OVERVIEW OF THE SAFE DRINKING WATER ACT: WHAT'S IN, WHAT'S OUT?

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OVERVIEW OF THE *SAFE DRINKING WATER ACT*:
WHAT'S IN, WHAT'S OUT?

By
Richard D. Lindgren[1]

1. INTRODUCTION

In December 2002, the Ontario Legislature passed the *Safe Drinking Water Act* ("SDWA")[2] in response to the recommendation of Mr. Justice O'Connor in the Part 2 Report of the Walkerton Inquiry that such legislation be enacted.[3]

Together with related legislative, regulatory and policy initiatives, the SDWA will serve as an important component of Ontario's overall framework for protecting drinking water across the province.

Accordingly, the purpose of this paper is threefold: (i) review the history of reform efforts leading up to the SDWA; (ii) describe the main elements of the SDWA; and (iii) identify the main omissions of the SDWA. The paper concludes with an assessment of future challenges in the forthcoming implementation of the SDWA and regulations thereunder.

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[2] S.O. 2002, c.32. The SDWA received Third Reading on December 10, 2002 and Royal Assent on December 13, 2002.
[3] Part 2 Report, page 28, Recommendation 67.

2. BACKGROUND TO THE SDWA

The use of specialized legislation to protect drinking water is not new or unprecedented. In fact, a number of North American jurisdictions have already passed or proposed laws that are intended to protect drinking water and its sources.

For example, the United States enacted the federal SDWA, which serves as the cornerstone for American drinking water protection efforts. First enacted in 1974, the federal SDWA (as amended in 1986 and 1996) is notable for its stringent national standards; public participation in standard setting; community "right to know" provisions; funding and research programs; and emphasis upon source water assessment and source protection (e.g. wellhead protection programs).

Similarly, British Columbia enacted the *Drinking Water Protection Act* in 2001,[4] which provides a comprehensive legal framework for ensuring drinking water safety, and requires the development of source protection plans for prescribed areas. It is noteworthy that the B.C. law has recently been subject to a formal public review by an independent panel, which made numerous recommendations to strengthen the Act, particularly in relation to source protection.[5]

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[4] S.B.C. 2001, c.9. This Act received Royal Assent on April 11, 2001.

[5] See Drinking Water Review Panel, *Final Report: Panel Review of British Columbia's Drinking Water Protection Act* (February 2002).

In Ontario, environmental groups (e.g. CELA and Pollution Probe) have been advocating the passage of the SDWA since the early 1980s.[6] More recently, CELA filed a formal application in 2000 under Part IV of the *Environmental Bill of Rights* for a governmental review of the need to enact the SDWA in Ontario. Interestingly, the Ministry of the Environment ("MOE") response to this Application for Review was that Ontario did not need a SDWA, even in the aftermath of the Walkerton Tragedy.

It should also be noted that from the early 1980's to 2001, opposition parties in Ontario Legislature introduced a number of private members' bills to enact the SDWA. One such bill (Bill 96, introduced in 2000 by MPP Marilyn Churley) even received Second Reading approval from the Legislature. Ultimately, however, Bill 96 – and every other private members' bill regarding the SDWA – failed to be enacted by the Ontario Legislature.

In light of this reform effort and legislative history, the concept of the SDWA was well-known within Ontario by the time that Mr. Justice O'Connor invited parties and the public to make submissions during Part 2 of the Walkerton Inquiry. The broad mandate of Part 2 was to "make such findings and recommendations as the commission considers advisable to ensure the safety of the water supply system in Ontario".[7] Not surprisingly,

[6] See, for example, T. Vigod and A. Wordsworth, "Water Fit to Drink: The Need for a *Safe Drinking Water Act* in Canada" (1982), 11 C.E.L.R. 80.
[7] Order-in-Council 1170/2000 (June 13, 2000).

a number of stakeholders filed Part 2 submissions that strongly urged the enactment and enforcement of comprehensive drinking water legislation in Ontario.[8]

In the Part 2 Report, Mr. Justice O'Connor made 93 recommendations aimed at protecting drinking water and its sources. While a number of these recommendations were technical, fiscal or policy-based, Mr. Justice O'Connor indicated that legislative reform was also necessary to implement the Part 2 recommendations:

> Certain legislative changes will be necessary to effect my recommendations. In making changes to legislation, I have also attempted to simplify the legislative and regulatory regime…
>
> A number of parties submitted that the volume of legislation in relation to drinking water safety can lead to confusion. For example, CELA suggested that the legislation and regulatory provisions that relate to drinking water "are scattered across a number of different statutes and regulations that are administered by different Ministries, agencies or institutions whose mandates, resources, and degrees of expertise in drinking water matters vary greatly"…
>
> While I do not believe that it is practical to have a single Act covering all matters related to drinking water, I do recommend some consolidation and simplification. Legislation related to drinking water, as well as virtually all of the recommendations in my report, should be put into four pieces of legislation, together with the relevant regulations thereunder: a new SDWA, containing provisions dealing with the treatment and distribution of drinking water; amendments to the EPA and regulations thereunder, containing provisions necessary to bring my source protection recommendations into effect; an act or regulation dealing with drinking water protection on farms; and an Act governing asset management in relation to municipal water systems.[9]

Having recommended passage of the SDWA, Mr. Justice O'Connor went on to describe the essential matters that should be contained within the SDWA. In particular,

[8] See, for example, CELA, *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act* (May 2001), which is available at www.cela.ca.

[9] Part 2 Report, pages 403-04 (footnotes omitted).

Mr. Justice O'Connor recommended that the SDWA should contain the following components:

- recognize that the public is entitled to expect that the drinking water coming out of their taps is safe;
- identify the MOE as the lead ministry for the purposes of the SDWA;
- establish a licencing regime for owners of drinking water systems;
- create a statutory standard of care for persons who exercise municipal oversight functions;
- set out requirements for certificates of approval, permits to take water, and operational plans;
- require the use of accredited operating agencies for municipal water systems;
- establish requirements for the training and certification of operators;
- require regulations setting out standards for drinking water quality;
- provide for the creation of an advisory committee on drinking water standards;
- require regulations setting out treatment, distribution and monitoring requirements for both municipal and private water systems (including variance procedures);
- establish requirements for government oversight of water testing laboratories; and
- enhance provincial powers and policies regarding inspections, abatement action, investigation and enforcement.[10]

Upon the release of the Part 2 Report in May 2002, representatives of the Ontario government indicated that the province would adopt and act upon all of Mr. Justice O'Connor's recommendations, including those related to the SDWA. In August 2002, the MOE released a discussion paper[11] which generally described the SDWA that the province intended to introduce in response to the Part 2 recommendations. After

[10] Part 2 Report, pages 405-10.
[11] MOE, *Proposed Components of a Safe Drinking Water Act* (August 2002).

numerous stakeholders commented on the MOE discussion paper,[12] the SDWA was drafted and introduced for First Reading on October 29, 2002.

