309

ONTARIO'S WATER RESOURCES: THE NEED FOR PUBLIC INTEREST REGULATION

Submissions to the
Ministry of Environment and Energy from the
Canadian Environmental Law Association
and Great Lakes United
regarding the
Water and Sewage Services Improvement Act, 1997
BILL 107

Publication # 309
ISBN# 978-1-77189-418-0

Prepared by:

Richard D. Lindgren, Counsel
Canadian Environmental Law Association

Sarah Miller, Co-Chair
Great Lakes United Sustainable Water Task Force

February 19, 1997

VF:
CANADIAN ENVIRONMENTAL LAW
ASSOCIATION.
LINDGREN, RICK.
CELA BRIEF NO.309; Onta...RN21272

3[?]

TABLE OF CONTENTS

Page

SECTION 1.0 - INTRODUCTION 1

SECTION 2.0 - WATER AND SEWAGE REGULATION: PUBLIC INTEREST PURPOSES, POLICIES AND PRINCIPLES 2

(a) Bill 107 - Historical Context and Policy Framework 2

(b) The Stated Objectives of Bill 107 4

(c) An Overview of OCWA's Roles and Functions 5

(d) Private Profits from Public Resources: The Case Against Privatizing Water and Sewer Services 7

(e) The Need for an Independent Regulator 11

SECTION 3.0 - CRITIQUE OF BILL 107 13

(a) General 13

(b) OCWA "Reforms" 16

(c) Sewage System "Reforms" 18

SECTION 4.0 - CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS . . 20

ONTARIO'S WATER RESOURCES: THE NEED FOR PUBLIC INTEREST REGULATION

SUBMISSIONS TO THE
MINISTRY OF ENVIRONMENT AND ENERGY REGARDING THE
WATER AND SEWAGE SERVICES IMPROVEMENT ACT, 1997
BILL 107

By

Richard D. Lindgren[1] and Sarah Miller[2]

SECTION 1.0 - INTRODUCTION

These submissions on Bill 107 (Water and Sewage Services Improvement Act, 1997) have been prepared by the Canadian Environmental Law Association (CELA) and Great Lakes United (GLU). CELA and GLU have had a lengthy history of casework and law reform activities aimed at protecting the quality and quantity of water resources within Ontario and across the Great Lakes basin.

CELA and GLU have used their public interest perspective to critically review and analyze the various components of Bill 107. It is the conclusion of CELA and GLU that Bill 107 is fundamentally flawed and is unsupportable in principle and in practice. CELA and GLU therefore recommend that Bill 107 be withdrawn by the Ontario government unless the legislation is substantially amended.

The concerns of CELA and GLU may be summarized as follows:

1. No environmental rationale has been offered for Bill 107, and the legislation does not appear to be motivated by ecological concerns.

2. Bill 107 fails to expressly prohibit the privatization of municipal water and sewage facilities, infrastructure or services, despite the Ontario government's professed commitment to "public ownership" of such undertakings.

3. Bill 107 makes no provision for an independent regulator of the water and sewer services industry in Ontario.

[1] Counsel, Canadian Environmental Law Association.

[2] Coordinator, Canadian Environmental Law Association, and Co-Chair, Great Lakes United Sustainable Water Task Force.

4. Bill 107 fails to enact or entrench the essential elements of the long-overdue Safe Drinking Water Act in Ontario.

5. Bill 107 fails to restore statutory provisions that previously required electoral assent to the creation or dissolution of public utilities or the granting of municipal franchises.

6. Bill 107 fails to require "full cost accounting" analyses of privatization proposals, and fails to provide procedural safeguards to ensure that municipal decisions respecting privatization are made in an open, public process.

7. Bill 107 fails to place any restrictions on proposals to sell, transfer or otherwise dispose of municipally owned lands used for water works or sewage works.

8. Bill 107 includes an excessively broad and unnecessary Crown immunity clause that attempts to bar Ontario residents from bringing certain civil actions against public officials.

9. Bill 107 inappropriately off-loads regulatory responsibility for Part VIII sewage systems from the Ontario government to local municipalities.

***

The purpose of this brief is twofold: (1) to outline the above-noted concerns in more detail, particularly in relation to the water and sewage "reforms"; and (2) to provide the key findings and recommendations of CELA and GLU with respect to Bill 107. These recommendations are summarized in Section 4.0 of this brief.

SECTION 2.0 - WATER AND SEWAGE REGULATION: PUBLIC INTEREST PURPOSES, POLICIES AND PRINCIPLES

(a) Bill 107 -- Historical Context and Policy Framework

For the past 100 years, the Ontario government has recognized the importance of regulating water and sewage services in order to protect the environment and public health. For example, Ontario first passed public health and municipal waterworks legislation in the 1880's, which was supplemented by more extensive public utilities legislation in the early 1900's.[3] In the 1950's, however, the province greatly expanded its role in safeguarding water resources by enacting the Ontario Water Resources Commission Act.

