Drinking Water Protection in Ontario:

A Comparison of Direct and Alternative Delivery Models

Issue Paper Prepared for Part II of the Walkerton Inquiry

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List of Acronyms

ABSA	Alberta Boiler Safety Association
AERs	Approval Exemption Regulations
A-G	Attorney-General
APAO	Aggregate Producers Association of Ontario
ARA	Aggregate Resources Act
ASD	Alternative Service Delivery
BCC	Building Code Commission
BMEC	Building Materials Evaluation Commission
CFIA	Canadian Food Inspection Agency
CIELAP	Canadian Institute of Environmental Law and Policy
D.L.R.	Dominion Law Reports
DAA	Delegated Administrative Authorities (Ontario)
DAO	Delegated Administrative Organizations (Alberta)
EBR	Environmental Bill of Rights (Ontario)
ECO	Environmental Commissioner of Ontario
EPA	Environmental Protection Act (Ontario)
ESA	Electrical Safety Authority
EUB	(Alberta) Energy and Utilities Board
FOIPPA	Freedom of Information and Protection of Privacy Act
MBS	Management Board Secretariat
MCBS	Ministry of Consumer and Business Services
MCCR	Ministry of Consumer and Commercial Relations
MMAH	Ministry of Municipal Affairs and Housing
MNDM	Ministry of Northern Development and Mines
MNR	Ministry of Natural Resources (Ontario)
MOE	Ministry of the Environment (Ontario)
MTO	Ministry of Transportation (Ontario)
NEB	National Energy Board
NEC	Niagara Escarpment Commission
OAG	Office of the Auditor General (of Canada)
OCWA	Ontario Clean Water Agency
OHRC	Ontario Human Rights Commission
OMAFRA	Ontario Ministry of Agriculture, Food and Rural Affairs
OPSEU	Ontario Public Service Employees Union
OWRC	Ontario Water Resources Commission
PTMAA	Petroleum Tank Management Association of Alberta
R.S.C.	Revised Statutes of Canada
R.S.O.	Revised Statutes of Ontario
REVA	Rewarding Environmental Voluntary Action
S.C.C.	Supreme Court of Canada
S.O.	Statutes of Ontario
TOARC	The Ontario Aggregate Resources Corporation
TSSA	Technical Standards and Safety Authority
W.W.R.	Western Weekly Reports

Executive Summary

This study compares the direct delivery of the protection of drinking water quality by a provincial government Ministry, with delivery by non-governmental or other alternative service models. The comparison is based on the delivery of a multi-barrier drinking water protection system for municipal and non-municipal communal drinking water systems. The question of arrangements for the operation of waterworks and drinking water distribution systems is not addressed. Rather the focus is on institutional arrangements for the regulation and support of these functions by system operators, and for source water protection.

Five alternatives to the current arrangements for drinking water protection in Ontario were examined:

- the creation of a special purpose agency;
- devolution to municipalities and private communal system owners;
- the establishment of an independent regulatory commission;
- transfer to a delegated administrative authority; and
- improved direct delivery.

The base case and each of these alternative options were assessed against the criteria of performance and governance and accountability.

The review of alternatives to direct delivery provided no conclusive evidence that any of the available options would result in better outcomes than a direct delivery approach. Evidence of significant programs with the performance of certain options, such as devolution, is noted. The options of a special purpose agency and delegated administrative authority were found to have limited capacity to deal with the interagency coordination functions needed to secure drinking and source water protection, and to carry significant risks associated with the de-coupling of policy and operational functions. An independent regulatory commission may also suffer from these limitations, depending on the scope of its mandate.

The direct delivery model provides the clearest and most extensive governance and accountability framework of the alternatives examined. The devolution and delegated administrative authority models were found to have substantial gaps and weaknesses in their governance and accountability structures.

Direct delivery by the Ministry of the Environment, with a strengthened statutory mandate and increased resources for the Ministry, was found to be the best mechanism for dealing with the key problems of the fragmentation of mandates and responsibilities for drinking and source water protection. This capacity could be further enhanced through the statutory designation of institutional focal points within the Ministries of Environment and Health for drinking water protection functions. The establishment of an independent advisory committee on drinking and source water protection policies and standards, that reports annually to the public on the state of the province's drinking and source waters, is also proposed as part of an improved direct delivery framework.

The key weakness of even an improved direct delivery approach is the vulnerability of its funding base to the budgetary priorities of the provincial government. The report concludes that an expanded and strengthened mandate for the Ministry of the Environment and other agencies would be meaningless unless they are given adequate resources to carry out new and existing responsibilities.

However, none of the alternative options was found to provide a more secure resource base beyond the ability to recover costs for a narrow range of activities related to approvals and inspections, an option that is also available under a direct delivery structure. The devolution and delegated administrative authority options may actually increase total costs, as they require significant provincial oversight and backstopping capacity to ensure satisfactory outcomes. The provision of an adequate resource base for the protection of drinking and source waters will ultimately depend on the political will of the provincial government.

The Ontario Clean Water Agency is noted as a good example of the use of the agency model, subject to the need to address concerns regarding the structure and membership of its Board of Directors. Given its technical expertise and province-wide presence, the OCWA is a potentially appropriate vehicle to deliver technical assistance and education and training to drinking water system operators.

The possibility of devolving responsibility for approval and inspection of non-municipal communal water systems and private wells, in addition to septic systems, to local government agencies such as health units, is also outlined. However, this would require the establishment of appropriate provincial support, oversight and reporting structures. Such structures are found to be absent with respect to the regulation of septic systems, which was devolved to municipalities in 1998. The potential for the designation of drinking water coordinators within local health units, as in the model of the British Columbia *Drinking Water Protection Act*, is highlighted as well.

Significant improvements in the protection of Ontario's drinking water can be achieved without major structural reforms that challenge existing constitutional, political, administrative and legal principles, would involve considerable transitional costs and risks, and are unlikely to produce better outcomes. Instead, provincial and local agencies need to be provided with clear legislative and policy mandates and direction for the protection of drinking and source waters. At the same time, an adequate and secure resource base should be allocated to support these responsibilities, and structures should be established for the regular and independent assessment and reporting to the public of the status of Ontario's drinking and source waters.

1. Introduction

1.1 Purpose

This study was prepared at the request of Part II of the Commission of Inquiry on the Walkerton Water Tragedy.[1] Its purpose is to compare models for delivering protection of drinking water quality, specifically direct delivery by a provincial government Ministry, and delivery via non-governmental or other alternative service models. The comparison was conducted on the basis of evaluative criteria of: performance; and governance, accountability and democratic values.

For the purposes of the study, a multi-barrier system for drinking water protection was defined as including:

- source water protection;
- drinking water regulation and policy development and implementation;
- approval, inspection, investigation and enforcement activities with respect to municipal and non-municipal communal waterworks and systems;
- complaint and emergency response capacity;
- training and technical assistance to system operators;
- public reporting regarding source and drinking water quality and drinking water system performance; and
- research on threats to drinking water quality and supply.

The question of arrangements for the operation of waterworks and for drinking water distribution systems is not addressed through this paper. Rather, the paper focuses on institutional arrangements for the regulation and support of these functions by system operators, and for source water protection.

1.2 Methodology

Direct delivery and alternative service delivery models were compared using the following steps.

1. Identify and explain the rationale for different functions that comprise a drinking water protection system.
2. Establish a base case for the purposes of comparison. The base case was defined as the regime delivered by the government of Ontario, as of May 2001.
3. Identify and characterize potential alternative service delivery models. These are based on experiences in Ontario and other, comparable jurisdictions, including the Governments of Canada and Alberta, selected states in the U.S., European countries, Australia and New Zealand, which provide examples of the use of service delivery options that may be applicable to the province.
4. Establish and explain the rationale for evaluative criteria against which to assess the base case and alternative models.
5. Evaluate the base case and alternative models against the evaluative criteria.
6. Present conclusions.

[1] The purpose of Part II of the Inquiry is to "focus on the policy issues related to ensuring the safety of Ontario's drinking water." See http://www.walkertoninquiry.com/legalinfo/docs/notice.html.

1.3 Outline of the Report

This report has six main sections and four appendices.

Section 1 describes the purpose and methodology for the study.

Section 2 presents the elements of a drinking water protection system.

Section 3 describes evaluative criteria for the assessment of service delivery options.

Section 4 summarizes six alternatives for drinking water protection arrangements (direct delivery, agency, devolution, regulatory commission, delegated administrative authority and improved direct delivery).

Section 5 evaluates these six alternatives against the assessment criteria, through the use of a series of tables.

Section 6 contains the study's conclusions.

Appendix 1 provides an overview of key points regarding the preferred option identified through the study.

Appendices 2, 3 and 4 outline examples of alternative service delivery practices in Ontario that have not been summarized elsewhere in the available literature to date. These include the regulation of septic systems through devolution to municipal governments, self-monitoring and compliance reporting for industries regulated by the Ministry of Natural Resources, and the creation of the Electrical Safety Authority, a safety-mandated delegated administrative authority, established in April 1999.

2. Elements of a Multi-Barrier Drinking Water Protection System

The functions that comprise a multi-barrier drinking water protection system with respect to municipal[2] and non-municipal communal drinking water systems[3,4] are defined, for the purposes of this study, to include the following elements:[5]

- The protection of sources of drinking water. This includes source water quantity and quality, and would encompass the regulation of water takings, and the protection of wellheads, groundwater recharge areas, headwaters, and aquifers.[6]
- The setting and regular review and updating of policies, standards and regulations related to drinking water. This includes standards for the quality of drinking water, and the construction, operation and maintenance of waterworks and drinking water distribution systems.
- The licensing and approval of the design, construction and operation of waterworks and drinking water distribution systems.
- The testing of drinking water quality, or the oversight of testing conducted by drinking water system operators or third parties.
- The conduct of inspections of waterworks and water distribution systems.
- The investigation of potential violations of standards or regulations for drinking water quality or water system operations.
- The carrying out of enforcement actions, ranging from requests for voluntary abatement, to administrative orders and the conduct of prosecutions.
- Systems for responses to public complaints regarding water system operations and/or drinking water quality.
- Systems for responding to incidents involving adverse drinking water quality.
- Public reporting of drinking water quality and the compliance of waterworks and systems with prescribed standards.[7]
- The delivery of technical assistance and training and education to drinking water system operators.
- The conduct of research on threats to drinking water quality and supply, and drinking water protection and treatment technologies and systems.

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[2] As of 1997, about 628 water treatment plants in Ontario were owned, operated or administered by municipalities. Ministry of the Environment, Proposal for Alternative Service Delivery – Communal Water Works: A Monitored Self-Managed Approach (Toronto: November 1997) pp. 5-6.

[3] As of 1997, there were estimated to be approximately 4,500 private (non-municipally owned, operated or administered) communal water works in Ontario. Ontario, Ministry of the Environment, Proposal for Alternative Service Delivery – Communal Water Works: A Monitored Self-Managed Approach (Toronto: November 1997), p.9.

[4] The paper also includes brief discussions of options for the regulation of private wells, and modifications to the existing system of regulation of private septic systems , as these are closely related to one another, and to drinking water protection.

[5] Adapted from R. Lindgren, Tragedy on Tap: Why Ontario Needs a *Safe Drinking Water Act: Volume III* (Toronto: Concerned Walkerton Citizens and Canadian Environmental Law Association, May 15, 2001), Table 1, pp 109-110; and Australian Productivity Commission, Arrangements for Drinking Water Standards (Canberra: AusInfo, 2000).

[6] Source protection is identified as a key function by the British Columbia Auditor General (Protecting Drinking Water Sources (Victoria: March 1999). See also Office of the Provincial Auditor (Ontario) 1996 Annual Report, pp.121-124, 1998 Annual Report p.273;, Environmental Commissioner of Ontario, 1995 Annual Report, p.57, 1997 Annual Report, p.68.

[7] As partially addressed via Ontario Regulation 459/00

The question of arrangements for the operation of waterworks and for drinking water distribution systems is not addressed through this paper. Rather, the paper focuses on institutional arrangements for the regulation and support of these functions by system operators, and for source water protection.

3. Evaluative Criteria for Assessment of Service Delivery Models

3.1 Introduction

Over the past two decades, governments around the world have adopted alternative approaches to delivering government services through traditionally structured ministries and departments. These new concepts, which are frequently referred to as "New Public Management" (NPM)[8] or "Alternative Service Delivery" (ASD) models, have taken many different forms. Alternative service delivery mechanisms adopted in Ontario over the past decade, for example, have included:[9]

- the privatization of functions through the sale of assets or a controlling interest in a service to a private sector company;
- the purchase of services under contract from a private firm;
- the establishment of partnerships with non-governmental parties in the delivery of services;
- the devolution of functions to other levels of government, outside agencies or regulated entities themselves;
- the creation of self-management systems through which regulation of a particular economic sector occurs through an organization made up of representatives of the sector; and
- the delegation of service delivery to an agency operating at arm's length from the ongoing operations of government, but under governmental control through such mechanisms as the appointment of agency heads and boards of directors and the use of statutory powers to give policy direction.

These new approaches are intended to improve efficiency and effectiveness in the delivery of public services, particularly through increased managerial autonomy and administrative flexibility relative to traditional models of direct delivery through ministerial departments. Alternative service arrangements may also increase organizational independence from government.[10] Among other things, ASD agencies are seen as vehicles that permit public sector organizations to break away from stifling central management bureaucracies that interfere with productivity improvements and customer service.[11] Alternative service models may also facilitate the recovery of costs for government services from the recipients of those services, by operating on a direct, fee-for-service basis.

However, alternative service arrangements are widely seen to pose challenges to long-established principles of parliamentary control and accountability. Accountability for the spending of public funds and the use of governmental authority can be put at risk by arrangements that involve others in governing who are not directly accountable to a Minister and not subject to parliamentary or legislative scrutiny.[12]

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[8] On "new public management" generally see M. Charih and A. Daniels eds., New Public Management and Public Administration in Canada (Ottawa: Institute of Public Administration in Canada, 1997).

[9] These options are described in detail in Alternative Service Delivery Framework (Toronto: Management Board Secretariat (MBS), September 1999 Revision), pp.15-30.

[10] J. Boston, "Organizing for Service Delivery: Criteria and Opportunities," in G. B. Peters and D. J. Savoie, Governance in the Twenty-First Century: Revitalizing the Public Service (Ottawa: Canadian Centre for Management Development, 2000), pp. 290-292.

[11] N. D'Ombrain, "Alternative Service Delivery: Governance, Management and Practice," in D. Zussman and G. Sears eds., Change, Governance and Public Management: Alternative Service Delivery and Information Technology (Ottawa: KPMG and Public Policy Forum, May 2000) p. 89.

[12] Auditor General of Canada (OAG) November 1999 Report, Chapter 23, "Involving Others in Governing: Accountability at Risk," para 23.16.

Specifically, accountability mechanisms such as public review and reporting by auditors-general, information disclosure and access to information legislation, complaint and redress mechanisms, and lobbyist registration, which apply in the case of direct service delivery by a government department, may not be applicable to alternative service delivery agents.[13] Legislation establishing these mechanisms may not apply to private sector actors, to whom the delivery of services is transferred,[14] or governmental ASD agencies may be granted explicit exemptions from these requirements.[15]

As a result, the adoption of alternative service delivery models for government services is often characterized in terms of a trade-off between improved performance and efficiency in service delivery on the one hand, and reductions in political control and accountability with respect to these functions on the other.[16]

Therefore, two groups of criteria were established to evaluate service delivery options for drinking water protection in Ontario. These are:

1. Performance

Performance is defined in terms of the potential of alternative service models to achieve the required outcomes, in this case, the improved protection of drinking water quality in Ontario.

2. Governance, Accountability and Democratic Values

Effective governance and accountability structures are essential for entities charged with the protection of public goods such as drinking water, for a number of reasons. Such arrangements are needed to ensure that an entity is actually capable of carrying out the mandate it has been assigned, and to provide for the identification and resolution of problems, ideally before they reach the stage at which actual harm to the public interest occurs.

An accountability framework is also needed to provide for the appropriate assignment of responsibility in the event that something does go wrong in the delivery of public services. This is a basic requirement in any organization, but is particularly important in terms of the ability of the citizens to evaluate the performance of their elected governments.[17] Accountability structures are also central to ensuring that the authoritative and coercive powers of the state are not abused or misused.[18]

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[13] Auditor General of Canada, November 1999 Report, Chapter 23, para 23.87 – 23.115.

[14] See, for example, Alasdair S. Roberts, "Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law," Public Administration Review, Vol. 60, No.4, July/August 2000, pp. 308-320. See Also Auditor-General of Canada, November 1999 Report, Chapter 23, "Involving others in Governing: Accountability at risk."

[15] See Auditor General of Canada, September 1998 Report Chapter 12, "Creation of the Canadian Food Inspection Agency."

[16] See generally N. D'Ombrain "Alternative Service Delivery." See also M. Charih and L. Rouillard "The New Public Management," in M. Charih and A. Daniels, eds., New Public Management and Public Administration in Canada (Ottawa: Institute of Public Administration of Canada 1997); Richard Mulgan, "Comparing Accountability in the Public and Private Sectors," Australian Journal of Public Administration Vol. 59, No. 1, March 2000; Office of the Auditor General of Canada, November 1999 Report, Chapter 23, esp. para 23.15, 23.89.

[17] R. Mulgan, "Accountability: An Ever Expanding Concept?" Public Administration, Vol.78, No.l3, 2000, pp.555-573. Mulgan highlights the importance of ensuring voters can make elected representatives answer for their policies and accept electoral retribution; ensuring legislators can scrutinize actions of officials and make them answerable for their mistakes; and ensuring that members of the public can seek redress from government agencies and officials.

[18] P. Aucoin and R. Heintzman, "The Dialectics of Accountability for Performance in Public Management Reform," in Peters and Savoie, eds., Governance in the Twenty-First Century, p. 260.

Under each of these two general headings, specific evaluative criteria were established on the basis of the review of the general academic literature and governmental policy statements regarding alternative service delivery arrangements, and more specific commentaries on the application of ASD models to environmental protection, particularly drinking water protection. The latter included examples from Canada, the United States, the United Kingdom, New Zealand and Australia, which represented models that might be employed in Ontario.

Each of the options described in section 4 (referred to as "models"), is subsequently evaluated in section 5, using the detailed criteria described below.

3.2 Performance

Five main criteria were developed to assess performance of the models:

1. *Ability of the model to undertake the required functions, defined in terms of:*
   - The degree to which the model can be provided with a mandate and authority sufficient to carry out its assigned functions, particularly in terms of jurisdictional considerations;[19]
   - The degree to which the model provides for the technical and policy capacity to carry out assigned functions;[20] and
   - The adequacy and security of the funding base provided by the model for the carrying out of assigned functions.[21]

2. *The performance of the model relative to the past performance of direct delivery,[22] defined in terms of:*
   - The ability of the model to maintain or improve service in achieving required outcomes, in this case the protection of drinking water quality.[23]
   - The record of the model in terms of level and effectiveness of enforcement activities and compliance rates.[24]
   - The consistency of protection provided by the model in terms of geographic regions, income groups or economic sectors.[25]
   - The degree to which the arrangement provides for information flow to facilitate assessments of performance by governments and the public.[26]

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[19] Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, Attachment 1A.

[20] This question has arisen in particular with respect to delegation of responsibility for implementation of environmental protection measures to local agencies in New Zealand. See "Review of Governance Models in Environmental Management," (Ottawa: Stratos Inc, 2000), p. 9, See also, Australian Productivity Commission, Arrangements for Setting Drinking Water Standards (Canberra: AusInfo, April 2000) Chapter D5.

[21] This is identified as a crucial weakness in the existing direct delivery model in Ontario. See N .D'Ombrain, "Machinery of Government for Safe Drinking Water." (Toronto: Walkerton Inquiry Issue Paper, March 2001), para. 451.

[22] On evaluation models see C. Politt, "How do we know how good public services are?" in Peters and Savoie, Governance in the Twenty-First Century, especially p. 138.

[23] C. Politt, "Justification by Works or by Faith: Evaluating the New Public Management," Evaluation, Vol.1(2), 1995, p.148, Management Board Secretariat, A Guide to Preparing a Business Case for ASD (Toronto: Queen's Printer, 1997), p.20.

[24] Australian Productivity Commission, Arrangements for Drinking Water Standards, Attachment A1.

[25] This criterion addresses equity/equality issues often overlooked in assessments of new public management models. See Politt, "Justification by works or by Faith," p.149.

[26] On problems in this area in New Zealand see Stratos, Inc., "Review of Governance Models in Environmental Management" (prepared for Executive Resource Group, December 2000), p. 3. See also

3. *Ability of the model to deal with the need for interministerial or intergovernmental coordination of policies and activities.*

   Fragmentation of program development and delivery is often identified as a significant risk with alternative service delivery arrangements, as elements of these activities are moved outside of core governmental structures and coordination mechanisms.[27] The need for effective coordination of policy development and implementation has been identified as being particularly important in protecting drinking water sources, as responsibility for this function is often spread among several agencies and levels of government.[28]

4. *The ability of the model to provide for policy learning on the basis of operational experience.*

   The separation of policy-making and policy-implementation functions is often a major feature of alternative service delivery arrangements, with operational functions being transferred to outside or alternative service agencies. This is based on the assumption that policy and administrative functions can be separated, and more efficient, non-traditional mechanisms can be used for program delivery ("rowing") while government retains responsibility for policy development and direction ("steering"). The intention is to provide better public services at lower cost while maintaining democratic control and accountability over the content of public policy.[29]

   However, many commentators have challenged assumptions about the degree to which policy and administrative functions can be clearly separated.[30] In addition, significant risks have been identified with the practice of "de-coupling" policy development from its operational delivery. The separation of policy development from program delivery may limit opportunities for the modification of policy on the basis of operational experience.[31] This is seen as a particularly serious problem where policy advisors need detailed knowledge of operational issues to supply good policy advice.[32] The ability of government to implement new policies may also be limited without the operational capacity to translate policy into action.

   Experience in Ontario suggests that operational and field knowledge is an important consideration in developing drinking water quality policy. Drinking water policies need to be informed by knowledge of facility operations and practices, and of emerging problems and threats in the field. The de-coupling of policy and operations through their assignment to separate entities would be problematic for these reasons.[33]

Mulgan, "Accountability" p.567; Auditor General of Canada, November 1999 Report, Chapter 23, para 23.91 – 23.96.

[27] See, for example, Thomas, "Change, Governance and Public Management: Alternative Service Delivery and Information Technology" in D.Zussman and G.Sears Change, Governance and Public Management (Ottawa: KPMG and Public Policy Forum, 2000), p. 67; Boston, "Organizing for Service Delivery," pp.306-307.

[28] See, for example, Auditor General of British Columbia, Protecting Drinking Water Sources (Victoria 1998/99), esp. chapter 2; See also D'Ombrain, "Machinery of Government for Safe Drinking Water," para 232, 453.

[29] For the classic statement of this approach see D. Osborne and T. Gabler, Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector (New York: Plume Books, 1993).

[30] See, for example, D. Beetham, Bureaucracy (Minneapolis, University of Minnesota Press, 1996), p.94, H. Mintzberg and J. Jorgensen, "Emergent Strategy for Public Policy," Canadian Public Administration 1987, Vol. 30, No.2.

[31] See for example, Thomas, "Change, Governance and Public Management, pp.67 and 75.

[32] Boston, "Organizing for Service Delivery," pp. 296-297.

[33] See generally Ontario Public Service Employees Union, "Renewing the Ministry of the Environment," May 2001. See also D'Ombrain, "Machinery of Government for Safe Drinking Water," para 453.

5. *Cost-Effectiveness*

   While reduced costs and improved efficiency are frequently cited as major goals of alternative service delivery arrangements,[34] for the purposes of this study they are not considered a priority goal for the reform of Ontario's drinking water protection system. The current study emphasizes improved outcomes and accountability and governance as primary considerations. The need to protect drinking water at reasonable cost, however, is recognized as an important factor in the consideration of delivery options throughout the paper.

6. *Other criteria considered but not employed in this study*

   Other results often identified as being major goals of alternative service arrangements were considered to be of limited relevance for of this study. These include:

   - Increased flexibility in human resources management, and administrative and managerial practices.[35]

     Increased flexibility in these areas is potentially problematic in the case of drinking water protection, where consistency of protection and the security of tenure of officials undertaking reporting and enforcement activities is critical.[36]

   - Increased customer and client focus[37]

     In this case, it is unclear who the customer or client of an alternative service arrangement is—drinking water providers or drinking water consumers. In fact, alternative arrangements for highly specialized services to specific clients or regulated entities may increase the likelihood of inappropriately close relationships developing between the regulator and regulated parties.

[34] Management Board Secretariat, Alternative Service Delivery Framework, September 1999 Revision, p.7; Politt, "Justification by Works or by Faith," p.138; Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, Attachment 1A.
[35] Politt, "Justification by works or by faith," p. 139.
[36] D'Ombrain, "Alternative Service Delivery," p.126.
[37] D'Ombrain, "Alternative Service Delivery," p. 100; Boston, "Organizing for Service Delivery," pp.306-307.