Upon introduction of the SDWA, the Premier of Ontario endorsed the need for legislative protection of drinking water:

> Ontarians deserve to have safe and clean drinking water… Commissioner O'Connor was firm about Ontario's need for legislation that would ensure the safety and sustainability of our drinking water.[13]

At the same time, Environment Minister Chris Stockwell also committed to the passage of strong and effective drinking water legislation:

> Safe drinking water remains a top priority of this government. We are committed to ensuring that Ontario has, and enforces, the best and toughest clean water policies in the world…
>
> By passing [the SDWA], the members of this House will make Ontario a world leader in drinking water protection and preservation.[14]

The Minister's commitment to passing the "best" and "toughest" drinking water legislation "in the world" was repeated during the Second Reading debate on the SDWA:

> We are strongly committed… to ensuring that the people of Ontario have safe drinking water, and that all of Justice O'Connor's recommendations are implemented…
>
> The proposed SDWA is an environmental milestone… [Bill 195] is the toughest legislation in the world for safe drinking water – not Canada and not North America; it's the toughest legislation in the world.[15]

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[12] See, for example, CELA, *Proposed Components of the SDWA (Report No. 428)* (September 2002), which is available at: www.cela.ca.
[13] Media Release, "Eves Moves to Protect Ontario's Drinking Water" (October 29, 2002).
[14] The Hon. Chris Stockwell, Minister's Statement on Bill 195 (*Hansard*, October 29, 2002).
[15] The Hon. Chris Stockwell, Second Reading Debate on Bill 195 (*Hansard*, October 31, 2002).

After Second Reading, the SDWA was referred to the Standing Committee on General Government, which held a short series of hearings to receive public submissions on the SDWA.[16] During clause-by-clause review of the SDWA, the Standing Committee made some minor amendments to the SDWA. Thereafter, the SDWA was sent back to the Ontario Legislature, where it received Third Reading on December 10, 2002 and Royal Assent on December 13, 2002.

At the present time, the numerous sections of the SDWA have not yet been proclaimed in force, largely because the implementing regulations are still being finalized by the MOE. For example, the MOE is currently soliciting public comment on a draft regulation that would consolidate existing requirements under O.Reg. 459/00 and O.Reg. 505/01, and would incorporate changes arising from the SDWA and the Part 2 Report.[17]

3. THE SDWA: WHAT'S IN?

The SDWA is a relatively detailed statute containing 173 sections that are organized into fourteen Parts. The essential elements of these Parts are summarized below.

[16] See, for example, CELA, *Submission of CELA to the Standing Committee on General Government re the SDWA, 2002* (November 2002), which is available at: www.cela.ca.

Part I - Interpretation

The SDWA commences with a concise statement of legislative purpose that focuses on public health and safety:[18]

> The purposes of this Act are as follows:
>
> 1. To recognize that the people of Ontario are entitled to expect their drinking water to be safe.
>
> 2. To provide for the protection of human health and the prevention of drinking water health hazards through the control and regulation of drinking water systems and drinking water testing.

Part I of the SDWA then sets out approximately 40 definitions that assist in the interpretation and application of the substantive provisions of the legislation.[19] Significantly, "drinking water" is defined as "water intended for human consumption" or water that is required by law "to be potable or to meet or exceed the requirements of the prescribed drinking water quality standards".[20]

Similarly, the term "drinking water system" has been defined broadly under the SDWA as:[21]

> … a system of works, excluding plumbing, that is established for the purpose of providing users of the system with drinking water and includes,
>
> (a) any thing used for the collection, production, treatment, storage, supply or distribution of water;

[17] MOE, "Proposed Drinking Water Protection Regulation under the SDWA" (January 2003). See also MOE, "Compendium to the Proposed Drinking Water Protection Regulation – Drinking Water Systems under the SDWA" (n.d.).
[18] SDWA, s.1.
[19] SDWA, s.2.
[20] *Ibid.* See also s.10 of the SDWA, which provides that where an act, regulation, order or other statutory instrument requires water to be "potable", this requirement shall be deemed to mean that the water, at a minimum, must meet the prescribed drinking water standards under the SDWA.
[21] SDWA, s.2.

(b) any thing related to the management of residue from the treatment process or the management of the discharge of a substance into the natural environment from the treatment system; and

(c) a well or intake that serves as the source or entry point of raw water supply for the system.

As noted above, the purpose of the SDWA is to prevent "drinking water health hazards", which have been defined as:[22]

(a) a condition of the system or a condition associated with the system's waters, including any thing found in the waters,

  (i) that adversely affects, or is likely to adversely affect, the health of the users of the system;

  (ii) that deters or hinders, or is likely to deter or hinder, the prevention or suppression of disease; or

  (iii) that endangers or is likely to endanger public health;

(b) a prescribed condition of the drinking water system; or

(c) a prescribed condition associated with the system's waters or the presence of a prescribed thing in the waters.

Part II – Administration

Part II of the SDWA specifies that the legislation will be administered by the Minister of the Environment, "who shall be responsible for overseeing the regulation of safe drinking water in Ontario."[23] To carry out this responsibility, the Minister has been given a number of discretionary powers under the SDWA, including authority to:[24]

- investigate and recommend standards in relation to various drinking water matters;

[22] *Ibid.*
[23] SDWA, s.3(1).
[24] *Ibid.*

- conduct drinking water research and data collection;
- convene drinking water conferences, seminars, and training and educational programs;
- ensure training (and retraining) courses for operators of drinking water systems;
- provide technical assistance to owners and operators of drinking water systems; and
- make grants and loans relating to various drinking water matters.