[3] Neil B. Freeman, Ontario's Water Industry: Models for the 21st Century (OMWA, 1996), pp.35-38.

This legislation created the Ontario Water Resources Commission, an independent body that enjoyed general supervisory and regulatory authority over water quality and water use within the province. The Commission had various approval powers and pollution abatement powers, and also served to finance and supply water and sewage services to municipalities. The Commission continued to exercise these powers until 1972 when the newly formed environment ministry took over administration of the legislation, which was re-named the Ontario Water Resources Act (OWRA).[4]

In 1993, the Ontario government created the Ontario Clean Water Agency (OCWA), a Crown corporation that, in many key respects, closely resembled the former Ontario Water Resources Commission. As described below, OCWA assumed the operation of the MOEE's numerous water and sewage facilities, and provided financial and technical assistance to municipalities. The public interest justification for OCWA included protecting human health, promoting water conservation, ensuring public accountability, and supporting provincial policies regarding land use and development.

Thus, the revamped provincial role in water and sewage regulation, first developed in the 1950's, continued intact until the recent introduction of Bill 107 in January 1997. It is noteworthy that Bill 107 was preceded by Bill 26 (Savings and Restructuring Act), which was enacted in early 1996. Among other things, Bill 26 makes it easier for municipalities to dissolve water or public utilities without electoral assent.

At the same time, the Ontario government's Municipal Assistance Program, which provided capital grants for municipal water and sewage projects, was virtually eliminated from the budget of the Ministry of Environment and Energy (MOEE). For example, in the MOEE's 1997-98 capital budget reductions announced on April 11, 1996, approximately $142 million was slashed from the Municipal Assistance Program, which had already suffered multi-million dollar reductions for 1995-96 and 1996-97.

If enacted as drafted, Bill 107 would largely confine OCWA to pursuing contracts to operate water and sewage facilities owned by municipalities. However, after Bill 107 was introduced, a provincial task force identified OCWA as a candidate under review for privatization.[5] Accordingly, the future of OCWA itself seems tenuous under the present government.

There can be little doubt that these and other "reforms" at the provincial and municipal levels pave the way for the privatization of all water and sewage services in Ontario. The threat of privatization potentially applies not only to the OCWA assets that will be transferred to municipalities, but also to the hundreds of water and sewage facilities already under municipal

---

[4] See D. Estrin and J. Swaigen (eds.), Environment on Trial (Emond Montgomery 1993), pp.530-31.

[5] See the Government Task Force on Agencies, Boards and Commissions, Report on Operational Agencies (January 1997), at p.9: "[The Task Force] recommends the government review the need for the province to own a water and sewage management company".

ownership.

It must be recalled that OCWA only owns 25% (i.e. 230 facilities) of the province's 937 water and sewage facilities. This means that approximately 700 municipally owned water and sewage facilities are potentially threatened by privatization under Bill 107. This fact underscores the significance and pervasive nature of Bill 107. Indeed, the Bill's apparent focus on OCWA should not deflect public attention from what appears to be the real agenda underlying Bill 107 -- the substantial reduction of the province's traditional role respecting water and sewage services, and the potential privatization of all water and sewage services in Ontario.

(b) The Stated Objectives of Bill 107

Bill 107 consists of two main components:

(i) a package of reforms in sections 1 and 2 and Schedule A (Municipal Water and Sewage Transfer Act, 1997) relating to the transfer of ownership/title of sewage and water works from OCWA to municipalities, and from municipalities to the private sector; and

(ii) a package of reforms in sections 3 to 5 relating to the administration of Part VIII (Sewage Systems) by municipalities under the Environmental Protection Act (EPA).

The stated objectives of Bill 107's OCWA "reforms" include:

- "disentanglement" of municipal and provincial roles regarding the delivery of sewer and water services; and

- "encouragement" of public ownership of water and sewage infrastructure.

It is ironic that none of these stated objectives include environmental protection or resource conservation goals. This is also true of the stated objectives for the sewage systems amendments, which tend to focus simply on the mechanics of transferring responsibility under Part VIII of the EPA to municipalities. It thus appears that there is no apparent environmental rationale or justification for the OCWA reforms or the sewage system reforms. Indeed, having regard for the British privatization experience, as discussed below, these reforms could result in significant environmental degradation.

Accordingly, CELA and GLU can only conclude that Bill 107 is not proceeding for ecological reasons. Moreover, many of the actual provisions in Bill 107 do little to accomplish the stated objectives of the legislation, such as "encouraging" public ownership of water and sewage infrastructure. Indeed, in light of the various developments described above, the

province's professed commitment to "public ownership" of water/sewage infrastructure is highly suspect. This is particularly true since Bill 107 potentially permits not only the privatization of OCWA-owned assets, but also permits the wholesale privatization of the hundreds of STP's and WTP's currently owned by municipalities.

(c) An Overview of OCWA's Roles and Functions

The provincial government's apparent intention to dismantle and transfer OCWA assets and/or privatize its services is sharply at odds with the reasons why OCWA was established in the first place.

