

**COMMENTS OF THE  
CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
REGARDING**

***Watertight: The Case for change in  
Ontario's water and wastewater sector***

*Publication No. 522  
ISBN No. 1-897043-41-4*



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November 22, 2005

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REGARDING ONTARIO'S**

***Watertight: The case for change in Ontario's water and wastewater sector***

**I. BACKGROUND ON CELA**

CELA is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

CELA has had a long history working with water issues both at the provincial and federal level. It has undertaken extensive research, published briefs, and conducted litigation in the field.<sup>1</sup>

CELA counsel represented the Concerned Citizens of Walkerton, a group of five hundred local residents, many of whom were adversely impacted by the E.coli outbreak, during both phases of the Walkerton Inquiry. CELA also prepared reports in relation to the provision of safe drinking water which were submitted to the Walkerton Inquiry during Phase Two. These reports included the *Financial Management of Municipal Water Systems in Ontario* prepared on CELA's behalf by C.N Watson and Associates Ltd and *Tragedy on Tap: Why Ontario Needs a Safe Drinking Water Act, Volume I and II*. The organization thus has considerable experience and expertise in relation to the issues that were addressed in the Expert Panel's report.

CELA is currently working with the Advocacy Centre for Tenants Ontario (ACTO) in addressing the implications the *Watertight* Report will have on mobile home parks.

**Preliminary Comments**

The Canadian Environmental Law Association ("CELA") has reviewed the report entitled *Watertight: The case for change in Ontario's water and wastewater sector* (Toronto: Queen's Printer, 2005) and has serious concerns with many of the recommendations made by the Panel.

The Expert Panel on Water and Wastewater prepared the report to address many of the long-term organizational and financing issues relating to Ontario's water and wastewater sector. The report states that its prime focus was on how best and most economically to deliver the high quality standards recommended by Mr. Justice Dennis O'Connor, the Commissioner of the Walkerton Inquiry, in his Part Two Report of the Walkerton Inquiry (Toronto: Queen's Printer, 2002). The panel claims to pick up where the Part Two Report ended. However, our review of the Panel report indicates that a number of the Panel's key recommendations are fundamentally at odds with Justice O'Connor's recommendations.

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<sup>1</sup> For a more detailed list of CELA publications related to water see CELA's website at: [www.cela.ca](http://www.cela.ca).

CELA is extremely concerned that the governance model and the institutional arrangements recommended by the Expert Panel would significantly erode public accountability and transparency over the operations of water systems in the province. Furthermore, it would unnecessarily divert a substantial amount of the provincial government's resources and staff time to establishing new institutional structures and operations which will be largely redundant, costly and unwarranted. It is CELA's view that the Provincial Government's efforts should instead be directed to abiding by its commitment to implement all the recommendations from the Part Two Report of the Walkerton Inquiry.

CELA's comments on the *Watertight* Report are organized under the following headings:

- (a) Governance Through a Corporatized Utility Model;
- (b) Creation of Water Board;
- (c) Inspections and Enforcement; and
- (d) Role of the OCWA.

## **II. SPECIFIC COMMENTS ON THE PANEL'S REPORT**

### **(a) GOVERNANCE THROUGH A CORPORATIZED UTILITY MODEL**

The Panel recommends municipalities be allowed to form corporations to deliver water and wastewater services. According to the Panel "the corporatized utility models offers the greatest benefits in terms of governance, transparency, financial sustainability and accountability" (*Watertight*, p. 33). The Panel concludes by stating that municipalities should be able to organize their water and waste water services as corporations for either non-profit under Part III of the *Ontario Corporations Act*, or for profit under the *Ontario Business Corporations Act* (p. 33).

The Panel cites EPCOR, which is owned by the public, its common shareholder being the City of Edmonton as a model example of a corporatized utility model. However, a recent study of EPCOR by the Parkland Institute (University of Alberta, 2005) has raised serious concerns about EPCOR's accountability. The study found that "EPCOR operates at the corporate end of the accountability spectrum; its primary accountability concern is in its relation to the shareholders and growth" (p. 2). Furthermore, the study concludes,

On EPCOR's board there is a lack of participation and oversight by City Council and other stakeholders. The utilities EPCOR controls are no longer the subject of democratic decision-making and there is no requirement for public transparency. The City can not set the operational priorities like environmental protection or wisely managed cost-efficient development. Finally, direct accountability to the public has been curtailed, as the corporatized utilities model is no longer subject to the *Freedom of Information and Protection of Privacy Act*. Key documents governing EPCOR's accountability with the City are unavailable to the public (p. 2).