3.3 Governance, Accountability and Democratic Values

3.3.1. Governance

1. *A Clear Assignment of Responsibility for Functions*

   A clear assignment of responsibilities is essential to provide authority to act, and accountability for outcomes.[38]

2. *Potential for Conflict of Interest*

   Potential conflicts of interest have been highlighted as a significant risk in alternative service arrangements,[39] particularly for self-management and devolution models.

3. *Independence vs. Ministerial Control*

   Many observers highlight the importance of ministerial involvement and control where coercive state powers or complicated objectives are involved,[40] or where confidentiality, security, equity, and procedural justice considerations are at play.[41] The Ontario Management Board Secretariat identifies a number of functions that are not appropriate for alternative service models due to the need for close political and policy direction. These include:

   - policy and program analysis and development;
   - intergovernmental relations;
   - regulatory proposals and standard setting; and
   - programs with strong requirements for equity and fairness.[42]

   On the other hand, the independence provided to an agency outside of the normal departmental or ministry structure has the potential to minimize political interference in decision making and to emphasize organizational and managerial autonomy and flexibility.[43] For these reasons, arm's-length agencies have been traditionally used for functions such as the protection or apportionment of public goods, the granting of funds, provision of independent advice, or the operation of programs in a commercial environment.[44]

[38] Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, Attachment 1A, D'Ombrain, "Machinery of Government for Safe Drinking Water," para 368.
[39] Management Board Secretariat, Guide to Preparing Business Case for Alternative Service Delivery, (Toronto: Queen's Printer, 1997) pp. 9-10; H. Bakvis, "Pressure Groups and the New Public Management," Charih and Daniels eds., New Public Management and Public Administration in Canada, p. 298 (describes NAVCanada as "the embedding of the interests of the user groups in a self-managed entity sanctioned by the state.); M. Winfield, D. Whorley and S. Kaufman, The New Public Management Comes to Ontario: A Study of the Technical Standards and Safety Authority (Toronto: CIELAP, 2000), esp. chapter III; D'Ombrain, "Machinery of Government for Safe Drinking Water," para 369.
[40] D'Ombrain, "Alternative Service Delivery," p.96.
[41] Boston, "Organizing for Service Delivery," pp.296-297.
[42] Management Board Secretariat, Alternative Service Delivery Framework, p.13.
[43] Boston, "Organizing for Service Delivery," pp.290-292.
[44] D'Ombrain, "Alternative Service Delivery," p.102.

3.3.2. Accountability

4. *A Clear, Single Point of Accountability*

   The agency responsible for service delivery should be accountable to a single higher authority,[45] and mechanisms for the application of sanction for poor performance should be clear.

5. *Responsiveness*

   The model should include structures to ensure that the overall directions of the responsible agency are consistent with the wishes of the public,[46] and that it is responsive to changing demands, trends and risks.[47]

6. *Control and Oversight Mechanisms*

   These are defined in terms of the structures put in place to control and oversee the exercise of power by the state and its agents, and to ensure that authoritative and coercive powers of the state are not abused or misused.[48] The loss of these types of mechanisms has been highlighted as a major concern in alternative service delivery arrangements. With alternative delivery arrangements, functions may be transferred to private actors to which control and oversight mechanisms do not apply, or explicit exemptions may be provided to the alternative service providers.[49] Control and oversight mechanisms include:

   - provision for independent audits of operations, including evaluations of performance (value for money) and public reporting of findings;
   - mechanisms for the resolution of complaints, including provisions for their independent investigation and resolution, through such mechanisms as legislative ombudsmen;
   - the applicability of freedom of information and protection of privacy legislation;
   - the applicability of legislative requirements that considerations such as environmental sustainability or sustainable development be taken into account in decision making, and mechanisms for the independent review of performance in light of these requirements, such as Environmental Commissioners;[50]
   - requirements for the registration of lobbyists interacting with the service delivery agent; [51]
     - requirements that service delivery agents provide business plans and annual reports on their performance; and
     - administrative accountability structures prescribed through legislation and central agency directives in such areas as:[52]

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[45] Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, Attachment 1A.
[46] Mulgan, "Accountability: An Ever Expanding Concept," pp.566-569.
[47] Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, Attachment 1A.
[48] Aucoin and Heintzman, "Dialectics of Accountability for Performance," p.260.
[49] Office of the Auditor General, November 1999 Report, Chapter 23, para 23.87 – 23.115.
[50] See, for example, *The Environmental Bill of Rights*, Ch.28, S.O. 1993. See also R.S.C., c. A-17 *An Act respecting the Office of the Auditor General of Canada and sustainable development monitoring and reporting* 1995, c. 43.
[51] See, for example, the Ontario *Lobbyist Registration Act, 1998*.
[52] It is recognized that increased efficiency through the removal of management procedures established through statutes and directives of this nature is one of the goals of alternative service delivery

- personnel management;[53]
- financial management;[54] and
- language of service.[55]

7. *Legal Accountability*

In addition to the foregoing oversight and control mechanisms, government agencies are also subject to a range of formal, judicially enforceable statutory and common law mechanisms. These rules have developed, in some cases over centuries, to ensure the just and fair administration of laws, policies and programs by government, and for dispute resolution in accordance with the principles of natural justice. As such they also represent important restraints on the arbitrary use of power by the state. However, important questions arise regarding the status of these rights where governmental functions are moved out of direct delivery structures, particularly to private sector actors, to whom they have not traditionally been understood to apply.[56]

For the purposes of this study, legal accountability issues with respect to ASD options are assessed in terms of the following dimensions:

- The applicability of the *Canadian Charter of Rights and Freedoms*[57] to policy decisions made by an entity, and prosecutions undertaken by it. A number of recent cases have explored the degree to which agencies that are delegated "government-like" functions are subject to the *Charter*[58] and the obligations of delegated authorities to respect the *Charter*'s section 8 guarantee against unreasonable search and seizure.[59]
- Public law principles, which generally concern relations between the state and the individual, addressed by administrative law protections, including statutory protections[60] regarding decisions, and the applicability of common-law rights of appeal, fairness and natural justice in decision making.
- The potential **liability** of alternative service delivery agents, and of the government relying upon them to deliver services, particularly with respect to regulatory negligence; and
- The status of prosecutions undertaken by an entity as being on behalf of the Crown or as private prosecutions, and the applicability of Attorney-General's directives to the conduct of prosecutions by the entity.[61]

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arrangements. However it is important to consider that these arrangements are intended to ensure the sound management of public monies, fairness, competence, and consistency in program delivery and the maintenance of the merit principle in the hiring and promotion of personnel.

[53] See, for example *The Public Service Act*, RSO 1990, c.P-47.

[54] See, for example, *The Financial Administration Act*, RSO 1990 c.F-12; *The Treasury Board Act*, SO 1991, c-14; , and *the Management Board of Cabinet Act*, RSO 1990, c.M-1.

[55] See, for example, *The French Language Services Act*, RSO 1990, c.F-32.

[56] See generally Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, especially chapter VI.

[57] Being Part I of the *Constitution Act, 1982*.

[58] See, for example, *Eldridge* v. *British Columbia (Attorney General)* [1998] 1 W.W.R. 50, (1997), 151 D.L.R. (4th) 577 (S.C.C.).

[59] See, for example, *Comite paritaire de l'industrie de la chemise* v. *Potash* (1994), 115 D.L.R. (4th) 702 (S.C.C.).

[60] In the case of Ontario the relevant legislation includes the *Statutory Powers Procedure Act*, RSO 1990, c.S-22 and *The Judicial Review Procedure Act*, RSO 1990, c.J-1.

[61] See Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, pp.61-65.

3.3.3. Democratic Values

8. Facilitation of policy discourse and dialogue

Public debate and input into the formulation and implementation of public policy is an important feature of democratic societies. Different service delivery arrangements may limit, discourage, or even prevent open discussion and debate on matters of public interest.

Requirements for public consultation prior to decision making or the provision of information to the public, for example, may cease to apply when activities are transferred to certain types of alternative service delivery agents.[62] The applicability of public rights of notice and comment regarding proposed regulations, policies and instruments, to request reviews of laws, regulations, policies, and instruments, or to request investigations of alleged contraventions of laws or regulations under the *Environmental Bill of Rights*,[63] would be particularly important in an Ontario context.

Alternative service delivery arrangements may also place particular interests in positions of power to influence policy formulation and implementation relative to other stakeholders or even governments themselves.[64]

[62] See for example, Auditor General of Canada, 1999 Report, Chapter 23, para 23.107.
[63] See, for example, The *Environmental Bill of Rights*, Ch.28, S.O. 1993.
[64] Bakvis, "Pressure Groups and New Public Management," p.298.

3.4 Summary of Evaluative Criteria

Performance	Governance/Accountability/ Democratic Values
1. Ability to Undertake Required Functions • Mandate and authority • Technical and policy capacity • Funding base **2. Performance** • Outcomes • Enforcement Record • Consistency of Protection • Information Flow **3. Interministerial and Intergovernmental Coordination Capacity** **4. Capacity for policy learning on the basis of operational experience** **5. Cost-Effectiveness**	**Governance** 1. Clear Assignment of Responsibility 2. Potential for Conflict of Interest 3. Independence vs. Ministerial Control **Accountability** 4. Clear, Single Point of Accountability 5. Responsiveness 6. Control/Oversight Mechanisms • Audit • Freedom of information • Ombudsman • Lobbyist Registration • Environmental Commissioner • Business plans and annual reports • Administrative accountability • Personnel management • Financial management • Language of service 7. Legal Accountability • *Charter* and Administrative Law Protections • Liability • Prosecutions **Democratic Values** 8. Facilitation of policy discourse and dialogue.

4. Options for Non-governmental and Alternative Service Delivery of Drinking Water Protection

4.1 Introduction

Five alternatives to direct service delivery by a government ministry were examined for the purposes of this study. These were:

- a special operating agency;
- devolution to other levels of government or third parties;
- an independent regulatory commission;
- industry self-management; and
- improved direct delivery.

For each alternative, a definition is provided; examples of the use of the model from Canada, the United States and other jurisdictions are identified; and ways in which the model might be applied to the case of drinking water protection in Ontario are described.

4.2 Options for the Delivery of Drinking Water Protection in Ontario

4.2.1 Direct Delivery (the Base Case)

Definition
Government delivers service (protection of drinking water via regulation and oversight of drinking water providers and source water protection) directly through a single Ministry or combination of Ministries.

Example
Drinking water protection arrangements in Ontario as of May 2001, including provisions of the August 2000 Drinking Water Protection Regulation.

The Model Applied to Drinking Water Protection in Ontario
Functions

- Ministry of the Environment sets policies, standards and regulations related to drinking water, including system design and operation and drinking water quality.
- Ministry approves construction and operation of waterworks and systems.
- Ministry inspects waterworks and systems, investigates potential violations of standards or regulations, and carries out enforcement actions.
- Ministry responds to public complaints about aesthetic aspects of drinking water and responds to incidents involving adverse drinking water quality in conjunction with system operators.
- Ministry provides for public reporting of drinking water quality via drinking water protection regulation.
- Ministry provides training for drinking water system operators.
- Responsibility for source water protection is shared among multiple agencies, including Ministries of Environment, Natural Resources, Municipal Affairs and Housing, Agriculture, Food and Rural Affairs, Northern Development and Mines, and local agencies.

Funding

- Ministry operations are funded through consolidated revenue fund, although cost recovery has been introduced for some approval functions.

4.2.2 Special Operating Agency

Definition

- Government delegates service delivery to an agency operating at arm's length from ongoing operations of the government, but maintains control over the agency.
- Day-to-day operations of the agency are directed by an agency head or board of directors appointed by the government rather than by a Minister.
- Minister remains accountable to legislature for ensuring agency performs duties appropriately.
- Staff remain civil servants appointed under *Public Service Act.* [65]

Examples

- Ontario Human Rights Commission (OHRC)[66]
- Canadian Food Inspection Agency (CFIA)[67]

The Model Applied to Drinking Water Protection in Ontario

Functions

- Agency assumes responsibility for approval of waterworks and water distribution systems, inspection, investigation, enforcement, response to public complaints (in conjunction with system operators), incidence response, and public reporting on drinking water quality and system performance from Ministry of the Environment.
- Ministry of Environment remains responsible for policy, standards and regulations development and oversight and review of agency activities.[68]
- Agency could be responsible for provision of technical assistance and training to operators, although these functions could also be shared with or transferred to Ontario Clean Water Agency (OCWA), which would eliminate potential conflicts re: enforcement and technical assistance roles.
- Responsibilities for source water protection would be unchanged, and continue to be shared between Ministry of the Environment and other Ministries.[69]

Funding

- Funding could be from a combination of general revenues and cost recovery from approvals and inspections as is done with the CFIA.[70]

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[65] As per MBS, Alternative Service Delivery Framework, definitions, p.26.
[66] On the Ontario Human Rights Commission see www.ohrc.on.ca. The Commission is given as an example of a Schedule 1 agency by MBS in its Alternative Service Delivery Framework, p.26.
[67] For a detailed discussion of the Canadian Food Inspection Agency (CFIA) see J. Castrilli, "A Review of Selected Canadian Agencies as Possible Environmental Management System Models in Ontario," (Toronto: Prepared for Executive Resource Group/Ontario Ministry of the Environment, November 2000), pp.8-9; See also Auditor General of Canada, September 1998 Report, Chapter 12 - The Creation of the Canadian Food Inspection Agency.
[68] Delegation of these functions would be contrary to MBS ASD Framework, p.13.
[69] MBS indicates the agency model is not appropriate for functions requiring interagency policy coordination; see MBS, ASD Framework, p.26.
[70] CFIA recovers approximately 12 percent of its operating costs through fees. See Office of the Auditor General, September 1998 Report, ch.12, para 12.16.

4.2.3. Devolution

Definition

Government transfers responsibility for delivering service to

- other levels of government (e.g.,, municipalities, conservation authorities or public health units);
- organizations receiving transfer payments from the province to deliver the service; or
- non-profit organizations that may receive grants from the province to deliver the service. [71]

Examples

Devolution of service delivery in Ontario has taken a number of different forms. In the case of the Ministry of Natural Resources, certain regulatory functions such as inspection, compliance monitoring and reporting have been devolved to the regulated firms and industries. This model has been followed in such areas as forestry, aggregates, petroleum resources, commercial fisheries, fur and baitfish.[72]

The government of Ontario has also devolved certain regulatory functions to other levels of government. Responsibility for the approval and inspection of septic systems was transferred from the Ministry of the Environment to municipal governments by the *Services Improvement Act, 1997*, which came into force in April 1998.[73] Prior to this, Conservation Authorities and Public Health Units had carried out these responsibilities in some areas, under contract with the Ministry of the Environment.[74]

Environmental protection responsibilities have been devolved extensively to local agencies in a number of other jurisdictions, notably New Zealand and the Scandinavian countries. In the case of New Zealand, the national Ministry of the Environment is limited to an advisory and monitoring role, with implementation and enforcement of national legislation and policies being the responsibility of local and regional councils.[75]

The Model Applied to Drinking Water Protection in Ontario

Functions

- Municipalities and private communal system owners would be responsible for inspecting waterworks and water distribution systems, and reporting results to Ministry of the Environment and the public. Regular Ministry inspections of facilities would cease, as is the case for MNR industry self-monitoring models.
- Municipalities and private communal system owners would retain responsibility for drinking water testing and reporting of results under *Drinking Water Protection Regulation,*[76] and would respond to adverse drinking water quality incidents and public complaints.

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[71] MBS ASD Framework, p.23.

[72] See M. Winfield and G. Jenish, Ontario's Environment and the 'Common Sense Revolution': A Four Year Report (Toronto: CIELAP, September 1999), Part IV. See also Appendix 3.

[73] S.O. 1997, c.30. See Schedule B, "Amendments to the *Building Code Act, 1992*, the *Environmental Protection Act* and the *Ontario Water Resources Act*. See also Appendix 2.

[74] See "Status Report of the Transportation and Utilities Sub-Panel" (Letter to the Hon. Al Leach, Minister of Municipal Affairs, from David Crombie, Chair, Who Does What Panel, and William F. Bell, Chair, Transportation and Utilities Sub-panel, August 14, 1996).

[75] See Stratos Inc., "Review of Governance Models in Environmental Management" (prepared for Executive Resource Group, December 2000), pp.19-20.

[76] O.Reg. 459/00.

- Ministry of the Environment would retain responsibility for setting policies and for standards and regulations, approvals, investigation and enforcement actions, as in the MNR model.
- Ministry of the Environment would oversee and monitor inspection and reporting by municipalities and private owners
- Ministry of the Environment could provide technical assistance and training and education, or this function could be contracted to OCWA or private providers.
- Source water protection responsibilities would be unchanged, and continue to be shared between Ministry of the Environment and other Ministries.[77]

Funding

- System operators would fund inspection and reporting functions via property taxes, water bills or membership fees or levies (in case of private systems).
- Ministry of the Environment functions related to approvals, investigations and enforcement, policy and standard setting, and technical assistance and training could be funded through a combination of cost recovery (for approvals and training and technical assistance) and general revenues.

Notes

Devolution to local governments may be a potential model for the approval and inspection of small private communal water systems[78] and private wells as well as septic systems, as it would allow these functions to be conducted by a governmental third party, rather than by regulated parties themselves. These functions could be carried out with provincial support or on a cost recovery basis.

However, gaps in the structure of existing arrangements with respect to septic systems would have to be addressed. This would include the provision of provincial oversight and support through standards setting, training and education of staff; technical support to local agencies; receipt and review of reports from local agencies; and reporting of results to the public. Specialized training for approval and inspection staff would be required combining knowledge of building code, environmental and health issues.[79]

[77] MBS indicates agency model not appropriate for functions requiring interagency policy coordination; see MBS, ASD Framework, p.26.

[78] The Ministry of the Environment estimates there to be approximately 4,500 non-municipally owned, operated or administered communal water works in Ontario. MoE, Proposal for Alternative Service Delivery – Communal Water Works: A Monitored Self-Managed Approach (November 1997) p.7.

[79] This proposal reflects gaps in the current devolution of responsibility for septic systems regarding environmental (OPSEU, "Renewing the Ministry of the Environment," p.62) and health dimensions (comments of George Pasut, Medical Officer of Health, Simcoe County, May 24 Walkerton Inquiry Part II Expert Meeting (p. 30 section 2.3.1., 3rd bullet of "Detailed Notes from Expert Meeting")).

4.2.4 Independent Regulatory Commission

Definition

Responsibility for drinking water protection would be assigned to an independent regulatory body, consisting of an autonomous statutory tribunal, appointed for fixed terms by the Lieutenant-Governor in Council, responsible for approvals and adjudicative functions, and for an administrative agency with staff responsible for inspection, investigation and enforcement functions. Staff would be civil servants appointed under the *Public Service Act.*

Examples

- Ontario Securities Commission [80]
- Niagara Escarpment Commission (NEC)[81]
- National Energy Board (NEB)[82]
- Alberta Energy and Utilities Board (EUB)[83]
- Ontario Water Resources Commission (historical) (OWRC)[84]

The Model Applied to Drinking Water Protection in Ontario

Functions

- Commission would be responsible for approval of waterworks and drinking water distribution systems.
- Commission field staff would undertake inspection, investigation, and enforcement functions.
- Commission would undertake drinking water testing, or oversee testing by operators or third parties.
- Commission would report to public on drinking water quality and drinking water system compliance with provincial requirements.
- Commission would provide structures for responding to public complaints and incidents involving adverse drinking water quality, in conjunction with system operators.
- Commission could establish standards for system construction, operation and maintenance subject to Ministerial and/or Cabinet approval.
- Commission could develop and adopt policies for drinking water protection subject to Ministerial and/or Cabinet approval.
- Ministry of the Environment would retain responsibility for developing drinking water standards.
- Commission may provide technical assistance and training for system operators, although these functions may be best assigned to an agency with non-regulatory functions (e.g., OCWA).
- Commission could be assigned responsibility for source water protection including approval of permits to take water. However, it would need an appropriate mandate,

[80] For a detailed description of the Ontario Securities Commission see Castrilli, "Review of Selected Canadian Agencies" pp. 12-14.

[81] For a detailed description of the role of the Niagara Escarpment Commission See Protecting the Niagara Escarpment, A Citizen's Guide (Toronto: Coalition on the Niagara Escarpment 1998).

[82] For a detailed description of the National Energy Board see Castrilli, " Review of Selected Canadian Agencies," pp. 4-7; Auditor General of Canada, November 1998 Report, Chapter 13.

[83] For a detailed description of the Energy and Utilities Board see M. Griffiths and T. Marr-Laing, When the Oilpatch Comes to Your Backyard: A Citizens' Guide to Protecting Your Rights (Drayton Valley: Pembina Institute for Appropriate Development, February 2001), pp.59-66.

[84] See J. Benidickson, " The Development of Water Supply and Sewage Infrastructure in Ontario, 1880-1990s: Legal and Institutional Aspects of Public Health and Environmental History" (Toronto: Walkerton Inquiry Background Paper, February 2001).

capacity and tools, possibly including veto over approvals of activities affecting water quality or quantity (e.g., approvals under the *Planning Act*, *Aggregate Resources Act*, and *Mining Act*), to be fully able to carry out source protection functions.
- The Commission could be mandated to undertake research on threats to drinking water quality and supply.

Funding
- Approvals and inspections could occur on a cost-recovery basis, as the NEB does. However, funding from a consolidated revenue fund would be required for other functions.

Notes

The scope of the mandate of a regulatory commission is the key issue. Options include:
- Narrow mandate: approvals, inspection, enforcement and reporting regarding waterworks and systems within a provincially established legislative and policy framework (e.g., NEC model), with Ministry of the Environment retaining policy, standards and source protection functions.
- Intermediate mandate: approvals, inspection, enforcement and reporting functions; policy and system standards development functions subject to Ministerial and/or Cabinet approval, with the role on source protection limited to advice (e.g., NEB model).
- Broad mandate: approvals, inspection, enforcement, and reporting; policy and standards development (subject to Ministerial and/or Cabinet approval and appeal); source water protection, including approval of permits to take water and possibly with veto over approvals by other agencies affecting source water quality and quantity (e.g., EUB model). Ministry of the Environment role regarding drinking water becomes very limited, similar to the former Ministry of Energy and Ontario Energy Board relationship.

4.2.5 Delegated Administrative Authority and Self Management

Definition

- Government delegates authority for administering specified legislation, regulations and standards (e.g., approvals, inspection and enforcement) to a non-profit corporation with a majority of its directors being representative of the regulated sector (e.g., in the case of drinking water, municipalities and private communal system owners), and a minority being Ministerial appointees.[85]
- Staff of the corporation are not civil servants.
- In some cases, standards and policy development have been delegated to the corporation, subject to Ministerial or Cabinet approval (e.g., ESA).
- The corporation is self-financing through the recovery of fees for service.

Examples

Ontario Delegated Administrative Authorities (DAAs):

- Technical Standards and Safety Authority[86]
- Electrical Standards Authority[87]

Alberta Delegated Administrative Organizations (DAOs):

- Petroleum Tank Management Association of Alberta[88]
- Alberta Boiler Safety Association [89]

The Model Applied to Drinking Water Protection in Ontario

Functions

- Authority would approve waterworks and systems.
- Authority would conduct inspections and investigations and carry out enforcement actions.
- Authority would oversee drinking water testing by operators or third parties.
- Authority would report on drinking water quality (in combination with system operators under Drinking Water Regulation) and system compliance with provincial standards.
- Authority would provide mechanisms to respond to complaints about drinking water quality and adverse drinking water incidents, in conjunction with operators and Ministry of the Environment.
- Authority could have responsibility for development of standards for system construction, operation and maintenance, subject to Ministerial and/or Cabinet approval, as is the case *de facto* with TSSA and *de jure* with ESA.[90]

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[85] MBS ASD Framework p.24.
[86] See Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, Castrilli, "Review of Selected Canadian Agencies" pp.14-17.
[87] See Appendix 4.
[88] See Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, pp.8-12, Castrilli, "Review of Selected Canadian Agencies, pp. 10-11.
[89] Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, pp.12-15; Auditor-General of Alberta, 1996-97 Annual Report – Labour Chapter, Auditor-General of Alberta, 1997-98 Annual Report – Labour Chapter.
[90] Re TSSA see Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, pp 32-34. Re: ESA, see Appendix 4 and Administrative Agreement between Her Majesty the Queen in Right of Ontario and Electrical Safety Authority, dated March 1999. Note that these arrangements are contrary to the MBS Alternative Service Delivery Framework, p.13.

- Authority could provide technical assistance and training to operators on cost-recovery basis, although this may conflict with regulatory role and may be best assigned to OCWA.
- Ministry of the Environment would retain responsibility for development and approval of drinking water standards, and overall drinking water policies.
- Ministry of the Environment would need to oversee and monitor authority performance,[91] and would require retained capacity to do so.
- Source water protection responsibilities would be unchanged, and continue to be shared between Ministry of the Environment and other Ministries.[92]

Funding

- As for existing DAA/DAO models, approvals, inspection, training and technical assistance functions would be funded on a cost-recovery basis.
- General revenues would be required for Ministry of the Environment policy, oversight and monitoring functions.