OCWA was established with great fanfare in 1993 when the Capital Investment Plan Act (CIPA) was enacted. The environmental and economic benefits of establishing OCWA as a new public agency were proclaimed by the MOEE as follows:

- contributes to economic renewal;
- ensures greater environmental accountability;
- promotes water conservation;
- encourages sustainable development;
- creates jobs;
- improves service and efficiency;
- fosters new financing and investing arrangements; and
- pursues opportunities for more effective partnerships.[6]

To achieve these benefits, OCWA was given a number of important roles and responsibilities, including:

- taking over the operation of 153 provincially owned sewage treatment plants (STP's), 77 provincially owned water treatment plants (WTP's), and 116 municipally owned STP's and WTP's being operated by the MOEE;
- assisting municipalities in planning, developing and constructing water and sewage services by, among other things, providing technical advice on water conservation and

[6] MOEE, Introducing Ontario's Clean Water Agency (1993), p.4.

demand management programs "that will ensure adequate supplies of water and cost-effective services -- both of which will save municipalities money"; and

- providing municipalities with financial assistance through a variety of means, including: direct investments; loans at preferential rates; partnerships; and capital grants (i.e. the Municipal Assistance Program).[7]

In general, CELA and GLU were supportive of OCWA's assigned roles and responsibilities since OCWA was clearly targetting the environmental and public health risks associated with improperly treated drinking water, obsolete or inefficient sewage treatment plants, continuing deterioration of Ontario's aging infrastructure, and the consequences of urban sprawl, scattered rural development, and other undesirable land use and development scenarios. Moreover, OCWA had a stated policy objective of promoting water conservation, which was an objective strongly endorsed by CELA and GLU.

Now that four years have elapsed since OCWA was created, CELA and GLU must ask: what environmental factors have changed so dramatically as to make OCWA redundant or unnecessary? More fundamentally, what environmental factors have changed so dramatically as to make privatization the preferred alternative? In other words, what is the environmental rationale for Bill 107?

In our view, the problems that led to the creation of OCWA have not been eliminated or significantly reduced, and they are unlikely to be eliminated or significantly reduced under the era of privatization that will inevitably result under Bill 107.

Recently, for example, outbreaks of cryptosporidium have threatened the drinking water of Ontario residents. This, in turn, prompted Ontario's Environmental Commissioner to make the following recommendation in her most recent Annual Report to the Ontario Legislature:

> The Ministry of Environment and Energy [should] assess the needs of approximately 40 surface water treatment plants in Ontario which are potentially vulnerable to cryptosporidium. For plants which are most vulnerable, planning for the installation of filtration should proceed, unless it can be demonstrated to be unnecessary. The Ministry of Environment and Energy and the Ministry of Health should also consider installing cryptosporidium detection methods at the most vulnerable plants to provide early warning of a breakout.[8]

Similarly, in a recent MOEE review of the environmental performance of STP's in Ontario, 91 facilities (approximately one-quarter of all STPs) were found not in compliance with

---

[7] Ibid., pp.5-6.

[8] Environmental Commissioner of Ontario, 1994-95 Annual Report (1996), p.40.

applicable effluent limits or guidelines.[9] There is little evidence that this non-compliance rate has materially changed since this report, and no evidence whatsoever to suggest that compliance rates will improve under the new Bill 107 regime.

In addition to ongoing water quality and STP discharge problems, it must be noted that Ontario's land use planning regime has been severely weakened. The present government's decision to reverse key policy and legislative reforms enacted by the previous government will contribute to continued urban sprawl and scattered rural development without due regard for groundwater and headwater areas. There are many examples of poor land use planning across Ontario where groundwater and surface water contamination has resulted from inappropriate development. The results of poor land use planning also include the need to provide costly water and/or sewage infrastructure to farflung, sprawling development. Under the current land use planning regime, these problems are likely to continue unabated.[10]

In the view of CELA and GLU, these continuing problems point to the need for greater, not lesser, provincial involvement in the planning, delivery and monitoring of the delivery of water and sewage services in Ontario. Transferring OCWA assets to municipalities, and then permitting municipalities to privatize any and all water and sewage services, is a fundamentally flawed and ill-timed proposal that will <u>not</u> translate into enhanced environmental protection or improved water or energy conservation. As described below, it is highly likely that Ontario's environment will be adversely affected by the proposed off-loading of OCWA facilities to cash-strapped municipalities, who will be undoubtedly tempted to sell, lease or otherwise transfer these (and other) facilities to private sector monopolies.

(d) Private Profits from Public Resources: The Case Against Privatizing Water and Sewer Services

Privatization of water and sewage services has already made inroads in Ontario. York Region, for example, has recently cast its lot with a consortium headed up by North West Water (a British utility company) and Consumer's Gas. Other Ontario municipalities are said to be considering various privatization options, and there appears to be growing private interest in acquiring OCWA itself.

