

The Walkerton Inquiry

Notes on the Expert Meeting

“Implications of Public and Private Operation for the Safety of Drinking Water”

**Ryerson University
July 4th - 5th 2001**

Topics Discussed

Public Systems and Private Systems:

the relationship between public-private partners, accountability, organizational culture, transparency, potential for political interference, ability to deal with long term planning, ability to build and finance infrastructure, constraints/incentives to adopt new technologies and approaches, social equity, water conservation and the broader environmental context, potential conflict between the regulator and the operator, implications of NAFTA

The detailed notes for this expert meeting have been prepared to brief the Commissioner and to facilitate participation in Part 2 by those who were not present at the meeting. The notes are intended to represent the major items of discussion and positions put forward by participants. They are based on notes taken by Rapporteurs and are not intended to be an official report or transcript of the meeting. They do not represent the views of the Commissioner.

Meeting Summary

The agenda, prepared for the meeting by the Chair, provided a loose framework for the meeting notes. The notes summarize the main points of contention and agreement between the parties under the themes of the agenda. The Chair suggested that the features and performance of public, private and mixed systems all be discussed in terms of implications for safe drinking water. It was outlined that currently in Ontario the provision of drinking water from source to treatment to distribution involves actors from the public and private sectors. Ownership remains public but private sector actors and organizations have been involved in various aspects of drinking water provision in Ontario. Discussion of the involvement of the private sector focused on involvement in operations as opposed to ownership of assets. Discussion focused on the following topics, although consensus was rarely reached.

There is no clear relationship between the degree of private and or public sector involvement in drinking water service provision and the safety of the drinking water provided – This statement summarizes the findings outlined in the issue paper by D. Cameron et al. The authors found that while there are significant differences in managerial style and culture between public and private organizations, these differences do not have a readily discernable impact on the safety of drinking water. Factors that do seem to have a detectable impact include the quality of the training offered individuals in the organizations, the state of infrastructure, or any of a number of other variables. Examples of excellence and failure can be found in both public and private organizations. What is clear is that providing safe drinking water requires a fully articulated system. Where the private sector is employed to deliver water services, the contract between the government and the provider is an important part of that system.

The relationship between public and private partners - There was a significant amount of discussion about the diversity and nature of relations between public and private partners. Some participants noted that an unequal relationship between public and private partners entering into contracts was an issue due to an imbalance of resources (legal, expertise, financial) during contract negotiation and implementation. It was also noted that a potentially unequal relationship may also exist due to the possibility of limited or no contract competition. Others noted that relations were not unequal and that municipalities had the necessary resources and expertise to enter into partnerships, and those that did not could be protected by competition and/or regulatory structures.

Accountability - There was consensus that accountability differs in the public and private sectors. The degree of public accountability and involvement possible in private firms or with private partners was tabled as a concern. It was suggested by some participants that whereas the public system is accountable to the users of the system, private sector corporations are also accountable to their shareholders. Contrary points were raised that accountability is enhanced as a result of contractual relations with a private operator when the role of government is monitor rather than operator/administrator. Market accountability and contractual accountability were discussed as alternative and supplementary forms of accountability, but there was disagreement regarding the effectiveness of these accountability mechanisms in ensuring the safety of drinking water. The accountability role of the province was also discussed with no consensus on the province's role related to public/private arrangements at the municipal level.

Organizational culture – Culture was noted as important when assessing the impacts and performance of public and private organizations. There was some discussion regarding risk

aversion and risk management cultures in different organizations. Although differences in organizational culture were recognized, there was no consensus on the attributes or problems in either sector.

Transparency - There was consensus that public access to information concerning drinking water safety in public systems and public private partnerships is crucial. Concerns were raised about transparency in the private sector due to the possible lack of access by the public to the details of contracts, the increased complexity and fragmentation introduced with private partners and financing, and the exclusion of private partners from environmental assessment. Other participants noted that transparency has also been a problem in the current public regime. It was noted in response that transparency problems in public agencies arise with the introduction of competitive contracting but are addressed by the application of transparency legislation to these public agencies. It was noted by some participants that the terms of contracts can be made publicly available and transparency can be increased through reporting. It was noted by other participants that it is general practice not to make contracts available to the public.

Potential for political interference - There was no consensus concerning the potential for political interference in either public or private organizations. For public systems, the possibility of direct, politically motivated interference was noted. For private systems, concerns were expressed over the possibility of influence through political contributions and access to decision-makers.

Ability to deal with long-term planning - Political actors were criticized for planning until the next election; private actors were criticized for not planning past the end of the contract. The capacity of bureaucrats and public sector organizations to plan in the long-term was questioned. Others noted that both public and private sector organizations do have the ability to engage in long-term planning. Limitations in the context of financial planning were discussed with reference to reserves in the public sector and short-term financial goals in the private sector. There was some discussion of requiring long term planning for both sectors through legislation or contractual requirements.

Ability to build and finance infrastructure – Issues of investment by the private sector, financial capacity of municipalities, ability of taxpayers to pay, differences between large and small systems and efficiency of financing infrastructure were discussed in the context of public and private systems. Some participants expressed the view that municipalities are almost always able to borrow money more cheaply than the private sector as a means of financing infrastructure. No consensus was reached on whether public or private bodies have more ability to finance infrastructure.

Constraints/incentives to adopt new technologies and approaches – Some participants noted that private organizations have the capacity to invest in and disseminate new technologies and are less conservative regarding the adoption of new technology, as efficiencies can be gained. Others noted that while private firms may bring new technologies to a partnership, private firms often have problems introducing new technologies and that there is nothing currently preventing municipalities from introducing new technology by hiring specialists or purchasing this knowledge as they have done in the past. The ability of municipalities to invest and commit to ongoing technological improvements was questioned. Information sharing and multiple testing venues in the public sector were cited as facilitating adoption of new technologies. It was argued that the drive for profit maximization by a private company or the pursuit of tax or water rate reductions within a public organization are both the

impetus for innovation but there was no consensus on the specific differences in terms of constraints and incentives.

Social equity - Equal access to safe drinking water across the province was a concern. The importance of rates, ability to pay, and relationship between the profit motive and social equity and access were discussed. There was also some discussion regarding the role of the province to directly increase quality above minimum standards. No consensus was reached.

Water conservation and the broader environmental context – It was noted that conservation is an issue beyond municipal provision and there was some consensus that this was a responsibility of the public sector. Discussion focused on the role of private firms in conservation. Some expressed concern that there is a conflict between the private sector's profit motive and water conservation since low water use can result in lower revenues that can impact the bottom line. The contrary position that water companies do have a strong interest in conservation as a matter of good business practice, that valuing water and full cost pricing provides an incentive to conserve, and that a competitive edge can be gained with conservation were raised. In terms of broader environmental concerns, the varied application of environmental laws and environmental assessment to the public and private sectors was debated. No consensus was achieved.

Potential conflict between the regulator and the operator - The nature of the relationship between regulator and operator, the separation of functions, the level of enforcement and risk were discussed in the context of public and private systems. No consensus was reached on whether a conflict of interest exists between the regulator and the operator.