4.2.6 Improved Direct Delivery

Rationale for Inclusion

Many commentators on alternative service delivery highlight the point that significant improvements in performance can often be achieved without major structural reforms that challenge existing constitutional, political and administrative values.[93] It may not be necessary, for example, to transfer the delivery functions of departments to separate, stand-alone arm's-length agencies in order to improve service delivery.[94]

Definition

Options for the improvement of service delivery by an existing Ministry can include such measures as:[95]

- improved internal management and organization;
- new services and methods of delivery;
- improved standards, quality management, and performance monitoring;
- closer cooperation and partnerships between organizations;
- funding changes;
- use of information technology; and
- new regulatory initiatives.

Examples

A central feature of the recommendations regarding drinking water protection arising from such sources as the Australian Productivity Commission,[96] the British Columbia Auditor General,[97] and research commissioned by the Walkerton Inquiry[98] has been the need to reduce the fragmentation of responsibility and accountability in the field. The Provincial

[91] See Comments of the Auditor General of Alberta, 1996-97 Annual Report – Labour.
[92] MBS indicates agency model not appropriate for functions requiring interagency policy coordination, MSB, ASD Framework, p.26.
[93] See Thomas, "Change, Governance and Public Management," p.70.
[94] Boston, "Organizing for Service Delivery," p.309.
[95] Boston, "Organizing for Service Delivery", pp.300-301.
[96] Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, p.67.
[97] Office of the Auditor General of British Columbia, Protecting Drinking Water Sources.
[98] D'Ombrain, "Machinery of Government for Drinking Water Protection," para 232.

Auditor[99] and Environmental Commissioner[100] have also highlighted this problem in Ontario, particularly with respect to groundwater protection.

The establishment of a lead drinking water agency is a key feature of institutional arrangements in other jurisdictions. In New Jersey[101] and England and Wales, [102]offices or inspectorates with specific statutory mandates related to drinking water protection have been established within environment departments. This provides a clear institutional focus within government for the drinking water protection function. The statutory designation of officials as Provincial Drinking Water Coordinators within the Ministries of Environment, Lands and Parks, and of Health is a major feature of the British Columbia *Drinking Water Protection Act*, enacted in April 2001 as well.[103]

The British Columbia statute also requires that local medical officers of health designate drinking water officers,[104] and that local authorities develop and implement source water assessment and protection programs.[105]

The Model Applied to Drinking Water Protection in Ontario

Functions

- The Ministry of the Environment would retain responsibility for setting drinking water standards, policies and regulations.
- New legislation would designate the Ministry of the Environment as the lead agency with respect to drinking water protection, including source water protection, with the support of the Ministry of Health.
    - Other provincial agencies with mandates affecting drinking and source waters would be required to cooperate with and support the Ministry of the Environment in the performance of its drinking and source water protection mandates.
    - The positions of Provincial Drinking Water Coordinators would be designated within the Ministries of Environment and Health at Director level or higher. The Provincial Drinking Water Coordinator within the Ministry of the Environment would lead an Office of Drinking Water Protection within the Ministry.
- The Ministry would be provided with the legislative tools needed to implement its source protection mandate including:
    - The elimination of exemptions for agricultural activities from environmental protection legislation.[106]
    - Independent rights of comment and appeal on land use decisions under the *Planning Act*, and other approvals, such as those under the *Aggregate Resources Act*, *Mining Act*, and *Public Lands Act* that may affect the quantity or quality of sources of drinking water.
- The Ministry of the Environment would retain responsibility for approvals of waterworks and systems.

[99] Office of the Provincial Auditor 1996 Annual Report, pp.121-124, 1998 Annual Report, p.273.
[100] Environmental Commissioner of Ontario, 1995 Annual Report, p.57, 1997 Annual Report, p.68.
[101] For a discussion of the role of the Bureau of Safe Drinking Water in the New Jersey Department of Environmental Protection see Tragedy on Tap: The Need for an Ontario *Safe Drinking Water Act* (Toronto: Canadian Environmental Law Association and Concerned Citizens of Walkerton, May 2001), Vol. II, pp.65-68
[102] For a discussion of the role of the Drinking Water Inspectorate within the Department of Environment, Transport and Regions, see Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, pp.281-292. See also www.dwi.detr.gov.uk.
[103] Bill 20, *Drinking Water Protection Act 2001*, s.4.
[104] Bill 20, *Drinking Water Protection Act 2001*, s.3.
[105] Bill 20, *Drinking Water Protection Act 2001*, Part 3.
[106] See, for example, *Environmental Protection Act*, R.S.O. 1990, c.E-19, s.14(2).

- The Ministry of the Environment would conduct inspections and investigations and carry out enforcement actions, employing a more "appropriate, aggressive and timely" [107] approach.
- The Ministry of the Environment would provide drinking water testing, or would oversee testing by system operators or third parties.
- The Ministry would maintain and strengthen systems for responses to public complaints about drinking water quality and incidents involving adverse drinking water quality, in conjunction with system operators and local health units.
- The Ministry would report to the public on the state of compliance of drinking water system operators with provincial standards and on drinking water quality.[108]
- The Ministry would conduct research on emerging threats to drinking water quality and supply and their protection against these threats.

Role of the Ontario Clean Water Agency

- The delivery of technical assistance and operator training would be provided through the Ontario Clean Water Agency, to eliminate potentially conflicting roles within the Ministry.
- OCWA would be mandated to carry out and support research on drinking water protection and treatment systems and technologies.

Drinking Water Advisory Committee

- An independent advisory committee on drinking water, with appropriate expertise, would be established to advise the Minister on standards and source water protection issues and to prepare an annual report on the state of drinking water and its sources in Ontario.

Roles of Local Agencies

Private Communal Systems, Wells and Septic Systems

- Approvals and inspections for small private communal systems and private wells, as well as septic systems could be delegated to local agencies (e.g., health units) operated either with financial support from the province or on a cost-recovery basis.
- Specialized training in health, environmental and engineering (building code) dimensions of these systems would need to be provided to local agency staff, and appropriate provincial oversight, technical support and reporting structures established. Such structures are absent in the current arrangements regarding the approval and inspection of septic systems.

Drinking Water and Source Water Protection

- Regional coordinators for drinking water-related functions could be established within local health units as in the British Columbia *Drinking Water Protection Act*.
- Local authorities could be required to develop and implement source assessment and protection programs, with the technical and financial support of the provincial government, as in the British Columbia legislation.

Funding and Resources

- The province should provide an adequate and secure resource base to support the performance of these functions by provincial and local agencies.

In the next section of this report, each of the six potential models for institutional arrangements for drinking water protection is evaluated against the criteria identified in section 3.

[107] Office of the Provincial Auditor, Special Report on Accountability and Value for Money (Toronto: Queen's Printer, October 2000), p.120.
[108] Partially provided for via Ontario Regulation 459/00.

5. Evaluation of Models Against Criteria

In the following tables, each of the six potential models for drinking water protection is assessed against the evaluative criteria outlined in section 3. In the first group of tables, the models are evaluated against performance criteria, and in the second group, they are assessed against criteria for governance, accountability and democratic values.

The evaluative commentaries are based on documented current practice and experience with the use of models in Ontario or other jurisdictions, and independent evaluations of examples of the models undertaken by Auditors-General, legislative ombudsmen, academics, and non-governmental organizations as cited.

Evaluation Tables: Performance Criteria

Model	Ability to Undertake Function	Performance and Outcomes	Interagency Issue Capacity and Policy Learning Capacity	Cost-Effectiveness
Direct Delivery **Example:** Ontario Ministry of the Environment, May 2001	**Authority/Scope of Mandate:** Strong legislative authority re: water works approvals and regulation. Significant gaps in existing authority and role regarding source protection[1] (e.g., agricultural waste exemptions from EPA,[2] reduced role in land use planning post-Bill 20[3]). **Policy/Technical Capacity:** Strongest among existing agencies, but significant gaps have emerged since 1995 as a result of budgetary reductions in areas of policy and standards development, monitoring and inspection [4] **Funding Security:** Key weakness is vulnerability of budget.[5] Current level of activity re: drinking water may be at expense of other Ministry functions.	**Outcomes:** Significant failures regarding drinking water protection (e.g., Walkerton), major gaps re: small sources,[6] and oversight role generally.[7] **Consistency of Protection:** Some evidence re: regional variations in protection, staff allocations not in accordance with regional needs.[8] **Enforcement:** Historically not strong re: drinking water.[9] Collapse of inspection and enforcement effort post-1995 documented by Provincial Auditor in 2000 Report.[10] **Information Flow:** Drinking Water Surveillance Program. Information flow fell off post-1995, improved with August 2000 Drinking Water Regulation.	**Interagency Capacity:** As full Ministry, Ministry is present on Cabinet committees and consulted routinely in government policy development processes. Capacity to affect horizontal issues limited by restricted role in land-use planning[11] and changes to Environmental Assessment Process.[12] **Policy Learning Capacity:** Operational and policy functions present within Ministry. Opportunities for policy learning on basis of available operational experience.	Costs could not be reduced further without creating additional gaps.
Overall Assessment	Key weaknesses are lack of adequate source protection mandate, lack of clear institutional focal point on drinking water, and vulnerability of budget.	Significant gaps re: drinking water quality	Institutional capacity for both horizontal policy coordination and policy learning on basis of operational experience.	Current funding levels below what is required to carry out function. Other models transfer costs elsewhere but do not reduce them directly.

Model	Ability to Undertake Function	Performance and Outcomes	Interagency Issue Capacity and Policy Learning Capacity	Cost-Effectiveness
Agency **Examples:** Ontario Human Rights Commission (OHRC) Canadian Food Inspection Agency (CFIA)	**Authority/Scope of Mandate:** Authority is a function of the mandate provided. Typically does not include horizontal issues such as source water protection. **Policy/Technical Capacity:** Function of adequacy of funding base. Agencies generally seen as means of strengthening focus on technical expertise.[13] **Funding Security:** In Ontario typically funded out of Consolidated Revenue Fund; fees and revenues collected are returned to fund.[14] Agencies have had budgets reduced significantly since 1995.[15] CFIA is funded through combination of budgetary allocation and cost recovery (12%of total budget).[16]	**Outcomes:** Generally successful in specialized functions. Administrative problems have been highlighted in OHRC for more than a decade.[17] Significant problems with Agency performance in UK (Prisons, Child Support)[18] and New Zealand.[19] Concerns re: prioritization of health protection vs. trade and economic concerns at CFIA.[20] **Consistency of Protection:** No evidence available re: variations. **Enforcement:** Note issue of pattern of very close relations with regulated industries in highly specialized agencies (capture).[21] **Information Flow:** Potentially reduced relative to within a department. Reporting tends to occur on an annual basis.	**Interagency Capacity:** Removed from regular interministerial discussions, especially at senior levels. Rely on Minister, whose primary concern is to present interests of own department in Cabinet processes. Would need overwhelming mandate to address this issue effectively (unlikely to be granted in Ontario – contrary to ASD Framework).[22] **Policy Learning Capacity:** Agency likely used to deliver operational activities, while policy and standards functions remain with Ministry. De-coupling would reduce opportunities for policy learning on basis of operational experience.	Rationale for Agency model has potential to increase efficiency via increased management autonomy and flexibility, through removal of centrally prescribed management, administrative and personnel requirements.[23] Actual evaluations of these outcomes are very limited.[24] Severe and persistent efficiency problems identified in some agencies (e.g., OHRC).[25] Oversight and backstopping capacity required by Ministry of the Environment to ensure protection. Transfer of drinking water functions to agency would weaken overall capacity of Ministry of the Environment.
Overall Assessments	Mandates typically narrow; funding security may be no better than direct delivery.	No evidence that performance is reliably better than direct delivery model	Horizontal policy coordination capacity limited relative to direct delivery. Potential loss of operations-based policy learning if operations functions assigned to agency.	Theoretical potential to be more efficient, but actual evidence very limited.

Model	Ability to Undertake Function	Performance and Outcomes	Interagency Issue Capacity and Policy Learning Capacity	Cost-Effectiveness
Devolution **Examples:** Ontario Septic Systems Ontario Natural Resources Industries New Zealand Drinking Water/Environment	**Authority/Scope of Mandate:** Typically very narrow and not designed to address horizontal and cross-agency issues, such as source water protection. **Policy/Technical Capacity:** Significant gaps in local agency capacity (policy and technical) identified in New Zealand.[26] Concerns over capacity re: municipal regulation of septic systems in Ontario, especially health and environmental expertise vs. building code aspects.[27] **Funding Security:** Uncertain. Assignment of adequate resources likely a function of the level of ongoing oversight provided by province.	**Outcomes:** Concerns re: effectiveness of self-monitoring for forestry raised by Provincial Auditor in Ontario.[28] Concerns re: septic systems regulation in Ontario raised by health units, OPSEU.[29] Difficulties in assessing outcomes in NZ due to lack of information flow to Ministry of the Environment.[30] **Consistency of Protection:** Significant potential for variation as a function of local will and resources. **Enforcement:** Levels of enforcement activity to audit results typically limited by resource limitations within delegating agencies.[31] **Information Flow:** Evidence of significant problems. Inadequate information flow for assessment in New Zealand,[32] Ontario septics,[33] MNR self-monitoring arrangements.[34]	**Interagency Capacity:** Very limited. In Ontario examples, delivery agencies are not part of provincial government. **Policy Learning Capacity:** Very limited, as operations and field knowledge and observations are de-coupled from policy and oversight functions retained by Ministry.	Reduced costs to regulatory agencies, but significant loss of direct knowledge of what is happening in the field. Inspection costs transferred in theory to delegated industries or municipalities rather than eliminated; long-term environmental costs of devolution (e.g., less effective oversight of septics policy, monitoring) may increase. Requires significant provincial oversight and backstopping capacity to ensure effectiveness.
Overall Assessment	Significant weaknesses re: jurisdiction and scope of mandate, especially re: source water protection, capacity, funding base.	Evidence of problems with performance of delegated agencies, although data for assessment often lacking	Little or no capacity for horizontal policy coordination with senior levels of government; significant potential problems associated with de-coupling policy and operations.	Transfers revenue raising and costs to delivery agents; may require increased costs for oversight and monitoring by delegating agencies, eliminating supposed advantage of cost saving.

Model	Ability to Undertake Function	Performance and Outcomes	Interagency Issue Capacity and Policy Learning Capacity	Cost-Effectiveness
Independent Regulatory Commission **Examples:** National Energy Board (NEB) Ontario Securities Commission Niagara Escarpment Commission (NEC) Alberta Energy and Utilities Board (EUB)	**Authority/Scope of Mandate:** Authority is a function of mandate. Strong mandate to deal with cross-agency issues (like water source protection) unlikely. **Policy/Technical Capacity:** Typically high in specialized field. Also a function of funding security **Funding Security:** Boards and Commissions can have some cost recovery (e.g., NEB)[35] but typically also are partially funded through general revenues and have seen budgetary reductions (e.g., NEC)[36]	**Outcomes:** Boards and Commissions have stronger record as allocation agents than public good protection agents. (Note Auditor-General on weak NEB record as environmental regulator).[37] **Consistency of Protection:** Generally high, although partially a function of local capacity to intervene in formal regulatory processes.[38] **Enforcement:** Variable. Issue of close ties to regulated industries. Note Auditor-General comments on weak enforcement efforts of NEB.[39] **Information Flow:** Boards and Commissions tend to keep information to themselves, limited sharing with other agencies and departments.	**Interagency Capacity:** Limited without very strong mandate and capacity (e.g., EUB) **Policy Learning Capacity:** Potentially available, as mandate may combine policy and regulation development role, along with approval and inspection and enforcement functions. Functions could also be de-coupled, e.g., if operations (approvals, inspection and enforcement) are attached to Commission, and policy development remains with Ministry.	No evidence of being better or worse than typical government department. Staff remain civil servants, although typically with more administrative and management flexibility than department. Transfer of drinking water functions to Commission would weaken overall capacity of Ministry of the Environment.
Overall Assessment	Potential for appropriate jurisdiction and mandate; high specialized technical/policy capacity required; funding remains vulnerable.	Performance results mixed, especially with respect to protection of environment.	Limited capacity re: horizontal policy coordination without overwhelming cross-agency mandate. Opportunity for experience-based policy learning is a function of degree of de-coupling of operations and policy functions between Commission and Ministry.	Evidence of performance relative to direct delivery limited. No evidence of greater efficiency.

Model	Ability to Undertake Function	Performance and Outcomes	Interagency Issue Capacity and Policy Learning Capacity	Cost-Effectiveness
Self-Management/ Delegated Administrative Authority (DAA) **Examples:** Technical Standards and Safety Authority (TSSA) Electrical Safety Authority (ESA) Petroleum Tank Management Association of Alberta (PTMAA) Alberta Boiler Safety Association (ABSA)	**Authority/Scope of Mandate:** Operations and policy split, with authority having operational mandate only. Source water protection issues unlikely to be addressed through DAA. **Policy/Technical Capacity:** Technical capacity high, policy capacity also present in Ontario Agencies. Partially function of agency scale. (Some Alberta DAOs may be too small to have adequate technical/policy capacity).[40] **Funding Security:** Self-funding through fees for inspections and approvals. Funding security a major rationale for Ontario DAAs.[41]	**Outcomes:** Limited assessments to date. Available data indicate no significant change from pre-delegation period (TSSA shows steady improvement pre-dating delegation in 1997).[42] Alberta boiler inspection backlog worsened after delegation to ABSA.[43] **Consistency of Protection:** No evidence to date of regional or sectoral variations, although fragmentation of functions among different, small DAOs in Alberta raises possibility. TSSA has multiple sectoral coverage on Board, which may limit degree to which any given sector may be favoured. **Enforcement:** Limited records to date. Indication of "softer" approach by TSSA.[44] **Information Flow:** Fairly strong with TSSA, although capacity of MCBS to assess and oversee limited.[45] Significant problems identified with Alberta DAOs by Auditor[46] improved by 1997-98 but still gaps.[47]	**Interagency Capacity:** Very limited relative to Ministry. Relies on Ministry and Minister to represent interests and concerns in interministerial and Cabinet processes **Policy Learning Capacity:** Limited by policy and operations split underlying model. DAA is operations, MCBS is policy	Marginal loss of efficiency in case of TSSA. Had to recreate administrative services previously provided by MCCR (finance, personnel, legal). Additional revenues have gone to these purposes.[48] Requires significant provincial oversight and backstopping capacity to ensure protection.[49] Transfer of drinking water functions to DAA would weaken overall capacity of Ministry of the Environment.
Overall Assessment	Strength of model is secure funding base for activities, but is limited to functions for which cost-recovery is possible (e.g., approvals, inspections)	No evidence of improved performance. Performance has remained largely as it was pre-delegation.	Very limited capacity for horizontal policy coordination and experience-based policy learning, due to de-coupling policy from operations (with some exceptions).	Marginal decrease in efficiency due to need to provide for separate administrative infrastructure. Potentially significant costs in provision of adequate oversight by Ministry.

Model	Ability to Undertake Function	Performance and Outcomes	Interagency Issue Capacity and Policy Learning Capacity	Cost-Effectiveness
Improved Direct Delivery **Examples:** New Jersey Bureau of Drinking Water Drinking Water Inspectorate (England) BC Auditor-General's Recommendations and Drinking Water Protection Act.	**Authority/Scope of Mandate:** Key element would be stronger, more comprehensive mandate, especially, re: source protection, and establishment of institutional focal point for drinking water protection. **Policy/Technical Capacity:** Strengthening of policy and technical capacity would be key goal. **Funding Security:** Remains vulnerable as before without secure revenue base.	**Outcomes:** Improved outcomes expected as a result of strengthened mandate, especially re: source protection. **Consistency of Protection:** Strengthened via improved public reporting. **Enforcement:** Strengthened via improved public reporting. **Information Flow:** Improved via Drinking Water Protection Regulation and other measures linking MoE to other ministries, decision making.	**Interagency Capacity:** Strengthening via strong statutory "lead" mandate on both drinking water and source water protection would be key element. **Policy Learning Capacity:** Strong provided operations not split from policy functions.	As for existing Ministry.
Overall Assessment	Funding security remains key vulnerability	Improved performance is key expectation	Strongest option for horizontal policy coordination, strong policy learning capacity as well.	As for base case.

Evaluation Tables: Governance, Accountability and Democratic Values

Model	Governance	Accountability	Democratic Values
Direct Delivery **Example:** Ontario Ministry of the Environment, May 2001.	**Assignment of Responsibility:** Clear responsibility re: regulation of drinking water providers on part of Ministry via OWRA. Responsibility re: source water protection divided among several agencies (MoE, MNR, MMAH, OMAFRA, MNDM, MTO). **Conflict of Interest:** Transfer of drinking water operations to OCWA has partially addressed issue, although D'Ombrain raises concerns re: Board structure (made up of deputy ministers).[50] **Independence and Ministerial Control:** Very strong Ministerial control.	**Clarity and Mechanisms:** Very Clear. Minister of the Environment responsible for regulation of drinking water providers. Answerable to Legislature and ultimately the electorate. Opportunities for legislative oversight of Ministry activities via Committees and estimates.[51] **Responsiveness:** Clear capacity of Minister and government to give policy direction, although actual direction not always made available to public (e.g., delivery strategies) **Oversight Mechanisms:** Provincial Auditor, Environmental Commissioner/EBR, Freedom of Information, Ombudsman, Integrity Commissioner apply. Central financial, administrative, management and personnel requirements apply. **Legal Accountability:** *Charter,* all admin law protections apply, potentially liable for regulatory negligence, although limited by Bill 57 provisions, prosecutions subject to Attorney-General's Directives.	**Facilitates Policy Discourse:** EBR requires public notice and comment re: policy, regulations, legislation, and approvals. Has been eroded through adoption of AERs,[52] devolution of functions to other agencies (e.g., for septic systems). Drift back towards close relationships with certain economic sectors in recent years (e.g., REVA).[53] Dissolution of Advisory Committees[54] has also reduced opportunities for informed discourse re: policy needs and initiatives.
Overall Assessment	Key weakness is weak and diffused mandates regarding source protection.	Clear and extensive accountability framework.	General duty to treat all stakeholders equally, although there has been erosion of public consultation requirements and drift back towards close relationships with certain economic sectors in recent years (e.g., REVA)

Model	Governance	Accountability	Democratic Values
Agency **Examples:** Ontario Human Rights Commission Canadian Food Inspection Agency	**Assignment of Responsibility:** Typically founding legislation provides clear, narrowly defined delineation of responsibilities. **Conflict of Interest:** Concern has arisen re: conflicting mandate at CFIA.[55] **Independence and Ministerial Control:** Removed from direct ministerial control. Day-to-day direction via agency head and board.	**Clarity and Mechanisms:** Potential for lack of clarity re: responsibilities of Minister, Agency Head and Board (if part of structure). Accountability of agency head to legislature and electorate is indirect, via Minister. Problems with assignment and acceptance of responsibility for problems (UK, NZ).[56] Typically agency head serves at pleasure (e.g., CFIA, OCWA). **Responsiveness:** Ministerial capacity to give policy direction, although agencies tend to set own direction. Requires considerable effort to alter. **Oversight Mechanisms:** Audit, Freedom of Information requirements usually apply. Central financial, administrative, management and personnel requirements may apply (Typically yes in Ontario,[57] varies with agency federally (e.g., CFIA Staff not under *Public Service Act*).[58] **Legal Accountability:** *Charter,* all admin law protections likely apply, potentially liable for regulatory negligence, although limited by Bill 57 provisions, prosecutions subject to Attorney-General's Directives.	**Facilitates Policy Discourse:** Agency less visible and accessible than Minister.[59] Tendency for highly specialized agencies to be strongly responsive to particular client groups (capture/clientele pluralism).[60]
Overall Assessment	Unlikely to be assigned strong source protection mandate, use of model is typically for narrowly defined functions.	Some loss of clarity relative to direct delivery re: role and responsibilities of board and agency heads.	Specialized functions result in tendency toward close relationships with particular client groups, risking conflict, bias, or appearance of bias.

Model	Governance	Accountability	Democratic Values
Devolution **Examples:** Ontario Septic Systems Ontario Natural Resources Industries. New Zealand Drinking Water/Environment	**Assignment of Responsibility:** Typically clearly defined and limited mandate. **Conflict of Interest:** Significant potential for conflicts when industry and operators self-monitor and self-report. **Independence and Ministerial Control:** Significant loss of ministerial control, transfer to agents in potential conflict of interest situations. Devolution of septic system functions to municipal officers disconnects daily decision making from provincial oversight.	**Clarity and Mechanisms:** Unclear re: responsibility of industry, operators and owners vs. Ministry. No capacity to withdraw self-monitoring regime if performance inadequate unless backstopping capacity maintained by Ministry **Responsiveness:** Limited, given government reliance on private or municipal actors to deliver key functions. **Oversight Mechanisms:** Provincial audit authority does not apply to agents carrying out functions, although oversight activities by province can be audited.[61] Status of reports under Freedom of Information legislation uncertain.[62] Self-applied,self-monitored "checklist" approach means greater likelihood of lower quality, less quantity information supplied by industry to MNR. **Legal Accountability:** Uncertain.[63] Issues of timeliness of reporting of violations have arisen with MNR arrangements.[64]	**Facilitates Policy Discourse:** No; places regulated entities carrying out functions in significant power position vis a vis all other stakeholders (in case of Ontario natural resources industries). Successful resistance to application of EBR provisions in case of MNR, aggregates regulation functions.[65]
Overall Assessment	Significant potential for conflict of interest.	Significant concern re: clarity of responsibilities and mechanism for sanction for non-performance. Uncertainties re: applicability of oversight mechanisms.	Places regulated entities in significant power position relative to other stakeholders (in case of Ontario natural resources industries).