It is the understanding of CELA and GLU that the group of private companies interested in bidding on Ontario water and sewage services include: large engineering firms from Canada

---

[9] MOEE, <u>Report on the 1991 Discharges from Municipal Sewage Treatment Plants in Ontario</u>.

[10] Generally, see CELA, "Submissions to the Standing Committee on Resources Development Regarding Bill 20" (February 20, 1996); "Septic Issue A Sleeping Giant", <u>New Planning News</u>, Vol.1, No.3 (December, 1991).

and the United States; de-regulated oil, gas and pipeline companies; private British and French utility companies; and various multinational corporations, including some that have previously advocated large-scale water diversion projects (i.e. the Grand Canal). A number of these corporations already have large U.S. customers, raising the possibility of renewed interest in diversion or export projects to service U.S. markets.

The diverse nature of the corporate community that is interested in the future of Ontario's water and sewage services raises a number of fundamental concerns and questions. For example, the rapid influx of numerous new private players will undoubtedly lead to the fragmentaion of the water services industry, which underscores the need for an independent public regulator, as described below. In addition, if multinational corporations are successful bidders on water and sewage services, then it appears likely that Ontario water and sewage rates will be determined abroad by foreign directors whose primary interest is maximizing profits and shareholder dividends. Similarly, having regard for the British privatization debacle, it also appears likely that Ontario water and sewer revenues will be siphoned abroad for other purposes, rather than be re-invested into infrastructure maintenance and improvements in Ontario. These are fundamentally important issues that cannot be ignored as Bill 107 proceeds through the legislative process.

The level of international corporate interest in Ontario's water and sewage services is undoubtedly fanned by rosy reports in international trade journals regarding the provincial government's apparent receptiveness to privatization proposals. One publication recently described the Ontario situation as follows:

> Ontario heeded this advice in early December with a plan to transfer ownership of about one-quarter of the province's water and sewage plants to local authorities. The move will give municipalities greater freedom to attract private-sector involvement in water supply and distribution systems. Formal transfer of ownership will occur when provincial loans used to build the plants are repaid. In addition, environment minister Norm Sterling said the province plans to halt loans and grants to finance construction of water plants, except in areas with unusually low assessment rates...
>
> The Ontario Clean Water Agency, which claims to be North America's biggest operator of water and sewage treatment systems, is to be privatised. The agency has annual contract revenues of about C$125m, with profits of C$40m, over the past two years.[11]

As described above, Bill 107 will permit the privatization of <u>any</u> municipal water and sewage facility in Ontario, including those facilities transferred from OCWA to municipalities. The only apparent restriction on selling off water and sewage facilities is the requirement to repay

---

[11] "Canadian Privatisation Dragging its Heels", 6 FT Newsletters - Global Water Report (December 11, 1996), Issue 13.

any provincial capital grants received for the facility since 1978. This restriction is intended to "protect the taxpayers' investment",[12] but does not serve as a meaningful safeguard or prohibition against transferring such assets to private interests. In essence, all this provision really does is establish the price tag for water and sewage facilities. In addition, it seems likely that the private sector's acquisition costs will ultimately be passed on to consumers of the privatized services through increased water or sewage rates (if not otherwise available for tax write-offs). This also means that only the largest companies will be able to acquire the facilities, which increases the likelihood of private sector monopolies controlling water and sewage services in many areas.

Inexplicably, only the face value of the provincial grants will have to be paid back -- no interest is payable. This relief against paying interest provides an indirect subsidy to private companies interested in acquiring part or all of a municipality's water or sewage infrastructure.

The Ontario government's desire to facilitate (if not openly encourage) the privatization of water and sewage services appears predicated on a number of fundamentally flawed tenets: (1) that private enterprise is inherently more efficient than public enterprise; (2) that private operators are more technically advanced than public operators; (3) that private operators will make capital investments in infrastructure maintenance and improvement; and (4) that water is simply a commodity that should be bought or sold in the open market like any other commodity.[13]
The fallacy of these myths has been amply demonstrated in Britain, where water services were privatized in 1989. A number of well-documented problems have been experienced in Britain under the privatization regime, including:

- substantial increases in water prices;
- the termination of water services to low-income families unable to afford the increased rates;
- severe water shortages and significant restrictions on non-essential water uses;
- outbreaks of dysentery, Hepatitis A, and other public health problems caused by poor sanitation and unavailability of water;
- the sell-off of water reservoir lands for development purposes;

---

[12] MOEE, "Water and Sewage Services Improvement Act: Media Backgrounder", p.3.

[13] See Neil B. Freeman, op. cit., pp.57-73, for a critical analysis of these and other myths surrounding privatization. See also Brendan Martin, "From the Many to the Few: Privatization and Globalization", in The Ecologist, Vol.26, No. 4, July/August 1996, p. 145.