The issue of good governance in relation to the provision of water services was also examined in a report jointly commissioned by the Federation of Canadian Municipalities and the University of Toronto's Munk Centre for International Studies entitled *Good Governance in Restructuring*

*Water Supply: A Handbook* (Bakker, K., undated). The report echoes a number of concerns highlighted by the Parkland Institute's study regarding the use of a corporatized model for the provision of municipal water services. The report states that the disadvantages of a corporatized public utility model include potentially higher capital costs, a weakening of accountability, commercial confidentiality limits on access to information by consumers and politicians as well as an incompatibility with some public services mandates. Moreover the report also notes that corporatization is often a precursor to full privatization and is sometimes recommended as an intermediate step prior to privatization by international lending agencies such as the World Bank (p. 2, 12).

In view of the foregoing CELA takes issue with the Panel's conclusion that the corporatized utility model offers the greatest benefit in terms of governance, financial sustainability and accountability. The research done by academic and public policy research institutions suggest that, in fact, a corporatized utility model would greatly reduce accountability and transparency. Consequently, CELA does not support the Panel's conclusion that the corporatized utility model provides the best governance structure to manage and operate water systems in the province.

## **(b) CREATION OF WATER BOARD**

### **(i) Establishment of Ontario Water Board unnecessary**

The Panel recommends the creation of an Ontario Water Board to carry out many of the functions delegated to municipalities under the *Sustainable Water and Sewage Services Act*, ('SWSSA') which was enacted by the Ontario government in December 2002.

The Panel suggests that this new body could be created by amending the SWSSA or by a separate statute or through an omnibus act that could include all the legislative changes required by the recommendation of its report (p. 39). The Ontario Water Board would, among other things, be required to analyze and rule on the water services "business plans" prepared by municipalities. The business plans would bring together all the local information and planning done under the SWSSA and look at the planning area as a whole and not just an individual municipality (Ibid. p. 38-39). These plans would look for options of working with neighbouring municipalities to save further costs (Ibid. p. 22). The Ontario Water Board would also require water services to provide information annually about their compliance with its regulatory regime and their financial services performance.

The Panel has stated that this business planning process is "not intended to happen in addition to full cost recovery plans required by SWSSA. Instead it would in effect, bring together all the local information and planning done to date and integrate it at a higher level" (p. 22). The Panel notes that systems on a combined basis will reduce the costs of preparing full cost recovery plans and provide more integrated solutions and better outcomes (p. 21). However, the panel has failed to provide any evidence to suggest that municipalities are unable or unwilling to do this under the present regulatory framework. Indeed, the Panel notes that full cost recovery planning and other regulatory instruments may well get the job done. The Panel also notes in its report that a number of municipalities, such as Perth and Sudbury have already completed the transition to full cost recovery (p. 49).

If the Panel's concern is simply that some municipalities may fail to address the additional savings that could be derived from consolidating waters systems, it could have simply recommended that the regulations passed under the SWSSA specifically require this information be provided in the full cost recovery plan. This would avoid the need to create an elaborate new regulatory scheme and a new institutional body to address cost savings which municipalities are already statutorily required to undertake under the SWSSA.<sup>2</sup> It should be noted that under section 5 of the SWSSA the Minister has authority to require two or more municipalities to prepare a joint full cost and cost recovery reports.<sup>3</sup> Thus, under the SWSSA the Minister can, where appropriate, promote economies of scale by requiring municipalities work together in preparing their reports.

Economies of scale can be addressed in other ways such as by bulk purchasing policies, regional transport of treatment chemicals and equipment, regional training and inspections, appropriate treatment technologies and energy efficiencies in operations. All of these should be applied to the problems of small systems and remote communities in the North. The Ontario Clean Water Agency (OCWA) was originally developed to provide such assistance and expertise to small operators. The need for this assistance has since grown as these communities work to comply with Ontario's new drinking water and SWSSA laws.

It is CELA's view that the creation of a new Ontario Water Board is unwarranted and would only add unnecessary complexity and create duplicate the roles and responsibilities under the SWSSA.

## **(ii) Creation of Ontario Water Board would reduce political accountability**

The Panel states in its report that "a considerable burden has been placed on the Minister under the SWSSA, which would, in most other jurisdictions be placed on an arm's length regulatory body" (p. 38).

It should be noted, however, that it was precisely this type of organizational structure that was rejected by Mr. Justice O'Connor in his Part 2 report. For example, in his discussion about the need for a Drinking Water Branch, Mr. Justice O'Connor notes in his report that locating the Drinking Water Branch within the Ministry of Environment can be useful in maintaining accountability. The report states that a

...branch that is assigned the responsibility of drinking water will help eliminate confusion over who is responsible for what. However, since the branch remains under the direct authority of the minister, direct political accountability remains intact as well. *This to be contrasted with a commission*

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<sup>2</sup> Subsection 4(5) of the SWSSA states that full cost recovery reports must contain information on the inventory and management plan for the infrastructure need to provide water services, an assessment of the full cost of providing the water services and revenue obtain to provide them and any other matter specified by regulation.