Model	Governance	Accountability	Democratic Values
Independent Regulatory Commission **Examples:** Ontario Securities Commission National Energy Board Niagara Escarpment Commission Alberta Energy and Utilities Board	**Assignment of Responsibility:** Typically clearly defined mandate and responsibilities. **Conflict of Interest:** Limited. Usually very strong conflict of interest rules for Commissions although Commission members often have ties to regulated industries due to need for expertise. **Independence and Ministerial Control:** High degree of agency independence.	**Clarity and Mechanisms:** Board and Commission members clearly responsible for decisions and consequences. However, they are insulated from electoral retribution. **Responsiveness:** Limited; typically policy direction to Board flows from legislation only. **Oversight Mechanisms:** Audit authority, Freedom of Information, Ombudsman, generally applicable. Staff are public servants. Administrative and/or financial requirements apply. **Legal Accountability:** Requirements re: procedural justice, fairness, appeal, *Charter* applicable. Regulatory negligence applicable Prosecutions subject to A-G directives.	**Facilitates Policy Discourse:** Limited. Boards traditionally speak to limited policy community. Historical problem of regulatory capture with specialized agencies.[66] Require mechanisms such as intervenor funding to provide capacity of community and public interest intervenors to counter influence of regulated entities.[67]
Overall Assessment	Strength lies in degree to which model insulates decision making from political considerations	Generally strong, although boundaries of accountability between Minister and Commission uncertain.	Tendency towards regulatory capture due to highly specialized nature of functions; this impact can be offset somewhat by mechanisms to support community and public interest intervenors.

Model	Governance	Accountability	Democratic Values
Self-Management/ Delegated Administrative Authority **Examples:** Technical Standards and Safety Authority Electrical Safety Authority Alberta Petroleum Tank Management Board Alberta Boiler Safety Association.	**Assignment of Responsibility:** Scope of mandate clear, policy direction and policy/operations split less certain. **Conflict of Interest:** High potential, given role of regulated industries on Boards of Directors. **Independence and Ministerial Control:** High level of independence, particularly in absence of clear legislative or policy direction in founding documents.	**Clarity and Mechanisms:** Significant uncertainty re: accountability of Minister, Board and CEO for outcomes. No mechanisms for Minister to remove industry-appointed directors, no link between directors and electorate. **Responsiveness:** Limited Ministerial capacity to give policy direction, due to lack of policy capacity within Ministry. **Oversight Mechanisms:** Audit, Freedom of Information, Lobbyist Registration Ombudsman not applicable under Ontario models. EBR applicable by special arrangement (TSSA). Administrative and financial requirements not applicable.[68] Typically, requirements for business plans and annual reports in delegation agreements.[69] **Legal Accountability:** [70]Significant uncertainties. Administrative law protections uncertain; although recent jurisprudence (*Comité, Elbridge* cases) suggest *Charter* protections will apply. Status re: regulatory negligence uncertain, may not have policy defence. Status of prosecutions in TSSA major issue. Crown Policy Manual not applicable.	**Facilitates Policy Discourse:** Role of industry on board puts it in unique position to influence authority direction. Reinforces ties between regulator and regulated entities.
Overall Assessment	Significant conflict of interest concerns.	Significant gaps in accountability framework.	Places regulated sectors in unique position to influence policy and operations.

Model	Governance	Accountability	Democratic Values
Improved Direct Delivery **Examples:** New Jersey Bureau of Drinking Water Drinking Water Inspectorate (England) BC Auditor-General's Recommendations and *Drinking Water Protection Act*.	**Assignment of Responsibility:** Clarification of responsibilities and mandates, especially regarding source protection, a key goal. **Conflict of Interest:** Limited potential, although OCWA relationship still a concern.[71] **Independence and Ministerial Control:** High level of Ministerial control	**Clarity and Mechanisms:** Minister is responsible to legislature, electorate for performance. Ministry of the Environment given lead role, and institutional focus re: drinking water. **Responsiveness:** Clear capacity to give direction **Oversight Mechanisms:** Audit, Freedom of Information, Ombudsman, EBR, Administrative, Lobbyist Registration requirements applicable. Improved reporting would be key feature. **Legal Accountability:** *Charter*, Administrative law, regulatory negligence, Crown prosecutions requirements fully applicable.	**Facilitates Policy Discourse:** EBR applicable. Advisory Committee would significantly strengthen opportunities for discussion and quality of policy discourse.
Overall Assessment	Governance framework strengthened through clarification of lead responsibilities for drinking water and source water protection.	Accountability may be improved relative to current direct delivery through clarification of mandates and responsibilities, and better reporting.	May strengthen policy discourse, particularly through advisory committee and provision of clear institutional focal points of responsibility and authority.

6. Conclusions

6.1 Purpose and Methodology

The purpose of this study was to compare the direct delivery of the protection of drinking water quality by a provincial government Ministry, with delivery through non-governmental or other alternative service models. Five alternatives to the current arrangements for drinking water protection were examined through the report. These were: the creation of a special purpose agency; devolution to municipalities and private communal system owners; the establishment of an independent regulatory commission; transfer to a delegated administrative authority; and improved direct delivery.

The base case and each of these alternative options were assessed against the criteria of performance and governance and accountability. The results of these assessments were presented in the tables at the end of section 4, and are summarized in the following table.

Model	Performance	Governance and Accountability	Comments
Direct Delivery	Significant failures (e.g., Walkerton). Key weaknesses are lack of adequate source protection mandate, lack of institutional focus within Ministry and vulnerability of funding base.	Clear and extensive accountability framework.	Performance of existing model re: drinking water has been enhanced in short term at expense of other Ministry functions. Approach is not sustainable in the long term.
Agency	No evidence re: stronger performance than direct delivery. Weaker capacity for horizontal policy coordination than direct delivery. Significant potential problems if policy and operations are de-coupled through transfer of operations to agency. Funding security remains a potential weakness	Potential blurring of responsibility and accountability between Minister and Agency head or board. Tendency towards close relationships with regulated industries as a result of highly specialized functions.	De-coupling and accountability issues make Agency inappropriate model for drinking water protection. OCWA in current role is good use of agency model; mandate does not require interministerial or intergovernmental coordination; no regulatory or policy roles. OCWA mandate could be expanded to include technical assistance and training functions for system operators. Transfer of drinking water regulation functions to agency would weaken overall capacity of Ministry of the Environment.
Devolution	Significant capacity and conflict of interest problems. Available evaluations of performance suggest significant weaknesses; little capacity for horizontal policy coordination; policy and operations de-	Significant potential for conflict of interest. Applicability of oversight mechanisms unclear. Places regulated entities carrying out monitoring and reporting functions in very strong power position (MNR).	Not appropriate model for municipal drinking water regulation due to conflict of interest issues, performance problems. Devolution to local governments may be viable approach for private communal water systems,

Model	Performance	Governance and Accountability	Comments
	coupling problems; costs may increase due to need for significant provincial oversight functions.		private wells, as well as septic systems, with appropriate (engineering, health and environmental) training for inspectors and provincial support and oversight mechanisms (not currently in place re: septic systems).
Regulatory Commission	Limited capacity for horizontal policy coordination role re: source protection in absence of a strong mandate. Funding base vulnerability remains an issue. Performance mixed, especially re: public good protection (as opposed to allocation) functions.	High degree of independence and protection from political interference. Accountability boundaries between Minister and Commission may be unclear. Tendency towards regulatory capture due to highly specialized nature of functions in absence of mechanisms to support community and public interest intervenors.	Would require very strong mandate to provide for source water protection. Transfer of drinking water functions to Commission would weaken overall capacity of Ministry of the Environment.
Delegated Administrative Authority	Strength of model is security of funding base for certain functions (removed from governmental budgeting process). No evidence of improved outcomes. Marginal loss of efficiency, which is likely to be increased if adequate provincial oversight provided. Capacity for interagency coordination very limited, significant potential policy and operations de-coupling problems.	Conflict of interest issues significant. Accountability of Minister, board, CEO unclear. Control and oversight mechanisms generally not applicable. Status re: legal accountability issues uncertain. Places regulated sectors in unique position to influence policy and operations.	De-coupling issues, weak interagency coordination capacity, conflict of interest, accountability gaps make model inappropriate for drinking water protection functions. Detailed, independent assessment of performance of Ontario DAAs required prior to extension of model to other public good protection functions. Accountability gaps need to be addressed before further use made of the model. Transfer of drinking water regulatory functions to DAA would weaken overall capacity of Ministry of Environment.
Improved Direct Delivery	Key objectives would include strengthening of source water protection mandate, and establishment of institutional focus for drinking water protection functions within Ministry. Funding security remains significant issue.	Accountability could be further enhanced through improved public reporting; establishment of independent advisory committee on drinking water.	Funding security remains a significant concern. Current level of drinking water activity being maintained at expense of other Ministry functions.

6.2. Major Findings

6.2.1. Performance

The review of alternatives to the direct delivery model provided no conclusive evidence that any of the available options would result in better performance outcomes. Significant gaps in policy and technical capacity were identified with the devolution of responsibility for monitoring and inspection to regulated entities. There are also serious concerns regarding the outcomes seen with similar arrangements in Ontario and elsewhere, although information needed for detailed assessments of performance is often not gathered. This is itself a significant problem.

The performance of special purpose agencies and regulatory commissions in protecting public goods has been mixed, while the outcomes achieved by delegated administrative authorities showed no change relative to the situations prior to delegation.

Findings indicate that the devolution, agency and delegated administrative authority models are unlikely to address the issue of source water protection. They would also provide very limited capacity for interagency or intergovernmental policy coordination, a crucial need given the degree of fragmentation of drinking water protection functions highlighted by the Provincial Auditor, Environmental Commissioner and others. The regulatory commission model has the potential to address source water protection and other interagency policy issues, but would require a strong and broad mandate to be able to carry out these functions effectively.

Significant potential problems associated with the de-coupling of policy and operational functions were identified with the agency, devolution, and delegated administrative authority models. De-coupling problems could arise with a commission as well, although this would be a function of the degree to which the body was mandated to undertake policy as well as operational activities.

The delegated administrative authority model offers the greatest potential for funding security through cost recovery, but only for a very limited range of activities, principally the granting of approvals and conduct of inspections. The Ministry, agencies and a commission could also engage in cost recovery for similar activities, but would remain vulnerable to reductions in their budgets from the province for such functions as research, policy and standards development, source water protection, monitoring and public reporting, and emergency response.

With the agency, delegated administrative authority and devolution models, additional resources may be required to provide adequate oversight and backstopping by the province. As a result, the total costs to society of these models may actually turn out to be greater than direct delivery, as both local delivery and provincial oversight capacity would be required.

Finally, the impact of the different alternatives on the non-drinking water responsibilities of the Ministry of the Environment must be considered. The transfer of drinking water functions and their associated staff and resources outside of the Ministry under the agency, commission, or delegated administrative authority models, or their disbandment as a result of devolution, would all imply a significant loss of overall capacity by the Ministry of the Environment.

6.2.2. Governance and Accountability

The direct delivery model provides the clearest and most extensive governance and accountability framework of all the alternatives examined. The devolution and delegated administrative authority models raise significant concerns about conflict of interest, given the role played by regulated entities in their structure. Important questions also arise about the responsibilities and accountability mechanisms applicable to the boards of directors of delegated administrative

authorities, and to bodies carrying out self-monitoring and reporting functions under the devolution model.

The commission and agency models also introduce some loss of clarity regarding responsibility and accountability for outcomes among the Minister, commissioners, agency head and/or board of directors, although the situation is less severe than for delegated administrative authorities or devolution.

Major gaps and uncertainties exist in the oversight and legal accountability frameworks for the delegated administrative authority and devolution models. Devolution and delegated administrative authorities also put regulated entities in unique positions of power relative to all other stakeholders and, indeed, the government itself.

Finally, there is a well-documented propensity for specialized bodies such as agencies or regulatory commissions to develop very close relations with regulated entities. Specific mechanisms to assist public interest and community based intervenors in policy-making and regulatory processes are needed to counteract this tendency.

6.3. Conclusions

The improved direct delivery model offers the best potential to deal with the key problems identified with drinking water protection in Ontario and other jurisdictions, namely the fragmentation of mandates and responsibilities for drinking and source water protection. Direct delivery, with a strengthened mandate and increased resources for the Ministry of the Environment, is the mechanism most able to deal with the need for interagency and intergovernmental policy coordination required to address these issues.

Direct delivery by the Ministry would achieve these outcomes within the clearest and most extensive accountability framework among the models examined. This framework would be enhanced by the assignment of a clear statutory mandate for drinking and source water protection to the Ministry of the Environment, and the statutory establishment of institutional focal points for these functions within the Ministry of the Environment and Ministry of Health.

Accountability could be further improved through better reporting, over and above that provided by the August 2000 *Drinking Water Protection Regulation*, and through increased capacity by the Ministry and the public to access and use the data being generated through the regulation. The establishment of an independent committee to advise the Minister of the Environment on drinking water and source water protection policies and standards, and to report annually on the state of the province's drinking and source water could further strengthen accountability and increase opportunities for informed public dialogue and debate.

However, the key weakness of even an improved direct delivery approach remains the vulnerability of its funding base to the budgetary priorities of the provincial government. An expanded and strengthened mandate for the Ministry of the Environment and other agencies would be meaningless unless adequate resources are provided to carry out these responsibilities. This will ultimately be a function of political will.[109]

[109] A dedicated revenue stream for drinking water protection functions could be provided as part of a full-cost pricing policy for water. However, such a policy also raises important questions of equity and social justice that would have to be addressed, as it could raise barriers to access to water for low-income groups.

The adoption of an improved direct delivery approach does not rule out the use of other institutional models for specific purposes. Notwithstanding the concerns regarding the structure of its board of directors,[110] the Ontario Clean Water Agency (OCWA) may be a good example of the use of the agency model. It carries out specialized technical functions (the operation of water and sewage plants), and has no regulatory or major policy, intergovernmental or interministerial roles. There was also a clear need to remove the utility function from the core operations of the Ministry, as the original structure left the Ministry in the position of directly regulating itself. Given its technical expertise and province-wide presence, OCWA may be an appropriate vehicle to provide technical assistance, education and training to drinking water system operators.

Similarly, responsibility for approving and inspecting non-municipal communal systems and private wells, as well as septic systems could be devolved to local government agencies such as health units, and operated either with financial support from the province or on a cost-recovery basis. Such arrangements would avoid the direct conflict of interest problems associated with the MNR industry self-monitoring and reporting systems as local government agencies would be regulating the activities of third parties, not their own operations.

However, local agency staff would need specialized training in environmental, health and engineering aspects of non-municipal communal systems, private wells and septic systems, and the province would need to provide appropriate oversight and technical support. Such structures have been lacking under the current arrangements for the devolution of responsibility for septic systems. In addition, regional coordinators for drinking water related functions could be established within local health units as in the case of the model of the British Columbia *Drinking Water Protection Act,*[111] and local authorities required to develop and implement source water assessment and protection programs, with technical and financial support from the province

Major improvements in the protection of Ontario's drinking water can be achieved without major structural reforms that challenge existing constitutional, political, administrative and legal principles, whose implementation would involve major transitional costs and risks, and which may not actually result in better outcomes. Rather, provincial and local agencies need to be provided with clear legislative and policy mandates and direction for the protection of drinking and source waters. An adequate and secure resource base should be allocated to support these responsibilities, and structures for the regular and independent assessment and reporting to the public of the status of Ontario's drinking and source waters established.

[110] See D'Ombrain, "Machinery of Government," para 325-326.
[111] *Drinking Water Protection Act*, *2001*, s.3.

Appendix 1: Improved Direct Delivery: Key Features

New Legislation

- New legislation would designate the Ministry of the Environment as the lead agency with respect to drinking water protection, including source water protection, with support of the Ministry of Health.
- Other provincial agencies with mandates affecting drinking and source waters would be required to cooperate with and support the Ministry of the Environment in carrying out its drinking water and source water protection mandates.
- The positions of Provincial Drinking Water Coordinators would be designated within the Ministries of Environment and Health at not less than Director level. The Provincial Drinking Water Coordinator within the Ministry of the Environment would be designated to lead an Office of Drinking Water Protection within the Ministry.
- The new legislation would provide the Ministry with the following tools for the purposes of source water protection:[112]
  - The elimination of exemptions for agricultural activities from environmental protection legislation.
  - Independent rights of comment and appeal on land use decisions under the *Planning Act*, and other approvals, such as those under the *Aggregate Resources Act*, *Mining Act*, and *Public Lands Act* that may affect the quantity or quality of sources of drinking water.

Ministry of the Environment Functions

- The Ministry of the Environment would assume lead responsibility for source water protection.
- The Ministry of the Environment would retain responsibility for setting drinking water standards, policies and regulations.
- The Ministry of the Environment would retain responsibility for approvals of waterworks and systems.
- The Ministry of the Environment would conduct inspections and investigations and carry out enforcement actions, employing a more "appropriate, aggressive and timely" approach.
- The Ministry of the Environment would provide drinking water testing, or oversight of testing by system operators or third parties.
- The Ministry would maintain and strengthen systems for responses to public complaints about drinking water quality and incidents involving adverse drinking water quality in conjunction with system operators.
- The Ministry would report to the public on the state of compliance of drinking water system operators with provincial standards and on drinking water quality.
- The Ministry would conduct research of threats to drinking water quality and sources.

Drinking Water Advisory Committee

- An external advisory committee on drinking water, with appropriate expertise, would be established to advise the Minister on standards and source water protection issues and to prepare an annual report on the state of drinking water and its sources in Ontario.

[112] The provision of additional legislative tools may also be appropriate. These examples are given for illustrative purposes.

The Role of the Clean Water Agency

- The delivery of technical assistance and training to system operators would be provided through the Ontario Clean Water Agency, to eliminate potentially conflicting roles within the Ministry.
- OCWA would have a mandate to carry out and support research on drinking water protection and treatment systems and technologies.

The Role of Local Agencies

Private Communal Systems, Private Wells and Septic Systems

- Responsibility for approving and inspecting non-municipal communal systems and private wells, in addition to septic systems, could be devolved to local government agencies, such as health units, operated either with financial support from the province or on a cost-recovery basis.
- Specialized training in environmental, health and engineering aspects of these systems would need to be provided to local agency staff, and appropriate oversight and technical support provided by the province. These steps are necessary to address gaps in the current arrangements regarding septic systems.

Drinking Water and Source Water Protection

- Regional coordinators for drinking water related functions would be established within local health units as in the April 2001 British Columbia *Drinking Water Protection Act.*
- Local authorities could be required to develop and implement source water assessment and protection programs, with technical and financial support from the provincial government as in the British Columbia legislation.

Funding and Resources

- The provincial government should provide an adequate and secure resource base to support functions performed by provincial and local agencies.

Appendix 2: Regulation of Septic Systems in Ontario

A2.1 Description of Function

Inspections to ensure compliance with construction standards for "on-site sewage" or septic systems are conducted by inspectors designated under the *Building Code Act*[113] and appointed by municipalities. This function, formerly the responsibility of the Minister of Environment in accordance with Part VIII of the *Environmental Protection Act*, was transferred in 1998 to the Ontario Building Code,[114] a regulation under the *Building Code Act* for which the Minister of Municipal Affairs and Housing is responsible.[115]

The official rationale for this change was to "reduce red tape and the regulatory burden on business, simplify municipal enforcement, and provide opportunities for cost savings through co-ordination of approvals and inspections." The change in legislation "would allow a one-window approach at the municipal level. The building industry and the public would only have to deal with one permit, one code, one appeals process and one ministry." "The province would incorporate into the *Building Code Act* stringent certification requirements for septic system installers and inspectors, which would ensure a higher level of competency and consistency in program delivery."[116]

The Ministry of Municipal Affairs and Housing (MMAH) had no prior experience in implementing the delegated responsibilities. Some continuity in implementation has been achieved, notably in unorganized areas, where boards of health continue to conduct inspections, but no additional resources were provided by the province to implementing agencies for the administration of these responsibilities.

A2.2 Structure

A2.2.1 Organizational form, chain of accountability, and status of implementing bodies

The Minister of Municipal Affairs and Housing is responsible for *administering* the *Building Code Act* and the Ontario Building Code. [117] The Director of the Housing Development and Buildings Branch in MMAH is appointed as the "director" for the purposes of the Act. The Building Code designates the director and his designates for the purpose of establishing standards for qualifications of inspectors, and persons who construct and install on-site sewage systems.

Except as noted below, the council of each municipality is responsible for *enforcing* the Act in the municipality.Each municipal council must appoint a chief building official and such inspectors as are necessary to enforce the Code "in the areas in which the municipality has jurisdiction."[118] Inspectors may only be appointed if they meet the qualifications prescribed in the building code (see below). A county or regional municipality may undertake these responsibilities for one or more municipalities within the county or regional municipality, by agreement with the participating municipalities.

[113] S.O. 1992, c. 23, as amended.
[114] O.Reg. 403/97.
[115] The change was effected by Schedule B of the *Services Improvement Act*, S.O. 1997, c. 30.
[116] "Backgrounder: Septics (On-Site Sewage Systems)", Ministry of Municipal Affairs and Housing, August 21, 1997.
[117] *Building Code Act*, subs. 2 (1).
[118] *Building Code Act*, s. 3.1

Boards of health, planning boards and conservation authorities prescribed in the Building Code are responsible for enforcing provisions of the Act and the Building Code related to sewage systems in those municipalities and territories without municipal organization that are prescribed in the building code. The list of areas where these agencies implement the Act is found in Table 2.15.1.1 of the Building Code, and currently includes six boards of health and one conservation authority. They are responsible for appointing such inspectors as are necessary. One such inspector must be designated as having the same powers and duties as the chief building official in municipalities.

Where no board of health, planning board or conservation authority exists or takes up the responsibility, or in a territory without municipal organization, the province of Ontario is responsible for the enforcement of the Act, and may contract with adjacent municipalities to administer and enforce the provisions.[119] Similarly, a county and a municipality in the county may agree on the county administering the provisions of the Act related to sewage systems, while the lower-level municipality pays the county for the cost of such service. Alternatively, the municipality may make a similar agreement with the board of health or conservation authority having jurisdiction in the municipality.[120]

The *Act* allows a municipal or county council or a board of health to pass by-laws, a planning board to make resolutions, and a conservation authority or the Lieutenant-Governor in Council to make regulations: prescribing classes of permits; providing for procedures and applications for permits and requiring the corresponding payment of fees and refunds; enabling the chief building officials to require the filing of plans on completion of construction; and other matters.[121]

Subsection 8 (1) prohibits any person from constructing or demolishing a "building" without a permit issued by the chief building official. Subsection 8(2) requires a chief building official to issue a permit *unless*, *inter alia*, the building is not in compliance with the Act, the building code, or "any other applicable law." Subsection 8 (11) of the Act prohibits a person from constructing or demolishing a building except in accordance with the Act and the code. Subsection (12) prohibits a person from making a material change to a plan or other document on which a permit is issued, without notifying and obtaining the authorization of the chief building official. Subsection 8 (13) prohibits a person from constructing or demolishing a building except in accordance with the plan or other document authorizing it.

Since 1998, a "building" has included a "sewage system" under the *Building Code Act* (para. 1 (1) (c.1)). The definition of "sewage system" encompasses several classes from privy toilets to leaching beds, having a design capacity of 10,000 litres per day or less, and located wholly on the same parcel of land served by the system. The standards for these systems are generally

[119] s. 5, *Building Code Act*.

[120] Before the transfer, one board of health we contacted implemented Part VIII of the *EPA* in 18 municipalities in that county. Now, it has contracts to implement Part 8 of the Building Code in just ten of the municipalities in the county. The result has been diluted oversight and policy implementation. The official we spoke to said that chief building officials in a couple of the municipalities in the county that eagerly took up the administration of the septics provisions have since told him "we'd give it back to you in a moment," citing the unanticipated complexity of the matter, the high costs and relatively low revenues generated, and the implications of increased liability. There was no transfer of expertise to the new delivery agents. As a result of many of these factors, this health unit will cease administration of Part 8 on December 31, 2001. The result will be further fragmentation of oversight in the province.

[121] s. 7, *Building Code Act*.

unchanged under the *Building Code Act*, although Class 5 systems (holding tanks for hauled sewage) are now only permitted under stricter rules.[122]

A prohibition more specific to sewage systems is contained in section 10.1, which prohibits operating or maintaining a sewage system except in accordance with the Act and the building code.

Section 11 provides that no person shall occupy or use a newly erected or installed building or any part thereof unless notice has been given to the chief building official; ten days have elapsed since the notice or the date of completion (whichever is later) or an inspection has been made pursuant to the notice; and any order by an inspector under section 12 has been complied with.