- the failure to re-invest profits into aging or leaking infrastructure;
- cutting corporate costs by laying off thousands of workers and lowering wages;[14]
- excessive executive salaries and shareholder dividends;
- numerous violations of regulatory requirements; and
- creation of integrated monopolies providing water, sewage, electricity, transportation, and waste management services.[15]

Interestingly, the Ontario government's media backgrounder for Bill 107 attempts to distinguish the British experience from the Ontario situation by suggesting, among other things, that "Britain's water and sewage systems prior to privatization were in [a] deteriorated state".[16] It appears to CELA and GLU that this description fairly characterizes the current situation in this province, where "25% of Ontario's infrastructure, including water and sewage systems, is almost 50 years old, which is close to the end of their lifespan".[17] Indeed, it has been noted that "some parts of Ontario's infrastructure are older than Canada".[18] It therefore appears that the British experience is not readily distinguishable from current conditions in Ontario, and the British problems may be replicated in Ontario if Bill 107 is enacted as drafted.

Not surprisingly, the problems and excesses of the British privatization regime has provoked considerable public outrage and prompted calls for a return to public delivery of water and sewage services. Similarly, in Ontario, there is very little public support for the privatization of water services. For example, a 1996 Insight Canada Research poll revealed that 76% of Ontarians strongly support having elected public officials in charge of water services, as opposed to having private companies control such services. The same poll revealed that an overwhelming majority of Ontarians want water services delivered on a non-profit basis, with surplus revenues being dedicated for improvements to water services.[19] Accordingly, Bill

---

[14] In Ontario, it appears that similar labour reductions can be anticipated under privatization, despite the fact that single greatest cost in water and sewage operations is energy use, not labour. If the objective is maximize savings, then greater emphasis should be placed on energy efficiency and conservation efforts, rather than simplistic workforce reductions.

[15] Brendan Martin, op.cit., p.147.

[16] MOEE, "Water and Sewage Services Improvement Act: Media Backgrounder", p.4.

[17] MOEE, Introducing Ontario's Clean Water Agency (1993), p.15.

[18] Ibid., p.16.

[19] See Insight Canada Research, "Attitudes of Ontarians Toward Community Drinking Water Systems: A Report to the Ontario Municipal Water Association", in Neil B. Freeman, op. cit., Appendix 3.

107 and the "drive to privatize" water services seem clearly out of step with widespread public support in Ontario for publicly owned and controlled water services.

It should also be noted that the creeping presence of multi-national corporations in Ontario's water industry may give rise to certain Free Trade Agreement implications. In particular, once these corporations secure long-term contracts locking up Ontario water supplies, they will be in a strategic position to renew the push to export or divert Ontario's water into lucrative, water-starved markets (or existing customers) within the United States. Once this export "tap" has been turned on, the Free Trade Agreement requires the continued supply of this "commodity" to south of the border, even if water shortages occur within Canada. CELA and GLU submit that Ontarians, as stewards of the province's increasingly precious freshwater resources, should strenuously avoid leaving such an undesirable legacy for future generations. CELA and GLU note that the current Minister of Environment and Energy has stated that the province will resist efforts to divert water out of the Great Lakes basin.[20] However, CELA and GLU point out that nothing in Bill 107 prohibits such diversions.

In summary, the Bill 107 regime does not merely change the title or ownership of water and sewage facilities in Ontario. Instead, the privatization regime facilitated by Bill 107 raises fundamental questions about the appropriate nature and extent of Ontario's regulatory role in relation to water and sewage services:

> Privatization is not simply a change of ownership. It is a change in the role, responsibilities, priorities and authority of the state.[21]

(e) The Need for an Independent Public Regulator

Among other things, Bill 107 proposes to transfer OCWA assets to municipalities, which, in turn, are free to sell off any WTP/STP facility to the private sector. The current Minister of Environment and Energy has indicated that if a sell-off were to occur, the province would still maintain and enforce "rigid" water quality standards.[22]

In previous years, this claim might have merited some credence; however, given the substantial staff reductions and budget cutbacks experienced by the MOEE (including abatement, investigation and enforcement departments), CELA and GLU seriously question the ability of the MOEE to adequately enforce existing standards, let alone improved water quality standards. In addition, Ontario still lacks an enforceable Safe Drinking Water Act, as

---

[20] See "Economize Water Use, Report Says", The Globe and Mail, February 11, 1997.

[21] Brendan Martin, op. cit., p.147.

[22] "Drinking Water Warning Issued", Toronto Star (December 4, 1996).

described below.

It is noteworthy that the MOEE STP discharges report described above indicated that although 91 STP's were found not in compliance with regulatory requirements, only two suspected infractions were formally investigated by the MOEE's Investigation and Enforcement Branch, and no charges were laid. This general lack of enforcement activity is unlikely to improve under the Bill 107 regime, particularly since recent MOEE enforcement statistics reveal a significant decrease in enforcement proceedings under Ontario's environmental laws within the past two years. Accordingly, CELA and GLU have no confidence that violations of provincial standards by municipal or private operators will be met with effective and timely investigation and enforcement activities by MOEE staff.