Implications of NAFTA – The implications of NAFTA for public and private provision of safe drinking water in Ontario and other jurisdictions were discussed. Concerns centered around the 'expropriation' clause of NAFTA. Some raised concerns that governments could be prevented from introducing standards and municipalities could find themselves in expensive NAFTA disputes if they wished to return services to the public sector. Others stated these concerns were unfounded. No consensus was reached.

Meeting Participants and Affiliations

Chair	Ron Foerster
Issue Paper Author, University of Toronto	David Cameron
Issue Paper Researcher, University of Toronto	Jennifer McCrea-Logie
Issue Paper Researcher, York University	Rachel Melzer
PSIRU, University of Greenwich, London, UK.	David Hall
Government of Ontario - Smith Lyons	Jim Ayres
Ministry of the Environment (MOE)	Jim McLellan
Superbuild / Ministry of Finance	Bill Hughes
Ontario Municipal Water Association (OMWA)	Dick Beck
	Doug James
	Gary Scandlan (also CELA)
Energy Probe Research Foundation (EP)	Elizabeth Brubaker
Canadian Environmental Defense Fund (CEDF)	David Donnelly
Strategic Alternatives	Mike Fortin
Canadian Union of Public Employees (CUPE)	Shannon McManus
	Gus Oliveira
	Ron Crawley
Ontario Public Service Employees Union (OPSEU)	Tom Parkin
	Marie Thomson
Association of Municipalities of Ontario (AMO)	Gail Alleyne
Concerned Walkerton Citizens/	Sarah Miller
Canadian Environmental Law Association (CELA)	John Jackson / Paul Muldoon
Azurix	Klaus Stolch
	Mark Hudson
	Dave Clancy
Canadian Council for Public-Private Partnerships (CCPPP)	Jane Peatch
	David Doubilet
	Mark Hodgson
	Michael Wilson
	Wallace MacKinnon
	Deb Shewfelt
	Peter Kirby
Research Advisory Panel Member	Doug MacDonald
Walkerton Inquiry Staff	James Van Loon
Rapporteurs	Sarah Hartley / Carolyn Johns

Discussion of Substantive Issues

1. PUBLIC AND PRIVATE SYSTEMS

Discussion focused on the characteristics of publicly or privately owned and/or operated systems and the implications, both positive and negative, for drinking water safety. Presentations at the outset of each day provided the stimulus for discussing a variety of factors affecting public and private provision of safe drinking water in Ontario.

The findings and conclusions from the issue paper by Cameron et.al. were summarized by David Cameron at the beginning of Day I. Cameron summarized the three questions which framed the analysis in the paper: Is there a relationship between water safety and water quality, on the one hand, and who owns or who operates the water system, on the other? Does it make a difference whether it is a private firm or a public body that owns all or part of the water system? Does it matter whether the water system is operated by a for-profit company or by a public agency? These questions were addressed with a focus on the safety of drinking water.

- Based on a number of different ownership models, cases and the literature reviewed, the tentative conclusion suggests that who holds title to the assets is a relatively unimportant consideration in the achievement of good water quality outcomes, compared to a variety of other factors.
- As for the difference between public and private operators, the picture is more complicated. It is clear that a significant private sector presence in the operation of a water system affects the management regime, however, the public and private elements seem to be relatively minor factors in a system that delivers safe water. Other considerations have a good deal more to do with determining the performance of a water system.
- The conclusions do not suggest that the choice of system makes no difference. The logic of the situation shifts according to whether there is a single public service provider, several public agencies, or a mix of public and private actors. These different models yield distinctive program, organizational and accountability patterns.
- In summary, the findings presented indicate that there is no clear direct relationship between the degree of private or public sector involvement in drinking water service provision and the safety of drinking water provided. The authors found while there are significant differences in managerial style and culture between public and private organizations, these differences do not have a readily discernable impact on the safety of drinking water. Factors that do seem to have an impact include the quality of the training offered, individuals in the organizations, the state of infrastructure, and a number of other variables. Examples of excellence and failure can be found in both public and private organizations. What is clear is that providing safe drinking water requires a fully articulated system. Where the private sector is employed to deliver water services, the contract between the government and the provider is an important part of that system.

Two other presentations helped frame the discussion around the agenda items. These are summarized here and also integrated into the various topics of discussion.

David Hall, Director, Public Services International Research Unit (PSIRU), University of Greenwich (UK) presented a summary of research into the privatization and restructuring of water and other services conducted by the PSIRU and presented in a brief to the Inquiry. His presentation suggested three key areas of impact: contract creation, impacts throughout the duration of the contract and under-investment.

- First, is the introduction of the profit maximization dynamic which is a significant difference. To avoid the possibility of corruption, this must be seriously considered at the contract point. Examples of corruption were offered from France, and New Orleans and Connecticut in the US. Corruption could occur at the contract formulation stage, the price-setting stage, and by under-investment. This latter area of corruption would impact safety through increased risk.
- Second is the fragmentation of responsibility through contracting and sub-contracting. Privatization introduces a fragmentation of the system into different components and increases the complexity for accountability and decreases transparency. Examples were offered from the water and rail sectors to explain how fragmentation was different for private as opposed to public ownership / operation. This results in fragmentation of accountability. In England, water board meetings that had been public were now secret, as open meetings were seen to be in conflict with commercialization. In Wales, where a devolved parliament was formed, a US energy company bought the water utility and created a new mutual company to take over the assets. OFWAT agreed to this, yet the Welsh Authority had no input. Privacy of contractual information was noted as normal practice and policy.
- Hall referenced a Latin American example to illustrate under-investment problems and outline that companies avoid these investments because of a financial risk rationale. In response to a question about whether it is possible to make this a responsibility in the contract (Foerster), Hall outlined that this was the approach in France but that the funds available were not being taken up as contracts were coming up for renewal. The UK-Yorkshire example was also cited to illustrate problems with under-investment due to limited rate increases.

A presentation was also given by representatives of the Canadian Council of Public-Private Partnerships (CCPPP) at the outset of Day II outlining the benefits of public private partnerships. These presentation notes have been submitted to the Inquiry. A brief summary follows:

- A brief overview of CCCPP's membership and mandate was provided by the Chair of CCCPP (M.Wilson). The limited finance and infrastructure capacity of the public water providers was reviewed. Based on CCCPP's submission to the Inquiry on the value of public-private partnerships and private sector involvement, different public-private partnership models were presented. This segment of the presentation also included an overview of the importance of a division of responsibilities in this

industry into three areas: regulation, water treatment and delivery, and financing, as a means of alleviating real or perceived conflicts of interest. Wilson also stated that the nature of private enterprise encourages companies to perform well, to train staff, to invest in technologies and to otherwise minimize risks.

- A second segment of the presentation (Hodgson) outlined the benefits of public-private partnerships for municipalities and the flexibility of these approaches. Key concepts and benefits of public-private partnerships such as value for money through competition, better allocation of risks, reduced life cycle costs, increased investment, operational efficiencies, synergies between design and operation, economies of scale, accountability, faster implementation and private financing for capital were presented.
- The Mayor of Goderich addressed the question: “Why a public-private partnership?” Based on the experience in his community, the Mayor outlined how a storm event in 1995 and the removal of hydro from the Public Utilities Commission presented the opportunity to consider private sector involvement. After an RFP and a two-year process, Goderich signed a contract with US Filter. The Mayor outlined the challenges of a negative press and public perception but detailed how under the contract the municipality maintained control over assets and setting of rates. Employees were transferred to the new regulator with protection. The Mayor referenced the cost savings from the contract, the performance requirements in the contract and the 180-day termination clause with no penalty. The Mayor outlined that another benefit was access to more expertise and the establishment of a municipal oversight committee which educated staff and Councilors. In closing the Mayor outlined that the contract is very transparent and details the performance requirements and accountabilities to the municipality. A copy of the contract was provided to Commission staff.¹

These presentations stimulated discussions on both meeting days. The following notes are organized around the factors identified on the agenda, and by meeting participants, which characterize public and private systems and potentially impact on the provision of safe drinking water in Ontario.