Additional standards relating to "property conditions" ("prescribing standards for the maintenance and occupancy of property" and "prohibiting the occupancy and use" of such property if it fails to meet the standards) may be adopted by a municipal council by means of a by-law (section 15.1). These conditions could include additional standards for septic systems.

A2.2.2 Testing, oversight and monitoring, and inspections, investigation and enforcement

The section 11 notice requirement appears to be the principal mechanism that would prompt an inspection and oversight. Once an official was alerted and an inspection made, any compliance requirements would be imposed before the building could be legally used.

An inspector may enter on any land without a warrant at any reasonable time to inspect a building or site in respect of which a permit is issued or an application for a permit is made, and to make an order directing compliance with the Act or the building code.[123] Orders of inspectors are reviewable and may be amended, varied or rescinded by the chief building official, who also has all the powers and duties of an inspector.

A municipal "property standards officer" also has powers of entry to inspect the property for conformity with a property standards by-law, and may make orders for repairs.

An officer also has power to issue a certificate of compliance to a property in compliance with the by-law. The officer may also issue emergency orders for immediate repair of the property that poses a danger to health or safety. Similar provision is made for emergency powers and orders for chief building officials on information provided by inspectors. The municipality has the power to "repair or demolish the property" if an order is not complied with, and the costs incurred comprise a lien on the property that is deemed part of property taxes.

Provision is made for notice of appeal from orders, for service of orders and registration of orders on title. Appeal from an order lies to a property standards committee that must be established by any municipality that enacts a property standards by-law (section 15.6). The municipality or the property owner or occupant may appeal an officer's decision to the committee. Appeal from a decision of the committee lies to the Superior Court of Justice.

The powers outlined here are backed up by the general offence provision in section 36, which makes failure to comply with orders, directions and other requirements under the Act an offence,

[122] "Regulatory Changes Affecting On-site Sewage Systems," by Bryan Kozman, Ministry of Municipal Affairs and Housing, Housing Development and Buildings Branch (Spring 1998), p. 10.
[123] *Building Code Act*, s. 12.

with penalties not to exceed $10,000 per day in the case of a continuing offence, not exceeding $25,000 in the case of a first offence, and not exceeding $50,000 for subsequent offences. A chief building official may apply to a judge of the Superior Court of Ontario for an order directing a person to comply with the Act, regulations or an order "despite the imposition of any penalty in respect of the non-compliance." An appeal from the judge's decision lies to the Divisional Court. There is also provision in section 38.1 for a "prescribed person" to suspend the licence issued under the building code of a person in default of a fine payable on conviction of an offence under the Act.

The qualifications of those constructing, installing, servicing, repairing or cleaning sewage systems are established by the building code, and the Act forbids any person from undertaking these functions unless they meet such qualifications. In short, the code establishes a licensing system that requires persons installing septic systems be supervised by an individual who has passed a Ministry-supervised examination.

Qualifications of sewage system inspectors are also established by the building code. Inspectors are required to write an examination on the Act, the code and the construction, maintenance and operation of sewage systems. They are also required to file basic information every three years including the name and address of the implementing body (e.g., municipality or health unit) appointing them as an inspector.

A2.3 Performance and Effectiveness

A2.3.1 Outcomes

The report of the Commission on Planning and Development in Ontario to the Minister of Municipal Affairs in June 1993, identified some problems that existed long before the 1998 devolution of responsibility for septic systems, including the following:[124]

> *In Ontario, there are one million conventional septic systems. There is increasing evidence of contamination of both ground and surface water as a result of their use.*
>
> *In 1990, the Ministry of the Environment inspected 9,067 systems province-wide, of which 34 percent were found to be malfunctioning. Ministry studies in Haliburton and in Muskoka found one-third of the systems were designed to current standards and worked properly, one-third were designed below standards, and one-third were classifiable as a public-health nuisance...*
>
> *More should be done to educate owners of existing systems about proper use and potential problems and to ensure systems are properly maintained; inspections and pump-outs should occur regularly; inspections should be mandatory when houses using septics are sold; and use permits should be time-limited, based on the life-expectancy of the system. …*
>
> *Inspections and the issuance of permits for private and communal systems are responsibilities of the Ministry of the Environment and Energy, and that ministry should continue to set standards for installation and operation. The ministry should continue to be responsible for licensing septic installers and septage haulers, and should institute training programs for them and for inspectors.*

[124] From "New Planning for Ontario, Final Report of the Commission on Planning and Development Reform in Ontario," by John Sewell, Chair and George Penfold and Toby Vigod, Commissioners. Queen's Printer for Ontario, 1993, pages 124-125.

> *The regular inspection of septic systems, after installation, should also be required. This should be the responsibility of the Ministry of the Environment and Energy. However, that ministry should consider entering into agreements permitting county and regional governments, their health units, or conservation authorities, or, where no upper tier exists, municipalities – provided all have the appropriate expertise – to assume the responsibility for inspections and for the issuance of permits for installation. …*
>
> *To control illegal installations, the province should institute a system whereby septic tanks may not be sold without the purchaser obtaining a certificate of approval from the province or its agent and showing it to the seller of the septic tank. This system will permit the province or its agent to inspect all sites before installation as well as during and after installation …*
>
> *The first priority for inspection should be systems installed before 1975, when the province imposed the most recent set of standards. Once these inspections are completed in an area, all other septic systems should be inspected at least once every five years.*
>
> *Pump-outs should occur regularly, although how often that should be depends on the use of the system as determined by the inspection. The province should require proof that systems are inspected regularly. …*
>
> *Further research is needed to test and approve alternative systems, and to learn more about how septics function. It would be unrealistic to expect the Ministry of the Environment and Energy to be able to fund such research on its own, but by working with universities, colleges, municipalities, and the private sector, it can accomplish a great deal. The Ministry should bring appropriate parties together and take the lead in establishing an ongoing research and development program into sewage-treatment matters in Ontario.*

The state of septic systems appears to be similar in the post-transfer period. While there is no province-wide requirement for re-inspection of septic systems (and MOE no longer has the authority to inspect them), some municipalities undertake their own programs. The Ontario Boating Forum, an organization representing recreational boaters, surveyed some of these municipalities and requested the results of year 2000 re-inspections. The results were assembled and released to the media in May 2001.[125] The Forum acknowledged and endorsed the Sewell Commission's findings regarding septics, and made further recommendations, including:

- implementation of a system of fines significant enough to encourage property owners to operate and maintain their septic systems;
- an education program to inform septic system property owners of their legal responsibilities and the best practices for the safe operation of a septic system;
- implementation of a by-law requiring mandatory septic tank pump out every two years;
- completion of all septic system re-inspections, repairs and replacements in the next two years;

And in addition that the province:

- require all property transfers to include confirmation the septic system has been inspected for safe operation, and that transfers be conditional on compliance with standards; and

[125] Ontario Boating Forum, "Are Old, Below Standard Cottage Septic Systems Discharging Waste Into Ontario's Recreational Waterways?" May 4, 2001.

- establish an "accountability and database function" to develop and implement best practices and document the status of maintenance, repair and replacement of septic systems and re-inspection processes in Ontario.[126]

The Forum's report reproduces year 2000 re-inspection results from the Townships of Georgian Bay, The Archipelago, Lake of Bays, and Muskoka Lakes, the Towns of Bracebridge and Gravenhurst, and the North Bay-Mattawa Conservation Authority. Combining the results of the programs (which appear to follow no standard methodology or testing criteria, and are conducted by municipal staff in some cases and by consultants in other cases), the Forum estimates that one-third to two-thirds of "cottage septic systems visually re-inspected last summer [2000] were deficient and may be contaminating groundwater and nearby recreational waterways."[127]

Other shortcomings in the implementation of the septics provisions persist, the most notable being the lack of enforcement of ongoing compliance and the lack of a re-inspection program. A model re-inspection guide (that is, not a mandatory program) for implementing agencies is expected to be released by MMAH in the near future,[128] but it will be up to implementing agencies to decide whether to require regular re-inspection of septic systems.

No official province-wide evaluation of performance or effectiveness of the regime has been made public, and presumably has not been conducted. The Ontario Boating Forum's survey results, however, indicate a serious problem on the scale of what the Sewell Commission identified in 1993.

An unnamed Ministry of Environment official said (regarding the removal of Part VIII of the *Environmental Protection Act*):

> *In eastern Ontario, 90% of the development is on septic systems. Probably half of the people of Ontario are drinking their own sewage. When the MOE was involved, we tried to ensure in the planning of a subdivision that the septic system was downgradient from the wells. This role was downloaded to building inspectors who are just interested in knowing if the design meets the code and there is no serious contamination. It used to be a critical role and now we can't even be brought in.*[129]

Similar comments have come from Medical Officers of Health.[130]

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[126] Ibid., pp. 2-3.
[127] Ibid., p. 1.
[128] See Ontario Environmental Registry Number PF00E1000, "Draft Septics Re-Inspection Program," posted 2000/11/30. The authors requested a copy of this draft document, which MMAH had posted for thirty days in late 2000 as an information-sharing gesture (the Ministry was not obliged by the EBR to post it). The posting listed headings used in the Draft Guide, from which the authors inferred the Guide would be useful in describing the septics regime. MMAH declined to provide the draft, saying the final version was soon to be released. The authors received an electronic copy of the final version on June 15, 2001, and were advised it is being printed for general release. See "Septic System Re-Inspections: Information for enforcement agencies and others interested in local septic system re-inspection initiatives," Ontario Ministry of Municipal Affairs and Housing, Housing Development and Buildings Branch, June 2001.
[129] Renewing the Ministry of the Environment, Submission by the Ontario Public Service Employees Union (OPSEU) to the Walkerton Inquiry on behalf of its members employed at the MoE, at page 62. May 1, 2001.
[130] For example, building officials are "starting to realize the implications of their inheritance" (of new responsibilities). Inspectors "need to go beyond the strict language" of the Building Code," because whether a septic system meets the Code and whether it meets health needs are "two very different questions". (Remarks of Dr. George Pasut, Medical Officer of Health, County of Simcoe; from author's notes, Walkerton Inquiry Part II Experts' Meeting, Toronto, 24 May 2001).

An important distinction in discretion for inspectors under the *Building Code Act* as compared to the previous *Environmental Protection Act* regime is that formerly,

> *an approving authority had broad discretion to refuse a certificate of approval on the grounds that the proposed sewage system would create a nuisance to adjacent property owners, pose a hazard to human health or safety, impair the quality of the natural environment or be contrary to the public interest. Likewise, (an approving authority) had considerable authority to impose standards which vary from those set out in the regulations.*[131]

Some discretion was built into Building Code provisions setting minimum distances between sewage systems and watercourses, but this appears to be less discretion than was allowed previously.

Part 8.9.1.2 of the building code imposes a general requirement that sewage systems not discharge sewage or effluent except where designed or intended to do so. The nature of building code inspections – which normally occur during the initial building process – combined with the absence of a universal re-inspection requirement, suggests that ongoing maintenance or non-compliance is unlikely to be detected or enforced on a consistent basis across the province.

To the extent that MMAH retains the power to license installers and inspectors, it might be expected that the Ministry retain sufficient capacity to perform at least this function. The authors requested information about the staff complement of the Housing Development and Buildings Branch, but received no response.

The Environmental Commissioner of Ontario recognized the Ministry's efforts in developing the certification and licensing regime for installers and inspectors, with the first "ECO Recognition Award" for programs and projects that best meet the goals of the EBR.[132] The Award also recognized MMAH's efforts in producing a brochure for property owners and cottagers who own septic systems, outlining how a septic system works, common system problems, tips on proper maintenance and use, and owner responsibilities.[133]

While MMAH thus appears to be fulfilling an education and awareness function, it remains to be seen whether the Ministry receives feedback from the range of actors implementing the rules for septics across the province and if so, how feedback is used to improve policy.

From the point of view of the builder or homeowner, the "one-window" approach achieved by giving municipalities the role of administering the system may give the advantage of convenience of not having to call a separate official to inspect a septic system. From the perspective of provincial oversight for water source protection purposes, there are a number of problems. There is no single provincial agency with capacity to give policy direction or to make policy based on results. In fact, the diverse number of diffuse implementing agencies means a greater potential variation in application of the law than can be justified by geographic differences alone. This

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[131] Kozman, ibid., at p. 10. While this loss of discretion has been criticized from an environmental health perspective, the MMAH appears to have viewed the discretion as being undesirable. A letter from Ann Borooah, Director, Housing Development and Buildings Branch, MMAH to "Ministry Stakeholders" dated August 22, 1997 said the new "rules governing septics will be maintained and, where possible, strengthened to protect public health and the environment. This will be achieved through less discretionary standards for septic installation and operation …."

[132] "Changing Perspectives – ECO 1999/2000 Annual Report", p. 123.

[133] "DRAFT: Septics Re-Inspection Program Guide." Exception / Information Notice for Policy, EBR Registry Number PF00E1000, posted to Environmental Registry 30 November 2000.

could, in turn, allow alleged offenders a common law or *Charter* defence on the basis of lack of clarity about the nature of the charge.

By some accounts (e.g., Sewell), the regime under Part VIII was less than satisfactory, but the current regime is likely to allow even less environmental policy learning connected to other source protection issues, in part because there is less likelihood of interministerial or intergovernmental coordination of policies when a diffuse number and range of actors are administering them.

A2.4 Governance, Accountability and Democratic Values

A2.4.1 Governance

Clarity of Assignment of Responsibility

A diffuse number and diverse range of implementing bodies (each with powers to vary the way the responsibility is carried out) may serve to obscure the ultimate accountability of the Minister, and almost certainly results in inconsistent application of the law.

A2.4.2 Accountability

Single point of accountability; responsiveness to changing demands

While the Minister of Municipal Affairs is ultimately responsible for implementing the septics regime, it is less clear what mechanisms for sanction might be used in the event of poor performance by implementing bodies. (Agreements or memoranda implementing the delegation, including agreements between lower- and upper-tier municipalities provided for under the *Building Code Act*, were not investigated.) The Ministry's capacity to withdraw the delegation to municipalities and undertake inspections and approvals itself appears to be extremely limited.

There appear to be no mechanisms for the monitoring of the performance of local agencies in carrying out their responsibilities regarding septic systems under the *Building Code Act*.

Control and Oversight Mechanisms

Audit

Municipalities are not subject to the *Audit Act*, so their performance in enforcing the *Building Code Act* is not subject to evaluation by the Provincial Auditor. The Ministry of the Environment's administration of Part VIII of the *Environmental Protection Act* was subject to the authority of the Provincial Auditor. However, the Ministry of Municipal Affairs's oversight of municipal efforts in this area could be subject to audit.[134]

Ombudsman or other complaints process

Neither bodies implementing the building code nor their officers are "governmental organizations" (i.e., a Ministry, commission, board or other administrative unit of the Government of Ontario) within the meaning of the *Ombudsman Act.* Therefore the Ombudsman would not have jurisdiction to investigate complaints regarding municipal governments' delivery of the septics program. The Ombudsman had such jurisdiction regarding the program's administration by the Ministry of the Environment.

Access to information and protection of privacy

While the Building Code Commission and Building Materials Evaluation Commission are designated as "institutions" subject to the *Freedom of Information and Protection of Privacy Act,*[135] municipalities, planning boards and conservation authorities are subject to the *Municipal Freedom of Information and Protection of Privacy Act,*[136] whose regime is similar to *FOIPPA*.

Both laws include discretionary and mandatory exemptions from access to government records, and competing provisions for disclosure. The facts of an individual case will determine whether information will be released. For example, "third party information" supplied in confidence, where its disclosure could prejudice the interests of a third party, including "environmental testing … if done as a service for a fee," is likely subject to mandatory non-disclosure if supplied to a home-owner by a contractor or consultant, but an "environmental impact statement or *similar record*" is subject to mandatory disclosure. Similarly, a government official may refuse disclosure of a record if it might reasonably be expected to "interfere with a law enforcement matter." Finally, exemptions from disclosure generally do not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption".[137]

Further research is required to determine whether and in what circumstances disclosure might occur in favour of property owners with septic systems, their neighbours, or members of the public at large.

Legal Accountability

Disputes relating to technical interpretations of the building code between the applicant or holder of a permit and an inspector or officer may be taken by application to the Building Code Commission (BCC). Decisions of the commission following a hearing are final. Appeals from orders or decisions of an inspector or officer on questions of other than fact alone may be taken to the former Ontario Court (General Division) (now the Superior Court

[134] See Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, p.46.
[135] R.S.O. 1990, c. F-31; for designations see Revised Regulation 460, amended to Ontario Regulation 304/99.
[136] R.S.O. 1990, c. M.56.
[137] See ss. 18, 13, 14 and 23 of *FOIPPA*.

of Justice) under section 25 of the *Building Code Act*, and from that court an appeal lies to the Divisional Court (section 26). No provision is made for the Minister of Municipal Affairs and Housing to be heard on a section 25 appeal to the Superior Court of Justice, but s/he is entitled to be heard on a section 26 appeal.

The Building Materials Evaluation Commission (BMEC) also plays a role in authorizing the use of "any innovative material, system or building design," when application is made to the Commission for that purpose (section 28).

The Minister has additional power to make rulings "approving the use of innovative materials, systems or building designs" and amending standards in the building code, by reference either to a materials evaluation body designated in the code (this is the Canadian Construction Materials Centre), or to a decision of the Building Code Commission. Although the minister has the ultimate decision-making power in such matters, deference to the expertise of the two commissions seems more likely.

Subsection 30 (1) of the *Act* provides immunity from civil action to members of, or persons acting under the authority of either commission established by the Act, a chief building official, inspector or officer acting in good faith in the execution or intended execution of powers and duties under the *Act*. Protection is also offered to the same persons for any alleged neglect or default in the execution in good faith of that power or duty. The Crown, a municipality, board of health, planning board or conservation authority may be liable for any tort committed by such officers notwithstanding subsection 30 (1).

The two commissions are mentioned here to illustrate the fact that they are the only formal means of administrative dispute resolution available in relation to septics. The BCC is an administrative tribunal empowered to hold hearings into disputes respecting permits and orders, and a person applying for or refused a building permit would therefore be able to benefit from administrative law remedies and the rules of natural justice. It is unlikely that a third party would have standing to take a dispute to the BCC, for example to compel enforcement of the septics provisions of the Building Code. (The BMEC is really a technical committee and is unlikely to mediate disputes of this type.) Public servants are eligible to serve on the BMEC, but not on the BCC.[138]

While the MMAH Re-Inspection guide acknowledges that "more intrusive inspection techniques (such as dye testing, opening-up of septic systems, or testing of soil depth) … is more time consuming and considerably more expensive than a visual inspection," the very next paragraph then goes on to describe the serious limitations of a visual inspection:

> *As most septic systems are generally "buried" installations hidden from normal view, many deficiencies may not show themselves during a visual inspection. As such it may not be possible to make an accurate assessment of the functioning of the system in all cases, as certain problems may be hidden. …*

[138] MMAH wrote to organizations in 1998 asking requesting suggested names for prospective appointees "with expertise in septics design, installation or enforcement" to serve on either of the two commissions. Letter from Anne Beaumont, ADM, Housing Policy and Programs Division, MMAH to Kathy Cooper, Canadian Environmental Law Association, February 5, 1998. It is not known whether individuals with special knowledge of septic systems were eventually appointed to the commissions.

> *A visual examination by an inspector is able to identify some conditions that provide evidence of an improperly operated or maintained system as per OBC section 8.9.1.2.*[139]

The shortcomings of visual inspection appear almost sufficient in themselves to justify a more pro-active and firm approach to achieving compliance. As visual inspection seems unlikely to reveal conclusively whether a system is out of compliance, it should be considered as just one early-stage tool used by inspectors within a spectrum of compliance tools that also includes more "intrusive" techniques. (The search powers afforded inspectors by the *Building Code Act* may be insufficient to allow the use of such techniques, which in itself may be further justification for strengthening these powers.) Re-inspections would continue to be focused first on older systems, in areas where vulnerability to contamination of water bodies is highest: these are some of the approaches now used in a few municipalities. There currently appears to be little appetite by municipal or provincial governments, however, for applying more intrusive measures.

A combination of more comprehensive training in health and environmental considerations, combined with expanded provincial oversight and appropriate funding mechanisms, is likely to improve the state of septic systems in Ontario. As suggested in the main body of this paper, if these conditions were met, the septics function might then be appropriately performed by local agents and be combined with monitoring responsibilities for non-municipal communal systems and private wells.[140]

A2.4.3 Democratic Values

The scale of environmental damage posed by individual septic systems may be too small to justify public consultation each time a system is installed or replaced. However, the Ministry of Environment may be better placed to conduct a broader consultation on improved septic system policy, in conjunction with other source protection matters, than are the large number of small agencies currently implementing the septics provisions.

The *Building Code Act* is not subject to the *Environmental Bill of Rights*, and building and septic system permits are not classified as environmentally significant under the EBR.[141] Third parties therefore have no rights of notice and comment regarding the approval of septic systems, except where common law remedies may be applicable, or to request reviews or investigations regarding septic systems under the EBR.

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[139] "Septic System Re-Inspections: Information for enforcement agencies and others interested in local septic system re-inspection initiatives," Ontario Ministry of Municipal Affairs and Housing, Housing Development and Buildings Branch, June 2001, at p. 8 (emphasis added). Section 8.9.1.2 of the Building Code is the general requirement that sewage systems not discharge sewage or effluent except where designed or intended to do so.

[140] See section 4.2.6 "Roles of local agencies," *infra*.

[141] When the proposed transfer of responsibility was posted to the EBR, the EBR notice read in part: "The Ministry of Municipal Affairs and Housing is investigating measures to ensure that the Environmental Bill of Rights requirements applicable to Part VIII of the EPA will be maintained." See EBR Registry Number A17E0001.D, August 22, 1997. The updated version of the same EBR posting that followed Third Reading of the *Services Improvement Act* notes:

> "In response to comments provided via the EBR Registry, the Ministry: has taken steps to ensure that staff are involved in the MOE's development of a groundwater strategy for the Province; is examining opportunities to create improved linkages between the building permit approval process for sewage systems and earlier land use planning decision making; evaluated the extent of sewage system failures described in the submission; … and made sewage system delivery agents aware of the Ministry's work to educate municipalities about BCA liability issues and risk management techniques."

A2.5 Conclusions

No overall assessment of the province-wide environmental status and impact of septic systems has been conducted, and information necessary for such an assessment is not being gathered by the province. There appear to be no provincial structures in place to monitor municipal agents' performance (including in reporting structures to the province with respect to the number of systems checked, the number in and out of compliance, etc.). The Provincial Auditor and Ombudsman have no jurisdiction to audit or investigate municipal governments' activities in this area, and rights to notice and comment, and to request reviews and investigations under the *Environmental Bill of Rights* no longer apply.

The state of septic systems across Ontario may be worse than in 1990 when MOE inspected 9,000 systems. The Ontario Boating Forum's attempt to gather results from seven municipalities, which collectively conducted 3,626 visual re-inspections in 2000 (in at least one case, results were cumulative over several years) and found an average 36 percent deficiency rate, is no substitute for official monitoring and oversight. More assertive use of statutory powers to inspect and enforce would likely boost the rate of compliance.

Appendix 3: Compliance Self-Monitoring and Reporting by Ontario Natural Resource Industries.

A3.1 Description of Function

A number of changes have taken place in recent years in the way natural resource industries in Ontario are regulated. Trends can be summarized under at least three headings. First, major cuts to the budget of the Ontario Ministry of Natural Resources (MNR) have occurred; these cuts are well-documented elsewhere. Second, trust and other accounts have been created for funds collected from licensing and other fees, and directed toward industry-managed environmental rehabilitation and other projects.[142] Third, self-monitoring and self-reporting schemes[143] have been implemented for various reasons, including the smaller workforce resulting from the cuts within the Ministry, which has necessitated different strategies for implementing regulatory requirements.[144]

This case study examines the above trends in relation to the aggregate resource industry in Ontario, with some references to the forest industry where relevant. The focus on aggregates has been chosen for two reasons, namely that the experience in delegation of functions to this

[142] See, for example, the description of the aggregates trust, below, and of the Fish and Game Fund at page 4-13 in "Ontario's Environment and the Common Sense Revolution – A Fourth Year Report" (Toronto: Canadian Institute for Environmental Law and Policy), September 1999.

[143] For example, MNR has entered into self-monitoring agreements with the commercial fisheries industry and the baitfish industry. See the CIELAP fourth year report (*ibid*), at pages 4-25 – 4-28. The CIELAP report also documents the transfer of surveys, assessments, monitoring, data collection, inspections and other activities to the forestry industry. As in the case of the aggregates industry described below, MNR "would rely on forest company reports as its primary source of information on the state of the province's forests, and on industry compliance with Ministry requirements. Checks would be conducted by MNR staff on the basis of public complaints and periodic audits of a yet to be specified nature." These measures are linked to a larger pattern of delegation enabled by the *Red Tape Reduction Act* of 1998, which permits the Minister to delegate authority for decisions affecting public lands to third parties. See pages 4-1 – 4-10 of the CIELAP fourth year report.
Of the *Red Tape* proposals, the Environmental Commissioner of Ontario (ECO) said, "Public oversight of such delegation is not addressed in the proposals, and accountability for these decisions may suffer." See "Supplement to the 1997 Annual Report of the ECO - Open Doors," p. 8.