Similarly, the Minister has discretionary authority to issue "directives" under the SDWA relating to "the exercise of a power or the performance of a duty by a person or entity appointed, designated or established under this Act".[25] Notice of these "directives" are to be published in the Registry under the *Environmental Bill of Rights*, and every person to whom the directive is given shall comply with it.[26]

To ensure timely public information and political accountability, the Minister is required by the SDWA to table annual reports in the Ontario Legislature in relation to various drinking water issues, including:[27]

- status and development of drinking water quality standards;
- new and emerging information on pathogens, chemicals and other potential causes of drinking water health hazards;
- summary of inspections and audits for drinking water systems and testing;
- summary of enforcement activities; and
- review of raw water quality and source protection initiatives across Ontario.

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[25] SDWA, s.9(1).
[26] SDWA, s.9(3) and (4).
[27] SDWA, s.3(4).

Similarly, the SDWA imposes a mandatory duty upon the Minister to create an Advisory Council on Drinking Water Quality and Testing Standards.[28] The stated purpose of the Advisory Council is to "consider issues relating to standards for drinking water quality and testing, and to make recommendations to the Minister" regarding such matters. In turn, the Minister is statutorily obliged to take the Advisory Council's recommendations into consideration when establishing or revising SDWA standards for drinking water quality or testing.[29] Clearly, the Advisory Council's recommendations are not necessarily binding on the Minister, but presumably the recommendations of the Advisory Council will carry considerable weight and be seriously considered by the Minister. Thus, it is anticipated that once the Advisory Council has been established, it will function much like the former Advisory Committee on Environmental Standards (ACES) that had previously advised the Minister on various standards under Ontario's environmental legislation.

Finally, Part II of the SDWA also creates and empowers a "Chief Inspector", whose statutory mandate includes:[30]

- advise the Minister on operational policies for inspections of drinking water and drinking water systems;
- review and revise all programs, protocols and procedures relating to drinking water inspections;
- develop training programs for drinking water inspectors; and
- monitor the overall frequency and efficacy of drinking water inspections.

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[28] SDWA, s.4(1).
[29] SDWA, s.5.
[30] SDWA, s.7(1).

The Chief Inspector is further required to file annual written reports to the Minister regarding "the overall performance of drinking water systems in Ontario and the inspection program for drinking water systems".[31] This report is to be made public "as soon as practicable" after the Minister receives it.[32]

Part III – General Requirements

Part III of the SDWA imposes a number of important operational duties upon owners and operators of drinking water systems caught by the Act. These duties generally apply not only to municipal drinking water systems (as defined by the Act), but also to non-municipal drinking water systems that are prescribed and regulated under the Act.[33]

In particular, section 11(1) of the SDWA specifies that the drinking water system owner (or, where relevant, the operating authority) shall ensure that:

- all water provided to users from the system meets the prescribed drinking water quality standards;
- the system is operated in accordance with requirements under the Act, maintained in a fit state of repair, and satisfies the requirements of the standards prescribed for that class of drinking water system;
- the system is operated by properly trained persons as required by the regulations and system licence or approval;
- compliance with all sampling, testing and monitoring requirements under the Act;

[31] SDWA, s.7(2).
[32] SDWA, s.7(5).
[33] For example, the draft regulation proposed by the MOE under the SDWA prescribes three municipal and five non-municipal classes of drinking water systems. It is anticipated that all but one class ("Non-Municipal – Other – Small") will be subject to requirements under the regulation.

- drinking water system personnel are supervised by persons with prescribed qualifications; and
- compliance with all monitoring requirements imposed by the regulations and system licence or approval.

Part III of the SDWA also stipulates that where the owner is obliged to report drinking water matters to the public, then the reporting must comply with requirements prescribed by regulation.[34]

In addition, Part III of the SDWA generally prohibits drinking water system owners from using water testing services from out-of-province laboratories, unless such laboratories satisfy the eligibility criteria under the Act.[35]

Furthermore, Part III of the SDWA specifies that drinking water system operators must hold a valid operator's certificate issued under the regulations.[36] For the time being, existing (and unexpired) operators' licences issued under O.Reg. 435/93 pursuant to the *Ontario Water Resources Act* will be deemed to be operators' certificates under the SDWA. However, it is anticipated that the existing licences will be phased out (and replacement certificates issued) once the successor regulation to O.Reg. 435/93 has been promulgated under the SDWA.[37] At this time, it is unclear when this new regulation will be in place.

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[34] SDWA, s.11(2). For example, the draft regulation proposed by the MOE under the SDWA prescribes content requirements (e.g. wording, size, design and location) for the posting of warnings to the public when there is non-compliance with minimum treatment, sampling or testing requirements by certain drinking water systems (e.g. "Non-Municipal – Commercial and Institutional – Other").
[35] SDWA, s. 11(3) to (8).
[36] SDWA, s.12(1).
[37] SDWA, s.12(2) to (4).

Part III of the SDWA further contemplates that once the relevant regulations are in place (see below), municipal and certain non-municipal drinking water systems will be required to ensure that an "accredited operating authority is in charge of the system at all times."[38] Once this obligation is in force, the owner and the accredited operating authority shall enter into agreement that describes:[39]

- the drinking water system (or parts thereof) for which the operating authority is responsible;
- the respective responsibilities of the owner and operating authority to ensure compliance with the Act, regulations, orders, permits or approvals;
- the respective responsibilities of the owner and operating authority in the event that emergencies or prescribed deficiencies occur; and
- the respective responsibilities of the owner and operating authority to ensure that operating plans are properly reviewed and revised.

In this agreement, the owner may delegate to the operating authority many of the duties imposed upon the owner by the SDWA.[40] However, delegation provisions in an agreement do not relieve the owner of the statutory standard of care imposed by section 19 of the SDWA (see below), nor do they relieve the owner of the duty to ensure that the operating authority carries out its responsibilities "in a competent and diligent manner" while in charge of the drinking water system.[41] Similarly, upon discovering that the operating authority is not acting in a competent or diligent manner, the owner must take all reasonable steps to ensure that the system is operated in compliance with the

[38] SDWA, s.13(1) and (2).
[39] SDWA, s.14(1).
[40] SDWA, s.14(2).
[41] SDWA, s.14(3).

requirements under the SDWA.[42] Interestingly, the content of the agreement is to be made public by the owner of the drinking water system.[43]

Part III of the SDWA also provides the statutory framework for the development of "operational plans" that are to be prepared by owners and/or operating authorities, and to be reviewed and approved by MOE Directors appointed under the Act.[44] All operational plans remain the property of the system owner, regardless of who prepared (or revised) the plan.[45] The plans must meet prescribed minimum content requirements, and must be retained on file and disclosed to the public in accordance with directions or regulations under the SDWA.[46]

Arguably, one of the most critical duties imposed under Part III of the SDWA is the duty to report adverse test results to the MOE (e.g. Spills Action Centre) and the local medical officer of health. In particular, section 18 of the SDWA imposes this reporting duty upon:

- the accredited operating authority responsible for the system;[47]
- if there is no accredited operating authority, the owner of the system; and
- persons at the laboratory at which the adverse result was obtained.[48]

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[42] *Ibid.*
[43] SDWA, s.14(4)
[44] SDWA, s.15 to 17.
[45] SDWA, s.17(1).
[46] SDWA, s.15 and 16.
[47] The operating authority must also report the adverse test result to the owner of the drinking water system: see SDWA, s.18(3).
[48] The laboratory person must also report the adverse test result to the owner and/or accredited operating authority: see SDWA, s.18(4).