1.1 General Discussion and Responses to Opening Presentations Day I:

- Hall agreed with the general conclusions of the Cameron paper.
- CELA, OMWA noted that Cameron’s paper had a narrow focus on drinking water supply, yet in reality there is private sector involvement in the whole process (technical support, planning, design, construction etc.) in Ontario. Cameron agreed with the point and noted that the focus on operations was chosen as it demonstrated an area where private influence was greatest and where the roles of the different partners were altered.

¹ At one point during the presentation David Donnelly of CEDF voiced an objection to the duration of the CCPPP presentation and the presence of CCPPP lawyers. The Chair of the meeting concluded that the objections had no merit, and the CCPPP continued with their presentation.

- Strategic Alternatives pointed out that the focus of discussion should be on public private partnerships rather than a regulated industrial utility model, as Ontario does not have the institutional structure for this model now. Although municipalities can sell their assets, this would require a huge institutional step to move to this model.
- CCPPP stated that it does not support full privatization as a practical model for Ontario.
- EP asked Cameron if he had examined the influence of private sector involvement on the factors that he identified as having an impact on quality. EP suggested that private involvement may improve skills and training, management systems, monitoring and the state of infrastructure. Cameron responded that he could not comment on these as possible benefits.
- CUPE noted that the focus of the meeting was on drinking water safety, yet the move to public-private partnerships has never been taken for this reason. Rather, the justification for moving the public-private partnerships has been financing and cost saving. CUPE stated that these are not legitimate reasons for moving to public-private partnerships. CELA noted that this focus on the financial realities tended to result in values of public involvement getting forgotten and excluded.
- EP noted that privatization has often improved both performance and regulation, making drinking water safer.
- OPSEU questioned why representatives from the Ontario Clean Water Agency (OCWA) were not present for the meeting. Smith Lyons responded that these meetings deal with policy issues whereas OCWA is an operator and is not a policy organization and representatives from Superbuild are present to answer questions on behalf of OCWA. OPSEU noted that non-policy government organizations had appeared at the meetings previously and stated that as representatives of OCWA's employees they can only do their best to represent their perspective.

There was no general disagreement with any of the findings in the Cameron et.al. issue paper however several items were further discussed throughout the meeting.

1.2 The Relationship Between Partners

There was some general discussion that having a good contract requires strength from both partners. There was no consensus on any elements that make a good public-private partnership contract. Some parties were concerned that municipalities could be overwhelmed by the strength of private sector partners who can access more financial, legal and expert resources. Other parties pointed out that municipalities can use other private sector actors as advisors in developing their contracts, that the private sector is disciplined by the market, and that higher levels of government can educate, advise, potentially impose conditions on contracts or even provide economic regulation.

- The significance and dangers of an unequal relationship between public and private partners entering into contracts was noted (OMWA, Cameron, CUPE, Hall).
- OMWA asked whether municipalities entering into public private partnerships when in a state of crisis therefore could be considered “equal”. Concern was also expressed for municipalities entering contracts with large multinational companies who have greater expertise and considerably more resources available for legal advice. (OMWA, CUPE).
- Cameron pointed out that there are other options such as OCWA. OMWA cited the City of Moncton as an example of a municipality that recently entered into a public private partnership where tax and financial constraints on the municipality resulted in an unequal partnership. Cameron noted that his impression was the Moncton situation was working out well. CUPE noted that reasons for privatization have been efficiency and financing, not safety and quality.
- OMWA suggested that regulation may be a solution to these imbalances, along with the use of private partners for advice and consulting. Further, full cost accounting and full cost recovery would be a means of avoiding crisis in the system.
- EP suggested that competition protects municipalities from the dangers of unequal relationships, as does familiarity with the experiences of other municipalities who have entered into contracts. In the US, the EPA offers advice and encourages public private partnerships and helps municipalities protect themselves by providing case studies, model contracts and advice on the RFP process. Some states also have economic regulation of public and private operations and regulatory commissions may review and approve contracts. (EP).

1.3 Accountability

There was consensus that accountability is different in public and private sectors (OMWA, Cameron, CUPE, CELA, EP, CCPPP, OPSEU). The discussion focused on various types and aspects of accountability under public and private systems.

- CEDF and CELA want more research conducted to see if private systems really can be accountable and provide good service. Both noted serious doubts exist for ownership and operation functions.
- Currently in Ontario, the owner is publicly accountable, even if operation is contracted out however the operator also needs to be responsible (OMWA).
- CELA noted the need for stability for accountability and expressed concerns about private firms being there for the long run.
- OPSEU expressed the view that due to its unique positioning as a crown enterprise, only OCWA combines administrative, political and market accountability. OCWA

has a memorandum of understanding which guides behavior and makes it accountable to citizens. It was noted that Australia has a similar memorandum which may be useful to look at for making improvements to OCWA. OPSEU noted that resources and political will would be needed to make such improvements.

1.3.1 Public / Democratic Accountability

- Public involvement is needed in public-private partnerships to increase accountability (EP, CUPE, CELA, OMWA). CUPE added that its position is not that public involvement is needed to make public-private partnerships work, it is that public involvement is needed to have a fully accountable public system.
- EP offered the example of Indianapolis as a successful public-private partnership where the public involvement had increased as a result of the arrangements made, and stated that private operations do not preclude public involvement. EP also noted that in England and Wales, OFWAT's customer service committees have facilitated greater public involvement under privatization.
- CELA noted the decline of a once intense public involvement culture in Ontario across all issues, but stated that people want to be more than simply consumers - they are citizens who want to be involved in policy development. This is particularly the case post-Walkerton. Public accountability should include the healthy involvement of the public in decision-making. CELA cited the Hamilton case where public-private partnerships have resulted in confused accountability and reduced public involvement for the Remedial Action Plan for cleaning up Hamilton Harbor. CELA noted that the size of the workforce in the Hamilton operation has also been cut radically since the partnership arrangement. CELA concurred with a comment by Foerster that the same accountability requirements under both types of arrangements would address this concern.
- EP had some concerns with the constant use of Hamilton as an example. First it noted that problems with operations existed in Hamilton prior to the public-private partnership. Hamilton's sewage treatment plants made 8 appearances on provincial non-compliance lists between 1987 and 1994. One plant performs poorly because it needs \$600 million in repairs – a municipal responsibility. Second, EP noted there was no competition for the Hamilton contract, which was given to an inexperienced local firm in order to promote economic development in the region. Many of the benefits of contracting out arise from competition between experienced firms, as indicated by the successful experience of Moncton, Atlanta and Seattle. (EP)
- EP also outlined that these accountability issues can be dealt with through Freedom of Information legislation or through contracts between municipalities and private operators. This should be a recommendation of the Inquiry for those who go with private arrangements.