As noted throughout this brief, CELA and GLU strongly favour the retention of water and sewage services in public hands. However, if privatization is not going to be expressly prohibited by Bill 107, then CELA and GLU strongly submit that Bill 107 must provide for the creation of a new, independent regulator of water and sewage services in Ontario. This streamlined agency, composed of provincially appointed members representing broad sectoral interests (including public interest groups), must be given adequate supervisory, approvals, and regulatory powers over a variety of matters, such as:

- proposals to sell, lease or otherwise transfer municipal water and sewage facilities or infrastructure to other municipalities, private corporations, or public-private consortiums;

- proposed water and sewage services rates;

- authority to review proposals to merge or amalgamate public or private utilities into integrated monopolies;

- authority to issue binding orders requiring the construction, maintenance, modification, expansion or upgrading of STP's, WTP's or related infrastructure;

- authority to issue binding orders requiring the prevention, mitigation or remediation of adverse environmental effects arising from the operation or management of STP's, WTP's or related infrastructure; and

- authority to require water conservation programs, energy efficiency programs, and demand management strategies.

It is noteworthy that in several other environmentally significant industries, the centrepiece of the legislative framework is an independent regulatory body. At the federal level, for example, the National Energy Board generally regulates intraprovincial and international energy exports and related activities. Within Ontario, the Ontario Energy Board regulates

the natural gas industry and reviews Ontario Hydro's bulk power rates. Even in Britain, when water services were privatized, a public sector agency -- the Office of Water Supplies -- was established to regulate water prices.

If Bill 107 proceeds without the creation of an independent regulator, then Ontarians will be virtually powerless against the private water and sewer monopolies that are likely to result under Bill 107. Consumers of water and sewer services do not generally enjoy the option of switching to a competitor, or not using the "product" at all. Water, for example, is a basic daily requirement for the health and safety of all persons, and is therefore distinguishable from other commodities or natural resources. In the opinion of CELA and GLU, there is a clear and compelling need for an independent public regulator to safeguard against profiteering on water and sewage services, to require water conservation programs and demand management strategies, and, perhaps most importantly, to ensure that Ontarians enjoy clean and safe drinking water.

SECTION 3.0 - CRITIQUE OF BILL 107

The fundamental objections of CELA and GLU to Bill 107 are based largely on public policy considerations rather than on technical or semantic concerns about the legislative language used in Bill 107. As described above, CELA and GLU recommend that Bill 107 be withdrawn unless it is substantially amended.

RECOMMENDATION #1: **The Ontario government should immediately withdraw Bill 107 unless the legislation is substantially amended.**

The nature and scope of the necessary amendments to Bill 107 are outlined below in our detailed review of Bill 107.

(a) General

Before CELA and GLU turn to what is included in Bill 107, it is necessary to review what is not in Bill 107.

First, Bill 107 contains no express prohibition against the privatization of water and sewage services in Ontario. CELA and GLU are strongly opposed to the privatization of such services, particularly in light of the questionable privatization track record in Britain and other jurisdictions. If the Ontario government is truly committed to the concept of "public ownership" of such services, then Bill 107 must be amended to include an express prohibition

against the privatization of water and sewage facilities, infrastructure and services in Ontario.

RECOMMENDATION #2: **If Bill 107 proceeds, it must be amended to include an express prohibition against the privatization of water and sewage facilities, infrastructure or services in Ontario.**

Second, as described above, Bill 107 makes absolutely no provision for an independent public regulator to safeguard the public interest as water and sewage services are transferred, amalgamated, and ultimately privatized. In the opinion of CELA and GLU, this omission is arguably the most objectionable aspect of the Bill 107 regime. Therefore, if Bill 107 proceeds in a form that does not prohibit privatization, then it must be amended to include provisions establishing an effective, efficient and independent public regulator.

RECOMMENDATION #3: **If Bill 107 proceeds, it must be amended to include provisions establishing an effective, efficient and independent regulator of water and sewage undertakings in Ontario.**

Third, Bill 107 fails to enact or entrench the essential elements of the long-overdue Safe Drinking Water Act. Such legislation has long been advocated by public interest groups[23] in Ontario, and would include the following components:

- entrench a clear public right to clean drinking water;
- establish standards limiting the amounts of contaminants in drinking water that may adversely affect human health;
- establish standards that address contaminants that may cause odour, appearance or useability problems with drinking water;
- impose a positive statutory duty on the MOEE to set and enforce drinking water standards;
- require public and private water suppliers to periodically sample, monitor, and report upon the quality of drinking water;
- promote research into alternative water treatment technologies that eliminate organic chemicals in the water treatment process;
- establish appropriate prohibitions, penalties, and investigation and enforcement

---

[23] 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; and G. Patterson, "Is Our Water Safe to Drink? Do We Need a Safe Drinking Water Act?" (CELA, 1985).

provisions;

- require public and private drinking water suppliers to provide timely public notice of operational problems, failure to carry out prescribed testing, or violations of prescribed standards; and

- create a statutory cause of action permitting individuals to sue violators of the Act or standards.