The report shall be made in accordance with the regulations,[49] which currently require the report to be made, *inter alia*, if there is an exceedance of a chemical/physical standard, or if there is an indicator of adverse water quality (e.g. E. coli or total coliform in samples other than raw water samples).[50] Similarly, the report shall be made immediately to the appropriate person, and shall be confirmed in writing within 24 hours.[51] Where adverse test results are reportable, the owner of the drinking water system must undertake the appropriate "corrective action" for the parameter (e.g. resample water, restore or increase chlorination, flush distribution mains, etc.).[52]

Part III of the SDWA also imposes a new "standard of care" in relation to the operation and management of municipal drinking water systems. In particular, section 19 of the SDWA requires specified persons to:

- exercise the level of care, diligence and skill that a reasonably prudent person would be expected to exercise in a similar situation; and
- act honestly, competently and with integrity, with a view to ensuring the protection and safety of the users of the drinking water system.

Persons subject to this statutory standard of care include: the owner of the municipal drinking water system; the person who oversees the accredited operating authority or who exercises decision-making authority over the system; or the officers and directors of the corporation (other than a municipality) that owns the system.[53] Failure to

[49] SDWA, s.18(2).
[50] O.Reg. 459/00, s.8. The draft regulation proposed by the MOE under the SDWA will generally retain the same triggers for reporting adverse test results.
[51] *Ibid.* The draft regulation proposed by the MOE under the SDWA will establish similar content and timing requirements for the report of adverse test results.
[52] *Ibid*., s.9. The draft regulation proposed by the MOE under the SDWA will impose similar obligations to take "corrective action".
[53] SDWA, s.19(2).

carry out this standard of care is defined as an offence under the SDWA,[54] and persons may be convicted of the offence regardless of whether the owner of the system is prosecuted or convicted.[55] Interestingly, the SDWA provides that the standard of care is not breached where the person, in good faith, relies upon the "report of an engineer, lawyer, accountant or other person whose professional qualifications lend credibility to the report."[56]

Finally, Part III of the SDWA prohibits any person from causing or permitting any thing to enter a drinking water system if it could result in:[57]

- a drinking water health hazard;
- a contravention of a prescribed standard;
- interference with the normal operation of the system.

Part IV – Accreditation of Operating Authorities

As noted above, section 13 of the SDWA contemplates that owners of municipal and certain non-municipal systems[58] will be required in the future to have an accredited operating authority in charge of the system.

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[54] SDWA, s.19(3).
[55] SDWA, s.19(4).
[56] SDWA, s.19(5).
[57] SDWA, s.20(1). This prohibition does not apply to activities needed to operate, maintain or repair drinking water systems, nor to activities undertaken pursuant to statutory authority: see SDWA, s.20(2).
[58] The Minister is empowered to make regulations requiring specified classes of non-municipal drinking water systems to be managed by accredited operating authorities. However, such regulations cannot come into force until five years after Part VI (Non-Municipal Drinking Water Systems) comes into force: see SDWA, s.169(1).

However, this obligation depends upon the promulgation of a Quality Management Standard that can be used as the basis for accrediting operating authorities under Part IV of the SDWA. Significantly, section 21 of the SDWA requires the Minister to approve the Quality Management Standard within one year of the section's coming into force. However, it is unknown when section 21 will be proclaimed into force, and, to date, the MOE has not released the draft Quality Management Standard for public review and comment.

Similarly, section 22 of the SDWA empowers the Minister to establish or designate one or more accreditation bodies for the purpose of accrediting and auditing operating authorities for drinking water systems.[59] Again, however, it is unclear at this time when the accreditation body will be in place under Part IV of the SDWA, but presumably this step will accompany or follow – not precede – the promulgation of the Quality Management Standard.

The primary functions of the accreditation body under Part IV of the SDWA will include: administering the accreditation program (e.g. grant, suspend or revoke accreditation for operating authorities); undertake an audit program to determine the level of conformity with the Quality Management Standard; and filing reports with the Minister regarding its activities.[60] Significantly, if an auditor, in the course of an audit under Part IV, becomes aware of non-compliance with the Act, regulation, order, licence

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[59] The Minister is empowered to execute an accreditation agreement with the accreditation body: see SDWA, s.24.

[60] SDWA, s.23 to 24, 27 to 29.

or approval, the auditor is obliged to report the non-compliance to the MOE Director as soon as practicable.[61]

Part V – Municipal Drinking Water Systems

Part V of the SDWA establishes a detailed approvals and licencing process for the establishment, operation or expansion of municipal drinking water systems in Ontario.