- Foerster noted the Hamilton example was a useful example but had to be taken in context. Cameron noted that Hamilton is useful as part of a learning process.
- CELA noted that this meeting was taking place in a climate of debate about the remaking of government, where government is leaving public concerns behind. However, people want to be citizens, not just consumers. In evaluating these frameworks, no one places value on public involvement. This loss of democracy is a big problem. There is a need to strengthen government and assure the public that confidence can be restored.
- CELA questioned the use of the term “privatization” when the focus of debate is on something else [contracting of water services provision]. This confuses the public and does not allow them access to public debate.
- OMWA suggested that public accountability did exist in PUCs before electricity was de-regulated and split off. Inherent in water safety is the requirement of knowledgeable board members (particularly to appraise staff recommendations). PUCs had elected board members. Some difficulties in building and maintaining this expertise were noted given elections every three years. OMWA also argued there is more accountability at the municipal level because the public actors are community members. Private sector actors may even be in another country (OMWA).
- CCPPP noted that while management may be from outside the community, people operating at the local level are still living in the community.
- EP noted concerns that OCWA is not forthcoming with information on its operations and does not have a record of public involvement.
- OMWA outlined that owner holds ultimate accountability but operator shares some responsibility. CUPE questioned the whole argument around risk transfer and that the private sector assumes risk because they take over services which are a natural monopoly and backed by various levels of government. CUPE cited the Hamilton case in 1996 as an example of confusion over liability.
- Strategic Alternatives outlined that in some cases, like the UK system, the regulatory regime requires the private provider under contract to pay compensation for failure to provide service and meet standards. However, Hall noted that this mechanism was not very effective in terms of scale and retroactive effect. In North London in 1997, £10 per household was given for failure to provide safe drinking water for 6 weeks. This is not an adequate deterrent.

1.3.2 *Market Accountability*

- Without evidence that public accountability is clear, we should hesitate embarking on privatization and splitting accountability further. This comment was directed

towards private sector ownership of water systems. The profit motive does not include the public interest (CEDF).

- Azurix noted that the profit motive does not mean poor quality. Azurix stated that contracts contained some of the strictest standards in the province and faced some of the stiffest penalties. In many cases, standards stipulated in contracts may exceed those laid out in regulation. (*Appendix of Schedule 8 to be provided by Azurix*). It was noted that companies must perform well in order to be in a position to renew contracts. Azurix stated that it would never put profit before quality.
- Hall noted that the parent company is now selling Azurix, and when sold, it will no longer be committed to existing contracts, for example Hamilton. CELA noted there is also concern about consolidation in this industry.
- EP stated that the profit motive and the public interest are not incompatible. Performing well is profitable in the long term. Performing poorly may lead to financial penalties, loss of contract, loss of potential customers, declining share values, and ultimately bankruptcy. The market thus creates kinds of accountability for the private sector that do not exist for municipal providers or OCWA. Other accountability mechanisms may include enforcement of health and environmental laws, access to information and public participation, exposure to tort liability, regulations requiring companies to compensate customers if they provide poor service and contracts requiring companies to pay fines to municipalities in the event of poor performance.
- Hall noted that there has been no evidence of market accountability working in the UK. Accountability was achieved through pressure from regulators and sensitivity to political pressures such as elections. This however, is political accountability, not market accountability. Examples to back up this point can also be found in France, the US, South Africa and Argentina.
- OPSEU noted that market accountability is reduced with lack of competition. Further, due to the tendency toward natural monopoly in the provision of water services, it was doubtful whether market accountability could be achieved through contracts.
- CCPPP stated that private actors were more accountable because they were not only accountable to the public, but also to shareholders. It was pointed out that a single serious failure could result in the death of a private sector company, but that this threat does not apply in the public sector.
- OPSEU noted that market accountability was only possible if competition exists. Problems with Philip's over-extension raises concern that market and legal accountability dissolves in situations of market failure (bankruptcy or severe financial crisis) during the contract term. OPSEU commented that OCWA gives municipalities a choice and an alternative to a private partner under different types of

accountability and taking away this choice would be problematic.

- EP noted that OCWA is an impediment to competition.

1.3.3 *Contract-based Accountability*

- For operations at the local level differences in accountability exist. Accountability is present in a public system, but in a privately operated system accountability is dependent upon the contract (Cameron).
- Following a request by Azurix for clarification, Cameron explained that accountability for private actors was focused on the negotiation, signing, and renewal of the contract, rather than being embedded in the political process as it is for the public sector. The capacity of municipalities to rethink contractual arrangements is limited to these times, therefore citizen impact is also limited. Azurix agreed with this explanation.
- Concerns were raised about accountability with private partners due to the lack of access by the public to the details of the contract, particularly as public money is involved (CUPE, CELA). The case of Hamilton was offered as an example.
- Azurix stated that private firms are resource managers and are simply an extension of the municipality. The only difference between the municipality and Azurix is the shareholders and profit. It was noted that Azurix is under greater public scrutiny than the public sector and essentially there are no differences between the public and private sectors in provision of the service. Later, following a question by Foerster, Azurix agreed with Cameron's paper, noting the importance of the contract and the differences between public and private in this regard. However, it was stated that for drinking water safety, Azurix provides higher quality and better service.
- CUPE questioned the transfer of risk from public to private with privatization and raised the issue of loopholes in these contracts. The Hamilton example was raised, where lengthy legal wranglings occurred, with the municipality having to take responsibility for the legal costs. Contracts are not clear in practice and contentions can be raised. Clear definition of who is accountable is needed.(CUPE)
- CCPPP noted that default and dispute resolution mechanisms can be included in contracts. Further, if bankruptcy occurs, the contract can allow the municipality to step right into the company's shoes until another firm can be found. The 180 day termination clause in the contract with the City of Goderich was to ensure an orderly transition to a new contractor or back to the municipality.
- Hall noted that the unequal nature of the relationship between public and private partners also had repercussions for contract termination. Often, officials must pay compensation for early termination. Grenoble, France, and Valencia, Spain, were

offered as examples.

- EP noted a study of 13 water companies that had come to the end of 127 contracts in the US. Twenty contracts were not renewed with the incumbent. This shows that it is possible for a municipality to choose a different operator or to re-assume operations itself.
- Re-tendering contracts is not simple (Hall). Hall noted that local authorities could call in performance bonds or renegotiate the contract, however re-negotiation is often chosen as the best option. Calling in the bond is cataclysmic. In addition, private firms may have access to a better legal team.
- Azurix noted that bonds and guarantees are commonplace in North America. Performance bonds are more difficult to draw on, but can be good. The use of penalties in the contract was recommended (Azurix).
- CUPE noted that in the case of long-term contracts, municipalities can build up dependency upon private partners so that breaking the tie could be difficult and reduce other options. Further, private companies often siphon off the experienced employees and managers from the public sector, therefore also reducing capacity. The public sector needs personnel to monitor and manage these contracts. Referencing the Cameron paper, CUPE noted the Azurix-Hamilton/Wentworth contract started with one municipal employee monitoring it, now there is a staff of eight doing this kind of work. CUPE noted that this was an exercise in public accountability and one that is a hidden and considerable cost to municipalities who enter into public-private partnerships.
- In response to a question posed by CEDF, Azurix stated that it would be willing to sign a contract that had a 180-day cancellation clause with no cause and no penalty. Negotiating the penalty is part of negotiating the contract.
- CEDF asked Azurix how this could be sold to investors. Azurix responded that they were not familiar with details but there were likely two parts to the contract. The 180-day cancellation likely refers to operations and capital investment part is likely completely separate.
- The Mayor of Goderich offered to provide a copy of their contract with US filter to the Inquiry which details the 180 day cancellation clause and illustrates contract-based accountability.
- CCPPP noted that the 180 day termination transition is needed to get an orderly transition. Termination for convenience is desirable so that municipalities can show citizens that they retain complete control.
- CUPE noted that the threat of law suits by multinationals will reduce the likelihood of municipalities using default mechanisms.