In the opinion of CELA and GLU, the need for safe drinking water legislation does not depend on the outcome of the current privatization debate. Regardless of whether water services are under public or private control, Ontarians deserve tough drinking water laws and regulations (as opposed to unenforceable "objectives" or "guidelines") to ensure safe and adequate supplies of clean drinking water. Nevertheless, the seemingly imminent arrival of privatized water and sewage services in Ontario makes it an even greater priority to pass safe drinking water legislation to enhance the accountability of private operators if and when problems arise. In short, the province must act now to ensure that drinking water is protected at the point of consumption.

RECOMMENDATION #4: **If Bill 107 proceeds, it must be amended to include or entrench the essential elements of a Safe Drinking Water Act in order to ensure that Ontarians enjoy safe and adequate supplies of clean drinking water.**

Fourth, Bill 107 fails to require electoral assent to the proposed privatization of municipally owned facilities or infrastructure. This important accountability mechanism was repealed under the Bill 26 reforms discussed above. In the opinion of CELA and GLU, a proposal to dissolve a public utility in order to privatize municipal water and sewage facilities is a fundamentally important matter with profound implications for all ratepayers (and consumers of such services) within a municipality. Accordingly, CELA and GLU submit that Bill 107 should restore the previous statutory requirements under the Public Utilities Act and Municipal Franchises Act regarding electoral assent.

RECOMMENDATION #5: **If Bill 107 proceeds, it must be amended to restore the previous statutory requirements under the Public Utilities Act and Municipal Franchises Act regarding electoral assent to proposals to dissolve or establish utilities providing water or sewage services, or to privatize municipal facilities, infrastructure or services respecting water and sewage.**

Fifth, Bill 107 does not require "full cost accounting" (or even traditional cost-benefit analysis) when proposals are made to privatize municipal facilities, infrastructure or services. In the opinion of CELA and GLU, full cost accounting principles must be applied to such

proposals to ensure that the full range of short-and long-term consequences of privatization are quantified and discussed in an open and public process before final decisions are taken.[24] Indeed, a strong argument could be made that municipal privatization proposals are significant enough to be designated or treated as "undertakings" that require individual environmental assessment under the Environmental Assessment Act before they proceed.

RECOMMENDATION #6: **If Bill 107 proceeds, it must be amended to ensure that proposals to privatize municipal facilities, infrastructure or services are subjected to "full cost accounting" to ensure that the full range of short- and long-term consequences of privatization are quantified and discussed in an open and public process before final decisions are made.**

The remainder of this section of the brief will focus on the provisions that are included in Bill 107 as drafted.

(b) OCWA "Reforms"

Municipal Water and Sewage Transfer Act, 1997

Section 1 of Bill 107 enacts the Municipal Water and Sewage Transfer Act, 1997 (MWSTA), which is attached as Schedule A to Bill 107. CELA and GLU have reviewed the MWSTA and have identified a number of concerns. First, section 2 gives the Minister broad discretion to make orders transferring OCWA's water works, sewage works, assets, rights, and obligations to a municipality. However, section 2(5) prohibits the transfer of certain OCWA liabilities to a municipality. In the view of CELA and GLU, this liability limitation provides further evidence of how the Ontario government hopes to make transfer orders more palatable to municipalities (and to any private sector companies waiting in the wings).

Second, section 3 of the MWSTA provides that an order which transfers an interest in land from OCWA to a municipality may be registered on title in the appropriate land registry office. This is an unobjectionable provision, but CELA and GLU note that the MWSTA contains no further restrictions on the municipalities' ability to, in turn, dispose of such lands by flipping former OCWA property to private utilities or potential developers. Indeed, nothing in Bill 107 appears to constrain the ability of municipalities to sell off any municipally owned water or sewer facility, property or asset.

It is the understanding of CELA and GLU that this "free rein" proved to be a serious

---

[24] A similar recommendation is made by Neil B. Freeman, op.cit., p.88.

oversight in Britain, where private companies acquired public utility properties for less than full market value, and then sold the properties at considerable profit for development purposes. Given that in many urban centres in southern Ontario, water and sewage plants occupy large expanses of prime waterfront property, CELA and GLU submit that Bill 107 and MWSTA must be amended to place substantive restrictions on municipal proposals to sell off such lands. For example, the legislation could prohibit municipalities selling such properties for less than the fair market value, as determined by independent real estate appraisals.

RECOMMENDATION #7: **If Bill 107 proceeds, the Municipal Water and Sewage Transfer Act must amended so as to place restrictions on proposals to sell, transfer or otherwise dispose of municipally owned lands used for water works or sewage works.**

Third, section 11 of the MWSTA contains an extremely broad Crown immunity clause that is intended to bar certain civil actions against the Crown and its ministers and public servants. In the view of CELA and GLU, public officials already enjoy sufficient protection under the Public Authorities Protection Act, the Limitations Act, and the Proceedings Against the Crown Act. Section 11 is overbroad and unnecessary, and should be deleted from the MWSTA.