In essence, the SDWA provides that no person shall establish, replace or alter a new municipal drinking water system except under the authority of, and in accordance with, an approval under Part V of the Act or a drinking water works permit.[62] Similarly, no person shall use or operate an existing municipal drinking water system (e.g. a system that pre-dates the SDWA) except under the authority of, and in accordance with, an approval under Part V of the Act or a municipal drinking water licence.[63] The SDWA sets out timing and content requirements for Part V applications (e.g. copies of operational plans, financial plans, permits to take water, etc.).[64]

Upon application for a Part V approval, the Director may grant, refuse or amend the approval, and may impose terms and conditions upon the approval.[65] The Director is further empowered to impose conditions which grant partial or complete relief from

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[61] SDWA, s.26.
[62] SDWA, s.31(1)(a). Note that this approval requirement may be inapplicable to prescribed municipal drinking water systems: see SDWA, s.31(4). For example, the draft regulation proposed by the MOE under the SDWA purports to limit the approval requirement to "Municipal – Residential" class (e.g. municipal systems that serve six or more private residences).
[63] SDWA, s.31(1)(b). Note that approvals issued to existing facilities under s.52 of the *Ontario Water Resources Act* shall be deemed to be an approval under Part V: see SDWA, s.31(2).
[64] SDWA, s.32 to 35.
[65] SDWA, s.36(1) and 37.

regulatory requirements regarding treatment, sampling, testing or monitoring.[66] However, the Director is generally prohibited from approving a proposed "fragmentation" of a municipal drinking water system (e.g. replacing it, in whole or in part, with a non-municipal system) except under specified circumstances.[67] Similar provisions regarding terms/conditions and regulatory relief exist under Part V of the SDWA in relation to municipal drinking water works permits[68] and municipal drinking water licences.[69]

The SDWA does not prohibit municipalities from selling their drinking water systems to non-municipal corporations. However, Part V of the SDWA provides that where a municipality transfers ownership of the drinking water system to a person other than a municipality, then the municipality shall ensure that the transfer agreement "includes all the provisions required to be included by the regulations to ensure continuing municipal responsibility for the system".[70] More importantly, the transferred drinking water system shall be deemed "to continue to be a municipal drinking water system and shall be subject to all requirements under this Act that relate to municipal drinking water systems".[71]

[66] SDWA, s.38.
[67] SDWA, s.36(3).
[68] SDWA, s.40 to 43.
[69] SDWA, s.44 to 50.
[70] SDWA, s.51(a). No such regulations have yet been released under the SDWA for public review and comment.
[71] SDWA, s.51(b).

Part VI – Regulated Non-Municipal Drinking Water Systems

Part VI of the SDWA establishes a statutory framework for regulating non-municipal drinking water systems under the Act.

In essence, the SDWA provides that no person shall establish, replace or operate a regulated non-municipal drinking water system except in accordance with prescribed requirements, and under authority of a Part VI approval if required under the regulations.[72] Again, "fragmentation" of a regulated non-municipal system is generally prohibited (e.g. replacing it, in whole or in part, with a non-prescribed system), except in specified circumstances.[73] Part VI of the SDWA also contains timing and content requirements for Part VI applications, and confers broad powers upon the Director respecting conditions of approval and relief from regulatory requirements.[74]

In addition, Part VI of the SDWA provides that where a person proposes to construct a non-municipal drinking water system to serve a "major residential development",[75] then the person must obtain written consent from the relevant municipality.[76] When issuing its written consent, the municipality may impose

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[72] SDWA, s.52(1). The draft regulation proposed by the MOE under the SDWA does not appear to require approvals for non-municipal systems. Instead, such systems will be required to submit an engineering report certifying that the system complies with regulatory requirements.
[73] SDWA, s.52(2) and (3).
[74] SDWA, s.54 to 61.
[75] This term is defined in s.2 of the SDWA as "a development of six or more private residences on one or more properties".
[76] SDWA, s.53(1) and (2).

appropriate conditions, including terms requiring financial assurance from the owner of the non-municipal drinking water system.[77]

Part VII – Drinking Water Testing

Part VII of the SDWA generally provides that all persons offering or performing drinking water testing services shall be licenced under the Act.[78] However, certain tests at the drinking water system may be performed by qualified persons under authority of the owner or operating authority.[79] Part VII of the SDWA also contemplates the establishment of an accreditation program and licencing regime for laboratories performing drinking water tests.[80] Under limited circumstances, however, the Director may authorize the use of non-accredited laboratories for drinking water testing.[81]

Part VIII – Inspections

Part VIII of the SDWA contains a number of broad inspection powers that closely resemble provisions found in Ontario's other environmental statutes. Indeed, many of the inspection powers under the SDWA are virtually identical to those found within the *Ontario Water Resources Act* and *Environmental Protection Act.*

For example, provincial officers may conduct inspections under the SDWA without a warrant or court order in order to determine a person's compliance with the Act

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[77] SDWA, s.53(3) and (4).
[78] SDWA, s.62 to 63.
[79] SDWA, s.63(2) and (3). For example, the draft regulation proposed by the MOE under the SDWA indicates that testing for fluoride, turbidity or residual chlorine may be carried out by a licenced operator, a trained person, or an experienced person, rather than by an accredited laboratory.
[80] SDWA, s.64 to 80. For example, the draft regulation proposed by the MOE under the SDWA provides that testing for microbiological and chemical parameters must be carried out by an accredited laboratory.

or regulations.[82] During SDWA inspections, provincial officers have a wide-ranging authority, including powers to:[83]

- enter into or on any part of the natural environment, or any place where a drinking water system, plumbing or SDWA documentation is located;
- take samples, conduct tests, take measurements, or make excavations;
- require production of documents, and examine, copy or record any document;
- take photographs, videotape or other visual recordings;
- request assistance from experts, police officers, municipal employees, or employees of the Ontario Clean Water Agency;
- stop and search vehicles and vessels;
- administer other environmental statutes while engaged in SDWA inspections;[84]
- enter dwellings with judicial authorization;
- prohibit entry into any place;
- secure land or other places or things by locks, gates, fences or guards;
- detain or remove things found during warrantless searches; and
- place any substance or tracking device on any land, place or thing for investigative purposes.

Where a provincial officer finds a "prescribed deficiency" during a SDWA inspection, then the SDWA requires a followup inspection to be conducted within one year.[85]

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[81] SDWA, s.74.
[82] SDWA, s.81(1).
[83] SDWA, s.81(2) to 102.
[84] This can only occur if the provincial officer is also designated as such under the *Environmental Protection Act*, *Ontario Water Resources Act*, *Pesticides Act,* or *Nutrient Management Act, 2002:* see SDWA, s.83.
[85] SDWA, s.103.

It should be noted that on or before Part VIII comes into force (or as soon as reasonably possible thereafter), the Minister is statutorily obliged to make a "compliance" regulation that specifies:[86]

- the frequency of inspections, and the actions required and response time in the event of a deficiency; and
- procedures and protocols for investigations and enforcement, including procedures to be followed to respond to a request from the public for an investigation of an alleged offence under the SDWA.