[144] MNR's Self-Monitoring Program: Update Report, March 1996 explained the problem in the aggregates industry as follows:

> In April of 1995, the MNR and the Aggregate Producers Association of Ontario (APAO) were concerned that annual inspection pursuant to Section 17 of the ARA [*Aggregate Resources Act*] were not being completed on an annual basis. The APAO and MNR were of the opinion that the validity/credibility of the licence could be in jeopardy and MNR's credibility to administer/enforce the legislation had been questioned and could be challenged by the producers and/or tribunals. Lack of inspections on the part of MNR can place MNR in a position of liability and in contravention of Section 57 of the ARA. This could lead to legal action being initiated by the general public and prosecution is possible against the Minister, Deputy Minister, District Manager and/or Inspector. Similarly, Part V of the Environmental Bill of Rights could be used to request an investigation of non-compliance with the site inspection requirement and Part VI of the EBR could see court action against the Minister and or the Deputy Minister.
>
> The main reason why MNR was [sic] developing a partnership with the APAO, was a result of fiscal constraints and a downsizing of staff, that prohibited MNR to meet their [sic] mandatory administrative through [sic] legislative requirements. Therefore, the APAO and MNR met to discuss the feasibility of a self-monitoring program for APAO members to ensure at least their sites would be inspected, verified or audited by MNR at a later date, which would allow MNR to concentrate on non-members of the APAO. This approach would basically allow MNR to inspect/verify all sites annually and be cost effective for MNR.

industry has not been documented extensively, and that relative to forestry, it is a smaller and less complex sector, allowing some analysis in a short timeframe.

Aggregate Resources Trust

Amendments to the *Aggregate Resources Act* (ARA) were made in 1996.[145] The changes included a provision requiring the Minister of Natural Resources to create a trust called the Aggregate Resources Trust.[146] The trust was to provide for, "on terms and conditions as may be specified by the Minister," the rehabilitation of land on the site of former pits and quarries, research on aggregate resource management including rehabilitation, "payments to the Crown and to regional municipalities, counties and local municipalities in accordance with the regulations," and "such other matters as may be specified by the Minister" (these are the "trust purposes").[147]

The Act also requires the Minister to appoint a trustee. By indenture made in June 1997,[148] the Ontario Aggregate Resources Corporation [149] (TOARC) is the trustee. The sole shareholder of TOARC is the Aggregate Producers Association of Ontario (APAO).[150, 151]

Article 2.02 of the indenture obliges the Crown to "direct the APAO to transfer on behalf of the Crown the Abandoned Pits and Quarries Rehabilitation Fund together with all accrued and unspent income to the Trustee." The APAO formerly administered this fund.

The indenture also identifies the assets of the trust as including the "Aggregate Resources Charges," and defines these charges in part as "the aggregate of annual licence fees, wayside permit fees, aggregate permit fees, royalties and special payments imposed or levied pursuant to the Act or regulations made thereunder and required to be paid to the Trust."[152]

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[145] See *An Act to promote resource development, conservation and environmental protection through the streamlining of regulatory processes and the enhancement of compliance measures in the Aggregate and Petroleum Industries* (Bill 52), S.O. 1996, c.30.

[146] s. 6.1 (1) of the ARA.

[147] s. 6.1 (2), ARA.

[148] "Indenture made as of the 27th day of June, 1997, Between Her Majesty the Queen in Right of the Province of Ontario as Represented by the Minister of Natural Resources for the Province of Ontario (as Settlor), and The Ontario Aggregate Resources Corporation (as Original Trustee)" ("the indenture").

[149] TOARC's seven-member board of directors is made up of APAO directors and representatives of environmental groups, municipalities and non-APAO member aggregate producers (Mineral Aggregates in Ontario: Statistical Update 1999. TOARC, 1999).

[150] By implication of Article 3.04 (b) of the indenture, which lists among the reasons for removal of the Trustee as trustee the event that the APAO "ceases to be the only shareholder of the original Trustee".

[151] The "President's Message" on the APAO website (www.apao.com) describes APAO as follows: "APAO is the non-profit industry association representing producers of sand, gravel and crushed stone in the province of Ontario, along with suppliers of aggregate industry products and services. We like to say that WE ROCK!"
According to MNR's Self-Monitoring Program: Update Report, March 1996, in 1996 there were about 2,700 licences issued under the ARA, of which "1,000 are controlled by the APAO, 700 are issued to the lower or upper municipalities and 1,000 are what we call non-members" (emphasis added). MNR told us it believes aggregate licences and permits currently held by municipalities number fewer than 300: B. Messerschmidt, MNR, 20 June 2001.

[152] See Articles 1.01 (c) and (t) of the indenture; subs. 50 (3) of the *ARA* requires rehabilitation security payments and special payments to be paid to the trust. Licensees pay annual license fees of six cents per tonne of aggregate removed from a site in the previous year, of which four cents goes to the local municipality, one-half cent to the upper-tier county or regional municipality, one-half cent to the Trust for rehabilitation of quarries, and one cent to the province's Consolidated Revenue Fund. See s. 46, *ARA* and ss. 2 and 3, O.Reg. 244/97.

The Crown is obliged to provide information allowing the Trustee to discharge its responsibilities, including "an up-to-date list of all active licences, wayside permits and aggregate permits," names and addresses of all licensees and permittees, locations of properties subject to licences and permits, and the status of "the account between the Ministry of Natural Resources and the active Licensees and Permittees with respect to license fees, … security deposits" (etc.). The Trustee is entitled to rely on this information and is not obliged to verify its accuracy. The information is to be considered confidential and competitively sensitive, and not to be disclosed except as required by the indenture or by law, or in statistical form that does not identify individual operators. [153]

A second indenture between the parties adds to the list of "Trust Purposes" listed in the ARA and in the original indenture. These additional trust purposes are:

> *"the education and training of persons engaged in or interested in the management of the aggregate resources of Ontario, the operation of pits or quarries, or the rehabilitation of land from which aggregate has been excavated; and the gathering, publishing and dissemination of information relating to the management of the aggregate resources of Ontario, the control and regulation of aggregate operations and the rehabilitation of land from which aggregate has been excavated."*[154]

While the trust purposes identified in the Act and the original indenture emphasize rehabilitation, the second indenture thus appears to expand the purposes to education and training, as well as information management, both functions traditionally conducted by MNR.

Article 8 empowers the Trustee to "employ, remunerate and direct such persons as may be designated by the Crown as inspectors pursuant to section 4 of the Act, to conduct and perform inspections and audits of Licensees and Permittees for the purpose of obtaining and verifying the information required by the Trustee in order to carry out and fulfil the Trust Purposes."[155] The effect of Article 8 is to *enable* the transfer by MNR to the industry of not only the administration, but also the monitoring and enforcement of the rules for rehabilitation of quarries and pits in Ontario.[156]

To date, MNR has not chosen to delegate inspection or enforcement functions in respect of rehabilitation. TOARC has, however, subcontracted the responsibility for *managing* the abandoned pits and quarries rehabilitation fund to the Aggregate Producers' Association of Ontario, in a program called the Management of Abandoned Aggregate Programs.[157]

Despite the government-like functions assigned to the trustee by the indenture, Article 8.09 clarifies the trustee's status in relation to government: "The Trustee is an independent corporation providing services for the benefit of the Crown in accordance with the terms of this Indenture, and neither the Trustee nor any employee, agent or servant of the Trustee will be construed to be an agent, employee or partner of the Settlor."

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[153] Article 5, indenture. This provision appears to reverse a conventional relationship between government and industry insofar as it obliges government to provide information about an industry association's members to the association.

[154] See "Indenture made as of the 17th day of August, 1999, Between" the same two parties as the original indenture, Article 1.

[155] Article 8.01 (a) of the original indenture.

[156] Part VI of the *ARA* governs rehabilitation, including powers for the Minister to order compliance with the Act, regulations, site plan, and license and permit requirements respecting rehabilitation (subs. 48 (2)).

[157] B. Messerschmidt, MNR, June 19, 2001.

The trust nevertheless has charge of considerable sums of trust monies for rehabilitation, as well as a delegated responsibility for rehabilitation of aggregate sites, with an unknown net effect on water quality and quantity and little public oversight of its performance.

Compliance self-assessment

Bill 52 also established a requirement for annual compliance assessment self-reporting by industry.[158] Self-reporting requires operators to follow the direction given in "Aggregate Resources of Ontario: Provincial Standards, Version 1.0" published by the Ministry of Natural Resources. The standards are a comprehensive guide to application for licences or permits, and reporting by operators on details of their proposed and ongoing operations.

Annual reporting is in the form of "checklists," with compliance or non-compliance noted under a series of categories depending on the type of operation. Should an operator detect a contravention of the standards, the offence is to be recorded in the annual compliance report. If the problem is remedied within 90 days of the report being submitted to the Minister and provided the operator "immediately stops the doing of any act that forms part of the contravention," the operator cannot be prosecuted.[159]

The reporting regime can arguably be seen to formalize the ability for operators to fail to comply with the standards without sanction, as long as the contravention is remedied within 90 days. More seriously, along with a lesser government inspection presence in the field, it increases the risk of failure to reflect accurately field realities in compliance reports, and increases the temptation to violate the standards in the hope of not being detected. Finally, the documentation provided through a checklist approach is likely to de-emphasize qualitative detail that an independent field inspection would be more likely to detect.

The self-assessment regime has been accompanied by a reduction in Ministry capacity. The number of full-time equivalent inspectors for the aggregates program on private land was 41 before Bill 52, and has been reduced to 14.[160] As was pointed out by a number of public interest groups in February 1997, the changes raise "serious questions about the ability of the remaining staff to adequately review and verify the accuracy and completeness of compliance reports that will be submitted by aggregate operators." In the opinion of these groups, "perfunctory reviews of the prescribed checklists are inadequate substitutes for a systematic program of on-site monitoring, investigation, and enforcement by public officials." They noted that even when the Act required mandatory annual inspections, 40 percent of all licensed operations had not been inspected annually.[161]

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[158] S. 15.1, *ARA*.
[159] S. 15.1 (5) *ARA*.
[160] Telephone conversation with Brian Messerschmidt, Manager, Aggregate and Petroleum Resources Section, MNR (Peterborough, Ontario), May 18, 2001.
Page 21 of the 1996 ECO Annual Report cites the number as having dropped "from 41 to 36 in 1996," and MNR's "1997 Status Report to the ECO" dated November 1997 says it had 20 aggregate inspectors and seven conservation officers. A gradual decrease in capacity can thus be traced over the past five years. Of the estimated 150 million tonnes/year of aggregate mined in Ontario, 130 million tonnes comes from aggregate operations on private land.
[161] "Submissions to the Ministry of Natural Resources Regarding Proposed Provincial Standards under Bill 52 (*Aggregate Resources Act*) by Canadian Environmental Law Association, Coalition on the Niagara Escarpment, Federation of Ontario Naturalists, Save the Ganaraska Again, Save the Oak Ridges Moraine, and Uxbridge Conservation Association," February 14, 1997. The 40% inspection rate cited in the submission was earlier reported in the Ministry of Natural Resources' Self-Monitoring Program: Update Report, March 1996, at page 1.

These concerns seem to be borne out by evidence that industry self-monitoring has been coincident with fewer inspections by MNR staff. In a follow-up report to an application for investigation under the *Environmental Bill of Rights (EBR)*, the Environmental Commissioner reported that

> *while ministry policy in 1999 was to field check 10 per cent of licences, [officers in] Guelph District did not field check any in 1997/98 or 1998/99, due to inadequate staffing, and was planning to inspect only 25 (or 8 per cent) of the 334 licences in the District in 1999/2000.*[162]

The Environmental Commissioner has also found that a lesser enforcement presence in the forestry sector, combined with industry self-monitoring and limitation periods that are too short in the circumstances, can risk the potential success of prosecutions.[163]

Also, public and government-wide oversight of standards is made more difficult when standards can be made at the Ministry level and amended without referral to Cabinet or the legislature, as is now the case with the aggregates standards. There is less opportunity for other ministries to comment when Cabinet is not directly involved in reviewing proposed standards. An important implication of cutting off commentary from other ministries is that broader source water impacts in the province cannot be addressed by, for example, the Ministry of Environment. The environmental impacts of any given aggregate extraction operation, or of many such operations in a region or in the province as a whole, may have significant effects on overall source water quality or quantity that merit review by other ministries.

One forum of public consultation remains despite the relative ease of amending the standards. Due to the requirements of the *EBR* for ministries to post proposed policy changes on the Environmental Registry, any environmentally significant changes to the standards document require posting on the registry for a public comment period.

A3.2 Performance

A3.2.1 Ability to Undertake Required Functions

It is difficult to assess the aggregate industry's capacity to perform its self-monitoring, rehabilitation or other efforts. Statistics published by TOARC consist mainly of production tonnage. Neither records nor any assessment of compliance has been made available by MNR or the industry (see "Outcomes," below). It is unclear whether this lack of availability of compliance records can be explained by industry non-reporting, lack of MNR capacity to synthesize information that is submitted, or other reasons.

A3.2.2 Outcomes, Enforcement Record, Consistency of Protection, Information Flow

The Environmental Commissioner of Ontario (ECO) has pressed MNR to track the performance of self-monitoring by the aggregates industry, with limited results. In 1996, the ECO said,

> *The Ministry should evaluate the effectiveness of the new self-monitoring system in achieving environmental protection and report annually on the results.*
>
> *Public consultation on this decision [to implement self-monitoring] was poor. The Ministry only consulted with the APAO. The Aggregate Strategy Task Force, whose members include the road builders association, municipalities and the Conservation*

[162] "Changing Perspectives – 1999/2000 Annual Report" of the ECO, p. 109.
[163] ECO 1998 Annual Report, pp. 185-188.

> *Council of Ontario, first heard about it when the proposed Act was introduced in the Legislature.*
>
> *The proposal was not posted on the Environmental Registry. And while legislative committee hearings were held, they are not a substitute for broad consultation through the Environmental Registry or for other consultation methods.*
>
> *The Ministry's Business Plan suggests that the public and municipalities have a role in monitoring compliance. But Ontarians have no access to private property where pits and quarries are located, and municipalities have declining resources and no jurisdiction for enforcing compliance.*
>
> *The Ministry committed to posting regulations under this new legislation on the Environmental Registry.*[164]

In 1997, the ECO wrote:

> *(In 1996) I recommended that MNR assess and report on the effectiveness of the self-monitoring system with respect to aggregates and forestry management in achieving environmental protection, and make this information available annually. MNR responded that the first annual aggregate resources compliance report will be available by summer 1998. I look forward to an assessment of the effectiveness of the transfer to self-monitoring in that report.*
>
> *With respect to forestry management, the Five-year State of the Forest Report has not yet been released. I trust that it will include a report on the effectiveness of the transfer to self-monitoring in forestry management.*[165]

MNR responded to the ECO's 1997 concerns as follows:

> *An aggregate resources compliance report will be prepared by MNR annually to evaluate the compliance program. The first such report is expected to be available by the Spring/Summer 1998.*[166]

No such report was ever submitted to ECO in accordance with this commitment.[167]

The ECO commented on the need for compliance reporting again in its 1999-2000 Annual Report:

> *The ECO encourages MNR to review the effectiveness of its Aggregate Resources Compliance Reporting Program, to determine how well inspections are being conducted by the different district offices, to see whether there are systemic problems with the program, and to develop remedies and put them in place.*

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[164] ECO Annual Report 1996, p. 22.
[165] Supplement to the ECO Annual Report 1997, item 3.18 at p. 45.
[166] "MNR 1997 Status Report to the Environmental Commissioner of Ontario," November 1997.
[167] Brian Messerschmidt, MNR, telephone interview, May 18, 2001. ECO staff offered a possible explanation, saying "we changed our ministry reporting requirements (i.e. what the ministries have to report to us) in 1999 when the Interim (Environmental) Commissioner was appointed. We decided to make specific requests for information rather than ask (for comprehensive updates)." (Electronic mail correspondence with ECO staff, June 14, 2001). An institutional change in the reporting relationship does not fully explain MNR's failure to comply with an earlier request by the Commissioner.

MNR replied:

> *MNR's 2000/01 Business Plan commits the Ministry to a review and audit program to assess the effectiveness of the Aggregate Resources Compliance Reporting Program.*[168]

In conversation with the author, an MNR official acknowledged that the aggregates section has "very poor [electronic and other capacity] for tracking and summarizing compliance," in contrast with the forestry division, which has an electronic system. He also suggested that the Aggregates Section has "success in prosecutions" on offences like extraction depth and tonnage limit exceedances, and said "illegal operations" (operating without a licence) is "probably the most common" offence.[169]

In a later conversation, he said licence suspensions under subs. 15.1 (6) of the ARA (which automatically deems a licence suspended where the licensee fails to submit an annual compliance report or where his report discloses a contravention that is stopped immediately and not remedied within 90 days) occur "quite a bit." By contrast, two other ARA provisions requiring actual enforcement action by MNR were respectively "sporadically" and "seldom used": subs. 22 (1) allows the Minister to suspend a licence for a contravention, and s. 63 allows the Minister to apply to the Superior Court of Justice for a restraining order when a person appears to be non-compliant despite the imposition of a penalty for non-compliance.[170]

Forestry Sector

In terms of compliance self-monitoring in the forestry sector, the Ontario Provincial Auditor audited MNR's Forest Management Program in 2000, and said:

> *As of April 1, 1998, the lead role for compliance inspections was delegated to forest management companies under the terms of the sustainable forest licence. Previously, the Ministry performed these inspections. …*
>
> *Over a three-month period, the Ministry performed 650 [supplementary] inspections in areas where the responsibility had been transferred to forest management companies. In many of these areas, forest management companies had implemented their own compliance plans and inspection cycles. …*
>
> *In areas where both the Ministry and the forest management companies performed inspections, ministry inspectors generally found significantly more instances of non-compliance. …*
>
> *Although this continued inspection program often duplicated the work of company inspectors, the primary goal of the inspection process was to ensure compliance, and the situation at the time of our audit indicated a need for a continued ministry presence. Alternatives need to be considered, such as more directly overseeing company inspectors where necessary or performing ministry inspections on a cost-recovery basis.* [171]

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[168] The ECO comment and MNR response are taken from "Changing Perspectives – 1999-2000 Annual Report of the ECO", pp. 109-110. The context was an application for investigation into alleged contraventions of an aggegrate operator's site plan, contrary to the *ARA*. MNR confirmed to the authors that it plans to supply ECO with audit results in March 2002.

[169] Brian Messerschmidt, MNR, telephone interview, May 18, 2001.

[170] Brian Messerschmidt, MNR, telephone interview, June 13, 2001.

[171] Ontario Provincial Auditor, "Ministry of Natural Resources Forest Management Program," Part 3.13 of "Special Report: Accountability and Value for Money," 2000 (emphasis added). (www.gov.on.ca/opa/english/en00/313eng00.htm) In the area of enforcement, the Auditor found

The Environmental Commissioner's Office has also recorded the following observations about shortcomings in information gathering by MNR:

> *Problems identified by the ECO in the 1997 annual report continue, for example, that some significant environmental information is not being collected or is not being analysed and reported. In program areas where MNR expects industry or partners to submit data and reports, the first few years of these programs have resulted in inconsistent data collection and reporting to MNR, as well as significant data gaps for natural resources values which neither MNR or partners are monitoring. It also appears that MNR stopped inventorying and monitoring and transferred these responsibilities to industries and other partners so quickly that consistent data standards, inventory methodologies and reporting rules were not in place. For example, by March 31, 2000, MNR still had not finalized its Forest Information Manual, which must be approved by regulation under the Crown Forest Sustainability Act, to set mandatory rules for the forest industry to inventory, monitor and report to MNR on forest resources and operations - even though MNR stopped its forest management inventory and monitoring activities in 1996. In 1999 the ECO observed that MNR does not appear to have the capacity to check partners' data, enter it into the computerized databases and analyse and report on the information in the manner that was originally intended.* [172]

The problems identified by the ECO may have a significant negative impact on the government's overall ability to track patterns and anticipate environmental problems. There is little evidence in the case of the aggregates industry that information provided for compliance assessment purposes, let alone for baseline information purposes, is adequate to inform MNR of environmental conditions respecting pits and quarries.

inconsistent application of enforcement policy among forest districts, and a failure to apply enforcement provisions in a progressively incremental manner depending on the frequency, severity and significance of the violation (in some cases because repeat offenders were neither identified nor tracked in the system). MNR indicated that its compliance reporting system would produce records allowing better enforcement decision making, and committed to review its enforcement activities and "act upon these audit recommendations."

[172] ECO staff report to the Commissioner, MNR Monitoring, May 2000 (emphasis added).

A3.2.3 Interministerial Coordination Capacity

The decreasing staff complement at MNR, for example in terms of aggregates inspectors, is likely to make the ministry less capable of playing a meaningful role in interministerial policy-setting.

An agreement between MNR and the Ministry of the Environment (MOE) made in 2000 establishes protocols for handling complaints from the public respecting pits or quarries. "The protocol is designed to clarify how MNR and MOE will work together when it comes to potential issues involving the *Aggregate Resources Act* (ARA), *Ontario Water Resources Act* (OWRA) and the *Environmental Protection Act* (EPA)."[173]

Unfortunately, the protocol offers little guidance, other than establishing the "principles" that "any required legal action will be the lead responsibility of the Ministry responsible for the legislation under which the action is being taken," but in all other cases MNR will "carry the complaint from receiving it through to notification to complainant regarding the outcome," and "MNR shall attempt to resolve all complaints either through voluntary abatement and/or through the enforcement tools available to MNR." "MNR may request abatement / enforcement support from MOE," but only "if voluntary abatement is not achieved and MNR does not have the necessary tools to enforce compliance. …"[174]

The principles and "scenarios" listed in the protocol attempt to institutionalize a reduced role for MOE regardless of its statutory responsibility, and otherwise add little guidance about roles for each ministry. For example, in one scenario (where "ARA Violation is Possible (including OWRA/EPA License and Permit Conditions)") the protocol suggests that MOE district offices "provide technical expertise and assistance/action in assessing compliance (e.g., possible well interference due to quarry dewatering)." Even in this scenario, where it might be appropriate for MOE to play a compliance or enforcement role as well as a technical role, the protocol goes on to say "MNR will undertake an investigation in order of priority, highest to lowest."[175]

While the option of requesting MOE's assistance is referred to, no option of an independent MOE enforcement action is mentioned.

A strategy for compliance and enforcement may be a good way of optimizing the use of capacity within and among ministries. Unfortunately the protocol does not add a great deal of strategic guidance in this respect, and in fact appears to attempt to limit the role of MOE contrary to MOE's statutory obligations. Written agreements may help to optimize relationships and information-sharing among ministries for better policy and results, but the protocol does not appear to achieve that end. It may also be appropriate for such policy proposals to receive public review prior to implementation.

Where communication by MNR with the Aggregate Resources Trust is concerned, Article 8.02 of the indenture "acknowledges" the right of an MNR representative to attend board meetings of the Trust, as an *ex officio* member.

[173] "Protocol to Address Environmental Complaints Regarding Pit and Quarry Operations in the Province of Ontario Between the MNR and MOE" dated Sept. 26, 2000 and signed by Gail Beggs, Assistant Deputy Minister, Field Services Division, MNR, October 27, 2000 and Carl Griffith, ADM, Operations Division, MOE (signature undated).
[174] Ibid. (emphasis added).
[175] Ibid.

A3.2.4 Opportunities for Operational Experience-Based Policy Learning

The dramatic reduction of the Ministry of Natural Resource's field staff in this area, and its reliance on 'check-list' compliance reports by aggregate operators, have likely reduced the Ministry's knowledge of actual conditions and practices in the field. This may have an adverse impact on the Ministry's ability to identify problems in the field, and formulate and implement appropriate policy responses.

A3.3 Governance, Accountability and Democratic Values

A3.3.1 Governance

Potential for Conflict of Interest

Aggregate Resources Trust – The effect of the trust arrangement is that APAO, an industry association, performs a number of functions, including statutory site rehabilitation functions. These functions are performed through the Aggregate Resources Corporation (TOARC). TOARC is wholly owned by APAO. TOARC, which is sole trustee of the Aggregate Resources Trust, has subcontracted management of the abandoned pits and quarries rehabilitation fund back to APAO. Two full-time APAO employees manage the program, called the Management of Abandoned Aggregate Properties program. The association does not appear to conduct inspections on behalf of the Crown, although as noted above, Article 8 makes such a delegation possible. Should such a delegation occur, issues will arise concerning the appropriateness of regulatees inspecting themselves, as well as the legality of the delegation itself.

The only provision in the trust indenture addressing potential conflicts of interest is Article 8.10, which provides the trustee is "not to knowingly enter into any indenture, business or other relationship or to incur any obligations which may conflict with this indenture." This does not address potential conflicts of interest between performance of the trust obligations and the association's members' obligations to government; nor does it address possible conflicts between the association and its members, for example situations involving relationships with non-members.

