority of the minister responsible.
 - g) Mechanisms to permit appeal of regulatory decisions concerning the provision of drinking water and its pricing.
 - h) A system of regular public reporting, evaluation and audit of 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.
479. 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 need to be linked together in a continuous cycle.
480. If the Ministry of the Environment is to take the lead it will require a complete overhaul. It needs experienced, senior policy resources. It needs regulatory, inspection, scientific and enforcement resources. It must have the consistent support of the central agencies and the Premier's Office. It will take a major commitment from the government and the Ontario

Public Service to effect such a turn around at the Ministry of the Environment, which is 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.

481. 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, and the Ministry would figure prominently in the policy framework for safe drinking water proposed in this report.
482. The remaining option is to create a regulatory agency, which 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.
483. The residual role of the Ministry of the Environment stripped of its regulatory and enforcement roles, would be minor. It would be a weak policy centre. It would lack 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 and regular peer review of its technical and scientific expertise.
484. A total re-think is required of how best to give effect to the government's responsibilities. This 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.
485. Future arrangements to fulfil 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.