1.3.4 *Provincial Accountability*

- Cameron noted that their issue paper did not explicitly address the oversight role of the province for the operational level. Broader provincial regulatory responsibility was taken as a given.
- CEDF and CELA stated that Ontario must deal with the accountability concerns at the provincial level before it starts talking about privatization at the local level. Accountability concerns at the municipality level also need to be improved for the public sector. Foerster pointed out that private actors are already in “the system”. CEDF pointed to the lack of public input in this process so far.
- EP agreed that accountability needs improving at the provincial level. Enforcement of laws protecting health and the environment is vital. EP argued that there is virtually no enforcement today, particularly against municipalities. The province is likely to hold private water providers more accountable than public providers. In Hamilton, the province began enforcing environmental laws more strictly after privatization. Law enforcement also improved after privatization in England and Wales. EP suggested that an increase in staff at the MOE would not necessarily result in more prosecutions. A change in the enforcement culture (from voluntary compliance to mandatory compliance) is required.
- With reference made to Part I of the Inquiry, CEDF had concerns about accountability at the senior levels of government with regards to the overall regulatory framework, but noted this problem exists regardless of whether public or private bodies operate the system (CCPPP agreed).
- Cameron noted that the capacity of the province to provide oversight would remain vital and unaffected by multiple private actors at the municipal level. Cameron suggested that an overall regime was needed whether public or private actors were at play.
- CELA argued for a Safe Drinking Water Act for direct provincial accountability.
- OPSEU noted that dealing with the issue of fragmentation (See Hall’s point above) should begin with identifying the most appropriate system and outlining the roles and responsibilities.
- OMWA recommended that we need a road map of water policy in the province to clarify accountabilities from conservation and source protection through operations. A central, provincial website with links to all aspects of water would also facilitate public involvement on an ongoing basis.

1.4 Organizational Culture

- Cameron noted that the evolution of organizational culture is beset by events like Walkerton and that culture is important when assessing the impacts of organizations (Cameron)
- OMWA made reference to the issue paper submitted by Martin, Archer and Brill *Why do people and organizations produce the opposite of what they intend?* Which suggested we need an organizational culture that promotes non-defensive behavior.
- CCPPP stated that differences existed between the board of directors in a private firm, and the public works committee in a municipality. The staffing of a works committee places no emphasis on qualifications for gaining a position. Rather, it is done by self-identification. Private boards seek out specific skills and expertise - general management expertise and industry specific expertise.
- CEDF stated that in a crisis, public actors decide what to release and release it, private firms release nothing because of fear of legal action. The corporate agenda is driven by a corporate mindset and loyalty to corporate interests, not the public interest. What is missing is a critical perspective. This is a very different culture to the public sector. Private actors tend to be reactive to a crisis rather than proactive. If the private sector had been responsible for the Walkerton crisis, instead of a public inquiry, litigation would be in progress. This would be a defensive move that would slow down resolution.
- CCPPP noted caution when using anecdotal evidence and that incidents of crises can result in poor behaviour in both public and private organizations - each can have good and bad cultures.
- EP stated that litigation can be a good way of holding decision makers accountable. At present PUC commissioners are not legally liable, while Boards of Directors are. Public owners and operators also enjoy liability limitations. Liability creates incentives to perform well. Foerster pointed out the individual board members may not be liable.
- CEDF agreed that litigation would be good where a party was at fault, but it would stall changes being made to the system. Litigation can stall the public interest.
- Foerster questioned whether litigation couldn't exist whether the operator is public or private. CEDF noted that the private sector's response would be a defensive one with limited information available until litigation had been cleared up.
- OPSEU stated that OCWA is not competing with other agents, so it is more able to share knowledge freely, for example with First Nations. Profit is not the primary operational motive and there is the ability to go beyond provincial standards and be responsible to the community. CCPPP pointed out that OCWA does compete for

contracts, even outside of the province. Foerster noted that OCWA does have proprietary systems and questioned whether they were likely to share them freely.

- CCPPP noted differences between risk culture in the public and private sector. Private actors favour risk management and have a more focused risk process, while public actors favour risk aversion. Risk aversion requires greater margins for error and therefore pushes up costs. Operations and design/build were provided as examples where risk aversion was reinforced by the inherent conservatism of engineers. Risk management recognizes that tradeoffs need to be made to manage risks and output requirements are necessary to increase efficiencies. Foerster pointed out that risk aversion is not necessarily a bad thing, especially in light of the Walkerton crisis.
- CCPPP noted that the more focused approach to assessing risk in the private sector maybe too thin at times. Output requirements set by government can reduce efficiency, but this is a legitimate government role. (CCPPP)
- EP stated that there is a significant difference in the culture of employment. The private sector tends to cut its workforce (sometimes by as much as 40 or 50 percent) as a result of cross-training and increased efficiencies, while the public sector tends to have more “fat”. Municipalities often require private contractors to achieve staff reductions through early retirement and attrition rather than layoffs. Foerster pointed out that “fat” has a negative connotation but asked whether some redundancy in the system might not be desirable.
- CUPE stated that as a representative of the employees who pay dues to the union, it is duty bound to question and challenge such decisions that will result in people becoming unemployed. CUPE is for improving public systems but it must be done in a way that involves meaningful consultation and in a way that does not create insecurity and unemployment for so many workers. Protection for whistleblowers was mentioned as one mechanism. The case of re-engineering in Winnipeg was cited as a positive example of changing the water and wastewater system.
- CELA stated that the meeting was missing the vital discussion on how the public sector could be improved to work effectively and efficiently. It was noted that government was already moving in the direction of public private partnerships, and fears were raised about Walkerton providing the reason for the move. Private partners were being offered as the only suppliers of expertise and capital, but municipalities could do this themselves. It is a question of reducing subsidies and introducing user fees.
- AMO noted that municipalities do have expertise.
- CELA noted that OCWA’s culture has been changed by competition and this has resulted in a decrease in excellence, expertise, training and advice and support to smaller municipalities.

