

## EXECUTIVE SUMMARY

### **Overview of Current Legal Regime in Ontario**

The current legal regime for protecting Ontario's drinking water (and its sources) is a diverse mix of general legislation, regulations, standards, policies, objectives and guidelines.

Under Canada's *Constitution Act*, the issues of environmental protection, public health and drinking water have not been exclusively assigned to either the federal or provincial levels of government. Accordingly, both levels of government have concurrent jurisdiction over certain aspects of the environment, public health and drinking water.

To date, the federal government has played a minimal role in regulating drinking water quality. Federal officials participate on the Federal-Provincial Subcommittee on Drinking Water, which publishes and updates non-binding drinking water guidelines. In 1986, the federal government introduced the *Drinking Water Materials Safety Act* to regulate water treatment devices, chemical additives and water system components, but this legislation was not enacted. Accordingly, the federal framework largely consists of environmental laws of general application, such as the *Canada Water Act*, *Canadian Environmental Assessment Act*, *Canadian Environmental Protection Act, 1999*, and *Fisheries Act*.

In contrast, the Ontario government has been more extensively involved in water resource management and drinking water protection. The centrepiece of Ontario's drinking water regime is the *Ontario Water Resources Act* (administered by the Ministry of the Environment) and certain regulations thereunder, such as the Drinking Water Protection Regulation (O.Reg.459/00) and the Water and Sewage Works Regulation (O.Reg. 435/93). In addition, the Ministry has developed numerous policies, guidelines and objectives regarding surface water, groundwater, and drinking water. General environmental laws – such as the *Environmental Protection Act*, *Environmental Assessment Act*, and *Environmental Bill of Rights* – also form part of the legal framework for protecting drinking water in Ontario.

Ontario has also enacted various laws that create and empower local agencies and municipal officials in relation to water quality and public health. These laws include the *Conservation Authorities Act*, *Health Promotion and Protection Act*, *Municipal Act*, *Planning Act*, and *Public Utilities Act*.

At the present time, there is no specialized safe drinking water legislation at either the provincial or federal level. From 1982 to 2000, seven private member's bills were introduced in the Ontario Legislature to establish a *Safe Drinking Water Act*. To date, none of these bills have been enacted.

### **Safe Drinking Water Legislation in Other Jurisdictions**

A number of Canadian, American, European and Australian jurisdictions have passed or proposed laws and regulations that, in many respects, offer greater protection of drinking water (and its sources) than is available under Ontario's current legal regime.

For example, British Columbia has promulgated Safe Drinking Water Regulations under its *Health Act*. More recently, B.C. passed the *Drinking Water Protection Act* (Bill 20), which, among things, creates and empowers provincial “drinking water coordinators” and “drinking water officers”; requires water system assessments and response plans; requires drinking water protection plans for prescribed areas; imposes statutory treatment, monitoring and notification duties; and creates new prohibitions and penalties in relation to drinking water contraventions.

Similarly, Quebec has passed a Drinking Water Regulation under its *Environmental Quality Act*. More recently, Quebec proposed a new regulation that would tighten up existing drinking water standards, and would require more extensive drinking water testing (including private wells).

In New Brunswick, a Potable Water Regulation was passed under the *Clean Water Act*, but regulations have also been passed to protect watersheds and wellfields. These regulations protect these drinking water sources through setback requirements, buffer zones and land use restrictions.

In the United States, the federal *Safe Drinking Water Act* serves as the cornerstone of American drinking water protection efforts. First enacted in 1974, this Act (as amended in 1986 and 1996) is notable for its stringent national standards; public participation in standard-setting; community “right to know”; funding and research programs; and emphasis on source water assessment and source protection, such as wellhead protection programs.

The U.S. Act has been supplemented at the state level in jurisdictions such as New Jersey, which enacted its own *Safe Drinking Water Act* in 1977, and has used its legislation to create a Bureau of Safe Drinking Water. The New Jersey regime also imposes drinking water requirements that, in some instances, are more stringent than federal standards. More recently, New Jersey has proposed testing and disclosure requirements in relation to private wells.