Presumably, this forthcoming compliance regulation will be used as the primary vehicle for addressing Mr. Justice O'Connor's recommendations in the Part 1 and 2 Reports that:

- the MOE inspection program for municipal drinking water systems should consist of announced and unannounced inspections; (Part 1 Recommendation 13);
- the MOE should develop and provide inspectors with written directions or protocols for announced and unannounced inspections (Part 1 Recommendation 14);
- MOE inspections of municipal drinking water systems, whether announced or unannounced, should be conducted at least annually (Part 1 Recommendation 15);
- copies of MOE inspection reports should be provided to the manager of the water system, the members of the operating authority, the owner of the water system, the local medical officer of health, the local MOE office, and the MOE's Approvals Branch (Part 1 Recommendation 18);
- the MOE should establish and require adherence to timelines for the preparation and delivery of inspection reports and operator responses, and for the delivery of interim status reports regarding remedial action (Part 1 Recommendation 19);
- MOE inspectors should be required to have the same or higher qualifications as the operators they inspect, and should receive special training in inspections (Part 2 Recommendation 73);
- the MOE increase its commitment to the use of mandatory abatement (Part 2 Recommendation 74);

[86] SDWA, s.168(4).

- the MOE increase its commitment to strict enforcement of all safe drinking water regulations and provisions (Part 2 Recommendation 75); and

- the public be enabled to require the MOE Investigations and Enforcement Branch to investigate alleged violations of drinking water provisions (Part Recommendation 76).

<u>Part IX – Compliance and Enforcement</u>

Part IX of the SDWA provides statutory authority for a wide variety of administrative orders and enforcement mechanisms to ensure compliance under the Act. Generally, these orders and mechanisms are similar to those found under the *Ontario Water Resources Act* and *Environmental Protection Act*.

For example, where a provincial officer reasonably believes that a person has contravened the SDWA (including regulations or statutory instruments thereunder), the officer may issue an order against the person to remedy the non-compliance.[87] Among other things, such orders may contain directions that require:[88]

- prevention of the continuation or repetition of the non-compliance;
- repairing or maintaining the drinking water system;
- treatment, testing, sampling or reporting;
- providing an alternative supply of water;
- preparing plans or retaining consultants; and
- posting notice of the order.

[87] SDWA, s.105.
[88] SDWA, s.105(2).

Similarly, where a provincial officer "considers it necessary for the purposes of the Act", the officer may issue an order against the owner, manager or controller of a municipal or regulated non-municipal drinking water system.[89] Among other things, such orders may contain the directions discussed above, and may include a direction to disconnect or repair any thing that poses a drinking water health hazard.[90]

Where a "contravention" order or "system" order is issued by a provincial officer under Part IX of the SDWA, the person(s) named in the order may request that the Director "review" the order.[91] The request for review must be made within seven days after the order was served, and must set out submissions indicating why the impugned order should be reviewed.[92] Upon considering the request for review, the Director may revoke, confirm or amend the order.[93] A decision by the Director that confirms the order may be appealed to the Environmental Review Tribunal (see below).[94]

In addition to empowering provincial officers to issue orders, Part IX of the SDWA also empowers the Minister to issue an order where he or she opines that there is an imminent drinking water health hazard.[95] This Ministerial order may address drinking water testing (e.g. suspension of testing licences issued under Part VII of the Act), and may address the operation or management of drinking water systems (e.g. cease or

[89] SDWA, s.106.
[90] SDWA, s.106(4).
[91] SDWA, s.107.
[92] SDWA, s.107(2).
[93] SDWA, s.107(7) and (8).
[94] SDWA, s.107(9) and 127.
[95] SDWA, s.108.

restrict the operation of the system).[96] It should be noted that the Director is also empowered to issue orders to eliminate or ameliorate imminent drinking water health hazards.[97] However, Part IX of the SDWA provides that the Ministerial order (if issued) prevails over any order issued by the Director or a provincial officer.[98]

Under prescribed circumstances (e.g. continuing non-compliance with an order under Part IX, abandonment of drinking water systems, etc.), the Director may issue a "notice of emergency response", which can be used to direct the Ontario Clean Water Agency to undertake necessary steps to rectify the emergency.[99] Arrangements made under a notice of emergency cannot exceed 90 days, unless it is extended with the approval of the Minister and the Chief Medical Officer of Health.[100]

Other administrative orders available under Part IX of the SDWA include:

- Director's order to decommission (or replace) all or part of a drinking water system;[101]
- Director's order to continue operation of a drinking water system;[102]
- Director's notice appointing an interim operating authority;[103]
- Director's order requiring municipalities to provide service from a municipal drinking water system to persons served by deficient drinking water systems;[104] and

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[96] *Ibid.*
[97] SDWA, s.109.
[98] SDWA, s.108(4).
[99] SDWA, s.110.
[100] SDWA, s.110(9).
[101] SDWA, s.111.
[102] SDWA, s.112.
[103] SDWA, s.113 to 116.
[104] SDWA, s.114.

- Director's order requiring the Ontario Clean Water Agency to prepare an operational plan for a drinking water system.[105]

It should be noted that orders under Part IX of the SDWA may provide temporary relief from strict compliance with regulatory requirements.[106]

Part IX of the SDWA also contains a number of enforcement mechanisms that are aimed at ensuring compliance with the Act. These mechanisms include:

- empowering the Minister to bring civil actions to restrain contraventions under the Act;[107]
- empowering the Director to impose "administrative penalties" in respect of contraventions under the Act;[108] and
- empowering the Director to issue cost orders where a notice of emergency has been issued, or where an interim operating authority has been appointed;[109]

Part X – Appeals

Part X of the SDWA establishes a framework for appealing the Director's decisions to the Environmental Review Tribunal ("ERT"). These appeal provisions are similar to those found within the *Ontario Water Resources Act* and *Environmental Protection Act*.

[105] SDWA, s.119.
[106] SDWA, s.117.
[107] SDWA, s.120.
[108] SDWA, s.121.
[109] SDWA, s.122 to 125.

In essence, many of the key decisions of the Director under the SDWA are deemed to be "reviewable decisions" under Part X. Such decisions include:[110]

- refusal to issue or amend a permit, licence or approval;
- imposing, varying or removing conditions in a permit, licence or approval;
- suspension or revocation of a licence or approval;
- refusal to renew a licence or approval;
- issuance of a cost order;
- confirmation of an order made by the Director or provincial officer; and
- issuance of a notice of administrative penalty.