- OPSEU noted the need for measures to help develop an organizational culture. First - training is needed to develop a common curriculum. This was handled by MOE, then OCWA, then eroded under financial pressures. OCWA would be a good vehicle for this across the province. Second - a means of empowering workers is needed where concerns can be raised, for example a Health and Safety Committee. Third - a message from the top is needed. The reluctance by the Provincial government to have OCWA at the table for these meetings is not understood. Organizational culture at OCWA has been undermined and in-house capabilities overlooked. MOE and OCWA have superior training systems and environmental management systems, but these have faded over time (OPSEU)
- OMWA offered the example of Perth as a municipality that had decided to establish a municipal water board and retain public operation. A key person to lead the operation and culture was considered crucial and recommended this role should be legislated. Legislation that mandates a lead manager/water director/engineer similar to that as required for a Fire Chief, Chief Librarian or Building Inspector was suggested. This water official should report directly to council (if there is no PUC or water commission), and not to the Public Works department or the Clerk/Administrator. (OMWA)
- CELA noted that differences between private and public organizational cultures are not black and white, but shades of grey - there are no purely private owned and operated systems, and no pure public systems (all municipalities contract some work out). Ontario has a cross-fertilization of cultures. CCPPP agreed.
- The culture of intermediary organizations like OCWA have a bit of both public and private culture (Cameron).

1.5 Transparency

- Public access to information concerning public private partnerships, OCWA, and municipal providers is crucial (EP, CELA, CUPE)
- CUPE and CELA noted concerns about transparency with private partners due to the lack of access by the public to the details of the contract. The case of Hamilton was offered as an example.
- Hall stated that secrecy in contracts between public and private partners is normal. Cameron agreed with the point, but noted that it was bizarre for public bodies to agree to this secrecy.
- OPSEU noted that contracts will always result in transparency problems and noted that OCWA, among contractors, is uniquely subject to freedom of information laws, audit legislation, conflict of interest etc. EP noted transparency problems with

OCWA.

- OPSEU noted that the OCWA Board needs to become more transparent and diverse and should hold public meetings. Board members should include those with skill sets related to water and large enterprises, stakeholders, certified operators, and municipalities. OCWA is currently run as a closely held government organization, but this is not appropriate. Links between OCWA and the Conservation Authorities would also be a possibility.
- OMWA noted that after deregulation of the PUCs, meetings of the corporatized electric companies became private, and board meetings of Ontario Hydro have been private for many years.
- CCPPP advocate full disclosure, an open-book policy, and regular reporting to council. Transparency is a huge issue which should be written into the contract.
- Access should be made law and should be dealt with in the contract (EP)
- CUPE noted that in the public service, citizens have access to information, budgets, allocations, operating requirements, status reports and recommendations etc. Citizens even have the ability to follow revenue streams. Private firms cannot be this transparent. It is difficult to put this into a contract.
- CCPPP noted that it can, and it is all in the contract - clients can be given enough information to satisfy the public. In one public private partnership, clients can walk into a plant and see the records at any time. Regular reporting is also a requirement, to show where money is being spent, and for the client to keep track of historical data on spending and financing. However, wages may be private
- CUPE insisted that without a full open door policy there will always be concerns.
- CELA stated that environmental assessment is a vital citizen tool for transparency and public involvement. However, it is only public ventures that are subject to environmental assessment, not private. Private ventures will reduce environmental assessments. These types of citizen tools have decreased in recent years in general. (CELA)
- Azurix noted that they do performance reviews and present them to Council.
- Transparency of contract conditions must be clear whether it is a private company or OCWA, particularly to avoid contract payments to staff or politicians, corruption or other conflicts when personnel move between the sectors. (OPSEU)
- Transparency is not only necessary with contracts. It is needed in the formulation of regulations and legislation. This should be an open process. (OMWA).

- Competition causes problems for transparency, as information is not revealed on these grounds. This is also a problem for OCWA as it has been forced to compete with private firms. (CUPE)
- Whistle-blowing is important, but this may be more difficult for private firms. (CUPE, OPSEU)
- CUPE noted that private firms may not be willing to give up the ability to control financial and operational information. For example, if the use of a cost-saving device was raised and agreed upon in a public forum with stakeholders. CUPE was concerned that these types of decisions would not be made publicly and reports do not allow this type of public involvement and debate.

1.6. Potential for Political Interference

- Political contributions should be stopped so that they do not influence decision-making of staff and elected officials. The movement of people between the public and private sector may also result in political interference (OPSEU).
- EP noted that government agencies are subject to direct political influence from above. EP also agreed that electoral reform is needed to stop private firms from buying political influence with contributions.
- EP noted that politicians like to interfere in the system by doling out jobs for employment, social policy or political reasons. EP noted that Toronto, by its own admission, employs 540 too many people in its water and sewage systems. CELA noted that governments are cutting jobs, not doling them out. Serious doubts were raised about the prevalence of politically motivated job-giving (CELA, OMWA).
- EP quoted a 1996 report indicating that government owned organizations are more likely to use political leverage to avoid compliance.
- EP stated that the Ontario Energy Board regulates private gas utilities more effectively than it regulates private electricity utilities, in part because there is less political interference with the former.
- CCPPP suggested that political interference caused uncertainty and pushed up costs. This occurred less in the private sector, where it was strictly business with political interference simply in terms of negotiating the contract.
- Foerster noted that water was a legitimate political issue, and therefore questioned whether “political interference” was necessarily a bad thing. CCPPP noted that there is a difference between positive and negative political interference.

1.7 Ability to Deal with Long-term Planning

- Foerster pointed out criticisms of both public and political actors: political actors have been criticized for only planning until the next election; private actors have been criticized for not planning past the end of the contract.
- Hall noted that in France funds were available for long term needs, yet these funds were not taken up as companies did not want to invest when contracts were coming to an end.
- OMWA stated private actors do not have the drive for long term planning. Public actors often routinely plan 5-10 years ahead, and one example was cited of a PUC which looked at possible capital demands over a 100 year period. Private firms are not as concerned about replacement in the long term. It may be easier to develop public interest and knowledge in long-term planning in a community with a public system.
- CCPPP noted that while bureaucrats can plan 25 to 30 years ahead, they are subject to the political whims of each government, so in reality it is not even a three year time period for planning. For public-private partnerships, planning is done in cooperation with the client so security exists within the contract.
- Foerster suggested that municipalities should take responsibility for long term planning, either with or without a private partner. OPSEU agreed. EP thought it depended on whether ownership was public or private, and noted for operations, it depends on the nature of the water company and the length of the contract. EP also noted that if there are concerns over the deterioration of assets, a contract can impose an obligation to service or upgrade equipment at certain intervals and to return it to the municipality in equal or better condition.
- Foerster outlined that CELA has suggested that a SDWA could force either public or private organizations to do long term planning. OPSEU agreed and suggested that OCWA could have a role in supporting long-term planning and implementing such plans.
- EP noted the difficulties in long term planning and cited the Ontario Hydro's Demand Supply Plan as an important caution. EP suggested that would depend on the contract and that municipalities that are concerned about long term asset management and deterioration can deal with this in a contract.
- CCPPP noted that long term planning could be imposed by provincial statute but planning will only be as good as capacity to implement. Reserves are needed to deliver these plans. Private firms are tied to contracts with rigid time-frames for maintenance and replacement. It's not the same in the public sector. (CCPPP)
- Foerster pointed out that legislation could be drafted to make municipalities put away

money in order to do this. CCPPP stated that Toronto did this, but the funds were used for social services, not for water. CELA and OMWA noted that reserves are discretionary but through reserve funds and other mechanisms, this can be addressed. They also noted that long term financial planning is related to broader planning process, such as development charges and the capital budgeting process. Typically on a five-year cycle, municipalities are moving towards longer term planning on a number of fronts.