<sup>3</sup> Subsection 5(1) of the SWSSA allows the Minister to require two or more municipalities to provide a joint report on full cost. Subsection 11 of the SWSSA allows the Minister to require two or more municipalities to provide a report on full cost recovery.

*or other arm's-length entity that enables the government of the day to be shielded to some extent from responsibility* (emphasis added) (p. 415).

Although Justice O'Connor's comments were directed to the relation the institutional arrangements under the *Safe Drinking Water Act*, CELA believes his comments are equally applicable in relation to the regulatory framework governing the financing and operation of water systems in Ontario.

The Panel fails to recognize that the responsibility placed on the Minister under the SWSSA to approve the full cost and cost recovery reports constitutes the most essential and effective means of ensuring government oversight and political accountability for the provision of water services to Ontarians. In contrast, the delegation of the Minister's responsibilities under the SWSSA to an arms-length regulatory body would seriously undermine political accountability. It may also render a number of statutes which provide for transparency and accountability in the government's decision making process, such as the *Ontario Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy* the *Ombudsman Act* inapplicable.

### **(iii) Creation of the Ontario Water Board would not address need for adequate resourcing**

The Panel is of the view that the Ontario Water Board can only be effective if the number of water services in Ontario falls. According to the Panel no "regulator could deal effectively or in a timely fashion with plans submitted by the hundreds of water services that currently exists" (p. 39). It appears that one of the reasons prompting the Panel to recommend the creation of the Ontario Water Board was a concern about the availability of government resources to review cost recovery plans. It is important to note however, that the establishment of a new institutional body will not address the issue of adequate resourcing. If the Panel was concerned about the lack of adequate resourcing to review the plans submitted by water services, the appropriate recommendation would have been to request that the provincial government be provided with the adequate resources to match its regulatory responsibility.

### **(iv) Ontario Water Board would lack retention of expertise and experience in water services**

The Panel recommends that support for the Board be provided "mainly by non-permanent staff members" (p. 40). The Panel recognizes that a small core of staff would be needed however, these members would carry out primarily administrative duties. With respect to other needs, such as in the regulation, performance measurement, business, planning, finance and law, the Panel categorically rejects the creation of a large permanent bureaucracy. Instead, the Panel recommends that to the extent possible, the Board should engage staff on contract from the private and academic worlds on secondment to the public service of the Province and Ontario municipalities.

While the Panel's proposed institutional arrangement may create lucrative consulting opportunities for those in the private and academic world, it does not serve to ensure the effective oversight of water systems in the province. It is CELA's view that the Panel's proposed

institutional arrangements fail to ensure the development of institutional knowledge experience, technical expertise, and experience on the part of those delegated the responsibility for overseeing water systems in the province. Furthermore, the creation of a body staffed by non-permanent members reduces accountability for the management of water systems, since there would be no long-term oversight. CELA is therefore strongly opposed to the creation of Ontario Water Board as well as the proposed institutional arrangements of this Board.

### **(c) INSPECTIONS AND ENFORCEMENT**

The Panel has raised the question whether the inspections and enforcement functions should reside with the Ministry of Environment. It is the Panel view that that other possibilities be considered, such as a regulatory body funded by a sector participants. The Panel cites the Technical Standards and Safety Authority ("TSSA") as an example of an "arms-length" entity that could be considered. The Panel has also suggested that there should be a move from the detailed command and control over inputs and processes to a focus on desired results (p. 40). It should be noted that similar recommendations were advocated by some parties at the Walkerton Inquiry but these recommendations were categorically rejected Mr. Justice O'Connor.

In his report, Mr. Justice O'Connor states:

Although the general recommendation of movement away from a command and control model to a more integrated, co-operative approach that would encourage potential polluters to change their ways may be useful for some aspects of the MOE's mandate, including the abatement of pollution, it is not in my view appropriate for the regulation of drinking water safety (p. 68).

According to Mr. Justice O'Connor, "given the public importance of safe drinking water system, safety can best be ensured when the government is directly involved in regulation and oversight" (p. 69).

A key factor underlying the Panel's recommendation to devolve the inspection and enforcement functions to an arms-length body is to ensure that "inspection functions are insulated from the provincial budget process" (p. 43). However, as Mr. Justice O'Connor notes the other effect of independence from political influence, is a "decrease in political accountability. If responsibility is passed on to a commission, the government will find it easier to deflect blame when something goes wrong. So long as processes are in place to promote transparency, political accountability can be a powerful democratic tool" (Part 2 Report, p. 414).