The appeal must be filed within 15 days of being served with a reviewable decision.[111] The filing of an appeal does not generally stay the operation of the reviewable decision, although the ERT has discretion to stay the decision pending the hearing.[112] Parties to the hearing include the appellant, the Director, and other person specified by the ERT.[113] After conducting the hearing, the ERT is generally empowered to: (a) confirm, vary or revoke the decision; (b) direct the Director to undertake specified action; or (c) substitute its opinion for the Director.[114] The ERT decision is subject to appeal to the Divisional Court on a question of law, and to appeal to the Minister on any matter other than a question of law.[115]

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[110] SDWA, s.127.
[111] SDWA, s.129. The ERT has limited authority to extend this deadline: see SDWA, s. 129(2).
[112] SDWA, s.131.
[113] SDWA, s.130.
[114] SDWA, s.132.
[115] SDWA, s.134 and 135.

Part XI – Offences

Part XI of the SDWA establishes a number of prohibitions and penalties under the Act.

For example, Part XI prohibits persons from hindering or obstructing provincial officers, MOE employees, or employees of the Ontario Clean Water Agency who are performing their duties under the SDWA.[116] Similarly, Part XI prohibits persons from submitting false or misleading information under the SDWA.[117] In addition, persons are prohibited from refusing to furnish information requested under the SDWA.[118]

Part XI further provides that persons are guilty of offences under the SDWA if they contravene specified provisions of the Act.[119] Similarly, persons are guilty of offences if they contravene SDWA regulations, orders, or conditions of certificates, permits, approvals or licences.[120] Corporate officers and directors are also subject to prosecution under the SDWA.[121]

For individuals convicted under the SDWA, the maximum fines payable range between $20,000 and $7 million, depending on the nature of the offence.[122] Imprisonment may also be imposed upon convicted individuals.[123]

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[116] SDWA, s.137.
[117] SDWA, s.138.
[118] SDWA, s.139.
[119] SDWA, s.140(1) and (2).
[120] SDWA, s.140(3) to (5).
[121] SDWA, s.140(7).
[122] SDWA, s.141(1), 142(2), 143(2).
[123] *Ibid.*

For corporations convicted under the SDWA, the maximum fines payable range between $100,000 and $10 million, depending on the nature of the offence.[124]

In addition to imposing fines and/or jail terms, the court may also impose other orders and monetary penalties that are available under the SDWA (e.g. profit stripping, restitution, order to prevent damage, etc.).[125]

Part XII – Miscellaneous

Part XII of the SDWA contains a number of miscellaneous provisions related to the administration and application of the Act (e.g. service of documents, fees, official documents as evidence, etc.).

In particular, section 164 of the SDWA specifies that the Crown is bound by the Act. Moreover, section 166 contains a paramountcy clause which generally provides that the SDWA and regulations prevail over the provisions of any other Act or regulations.

Most importantly, sections 167 to 170 of the SDWA confer broad regulation-making powers to the Minister and Ontario Cabinet over a wide variety of drinking water matters. It is noteworthy, however, that most of these powers are permissive rather than mandatory in nature. For the most part, these sections merely provide that regulations "may" be made, as opposed to "shall" be made. Thus, it remains to be seen when – or

[124] SDWA, s.141(2), 142(1), 143(1).
[125] SDWA, s.145 to 148

whether – the full range of regulation-making authority will be used by the Minister and the Ontario Cabinet under the SDWA.

Part XIII – Complementary Amendment

The only consequential amendment made by the SDWA to another statute is a brief amendment to section 62 of the *Health Protection and Promotion Act*. This amendment provides that if the position of the local medical officer health becomes vacant, the vacancy should be filled "expeditiously" by hiring a full-time medical officer of health.[126]

Part XIV – Commencement and Short Title

Section 172(2) of the SDWA provides that sections 1 to 170 come into force on a day named by proclamation of the Lieutenant Governor. In effect, this gives the Ontario government considerable discretion as to when – or if – the various sections of the SDWA will be proclaimed in force. Accordingly, it appears likely that the SDWA provisions will be proclaimed in a selective fashion as the implementing regulations are finalized and phased in over time. On this point, it should be recalled that even when proclaimed in force, several SDWA provisions contain extended deadlines for regulatory efforts by the Minister.[127] Thus, it may take considerable time before all components of the SDWA are fully in force.

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[126] SDWA, s.171.

[127] For example, the Minister has an additional year after section 23 comes into force to approve a Quality Management Standard.

4. THE SDWA: WHAT'S OUT?

While it is important to know what is in the SDWA, it is also instructive to briefly review what is not in the Act. In particular, the SDWA does not include or fully address the following matters:

(a) **Source Protection:** There is widespread consensus that the preferable way to ensure drinking water safety is to implement a "multi-barrier" approach, *viz.* placing multiple barriers aimed at preventing contaminants from reaching drinking water consumers. There is also widespread consensus that the first, and arguably, most important, barrier is protecting sources of drinking water against contamination or degradation. However, despite its critical importance, source protection is not addressed by the SDWA. Instead, the Ontario government is apparently following Mr. Justice O'Connor's recommendation to address source protection matters under separate legislation (e.g. amendments to the *Environmental Protection Act*).[128] At the present time, a multi-stakeholder advisory committee[129] is developing a framework for watershed-based source protection in Ontario. The advisory committee will soon provide its recommendations on source protection to the Environment Minister, who has suggested the source protection legislation may be in place by the spring of 2003. Even if this anticipated timeframe is met, it will likely take a number of months (if not years) to fully implement the source protection regime across Ontario (e.g. development and approval of watershed-based source protection plans).

(b) **Community Right-to-Know:** There is a fundamental principle that drinking water consumers ought to be fully and regularly informed about what is in their water,

[128] Part 2 Report, Chapter 4.3, and Recommendations 1 to 17.

especially when there are equipment breakdowns, upset conditions, or contaminants in excess of prescribed standards. While community right-to-know is firmly entrenched in the U.S. SDWA (e.g. via comprehensive "Consumer Confidence Reports" that are sent to consumers by mail or included with water bills), this principle is virtually absent from the Ontario, aside from provisions that merely authorize regulations to be made in respect of public information under the SDWA.[130] Significantly, the draft regulation proposed by the MOE under the SDWA will eliminate the quarterly reports currently required of owners of drinking water systems under O.Reg. 459/00. Instead, the draft SDWA regulation will only require owners to send annual reports to the MOE Director rather than to consumers served by the drinking water system.[131]

(c) **Substantive Right to Safe Drinking Water:** While section 1 of the SDWA "recognizes that the people of Ontario are entitled to expect their drinking water to be safe", it would appear that the SDWA does not confer a substantive (and legally enforceable) public right to clean and safe drinking water. Presumably, this omission reflects Mr. Justice O'Connor's conclusion that such substantive rights should not be created within the SDWA because existing common law and statutory causes of action are adequate to protect the interests of drinking water consumers in Ontario.[132]

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[129] CELA is a member of this advisory committee.
[130] SDWA, s.11(2) and 167(3), para.4.
[131] It should be noted that these annual reports are to be provided to consumers upon request, and, in some cases, should be posted on the internet. It thus appears that under the SDWA, consumers will have to be proactive in tracking down this information, rather than having it sent to them.
[132] Part 2 Report, pp. 405-06. It should be noted, however, that SDWA contains an immunity clause intended to provide protection against personal liability for certain persons: see SDWA, section 158.