- Municipalities are capable of long term planning and there is a need for it, but it should not be a regulation. It is important to stipulate standards of performance and monitoring and liability, but government doesn't have resources for this. Concern was expressed about requiring this under legislation because government wouldn't enforce it. Long term financial planning could help municipalities but guidance and resources are needed more than regulations. (Strategic Alternatives).
- CCPPP outlined there are three impediments to long term planning in the public sector (1) the budget approach in municipalities and changing priorities, (2) accounting practices where cash-based accounting using reserves is required versus accrual based accounting in the private sector, (3) capital constraints on municipal governments. Foerster questioned whether these could not be used in the public sector and organizations such as OCWA. CCPPP replied yes but not in the absence of political interference.
- CCPPP noted that if OCWA bids on a contract and makes a mistake, the shortfall is paid for by the tax payers. This results in an unfair advantage in long-term planning.
- OPSEU noted that OCWA is a financially self-sufficient agency with no tax subsidy.

1.8 Ability to Build and Finance Infrastructure

- Hall noted that in Yorkshire, England, under-investment was a serious contributor to the crisis that occurred (see Cameron paper). OFWAT (Office of Water Services) in the UK stipulates that if investment is lower, then the company must lower its prices, but this leads to less money available for the company to invest. This type of economic tool or incentive is not recommended.
- EP noted that under-investment was a greater problem in England and Wales before privatization. The government's reluctance to spend enough on infrastructure to meet European standards was one of the drivers of privatization. In the decade following privatization, water companies invested 33 billion pounds. EP added that rate-of-return regulation can encourage private companies to invest.
- OPSEU noted that there has been a drop in expenditure on infrastructure across the province and a reduction in subsidies. At the same time, industry is increasingly competitive and municipalities are driven by their budgets. This situation has

negatively affected the ability of municipalities to build and finance infrastructure, it is also not good for safety.

- CELA raised the concern that customer money is going out of the country and not being reinvested.
- OMWA noted that under Section 210.1 of the Municipal Act there are provisions for private sector financing and operating contracts but that these are just two tools of many available.
- Strategic Alternatives noted that municipalities have the capacity to finance infrastructure investment, but the problem lies with the willingness and ability to go into debt.
- AMO noted that there is only one tax payer - whether public or private, it's the same source. OMWA pointed out that no matter whether private or public actors are involved, it is still the users who need to pay for it. There's no escaping the costs.
- OMWA commented that costs will be higher for private companies because of the need to make a profit, and higher capital costs. Profits would be better put into reserves for future infrastructure needs. EP noted that this would only be the case if all other things were equal, and they are not. EP noted that it is a question of efficiency, and a number of studies indicating that private partners bring savings of between 20 and 50 percent.
- OMWA noted concern that this item was being discussed with a focus on large systems when small systems are the ones facing a financing challenge.

1.9 Constraints/incentives to adopt new technologies and approaches

- CELA stated that private firms come to tender with one technology. Choosing one firm means choosing one technology. It may not be the best technology. A review of all technologies is needed by government. Environmental assessment is also needed in this process.
- EP noted that the competitive contracting process gives bidders incentives to adopt new technologies that will do a better job at a lower cost. In Moncton, the new technology brought by the private partner resulted in a reduction of the size of the plant and had reduced costs.
- OMWA stated that firms can sell technology to municipalities. It is not access to the technology itself which is the difference between public and private, but the timing of the replacement and municipalities pay over a shorter period of time as they do not use depreciation.

- CCPPP (US Filter) noted that the private firm has more of an appetite for risk and a broader base of experience experimenting with technologies. Companies do research and site visits. Whereas municipalities are dependent on personal experience or on the consultant they hired. Private firms are more familiar with technology so they are more likely to know if it works or not. Companies promote proprietary and non-proprietary technology with a performance guarantee. Foerster pointed out that there is nothing preventing municipalities from hiring or purchasing this knowledge.
- CCPPP commented that increasing investment meant better technology, but municipalities don't have the ability to invest. Municipalities have other commitments that might not allow them to adopt.
- CCPPP noted that municipalities bring in technology as part of a program, but with the private sector, new technology is brought in constantly rather than on a program by program basis. Municipalities deal with blips as "initiatives" whereas the private sector sees it as maintenance. CCPPP also noted that technology changes in government seem to be viewed as an end-point, not an ongoing process. This is cultural and relates to political approvals.
- CCPPP pointed out that the profit motive is an incentive to seek out new technologies and the private sector is more willing to accept risk of adoption based on broader base of experience. CCPPP also noted that contracts can include provisions for cost sharing for new technologies.
- CUPE noted that the criticisms of the public sector in regards to new technologies could equally apply to the private sector.
- OPSEU noted that multi-locations of OCWA permit testing and experimentation with technology.
- OMWA noted that both sectors face these problems, but municipalities can borrow at lower interest rates.

1.10 Social Equity

- Cameron noted that scale is a vital issue and a major political challenge in terms of social equity.
- There is a need to mandate social equity and improvements in water quality through increases in rates. Users need to be charged but recognizing water must be affordable and accessible. (CELA).
- Hall noted that in Latin America, one of the key objectives of public-private partnership was to extend water service to the poor, but companies have avoided this due to the risks of supplying water to people who cannot afford to pay.

- Foerster asked whether it was up to municipalities to think ahead and put provisions for this into the contract. However, Hall noted that in France this had been done, with funds available for long term needs, yet these funds were not taken up as companies did not want to invest when contracts were coming to an end.
- OPSEU noted quality should be high across the province rather than a patchwork effect. The province should set minimum standards and its crown agency, OCWA, should be used as a tool to lead the way by reaching above the minimum standards. OCWA would need improving to take on this role, but it could be a leader that others would aspire to. A private firm could not take on this role. OCWA could be used for subsidies for capital and conservation from MOE to ensure proper allocation and spending. The project design department of OCWA would be ideal (OPSEU).
- EP noted that OCWA is not meeting minimum standards at one-third of its drinking water plans.
- EP noted that, in the name of social equity, subsidies should go to needy consumers rather than to municipalities. The needy should be subsidized in cash rather than in kind, in order to maintain incentives to conserve water.
- CUPE noted that social equity and conservation could also be addressed through legislation. OPSEU agreed.
- EP noted there are parallels between food and water in terms of being an essential resource and we do not discuss nationalization of this sector. Foerster noted that one is a natural monopoly and that there are many differences. EP replied that a monopoly requires regulation and noted that food is harder to regulate, as there are more suppliers to monitor and more products to test.

1.11 Water conservation and the broader environmental context

- Concerns were raised about the conflict between the private sector's profit motive and water conservation (CELA, OPSEU, Melzer).
- Azurix noted that operators produce water to satisfy a need. Conservation is not the job of the operator, but a municipal responsibility.
- CCPPP noted that showing clients value for money provided an incentive to conserve. An increase in consumption costs means an increase in conservation.
- OPSEU had concerns about the marketing of water and about the trading of water, particularly across watersheds as this is not good for the environment. It was noted that once private actors are embedded in the system then there is a danger that institutional pressure will mount for water trading.