In Europe, the European Union (EU) has issued directives to member states on various drinking water matters, such as parameter limits, monitoring and reporting. More recently, a Water Framework Directive has been released to place greater emphasis on watershed management and groundwater protection.

In light of these EU directives, England has passed drinking water quality regulations, and has enacted a number of laws regarding water resources and water suppliers. Significantly, England established a specialized Drinking Water Inspectorate for investigation, enforcement, monitoring, reporting and research purposes. In addition, England’s Environment Agency has authority to delineate “water protection zones” for surface watercourses that serve as sources of drinking water.

In Australia, the New South Wales government has passed drinking water legislation and licencing requirements that, among other things, authorize the development of watershed management, create statutory consumer rights, and require extensive monitoring and reporting (including posting “right to know” information on the Internet)

## **The Need for Legislative Reform in Ontario**

Having regard for these developments in other jurisdictions, it is clear that there is considerable room for improvement in Ontario's current legal regime for protecting drinking water and its sources.

In summary, the following conclusions can be reached about Ontario's current legal regime:

- regulatory responsibility for drinking water safety remains highly fragmented and uncoordinated between various provincial ministries and local or municipal officials;
- Ontario's drinking water requirements are primarily set out in subordinate regulation, which lacks the legal weight, significance and longevity of legislation;
- there are few mechanisms to hold the province politically or judicially accountable in relation to drinking water protection;
- there are minimal opportunities for public participation in the standard-setting and approval processes regarding drinking water;
- source water assessment and source water protection programs are not mandated by statute;
- the public has no remedies to directly initiate legal actions on safe drinking water
- investigation and enforcement remains discretionary and uncertain;
- community "right to know" provisions are limited in scope and content;
- financial/technical assistance programs for drinking water are discretionary and incomplete; and
- no multi-stakeholder drinking water advisory committee exists in Ontario.

Accordingly, it is strongly recommended that Ontario should enact a *Safe Drinking Water Act* as soon as possible. Among other things, the following principles and provisions should be incorporated into Ontario's *Safe Drinking Water Act*:

- creation of a substantive public right to clean and safe drinking water;
- inclusion of a paramountcy clause that confirms the priority of drinking water safety in cases of conflict with other provincial laws;
- application to all public and private owner/operators of water treatment and distribution systems in Ontario;

- establishment of a specialized “Drinking Water Commission” (reporting to the Minister of the Environment) to develop and oversee the province’s drinking water program (including standard-setting, approvals, investigation, enforcement, and provincial level monitoring/reporting);
- clear definition of lines of authority, responsibility and communication between the Commission and other statutory officials involved in drinking water protection;
- mandatory duty to set, review and revise provincial standards (with full public input) that implement the “multi-barrier” approach to drinking water safety, and that are aimed at protecting the health and safety of all Ontarians (including persons who may be particularly vulnerable to waterborne disease);
- inclusion of the “precautionary principle” in cases of scientific uncertainty regarding drinking water contaminants;
- mandatory duty to identify and evaluate new or emerging threats to drinking water safety;
- mandatory duty upon drinking water suppliers to undertake comprehensive source water assessments, and to develop and implement source water protection plans (eg. through acquisition, expropriation, and land use prohibitions or restrictions);
- entrenchment of drinking water treatment, testing, monitoring, notification, laboratory accreditation, and operator training requirements on a statutory basis (including a specific definition of, and treatment requirement for, “groundwater under the influence of surface water”);
- creation of broad prohibitions, strong penalties, and administrative order powers;
- inclusion of public enforcement tools, such as judicial review, citizens’ suit provisions, and civil cause of action for harm caused by contraventions of the Act;
- creation of a centralized and publicly accessible database of drinking water information and records;
- expansion of community “right to know” provisions;
- mandatory duty to establish financial/technical assistance programs, particularly for small waterworks; and
- creation of a multi-stakeholder drinking water advisory committee.

Unless and until these legislative reforms are enacted in Ontario, drinking water and public health will continue to be at risk across the province.

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