Compliance self-assessment - In 1998 the ECO "encouraged" ministries to assign decisions involving reviews or investigations to persons without previous involvement or a direct interest in the matter. [176]

MNR reported in reply that

> *in July 1998, MNR put in place a redesigned decision-making process for reviews and investigations. This process involves senior staff who have no direct interest in the issues or programs raised by applicants [sic] in decisions whether reviews or investigations will be conducted and in determining the outcome of investigations or reviews. Staff who are assigned the role of conducting reviews or investigations will be selected based on the knowledge and skills that are necessary to complete the review or investigation thoroughly and competently. The Ministry has indicated that if circumstances dictate, it will entertain assigning the responsibility for carrying out reviews and investigations to persons not employed by MNR (e.g., the Mining and Lands Commissioner).* [177]
>
> MNR said it would test the process for one year and would consider it for inclusion in its Procedures Manual. The Procedures Manual was not consulted for the present study.

[176] Recommendation 22, ECO 1998 Annual Report.
[177] MNR's Submission to the ECO's 1998 Annual Report (November 1998).

Tracing MNR's adherence to this commitment would require examination of individual compliance and enforcement files or at a minimum, current MNR enforcement and compliance policies.

Responsiveness

Article 8.02 of the indenture "acknowledges" the right of MNR to be notified of meetings of the Board of Directors of TOARC, and to attend *ex officio*.

A3.3.2 Accountability

Control/Oversight Mechanisms

Audit

The Provincial Auditor does not appear to have authority to directly audit the self-monitoring activities of aggregate operators. However, as has been the case with self-monitoring in the forestry sector,[178] the Auditor could audit the Ministry's oversight of these activities by the industry.

Freedom of information

Reports prepared by third parties describing environmental conditions, and submitted to MNR in support of aggregate licences, have been ordered disclosed in some cases and ruled confidential in others by privacy officers under the *Freedom of Information and Protection of Privacy Act.* [179] Traditionally, MNR files relating to compliance of operations would have been available to requesters provided they did not concern "law enforcement" matters (and even this exception is subject to discretion).[180] It remains to be seen how disclosure rules would be applied to the contents of compliance assessment reports submitted by operators (let alone whether the contents would be sufficient to inform neighbours of an aggregate operation, for example, of the possible environmental impacts of an operation).

Environmental Bill of Rights

In 1996, the Environmental Commissioner said, "MNR did not draft its instrument classification proposal during the reporting period. This denied Ontarians the right to comment on, appeal or apply for Reviews and Investigations of instruments issued by the Ministry."[181] As of June 2001, MNR had not yet classified its instruments.[182] The ECO's special report on MNR's non-compliance with instrument classification (IC) obligations includes a chronology of MNR-ECO communication on the subject. The chronology includes the following entry for October 20, 1997:

> *MNR staff contacts ECO staff and explains that the aggregate industry led by the APAO, and supporting government officials intend to oppose further implementation of the MNR IC regulation. A major concern is that the aggregate companies do not wish to be subject*

[178] See Office of the Provincial Auditor, Special Report on Accountability and Value for Money (October 2000).
[179] See Orders P-798 and P-725 on website of the Commissioner (www.ipc.on.ca).
[180] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F-31, s. 14 (1).
[181] ECO Annual Report 1996, p. 8.
[182] See "Broken Promises: MNR's Failure to Safeguard Environmental Rights" (ECO Special Report, June 2001), and "ECO Staff Report to the Commissioner: Chronology of ECO-MNR Discussions and Correspondence re: Classification of Instruments and Related Policy Issues, 1995 -2001."

to applications for review and applications for investigation related to specific pits and quarries. [183]

Legal Accountability

Aggregate Resources Trust - The trust indenture gives TOARC, as trustee, the power to "institute and defend legal proceedings" concerning the affairs of the trust, and to use trust assets for that purpose.[184] MNR agrees in the indenture to indemnify the Trustee and its employees, officers, directors, agents, etc. from and against all expenses and liabilities including taxes, but TOARC must "seek such indemnity out of the Trust Assets."[185] Presumably, it can seek further funds from MNR if the trust assets are exhausted. Article 10 also limits the duties of the Trustee respecting the trust assets to what is specified or reasonably expected under the indenture (such actions would include investments allowable under the *Trustee Act*, and holding and refunding licensees' and permittees' security payments).

As noted above, Article 8.09 provides that the Trustee is an "independent corporation" and neither it nor its employees are agents, employees or partners of MNR.

Article12.01 of the indenture requires it to be construed in accordance with Ontario laws, "including the *Trustee Act*." The same article provides that TOARC "shall have no duty or obligation under this Indenture to monitor compliance with the [*Aggregate Resources*] Act … except as may be expressly agreed to in this Indenture or otherwise in writing."

A3.4 Conclusions

The absence of publicly available reporting on compliance self-monitoring in the aggregates sector makes it impossible to assess the ability of the industry to perform this responsibility. The "checklist" approach now in place may create serious barriers to MNR being able to follow up and correct violations in a timely way and within statutory limitation periods. This conclusion appears to be borne out by an MNR official's acknowledgement that certain statutory enforcement tools are used infrequently in the aggregate sector, and by the results of an ECO report on a forestry sector investigation. The annual reporting structure that allows problems to be documented and corrected within certain timeframes may institutionalize some degree of non-compliance, provided the traditional deterrence effect of a substantial compliance and enforcement presence is not present, which may result in lower compliance. Similar results have been observed in the forestry sector.

[183] See "Broken Promises" at p. 10 (emphasis added). Asked in a radio interview on the day this report was released why he thought MNR refused to comply, ECO Gord Miller said he knew no reason. He made no mention of industry pressure on government officials (radio interview on CBC Radio Ottawa program "All In A Day," June 21, 2001).
[184] Article 8.06, Trust Indenture.
[185] Article 10.01, Trust Indenture.

Appendix 4: The Electrical Safety Authority

A4.1 Description of Function

The Electrical Safety Authority (ESA) is a corporation without share capital established 12 January 1999 by letters patent under the *Corporations Act.*[186] Its functions were transferred from the electrical inspection division of Ontario Hydro when the assets and liabilities of Ontario Hydro were broken up pursuant to the *Electricity Act, 1998*.[187,188] It is responsible for wiring inspections, general electrical inspections, Ontario Electrical Safety Code advice and information, and product approval inspections.[189]

Section 113 of the *Electricity Act, 1998* gives the ESA the power to make regulations. The ESA administers the Electrical Safety Code ("the Code"), a comprehensive code consisting of the Canadian Electrical Code and Ontario Amendments.[190]

While the "Minister" for the purpose of the *Electricity Act* generally is the Minister of Energy, Science and Technology, an Order in Council dated 24 March 1999 assigned the powers and duties and administration of section 113 to the Minister of Consumer and Commercial Relations (now the Minister of Consumer and Business Services).

A4.2 Structure

A4.2.1 Relations between Minister, Board, CEO; Board and staff status

Certain roles of the Minister and the Authority are spelled out in an administrative agreement.[191] The purpose of the agreement is to "set out the relationship between the Minister and the Electrical Safety Authority." The agreement is to be carried out "with the objective and principle of ensuring a fair, safe and informed marketplace that supports a competitive economy."

The agreement reaffirms the ultimate responsibility of the Minister for the administration of section 113, which in turn gives ESA authority to make regulations prescribing design, installation, etc. of all works and other matters used in the generation, transmission, distribution, retail or use of electricity in Ontario; prohibiting the use of such works until they have been inspected and approved; adopting by reference any code or standard (or part thereof) and requiring compliance with it, etc. These matters are contained in the Code.

The balance of policy-making capacity and power appears to be intended to lie with the ESA rather than the Minister: the Minister is obliged to consult with the ESA in respect of current and

[186] R.S.O. 1990, c. C-38.
[187] S.O. 1998, c.15.
[188] A Transfer Order by the Lieutenant Governor in Council took effect on April 1, 1999, and transferred all rights, title, interests and obligations of Ontario Hydro in, to and in respect of all employees, assets, liabilities, rights and obligations of Ontario Hydro related to electrical safety as previously carried out by the electrical inspection branch of Ontario Hydro, to ESA. (Electricity Act, 1998. Transfer Order – Transfer of Certain of the Officers, Employees, Assets, Liabilities, Rights and Obligations of Ontario Hydro ESA (undated but taking effect April 1, 1999)).
[189] ESA website: www.esainspection.net. The present study is concerned with ESA's inspection of installation function, not the product approval process.
[190] Canadian Electrical Code Part I C22.1-98, as amended by the "Ontario Amendments to the Canadian Electrical Code Part I, C22.1-98." Together these documents comprise the Ontario Electrical Safety Code, incorporated by reference in Ontario Regulation 164/99.
[191] Administrative Agreement between Her Majesty the Queen in Right of Ontario and Electrical Safety Authority, dated March 1999 (hereafter "the agreement").

proposed government legislation or policy, but only where the law and policy "will directly impact upon the ESA's administration of the Act" (section 3 (1) (a) of the Agreement). The Minister is also obliged to make reasonable efforts to support the ESA's recommendations for legislative or regulatory change in respect of the administration of the Act. Section 3 (3) obliges the Minister to consider amendments to the legislation as proposed by the ESA, review its activities in administering s. 113 of the *Electricity Act*, conduct policy, legislative and regulatory reviews. There is no express requirement for the Minister to sustain sufficient capacity to perform these roles.

For its part, the ESA must "inform and advise the Minister with respect to matters that are of an urgent or critical nature and that are likely to require action by the ESA or Minister to ensure that the administration of section 113 of the *Electricity Act, 1998*, is carried out properly."

The agreement also requires the Minister to give reasonable notice and reasons to the Authority if he intends to recommend to Cabinet that ESA's authority to administer section 113 be revoked (Section 10). In the event the Authority is to be wound up, the Authority is required to provide unfettered access to its documents in respect of administration of section 113.

The supplementary letters patent of the ESA require that the Board consist of twelve directors. Three directors are to be appointed by the Minister from among a "Minister's Class" of directors and one, the Chief Executive Officer, is to be a director *ex officio*. The remaining directors are to be elected "as set out in the by-laws." Article 3.10 of the by-laws requires that persons elected to the board be "reflective of the following sectors": one from the "engineering sector," one from "electrical manufacturing," two from "electrical utilities," three from among "electrical contractors," and "one person who is not a member of the aforementioned sectors." Section 3.11 stipulates that, "the members shall not elect an employee of an electrical trade association as a member of the Board."[192]

Subsection 6 (5) of the agreement concerning remuneration is noteworthy: "Board members approved by the Minister shall be paid by the ESA in an amount and on a basis that is equivalent to all other members of the Board, *unless otherwise agreed to by the Board member and the Minister*."

The President is also to be the CEO of the authority, and is selected by the board members (subject to resolution of the board).

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[192] A list of members of the Board of Directors was provided by the ESA. Three were identified as being members of the "minister's class": one, Rob Dower, is "Director, Marketplace Service and Standards Branch, Ministry of Consumer and Business Services"; another is Michael Lio of "Lio & Associate"; and the third is Roy R. Philippe, "Retired Deputy Fire Marshall." The regular members include the Presidents of "Powertel", "Honey Electric Limited" and "Black and McDonald Group Ltd." (all "Reflective of Electrical Contractors"); the President of "Annedane Investments Inc." ("Reflective of Electrical Utilities"); the CEO of "Marshall, Macklin, Monahan" ("Reflective of Engineering Sector"); the CEO of "Energy Cables Division, Nexans" ("Reflective of Manufacturing Sector"); an individual identified as "Retired, York Hydro" ("Reflective of Utilities Sector"). The other members listed include the ESA's President and CEO, who is a board member *ex officio*, and an individual identified as "not reflective of a sector."

We were advised that "electrical trade associations" mentioned in article 3.11 include the Electrical Contractors Association of Ontario and the Ontario Electrical League "which represent the interests of their members as electrical contractors. We asked the rationale for excluding them from the Board. The reason given was "to provide assurance, in addition to the provisions of the Corporations Act and the by-laws, that Board members would act at all times in the best interest of ESA." (letter from Judith McTavish, Corporate Secretary and General Counsel, ESA, June 21, 2001).

Board members may serve no more than two consecutive three-year terms. The CEO and Minister-appointed directors are exempt from this limitation.

The "members" of the authority are the members of the board while holding office. Members elect (themselves as) directors,[193] appoint auditors and fix or authorize the board to fix their (own) remuneration at the annual meeting. The Board has full power in passing by-laws and resolutions and taking "any other action" according to the by-laws; its decisions are not subject to ratification by the members, as they are the same people as the board members according to Article 7.1 of the by-laws.

At least some ESA personnel have expertise arising from their employment at the ESA's predecessor institution, the electrical safety division of Ontario Hydro. [194]

The objects for which the authority is incorporated include: [195]

(A) to promote and undertake activities which enhance public electric safety including training, authorization, registration, audit, quality assurance, inspection, investigation, enforcement and other public electric safety services;
(B) to act in any capacity under all legislation and regulations designated and delegated to the Corporation under the *Safety and Consumer Statutes Administration Act, 1996*, S.O. 1996, C.19 as amended from time to time and any other legislation or regulations under which responsibilities are delegated to the Corporation in the future;
(C) to inform, educate and work with industry, government and the public;
(D) *to promote and undertake activities that enhance the competitiveness of the Ontario and the Canadian economy*;
(E) to promote and undertake activities that encourage the harmonization of electric safety standards and compliance practices; [and]
(F) to encourage industry to responsibly enhance electric safety.

The "special provisions" in the letters patent comprise the standard set of powers such as powers to accumulate and invest funds, acquire real and personal property, employ workers and maintain offices and facilities, enter into contracts consistent with the objects, sue and be sued in the name of the corporation, deal with negotiable instruments, etc. Article 2 of the by-laws confers powers to borrow money and to incur charges against the authority, and to delegate these powers to officers of the authority.

[193] The original directors were identified as potential nominees by an executive search firm on the basis of critieria developed by the CEO, Chair and "Minister's class" directors. Personal Communication, Judith McTavish, July 10, 2001.

[194] "The employees transferred to ESA were all previously employed in the Inspection Department of Ontario Hydro. The Ontario Hydro criteria for hiring an inspector included the requirement that the applicant was a licensed electrician with at least 10 years' experience in the electrical industry. All inspectors transferred from Ontario Hydro to ESA met these requirements. This continues to be a requirement of employment for ESA inspectors and all our inspectors meet the requirement." (letter from Judith McTavish, Corporate Secretary and General Counsel, ESA, 21 June 2001). Current ESA staff numbers found in a summer 2000 newsletter are similar to the staff complement of Ontario Hydro Electrical Inspection in 1997. (See "For Your Safety – An Update from the ESA" (METRO – Summer 2001, Vol.1): "The ESA is comprised of 300 plus employees …"; and Working Group Report, Appendix A "Electrical Inspection Staff Numbers, December 1997": "Overall Total: 294".)

[195] See Letters Patent for Electrical Safety Authority (Ontario Corporation Number 1333126) dated January 12, 1999 (emphasis added).

A4.2.2 Inspections, Investigation and Enforcement

The Code includes a basic obligation for a contractor to file an application for inspection for every "electrical installation," before or within 48 hours after commencing the work, and at least 48 hours' notice of completing the work and readiness for a "connection authorization." Inspections may be deemed to have been made where the contractor is "qualified," provides assurances that all portions of the relevant installation comply with the Code, and portions of the installation have already been inspected and are in compliance.[196]

The Authority's website advises that:

> *Responsibility not only for compliance but for verification of compliance is viewed as shared by both contractors and the ESA. … This process has a shared and complimentary responsibility [sic] whereby those performing work to the regulations identified in the Ontario Electrical Safety Code will be recognized by the Electrical Safety Authority. The Electrical Safety Authority will conduct field monitoring and auditing as set out by the Authorized Contractor Process and its procedures. … Contractor staff are … expected to be conducting monitoring for due diligence at jobsites.* [197]

To qualify as a contractor, an applicant must complete an application "for acceptance into the process," provide proof of $2-million minimum liability insurance and the appropriate Certificates of Qualification under the *Trades Qualification and Apprenticeship Act.*[198]

The rules in the Code are elaborated through ESA's Authorized Contractor Process. The website explains, among other contractor obligations, that 24 hours after an application for inspection is received by ESA (after 2 PM the next business day), "an inspection shall be deemed to have taken place by the Electrical Safety Authority," even if an inspection has not actually taken place. The interplay between this practice and Rule 2-004 is unclear.

"Periodic inspection" is carried out in buildings where electrical installation work of a routine nature is required at frequent intervals. The owner or occupant of the building submits an application, and acceptance of the application by ESA's inspection department authorizes the carrying out of periodic inspection during the relevant period. In this case the initial inspection process outlined above does not apply.[199] The inspection department also has a right to re-inspect an installation at any time, notwithstanding any previous inspection and acceptance.[200]

A companion program to the Authorized Contractor Process is "Continuous Safety Services," which is described as a "partnership" to help participants achieve "due diligence" in their work. Inspectors are "committed to building relationships and supporting your staff." The website claims:

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[196] Rule 2-004 of the Code. We did not consult the full text of the code, and therefore did not ascertain the definition of a "contractor" (and other terms) and whether it includes individuals doing their own installations.

[197] ESA website ("Authorized Contractor Program").

[198] See also Ontario Electrical Safety Code, Subrule 2-004 (8). We requested information respecting training, and were told "The program for certification of inspectors is going to ESA's Governance and Human Resources Committee May 23, 2001, and to our Board of Directors June 21, 2001. It would be premature to release it prior to Board approval" (Letter from Judith McTavish, ESA Corporate Secretary and General Counsel to Hugh Benevides, May 7, 2001).

[199] See Ontario Electrical Safety Code, Rule 2-006.

[200] Ontario Electrical Safety Code, Rule 2-016.

> *CSS adds education, Code interpretation and documentation of your compliance to a solid foundation of our traditional inspection services. … CSS presents a cost-effective, time-saving option [alternative?] to submitting individual Applications for Inspection for each routine maintenance job. Further, through CSS we anticipate your needs for electrical safety solutions and support you in demonstrating your due diligence. … As you document your electrical maintenance work, we inspect it and record the results. We also document all other safety efforts we take together. This documentation provides solid proof of your due diligence.*

Guidance in compliance thus appears to be blended with education and training as well as investigation and enforcement roles.

A Provincial Offences Officers Designation dated 29 March 1999 and signed by the Minister of Consumer and Commercial Relations, designated "those persons appointed by the ESA as Security Investigators and Security Officers" under the *Electricity Act, 1998* as Provincial Offences Officers for the purpose of offences established by section 113 of the Act and the regulations.

A4.3 Performance

The ESA's constituting documents (letters patent, by-laws, transfer order; administrative agreement; delegation of authority respecting provincial offences officers, etc.) were requested and received from ESA. Further information was requested of ESA respecting the record of performance related to the conflict of interest provision,[201] information on the nature of constituencies actually represented by board members; information on the personnel transferred from Ontario Hydro electrical inspection; internal or other evaluations of both Ontario Hydro's inspection division and ESA's performance (i.e., pre- and post-transfer); frequency and public availability of audits and other safety reports; statistics respecting investigations, prosecutions and other enforcement information; the nature and amounts of any appropriations from government or Ontario Hydro when ESA was created; information respecting the application of the Management Board's Agency Establishment and Accountability Directive; whether Crown policies for the conduct of prosecutions apply to ESA inspectors; and the nature of any reporting or oversight relationship with the Attorney-General and participation by the Attorney-General in inspection or enforcement decisions.[202]

We were told that some answers to our questions would have to be sought from outside ESA, and due to time constraints no further answers could be sent until after our deadline. We did subsequently receive a letter with further replies as noted below.

We were referred to the Working Group Report (see Addendum below) for background information about the creation of the ESA, but received no empirical evaluation of performance of the Ontario Hydro Electrical Inspection division.

[201] Article 9.1 of the by-laws obliges directors or officers who are directly or indirectly interested in proposed contracts with ESA (including notice that they are a shareholder or "otherwise interested in any company") to declare their interests at a directors' meeting. Conflicts of interest have been declared on four occasions by ESA Board Members (Letter from Judith McTavish, Corporate Secretary and General Counsel, ESA, June 21, 2001).

[202] Letter to Judith McTavish from Hugh Benevides, June 10, 2001.

Respecting audits, we were told:

> *External financial audits are conducted annually and are published in the Annual Report in accordance with the requirements of the Administrative Agreement with the Ministry of Consumer & Business Services.* [203]

We asked for any "statistics respecting investigations, prosecutions and other enforcement data since the ESA's inception," and were told "ESA's Annual Report provides information on operational performance and the Business Plan provides information on key business indicators." [204] The 2000 Annual Report cites the ESA's success in terms, for example, of "the growth of Continuous Safety Services to a $7 million a year safety business", "the 10 processing centres and their staff of Inspection Representatives, who handled 293,000 work orders in 1999", "the 200 Inspectors who conducted 550,000 inspection visits and resolved 117,000 electrical defects", and "the Authorized Contractor Program team that facilitated a 34 percent decrease in electrical defects among participants." [205]

The Annual Report also lists performance measures for four "business objectives". For example, Business Objective 2 is to "Create a safety organization focused on providing new electrical safety services to the public." The Annual Report describes performance in relation to this objective as follows:

> *In our traditional businesses of Wiring Inspections, Product Approvals and Continous Safety Services, demand is running at 14.5 per cent ahead of the previous year.*
>
> *In addition, monthly customer satisfaction ratings of 4.1 out of 5.0 were maintained throughout 1999.*
>
> *ESA embarked on an ambitious program to work more closely with the industrial customers, which resulted in the successful establishment of the Industry Advisory Council. This council met three times in 1999 providing valuable feedback and partnership in joint project initiatives.* [206]

Business Objective 3 is to "strengthen business processes, systems and monitor performance." Under this heading, the Annual Report includes the claim that "the "Standardized Operating Procedures" project has resulted in the documentation of 90 per cent of the inspection processes."[207]

ESA's Chief Engineer's answers to interview questions in a trade newsletter (and available on the ESA website through a link called "compliance") reveal the following about ESA's approach to compliance and enforcement:

> *From March 2000 to January 2001 ESA investigated about 1,994 situations involving violations of the Code. About 1,200 were installations where there was no application for inspection, 500 involved outstanding defects, 200 related to unapproved electrical products and about 100 were referrals from other agencies such as the Fire Marshal's office, police or the Ministry of Labour. These investigations resulted in a total of 289 charges. …*

[203] Letter from Judith McTavish, Corporate Secretary and General Counsel, ESA, June 21, 2001.
[204] Ibid.
[205] ESA Annual Report 2000, page 13.
[206] ESA Annual Report, 2000, page 14.
[207] ESA Annual Report, 2000, page 14.

More than 85% of the situations we investigate are resolved without the need to lay charges. However, if there are serious safety hazards or there is a history of non-compliance and disregard for the requirements of the Code we will take immediate action. …

*The vast majority of our enforcement activity **has not** involved electrical contractors. In fact, less than 30% of the charges and convictions from March 2000 to January 2001 involved electrical contractors. Most involved heating and ventilating installers, renovators, and what I can best describe as "trunk slammers". …*

I looked at the "permit" history of those people that we have charged or convicted. 72% of these people had never taken out an application for inspection or had taken out less than one permit per month with ESA prior to being charged. Clearly these are people who have little or no track record of complying with the requirements of the Code. The electrical contractors we charged were taking out less than three permits per month on average. …

[Objectives of the enforcement policy:]

ESA believes that its enforcement process should be fair, understandable, reasonable, clear and open, and effective.

Enforcement will be directed to areas where there is an expectation of public electrical safety impact. The approach must be consistently applied across the province.

We will seek to explain the reasons and goals of the safety programs we develop along with the role of enforcement. We want to involve the industry and stakeholders in developing safety programs. Finally we hope that our enforcement activities will help ensure a level playing field and support the people who consistently comply with the Code.

ESA will proactively communicate the risky situation(s) or electrical hazards being targeted and explain the safety rationale for undertaking enforcement.

We also want to do a better job of communicating our enforcement efforts and activities.

ESA will publish its enforcement policy. We will proactively communicate our enforcement activities and publish a yearly summary report.

Rather than having enforcement standalone as a program or separate activity, ESA will create a series of safety programs that target specific higher risk situations with enforcement integrated into these programs. Clear safety objectives and goals will be established for each of these programs.

We want to involve the electrical industry and other stakeholders in the design and implementation of targeted safety programs. This approach will enable ESA to focus its resources on issues that will have the greatest safety impact, and will support us in conducting enforcement activities in greater cooperation with industry.

We will actively communicate the expected results to be achieved from a safety program, and the related enforcement activities, with the industry and the public.

The Electrical Safety Authority will be communicating the enforcement policy to our own staff, industry and stakeholders. We are committed to an open and accessible approach to enforcement and the policy has been posted on our website at www.esainspection.net. We will communicate our enforcement activities and are committed to providing a yearly

> *summary report of our enforcement activities. We are establishing a process to monitor that this policy is meeting the strategic objectives and that ESA is operating in accordance with the principles, objectives and guidelines.*[208]

Respecting the conduct of prosecutions, we were told:

> *Prosecutions for offences under the Power Corporation Act (which governed Electrical Safety Code compliance under Ontario Hydro) were conducted by Crown Attorneys. To date this has been the practice at ESA. Decisions to prosecute are made by the General Counsel based on information provided by security investigators who are Provincial Offences Officers. The General Counsel is prohibited from discussing a decision to prosecute with any ESA board member.* [209]

We found no enforcement statistics about actual prosecutions conducted or convictions registered.