- Strategic Alternatives noted that water conservation is a management tool. Water conservation not always efficient and costs may reduce money for safety.
- Water meters are an incentive to conserve (CCPPP)
- Full cost pricing will lead to conservation (AMO)
- EP noted that the only energy companies that push conservation are the private gas companies. The public electricity companies do not do so. Private firms promote conservation in order to avoid capital expansion costs.
- CELA noted that private companies, as “partners” are not covered by environmental laws such as environmental assessment legislation, while as direct owners they would be. CELA stated that this could have significant consequences. Foerster asked whether this could be dealt with in the contract. He also noted that there seems to be a clear role for government in conservation and asked whether the parties felt that there was a built-in incentive in conservation in the private sector.
- Strategic Alternatives noted that some private companies gain competitive advantage by including conservation assessment and efficiencies in their contracts. CCCPP agrees that savings can be achieved through conservation and reduced plant size. Private sector operators are interested in conservation to reduce costs of operation and satisfy customers. Water meters and the development of new plants and technologies were cited as examples that contribute to conservation. (CCPPP)

1.12 Potential conflict between the regulator and the operator

- The Provincial government enforces the law to a greater degree on private rather than public sector actors (EP). Privatization would stop political infighting. Government can enforce the law better against private industry.
- CCCPP commented that the best system is one in which the responsibility and accountability for standard setting is separate from operation, and even then there will be conflicts. Ownership can remain with the municipality, but operations should be with another organization. By splitting functions, conflicts can be avoided and this is a good way to manage risk. (CCPPP)
- CELA asked CCCPP if this separation could only be achieved with a private operator, or whether legislation and specific individual responsibilities could be as effective. CCCPP noted that a contractual relationship with an operator who maintains and operates is governed by a legal contract, but a government department responsible for operation and maintenance is not under a legal contract so safety can deteriorate.

- Governments cut corners on maintenance because it doesn't show up under that government. There is greater assurance with a private operator (CCPPP)
- AMO noted that accountability stops governments from cutting corners.
- OPSEU stated that there was no conflict between regulator and operator. An intimate knowledge of operating is needed for regulating - people with water backgrounds are needed, particularly for compliance issues. There is a chain of responsibility from the crown to the regulator to the enforcer. This chain is important to the system. OPSEU noted that the d'Ombra issue paper supports an arms length relationship between operator and regulator, but a private firm is not the only response to this - examples of nursing homes, schools, and the appointment of judges were offered as examples. OCWA could be an alternative, alongside other operators.(OPSEU)
- In explaining the conflict of interest problem, EP cited the principle of natural justice that no man may be a judge of his own cause. The province cannot judge (i.e. regulate) a utility that it also operates and finances. The government shields itself from criticism. The England, the conflict that arose when the government was both the regulator and operator was one of the reasons behind privatization. Separating regulation from operations is essential. Giving responsibility to OCWA for operations is not sufficient, since OCWA is a government agency. Nor do municipal operations completely solve the problem, since municipalities are considered children of the province. Privatization is the best solution.
- EP expressed concern about the conflicts arising not only from operations but also from government financing. The government is less likely to enforce the law if doing so means that it will have to finance required improvements. The Province takes into account the ability of municipalities to pay when enforcing laws. EP referenced the Benedickson issue paper and evidence presented in Part 1(b).
- Regarding the political will to raise water prices, EP noted that the use of private firms helps in the raising of prices as the private firm can take the "political heat" away from government as public concern is directed at companies.
- CCCPP stated that the splitting of responsibility between governance, operation and financing is a good way to manage risk. Responsibilities should be divided and clearly delineated.
- CUPE noted that while the monitoring and enforcement need to be separate from delivery and operation, both can be done by the public sector.

1.13 Implications of NAFTA

- CUPE made reference to a legal opinion it has submitted to the Inquiry (Steven Shrybman, Sack, Goldblatt, Mitchell) concerning the potential impact of NAFTA

and international trade agreements. CUPE raised concerns that municipal processes could be challenged under NAFTA and municipalities would not have the financial resources to respond. Municipalities would also find it difficult to return services to the public sector, if they found themselves unhappy with private sector delivery, because huge American corporations could, under NAFTA, demand compensation. The concern was also raised that under NAFTA, the Ontario government could be prevented from bringing in tough standards, because private corporations could argue those standards amounted to "financial expropriation". (CUPE)

- CCPPP felt that CUPE's claims were exaggerated, and that municipalities and the capacity to regulate were not hindered by Chapter 11 of the NAFTA agreement. CCPPP stated that contracts establishing public-private partnerships contain provisions dealing with concerns that anyone contracting with government would have, such as the right of government to terminate an agreement without cause, or the taking of action by government, including passing a law that might target the investor or its business or have a material or adverse effect on its business or reduce the fair market value of its business or taking an action equivalent to expropriation. A properly drafted agreement would state what entitles the private sector entity to claim compensation and what the private sector entity is not entitled to claim compensation for. The existence of such provisions in a contract eliminates the right of an investor to make a claim under NAFTA for compensation for expropriation.
- Melzer noted that environmental regulations have been overturned when in conflict with NAFTA and citing the example of a Chapter 11 case regarding a gasoline additive. CCPPP responded that the fuel additive was a legal commodity and was not banned on environmental grounds; only its importation and its inter-provincial trade were banned under a federal statute. A manufacturer of the fuel additive had challenged the ban on importation under Chapter 11 of NAFTA and the Government of Alberta (supported by the governments of several provinces) challenged the federal statute on the ground that the ban violated the Agreement on Internal Trade as it could not be justified on the basis of scientific proof. Canada chose to settle the Chapter 11 action with the manufacturer because the ban on the fuel additive was held to have violated the Agreement on Internal Trade.
- CUPE was concerned that municipal RFP processes could be challenged as limiting competition preventing municipalities from knowing when companies have not performed well internationally. CCPPP outlined that some US states have "bad actor" legislation that protects against this and the fact that a private sector entity had a poor reputation would be a valid reason for a municipality to refuse to deal with it.
- Foerster noted that there was some consensus that NAFTA adds complications that must be considered. CCPPP stated that it did not agree with the legal opinion submitted by CUPE and pointed out that a portion of it consisted of speculation as to future changes in the GATS. Foerster invited Peter Kirby and David Doubilet of Fasken Martineau DuMoulin LLP, appearing on behalf of CCPPP, to submit a paper to the Inquiry commenting on the legal opinion submitted by CUPE.

1.14 Other

- EP queried the issue paper authors about the correlation between skills and training and private systems. Cameron responded that there is more discussion of this in the private systems but in York they acknowledged this and then use private consulting expertise to train their own municipal staff. Beyond this there is no documentation of this in the paper.
- OCWA has a role beyond that of operator, particularly build and design and project management. A chain of responsibility runs from the crown through MOE to OCWA. While larger municipalities are capable of managing design and build projects, d'Ombraïn notes that smaller municipalities need the expertise and independence of OCWA. It would not be wise to have design and build knowledge separated from operating knowledge. Checks and balances could be established. Municipalities could carry out design and build functions with the help of OCWA. (OPSEU)
- OPSEU expressed concern that contracts and private water operators may act as a door to access more lucrative design/build contracts.
- CELA expressed concern that governments are using language of privatization and pursuing privatization without clearly explaining the complexities to citizens. In the public-private debate, people are confused and clarity is needed.