(d) **Citizen Suit Provisions:** The U.S. SDWA (and, indeed, some Canadian environmental laws) contain provisions that allow citizens to go to the civil courts to restrain contraventions of the law. Citizen suits are generally regarded as useful supplements to agency enforcement, particularly where governmental resources may be limited or where governmental staff may be unable or unwilling to undertake appropriate enforcement action. Thus, citizen suit provisions (where available) have resulted in a higher level of enforcement activity, acted as a deterrent to unlawful conduct, and helped enhance accountability for drinking water safety. However, the Ontario SDWA does not contain a citizen suit provision, which leaves the Minister as the only person who can seek injunctive relief under the SDWA.[133] It remains to be seen whether the Minister will be ready and willing to go to the civil courts to enjoin contraventions under the SDWA.

(e) **"Source to Tap" Drinking Water Policy:** Significantly, Mr. Justice O'Connor recommended that the provincial government (e.g. the MOE) "should develop a comprehensive, 'source to tap' drinking water policy covering all elements of the provision of drinking water, from source protection to standards development, treatment, distribution and emergency response" (Recommendations 65 and 66). Indeed, Mr. Justice O'Connor described this policy as "the necessary first step". However, the SDWA was developed and passed without having this "source to tap" policy in place, nor does the SDWA require the MOE to develop this policy. Therefore, it is unclear when – or whether – this critical "first step" will be taken by the Ontario government.

[133] SDWA, s.120.

(f) Nutrient Management: The contaminants that caused the Walkerton outbreak (e.g. *E. coli* and *Campylobacter jejuni*) originated from manure spread on a farm near Well 5.[134] However, the storage and spreading of manure will not be specifically addressed under the SDWA. Instead, it is anticipated that these and related activities will be addressed under the *Nutrient Management Act, 2002* (which pre-dates the SDWA). It is noteworthy that Mr. Justice O'Connor noted a number of concerns about the adequacy of the *Nutrient Management Act, 2002*.[135] Nevertheless, the Ontario government has been undertaking public consultation on various regulations under the *Nutrient Management Act, 2002*. However, it has been recently announced that these new regulatory requirements may not be finalized and come into force until later in 2003. Therefore, the content and adequacy of the new nutrient management regulations will not be known for several more months.

5. CONCLUSION

Ontario's SDWA represents a clear improvement over the legislative regime that existed under the *Ontario Water Resources Act* prior to the Walkerton Tragedy. However, it is also clear that, contrary to the claims of the Environment Minister, the SDWA is not the "best" or "strongest" drinking water law "in the world". Indeed, in many respects, the Ontario SDWA is not as strong as the U.S. SDWA, especially in relation to source protection and community right-to-know. Nevertheless, the Ontario

[134] Part 1 Report, p.3.
[135] Part 2 Report, pp.136-39.

SDWA (and regulations thereunder) should provide an enhanced level of protection of drinking water quality across the province.

However, since the SDWA has just been enacted and is not even in force yet, it is difficult at this time to precisely assess the overall effectiveness of the legislation. This is particularly true since the effectiveness of the SDWA, in turn, depends on the effectiveness of other pending reforms, such as the source protection regime and regulations under the *Nutrient Management Act, 2002*. In fact, the proper (and timely) integration of the SDWA with other related legislative and regulatory initiatives will be one of the greatest implementation challenges in Ontario's new drinking water protection regime.

Funding represents another significant challenge under the SDWA. It goes without saying that the SDWA cannot be effectively implemented unless the MOE is adequately resourced and properly staffed to carry out its various duties, roles and responsibilities under the Act. It should be noted that the MOE has recently hired a number of drinking water inspectors in the post-Walkerton era. However, given the massive MOE budget cuts and staff reductions documented by Mr. Justice O'Connor,[136] it cannot be concluded that these recent hirings have fully restored the MOE's inspection/enforcement capabilities to pre-1995 levels. Indeed, hiring more inspectors – but not fully restoring the institutional resources (e.g. laboratory services) needed by inspectors – does not appear conducive to effective investigation/enforcement activities under the SDWA. Presumably, this is why Mr. Justice O'Connor expressly

recommended that "the government should ensure that adequate resources are provided to ensure these inspections are thorough and effective" (Part 1 Recommendation 17), and that "the provincial government should ensure that programs relating to the safety of drinking water are adequately funded" (Part 2 Recommendation 78).

Another noteworthy implementation challenge arises from the high degree of political discretion conferred upon the Minister and the Ontario Cabinet under the SDWA. For example, the Minister's administrative duties and powers in section 3 of the SDWA are expressed in permissive rather than mandatory terms. Thus, the Minister appears to have virtually unfettered discretion as to whether – or to what extent – the MOE "may" provide financial assistance for drinking water systems (section 3(1)(i)), even though Mr. Justice O'Connor expressly recommended that provincial financial assistance should be provided for small systems under certain circumstances.[137] Another example of considerable political discretion is found in most of the SDWA's regulation-making provisions, which generally provide that regulations "may" be made in relation to drinking water matters. In light of such discretionary provisions, it cannot be confidently predicted when – or whether – comprehensive regulations will be promulgated under the SDWA.

In summary, the SDWA represents a significant step forward in ensuring drinking water safety in Ontario. However, it remains to be seen whether the SDWA regime will

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[136] Part 1 Report, Chapter 11.
[137] Part 2 Report, Recommendation 84.

be properly funded, rigorously applied, and strongly enforced in order to protect public health and safety and to prevent a recurrence of the Walkerton Tragedy.