A4.4 Governance, Accountability and Democratic Values

A4.4.1 Governance

ESA's relationship to industry seems in some respects more like a "partnership" than a regulator-regulatee relationship (see above reference to Object (D) among the ESA's objects in the letters patent):

> *In addition to inspecting electrical work and equipment, we have defined our mission as creating the safest and most productive workplaces and public spaces in the world. Continuous Safety Services supports your safety efforts with expert inspection, electrical safety training, Code interpretation and easy access to all our other services.*[210]

This mandate, while perhaps not a classic "mixed mandate" of conflicting roles as is noted in the main paper,[211] nevertheless combines unnecessarily separate roles, one (safety inspections) that is clearly appropriate for a safety authority, and one that is less so (enhancing competitiveness).

Add to this the manner in which it presents its public face in website materials and an annual report that resembles a report to prospective shareholders, and ESA clearly cannot be described as serving a conventional regulatory function.

Two documents respecting the conduct of ESA directors and employees were received after our deadline. [212] The "Code of Conduct" for employees and officers of the ESA discusses hypothetical situations and emphasizes values such as the need to "ensure we do not use our regulatory mandate to gain an unfair competitive advantage." It provides guidance in selecting suppliers, accepting gifts from customers and suppliers, participating in industry associations and other business-related activities, and maintaining confidentiality. It gives no direction as to how conduct issues will be resolved, other than to ask employees to raise any questions "about Code of Conduct issues … with your manager or the Corporate Secretary and General Counsel."

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[208] Dialogue – A Publication of the Ontario Electrical League. Issue 23-3, Summer 2001 (emphasis in bold original; emphasis in italics added). The enforcement policy was not readily apparent on the website (week of June 18, 2001).
[209] Letter from Judith McTavish, Corporate Secretary and General Counsel, ESA, June 21, 2001.
[210] From ESA website ("Due Diligence: Continuous Safety Services") (emphasis added). The Ontario Electrical League identifies ESA as one of its "members."
[211] See commentary in the main paper respecting, for example, the Canadian Food Inspection Agency.
[212] See "Electrical Safety Authority, Directors' Code of Conduct" (undated); and "Code of Conduct: a guide to living our values" (ESA; undated).

The Directors Code of Conduct and relevant provisions of the Corporations Act are appended to this case study. Item number six provides a framework for concerns about a director to be raised by a director about another director; such concerns are to be decided upon by the Chair and if still in dispute, by the entire board with reference as necessary to the Governance and Human Resources Committee of the board. It does not set out, for example, the procedure to be followed where an employee or member of the public raises a conduct issue concerning a director, officer or employee.

More broadly, many of the problems associated with the accountability structures regarding the Technical Standards and Safety Authority appear to be reproduced in the case of the ESA.[213] The structure provides no direct or indirect accountability link between the majority of the Authority's directors and the public for the Authority's use of the powers delegated to it.

A4.4.2 Accountability

Ability to give policy direction

The ESA's policy capacity is probably close to the capacity that existed in the electrical safety division at Ontario Hydro, from which the electrical safety function was transferred. The question remains as to what degree, in practice, the Ministry of Consumer and Business Services retains sufficient capacity to interact and give the necessary policy direction to ESA.

Control/Oversight Mechanisms

Audit

Section 5 of the administrative agreement requires the ESA to provide an annual report and business plan. Schedules to the agreement list the required contents of both documents.

As with any public or private corporation, the members are to appoint an auditor at each annual meeting. The auditor is to audit the accounts of ESA and to hold office until the next annual meeting (Article 11 of the by-laws). Subsection 7 (7) of the agreement requires the ESA to "provide the Minister with audited financial statements on an annual basis," but the ESA is not required to provide its accounts to the Provincial Auditor. More broadly, like the TSSA, the ESA is not subject to the audit authority of the Provincial Auditor. However, the Auditor could conduct an audit of the MCBS's oversight and monitoring of the ESA's performance.[214]

In accordance with the *Corporations Act*, members have power to demand an audit or investigation of the corporation; this power is limited to members, however.

Freedom of Information and Protection of Privacy, Ombudsman, EBR

As with the TSSA, the Authority is not subject to statutory requirements in these respects,[215] except as noted below. The agreement requires the ESA to "develop or adopt an access and privacy code addressing issues of access to public and personal information, protection of personal information, and effective procedural remedies with respect to records and information that it owns and is custodian [sic]. Upon approval by the Minister, such code shall be attached to this Agreement as Schedule "F" hereto."

Schedule F, the "Access and Privacy Code," is structured similarly to access legislation. It establishes a general right of access to "records" subject to listed exemptions. Mandatory

[213] See Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, p.48.
[214] Winfield, Whorley, and Kaufman, The New Public Management Comes to Ontario, p.46.
[215] Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, ch.V.

exemptions include personal information and business confidences. Discretionary exemptions include legally recognized privilege, records concerning ESA's investigation and enforcement activities, disclosure contrary to section 113, and information "that is the substance of deliberations by ESA's Board of Directors and its committees." It also establishes standards for collection, retention, use and disclosure of personal information by the Authority. It requires the Authority to develop and implement procedures and practices to deal with complaints regarding the release or refusal to release information.

Pending development of its code, the agreement required the ESA to conduct privacy and access procedures "in accordance with the principles of the *Freedom of Information and Protection of Privacy Act*, and provide effective procedural remedies in support of those principles" (section 8 (1)). It may be fairly asked why the Authority is not subject to this Act, especially given the similar structures of its own access code.

Legal Accountability

Some functions of the ESA are in the nature of agency roles. For example, section 9 of the agreement requires ESA to defend or carry out civil and administrative litigation related to the Act in which the Minister or the Crown is a defendant or an interested party, unless the parties expressly agree otherwise. ESA has "full right and power to choose legal counsel" and "full right and power to reach a settlement which binds the ESA and, with the Crown's consent, binds the Crown." ESA is further responsible for all costs incurred, including settlements and damages awarded.

The Agreement purports to give the ESA authority to carry out "all prosecutions related to [section 113 of the Electricity] Act on behalf of and in the name of the Crown."[216] As noted above, the practice of ESA to date has been for Crown Attorneys to conduct prosecutions on behalf of the ESA, although no statistics regarding the conduct of prosecutions were available.[217]

Section 6 (9) of the agreement reads: "The ESA acknowledges that inspectors and other officers exercise statutory and regulatory duties which require independent decision making and, for that purpose, the ESA agrees that the Board shall not interfere with the independent exercise of these … functions but reserves the right to review how those functions are carried out, consistent with its duty to supervise the management of the business affairs of the ESA."

In these respects the separate legal personality of both the Minister and the ESA are acknowledged as well as, arguably, the ultimate responsibility of the Minister, but an agency role for the ESA in the conduct of civil litigation is also established.

[216] Article 9 (3) of the agreement. The provisions of the Agreement do not appear to address a key issue that has been raised regarding the TSSA – namely the authority of Ministers to delegate responsibility for the conduct of prosecutions on behalf of the Crown to the Authority. Responsibility for the conduct of such prosecutions rests with the Attorney-General, not the Ministers of Consumer and Business Services (whose predecessor, the Minister of Consumer and Commercial Relations signed the administrative agreement with the ESA) or the Minister of Energy, Science and Technology (the Minister responsible for the administration of the Electricity Act) and therefore those ministers have no authority to undertake such a delegation. See Winfield, Whorley and Kaufman, The New Public Management Comes to Ontario, p.62.

[217] These arrangements are currently in "flux" as the Crown Attorneys who have conducted prosecutions in the past are indicating their desire to withdraw from this role in the future. ESA is investigating the options of having Crown Attorneys undertake prosecutions under an arrangement that would provide compensation to the province for their work on behalf of the Authority, and of contracting private prosecutors. Personal communication, Judith McTavish, General Counsel and Corporate Secretary, ESA, July 10, 2001.

A4.4.3 Nature of Funding Arrangements

On its inception ESA received no appropriation from government, and relied soley on the transfer of assets from Ontario Hydro. [218]

Section 7 of the agreement requires the ESA to "ensure that it has adequate resources to comply with this Agreement and the Act in accordance with the business plan."

Also, the ESA agrees to pay a fee for the cost of "services from the Ministry" for each of fiscal years 1999, 2000 and 2001, once agreed upon by the parties and reconciled at the end of each year. The payment obligations (listed in Schedule "D" to the agreement) include payment for "additional services for any significant undertaking (e.g., a comprehensive review and reform of the Act)," for which "ESA agrees to pay the Ministry the costs incurred." This suggests that the government intends to charge the ESA for what appears to be a government function to be performed in the public interest.

The Minister is obliged under section 7 (5) of the agreement to seek legislative authority for the ESA to collect court-imposed fines *under the Provincial Offences Act* and retain them as revenue; at present it appears that such fines go to the province's Consolidated Revenue Fund. [219]

The ESA agrees "to adopt the existing fees of Ontario Hydro set out in Ontario Regulation 621/98 and any changes to these fees will be made pursuant to a fee setting process approved by the Ministry and attached Schedule "E"." Schedule "E" requires the Authority to "implement a financial system which allows for the identification of direct and indirect costs attributed to each service for which a fee is intended to be established," and to "bench mark to ensure that services are cost effective." It also establishes criteria to be "considered and addressed" when setting revised fees, including the following:

- Customer impact on public electric safety [sic];
- All related costs incurred by the program in the delivery of services, including non-revenue generating activities must be offset;
- Uniformity of application given geographic location [sic];
- Mandatory services will not subsidize non-mandatory services;
- Whenever possible fees should act as an incentive for good performance; and
- Normal business practices will be followed (e.g., interest charged on overdue accounts; part hours, other than the first hour, are billable).

A4.5 Conclusions

Not enough public evidence is available to indicate whether there is sufficient information provided to, or capacity in, the Ministry of Consumer and Business Services to close the "policy-operations" loop, a serious consideration when the Minister retains legal responsibility for the implementation of section 113.

The ESA appears to consist however of an extremely close circle of decision makers; for example, the Authority's "members" are the members of the Board of Directors, who fix their own remuneration.

The Authority appears to have a mixed mandate that includes ensuring public safety and "enhancing" competitiveness and the larger economy. Given that electricity supply can have an impact on, for example, energy supply and demand, there is no reason why the objects of the

[218] Letter from Judith McTavish, Corporate Secretary and General Counsel, ESA, June 21, 2001.
[219] See Dialogue – A Publication of the Ontario Electrical League. Issue 23-3, Summer 2001.

Authority should not also promote environmental sustainability and social considerations, as well as the economy.

Not enough information was available to determine the procedures for how and how often inspections by ESA staff are carried out, or to assess the record of enforcement or its success in achieving better compliance with the Code. The language of "shared responsibility" blurs the reality of ultimate Ministerial responsibility.

Very little information is available on the performance of ESA's "Authorized Contractor" or "periodic inspection" approaches. It is unclear where inspection ends and investigation and enforcement begin; in the enforcement context, "building relationships and supporting staff," and acting as an "active partner in due diligence" may be inappropriate for reasons of potential conflict of interest.

It is recognized that a transfer from the former Ontario Hydro to the ESA is a different type of alternative service delivery model insofar as the delegation is not directly from a government ministry; however, the nature and extent of Ministerial responsibility for the function is probably similar if not identical now to what it was before the transfer.

A4.6 Addendum: Working Group Report

At the end of our study we were kindly referred by ESA to Electrical Inspection in Ontario: A New Governance Structure (Report of the Working Group on Electrical Inspection and Safety in Ontario), April 1998. The working group included members from the Ministry of Energy, Science and Technology, the Ontario Electrical League, Ontario Hydro, the Municipal Electrical Association and the Electrical Contractors Association of Ontario. (The current Chair of the Board of Directors "was available as a consultant and facilitator to the Working Group.")

The scope of its mandate was "to examine possible alternative delivery models and advise on required legislative policy and resource implications with respect to any transfer of current safety and inspection functions from Ontario Hydro." The paper refers to an "Advisory Committee on Competition in Ontario's Electricity System" (full references not included), which had "recommended that responsibility for the development and approval of the Ontario Electrical Safety Code should remain the responsibility of a stakeholder group and concluded that OH's current electrical inspection activities could be neatly severed from the utility."

Although the working group acknowledged three delivery options (transfer to an independent organization; municipal delivery by local governments and/or utilities; and "divestment to a government ministry (MCCR/TSSA) or agency," the context inherited from the earlier report and inherent in other factors (including "key policy objectives" that included "high-quality, cost efficient inspection services" and "provisions to ensure that the costs of the inspection service are borne by its users, with no government subsidization"), suggest that the latter two options were not likely candidates. The report notes that "the addition of some 290 staff as Crown employees runs directly counter to the stated Government intention to reduce Government delivery agencies and concentrate their resources on policy direction. In addition, as part of a large Ministry there would be a less dedicated focus on Electrical Inspection."

In the financial context, the working group had this to say:

> *Ontario Hydro's practice has emphasized safety but placed less importance on cost tracking and financing inspection costs through revenues. Fees were often subsidized through the cost of power and were somewhat lower than what would otherwise be the case. Part of the rationale for this course of action was the view that if fees were not too costly, then fewer clients would be less likely to avoid electrical inspection requirements.*

In the absence of pre- and post-transfer compliance figures and analysis, it is impossible to assess whether this view was justified.

The working group perceived that the appearance of conflict of interest would be removed if electrical inspection were "hived off" from Ontario Hydro, and preferred "greater stakeholder input, such as through a Board of Directors with industry representation, and the use of advisory groups." Without further information the nature and extent of communication among officers and directors and the represented constituencies, it is difficult to assess what conflict issues may remain in the current ESA.

The report also discussed the need for a dispute resolution process for those disputing inspection decisions. We found no details about such a process.

A4.7 Addendum: Electrical Safety Authority Directors' Code of Conduct

The Board expects of itself and its members ethical and businesslike conduct. This commitment includes proper use of authority and conduct that is, at all times, consistent with the standard of conduct governing employees of the Electrical Safety Authority. The following further obligations apply specifically to directors:

1. Directors must represent unconflicted loyalty to ESA's public electrical safety mandate.
2. This accountability supersedes any conflicting loyalty such as that to advocacy or interest groups, membership on other boards or involvement in other organizations and the personal interest of any director acting as a customer of the Electrical Safety Authority.
3. Directors must avoid any conflict of interest with respect to their fiduciary responsibility. There must be no self-dealing or any conduct of private business or personal services between any director and the ESA, except as procedurally controlled to assure openness, competitive opportunity, equal access to information and in compliance with the provisions of the Corporations Act, Section 71, appended to this Directors' Code of Conduct.
4. The Board governs collectively, not individually. Directors may not attempt to exercise individual authority over ESA, its officers or employees or regulators unless such authority is delegated by the Board.
    - Directors' interaction with the CEO or other officers or employees of ESA must be consistent with collective governance by the Board.
    - Directors' interaction with the public, press or other entities must be consistent with collective governance by the Board and such interaction should be directed through the Chair.
    - Directors may express positions alternative to other Board members, but shall not publicly advocate a position contrary to that taken by the Board or ESA employees.

5. In the course of their duties Board members may become aware of information which is private, privileged, confidential or proprietary in nature. Board members shall not disclose any such information either during or after their term of office.
6. Board members have an obligation to raise with the Chair, any concerns with respect to their own conduct or that of another Board member, regarding compliance with this Directors Code of Conduct, the ESA Code of Conduct (or, until such a code has been adopted, the appended Ontario Hydro Code of Conduct) and any applicable legislation. The Chair will consider the matter and, if appropriate, may consult the Governance and Human Resources Committee. The decision of the Chair will be communicated by the Chair to the board member who raised the issue and the Board member whose conduct is at issue. If the matter remains in dispute after the decision of the Chair, the director who raised the issue may request that the matter be submitted to the full board for consideration. In that event the matter shall be reviewed by the Governance and Human Resources Committee and submitted to the full Board with a recommendation as to the resolution of the matter.
7. The Governance and Human Resources Committee shall conduct an annual review of this Directors' Code of Conduct and recommend to the full Board, for consideration, any changes considered appropriate.

From the *Corporations Act*, R.S.O. 1990, c. C-38:

71. (1) Every director of a company who is in any way directly or indirectly interested in a proposed contract or a contract with the company shall declare his or her interest at a meeting of the directors of the company.

Time of declaration

(2) In the case of a proposed contract, the declaration required by this section shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration or, if the director is not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he or she becomes so interested, and, in a case where the director becomes interested in a contract after it is made, the declaration shall be made at the first meeting of the directors held after he or she becomes so interested.

General notice

(3) For the purposes of this section, a general notice given to the directors of a company by a director to the effect that he or she is a shareholder of or otherwise interested in any other company, or is a member of a specified firm and is to be regarded as interested in any contract made with such other company or firm, shall be deemed to be a sufficient declaration of interest in relation to a contract so made, but no such notice is effective unless it is given at a meeting of the directors or the director takes reasonable steps to ensure that it is brought up and read at the next meeting of the directors after it is given.

Effect of declaration

(4) If a director has made a declaration of his or her interest in a proposed contract or contract in compliance with this section and has not voted in respect of the contract, the director is not accountable to the company or to any of its shareholders or creditors for any profit realized from the contract, and the contract is not voidable by reason only of the director holding that office or of the fiduciary relationship established thereby.

Confirmation by shareholders

(5) Despite anything in this section, a director is not accountable to the company or to any of its shareholders or creditors for any profit realized from such contract and the contract is not by reason only of the director's interest therein voidable if it is confirmed by a majority of the votes cast at a general meeting of the shareholders duly called for that purpose and if the director's interest in the contract is declared in the notice calling the meeting.

Offence

(6) If a director is liable in respect of profit realized from any such contract and the contract is by reason only of his or her interest therein voidable, the director is guilty of an offence and on conviction is liable to a fine of not more than $200.

Notes to Evaluation Tables

[1] D'Ombrain, "Machinery of Government," para 232.
[2] See, for example, ss.6(2), 13(2), 14(2), 15(2).
[3] Winfield and Jenish, Four Year Report, pp.2-37 – 2-38.
[4] Executive Resource Group, Managing the Environment: A Review of Best Practices (Toronto: Ministry of the Environment, January 2001, p.200; D'Ombrain, "Machinery of Government for Safe Drinking Water," para 251.
[5] D'Ombrain, "Machinery of Government," para 451
[6] Ministry of the Environment, Proposal for Alternative Service Delivery – Communal Water Works: A Monitored Self-Managed Approach, November 1997, pp. 8-9.
[7] Office of the Provincial Auditor (Ontario), Special Report on Accountability and Value for Money, (October 2000) Chapter 3.06.
[8] OPSEU, "Renewing the Ministry of the Environment.
[9] Inquiry Document 287 Tab 1 (Bob Shaw).
[10] Office of the Provincial Auditor (Ontario), Special Report on Accountability and Value for Money (October 2000), pg.118-119.
[11] Winfield and Jenish, Four Year Report, pp.2-37 – 2-38.
[12] Winfield and Jenish, Four Year Report, pp.2-10 – 2-11.
[13] Boston, "Organizing for Service Delivery," pp. 290-292.
[14] MBS, ASD Framework, p. 26.
[15] Ombudsman Ontario, Ombudsman's Conclusions and Recommendations Pursuant to Section 21 of the *Ombudsman Act Re:* Own Motion Investigation of the Timeliness of Ontario Human Right's Commission Process, May 1998, reports OHRC underwent a 25% reduction in its budget 1993-94 – 1997-98, p. 3.
[16] Auditor General of Canada, September 1998 Report, Chapter 12, p. 3 of 16.
[17] Office of the Ombudsman, Annual Report 1991/92, 1998/99, Special Report July 1993, Own-Motion Investigation Reports, May 1998, April 1999.
[18] Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, p. 6.
[19] Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, p. 7.
[20] See, for example, L. Eggertson, "Food Inspection Agency abandons job, vets say," The Toronto Star, May 28, 1999.
[21] See M.H. Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955) for a classic statement of the problem of regulatory "capture."
[22] MBS, ASD Framework, p. 29
[23] D'Ombrain, "Alternative Service Delivery," p. 97.
[24] Politt, "Justification by Works or by Faith."
[25] See Ombudsman Ontario, Ombudsman's Final Report Pursuant to Section 21 of the *Ombudsman Act*: Own-Motion Investigation of the Timeliness of the Ontario Human Right Commission's Investigative Process, April 1999.
[26] Stratos, "Review of Governance Models," p. 9.
[27] See OPSEU, "Renewing the Ministry of the Environment," p. 62) and comments of George Pasut, Medical Officer of Health, Simcoe County, May 24 Walkerton Inquiry Part II Expert Meeting (p. 30 section 2.3.1, third bullet of "Detailed Notes from Expert Meeting").
[28] Office of the Provincial Auditor (Ontario), Special Report on Accountability and Value for Money (October 2000) Chapter 3.13.
[29] See Appendix 2.
[30] Stratos, "Review of Governance Models," p. 3.
[31] Office of the Provincial Auditor (Ontario), Special Report on Accountability and Value for Money, p. 231.
[32] Stratos, "Review of Governance Models," p. 3.
[33] M.Mittlestaedt, "Pollution plagues tony cottage lakes," The Globe and Mail, May 9, 2001, citing report by Ontario Boating Forum.
[34] See Appendix 3.
[35] Auditor General of Canada, September 1998 Report, Ch 13, para 13.71.
[36] Winfield and Jenish, Four Year Report, 2-43.
[37] Auditor General of Canada, September 1998 Report, Ch.13.

[38] See for example, Griffiths and Marr-Laing, When the Oilpatch Comes to Your Backyard.
[39] Auditor General of Canada September 1998 Report, Chapter 13, para 13.41.
[40] PTMAA has budget of less than $1million/yr and staff of less than ten. See Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, p. 11.
[41] Winfield, Whorley and Kaufman, New Public Management Comes to Ontario pp. 48-49.
[42] Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, Appendix II.
[43] Alberta Auditor-General 1996-97, 1997-98 Annual Reports, Labour Chapter.
[44] Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, pp. 62, 64-65.
[45] As of July 2000, MCCR had a total of five staff assigned to over see five DAAs (TSSA, ESA, Motor Vehicle Industry Council, Real Estate Council of Ontario, and Travel Industry Council of Ontario), the Ontario Home Warranty Program, and the Funeral Services Board. See Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, p. 34
[46] Auditor-General of Alberta 1996-97 Annual Report, p. 2 of 6.
[47] Auditor General of Alberta, 1997-98 Annual Report – Labour Chapter.
[48] Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, p. 86.
[49] Auditor-General of Alberta 1996-97 Annual Report – Labour Chapter
[50] D'Ombrain, "Machinery of Government," pp.85-86.
[51] J.R. Mitchell, S. Southerland, "Relations between Politicians and Public Servants," in Charih and Daniels, New Public Management and Public Administration in Canada, p. 184.
[52] Winfield and Jenish, A Four Year Report, pp.2-1 – 2-8
[53] Winfield and Jenish, A Four Year Report, pg. 2-27.
[54] Winfield and Jenish, A Four Year Report, pp. 2-17 – 2-18
[55] L. Eggertson, "Food Inspection Agency abandons job, vets say," The Toronto Star, May 28, 1999.
[56] Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, p. 41.
[57] MBS, ASD Framework, p. 26.
[58] Auditor General of Canada, September 1998 Report Chapter 12, para 12.13.
[59] Mitchell and Sutherland "Relations between Politicians and Public Servants," in Charih and Daniels, New Public Management and Public Administration in Canada, p. 184.
[60] See M.H. Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955) for a classic statement of the problem of regulatory "capture."
[61] See, for example, Office of the Provincial Auditor (Ontario), Special Report on Accountability and Value for Money, MNR Forest Management Program Chapter (3.13).
[62] See Appendices 2 and 3.
[63] See Appendices 2 and 3.
[64] ECO, 1998 Annual Report, pp. 187-188.
[65] See ECO, Broken Promises: MNR's Failure to Safeguard Environmental Rights: Special Report to the Legislative Assembly of Ontario, June 2001.
[66] See M.H. Bernstein, Regulating Business by Independent Commission (Princeton: Princeton University Press, 1955) for a classic statement of the problem of regulatory "capture."
[67] See, for example, R. Schultz, "Winning and Losing: The Consumers' Association of Canada and the Telecommunications Regulatory System," in "G. B. Doern, Margaret Hill, Michael J. Prince, and Richard J. Schultz eds., Changing the Rules: Canadian Regulatory Regimes and Institutions (Toronto: University of Toronto Press, 1999), Chapter 8.
[68] Whorley and Kaufman, New Public Management Comes to Ontario, Chapter V.
[69] See, for example, the TSSA/MCCR Administration Agreement, ss.4 and 5.
[70] See generally Winfield, Whorley and Kaufman, New Public Management Comes to Ontario, Chapter VI.
[71] D'Ombrain, "Machinery of Government," pp.85-86.