The Panel's recommendation in regards to inspection and enforcement are clearly at odds with Mr. Justice O'Connor's recommendations in his Part Two Report of the Walkerton Inquiry. Moreover, the Panel fails to provide any compelling evidence why there is a need to fundamentally depart from Mr. Justice O'Connor's recommendations regarding inspections and enforcement of drinking water systems. CELA is of the firm view that the inspection and enforcement functions over water systems should continue to reside with the Ontario Ministry of Environment.

#### **(d) THE ROLE OF OCWA**

In his Part Two reports, Justice O' Connor notes that the primary role of the Ontario Clean Water Agency ("OCWA") "remains the same: to operate water systems under contract with the municipal owner" (p. 294-295). Mr. Justice O'Connor observed that "OCWA offers an important alternative to other external operating agencies, especially for small or remote municipalities that have limited options to operate their own water systems or to pursue regionalization. Also OCWA is a useful vehicle for the provincial government in circumstances where it finds it necessary to mandate the restructuring of "non viable" municipal systems or to respond to emergency situations, as in the case of Walkerton" (p. 294-295). Consequently, Mr. Justice O'Connor emphasized that he saw "OCWA continuing to play an important role in the province's water industry" (p. 295).

In view of the above, CELA was very surprised the *Watertight* Report would recommend that the government take measures to significantly alter the structure, mandate and role of OCWA. The report even considers the prospect that OCWA could be "wound down" or "sold off -either to a private sector firm or to a government owned company seeking to enter or expand into the Ontario Water sector " (p. 69-72). These recommendations are fundamentally at odds with the recommendations in the Part Two Report of the Walkerton Inquiry.

CELA also takes issue with the premise in the *Watertight* Report that "all of Ontario's water service providers can stretch their resources to cope with local or nearby failures" (p. 74). The nature of recent emergencies in Ontario and elsewhere serve to highlight the fact that the Walkerton tragedy cannot be regarded as a unique event. A neighbouring community would not have had the expertise or the resources to replace the entire contaminated water infrastructure of the Town of Walkerton, an activity that took well over a year. Nor are there any near neighbours to help with the unfolding disaster on the Kashechewan Reserve that has resulted in the relocation of an entire community. Both of these tragedies underscore the importance having a body such as OCWA to deal with emergency response.

CELA recommends that OCWA emergency response mandate be retained and that its role be expanded to also address emergency prevention. In particular, there needs to be a focus on innovative treatment methods for drinking water. Replacing chlorine based water treatment with activated carbon and/or ultraviolet treatment, for example, will eliminate more pathogens as well as carcinogenic by-products of chlorination, trihalomethane and other harmful substances from drinking water. OCWA should develop expertise in these and other alternative treatment methods and best practices.

The report that CELA commissioned for the Walkerton Inquiry *Financial Management of Municipal Water Systems in Ontario* prepared on by consultants C. N. Watson and Associates Ltd. (2001) highlights a number of advantages governments have over the private sector in financing of infrastructure. In particular, loans are available at better rates for the public sector in comparison to the private sector. The report also included guidance on how amortising capital expenses and planning for infrastructure over longer timeframes have proven to assist water and wastewater services to achieve greater self-sufficiency while planning for routine infrastructure renewal.



### III. CONCLUSION

CELA has serious concerns with many of the recommendations made in the *Watertight* Report. In particular, CELA is opposed to the creation of a corporatized utility model to deliver water and wastewater services in Ontario. A number of academic and public policy institutions which have examined the "corporatized model" have concluded that it would reduce accountability and transparency and increase capital costs.

CELA does not support the creation of an Ontario Water Board as its functions would be costly, redundant and unwarranted in view of the current regulatory framework established by the SWSSA. The proposed institutional arrangements for this Board are very problematic since it precludes the development of long-term institutional knowledge and expertise on the provision of safe drinking water. CELA is also extremely concerned about the devolution of the inspections and enforcement functions over drinking water to an arms-length body such as the TSSA. This recommendation is fundamentally at odds with the Mr. Justice O'Connor's recommendation in his Part Two Report, in which he emphasized the need to maintain direct government responsibility over regulation and oversight of Ontario's drinking water system.

In conclusion, the recommendations in the *Watertight* Report are fundamentally at odds in many key respects from the recommendations of the Part Two Report of the Walkerton Inquiry. CELA is concerned that recommendations of the *Watertight* Report would result in a substantial and unwarranted diversion of the provincial government's resources and staff time which instead should be directed to implementing the recommendations of the Part Two Report.

Protection of the health, safety and security of the province's drinking water and wastewater services requires expertise, commitment and accountability that are best placed in the public sector. Public polls repeatedly show that taxpayers are most comfortable with government control of these systems. It is time now to move beyond the governance debates to action on Justice O'Connor's dictum "given the public importance of a safe drinking water system, safety can best be ensured when the government is directly involved in regulation and oversight" (p. 69).

## *References*

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