RECOMMENDATION #8: **If Bill 107 proceeds, section 11 of the Municipal Water and Sewage Transfer Act should be deleted.**

Amendments to the Capital Investment Plan Act, 1993

Section 2 of Bill 107 does two things: (1) it repeals section 53 of the Capital Investment Plan Act, 1993 (CIPA), which transferred various assets and liabilities to OCWA when the agency was established; and (2) it adds new provisions to the CIPA which are intended to relieve OCWA and the Crown of obligations to construct, expand or finance the construction or expansion of water or sewage works under agreements entered into before Bill 107 receives Royal Assent.

In addition, new section 56.2 of the CIPA prohibits municipalities from transferring ownership of water and sewage works unless there is repayment of provincial funds received since 1978 to subsidize the capital cost of such water or sewage works. Significantly, there is no obligation to repay any federal funds that were received by the municipality, nor is there any obligation to pay interest on the provincial funds that are payable to Ontario. The Minister is to be the sole arbiter of any disputes as to the amount of funds that are to be paid back to the province.

In the view of CELA and GLU, the mere requirement to pay back interest-free funds to the province constitutes an inadequate safeguard against privatization. For the reasons stated above, CELA and GLU submit that Bill 107 should contain an express prohibition against privatization, or alternatively, should contain a series of amendments that protect Ontario residents against the undesirable consequences of rampant and unregulated privatization.

(c) Sewage System "Reforms"

Section 3 of Bill 107 transfers from the MOEE to municipalities the general responsibility to regulate the construction and use of sewage systems under Part VIII of the EPA. In unorganized territories, this responsibility is transferred from the MOEE to the Ministry of Municipal Affairs and Housing, an agency that is not generally known for its sewage system expertise.

In general, Part VIII sewage systems include septic tanks, small private sewage works, and other systems that do not discharge effluent directly into watercourses. The precise number of Part VIII systems across Ontario is not known, but it has been estimated that there may be over one million such systems located throughout the province.[25] The problem is that without adequate soil conditions, sufficient separation distances, or proper design, construction and maintenance, Part VIII systems can adversely affect groundwater and surface water and result in other nuisance impacts to nearby landowners.

For example, the Commission on Planning and Development Reform in Ontario found that there "is increasing evidence of contamination of both ground and surface water" from septic systems. The Commission also referred to regional MOEE studies that showed one-third of septic systems were designed below standards, and one-third were classifiable as a public health nuisance.[26] Given the environmental and public health significance of septic systems, the Commission correctly concluded that the MOEE should continue to have the primary responsibility for inspecting and regulating septic systems:

> The Commission recommends that:
>
> 90. The MOEE continue to be responsible for inspections and the issuance of permits for private and communal systems, for setting standards for installation and operation, and for licencing septic haulers and septage haulers...
>
> 91. The MOEE be responsible for regular inspection of private and communal

[25] D. Estrin and J. Swaigen, op.cit., p.533.

[26] Commission on Planning and Development Reform in Ontario, Final Report (1993), p.124.

septic systems every five years....[27]

It is noteworthy that the Commission went on to suggest that the MOEE "consider" entering into contractual arrangements assigning inspection and permit-issuing functions to upper- and lower-tier municipalities.[28] However, the Commission imposed an important caveat on this potential delegation -- before entering the delegation agreement, the MOEE had to be satisfied that the municipality in question had "appropriate expertise" to handle inspection and permit-issuing responsibilities.

Unfortunately, no such safeguard exists in section 3(4) of Bill 107, which simply imposes regulatory responsibility for sections 76 to 79 of the EPA upon all local municipalities, regardless of whether individual municipalities are willing, able or equipped to properly carry out these new duties. In the opinion of CELA and GLU, it is completely unacceptable for the MOEE to simply confine its role to promulgating provincial standards, while leaving the critically important matters of implementation and enforcement of standards up to the vagaries of local municipal budgets, staffing, and priorities. The MOEE's self-serving attempt to absolve itself of regulatory responsibility for Part VIII systems is highly objectionable and contrary to the public interest.

CELA and GLU recognize that the MOEE's enforcement of Part VIII requirements by the MOEE has been sporadic at best over the years. However, there is no reason or evidence to believe that enforcement activities are going to materially improve under the new regime contemplated by section 3 of Bill 107. CELA and GLU also acknowledge that in some areas, the MOEE has already designated municipal health officials as "Directors" for the purposes of Part VIII. While this arrangement has produced acceptable results in some jurisdictions, it has produced mixed results in others, underscoring the need for a continuing provincial role in inspections and approvals, as opposed to a wholesale devolution of such responsibilty to every municipality in Ontario.

Aside from the practical constraints facing municipalities now burdened with Part VIII responsibilities, it must be recalled that municipalities also enjoy statutory authority under the Planning Act to approve severances and subdivisions that may be serviced by Part VIII systems. In the past, many of these Planning Act approvals were issued without proper regard to whether the new lots were suitable for septic systems, but at least independent MOEE staff could, in theory, catch such problems when assessing applications for Part VIII certificates of approval. However, removing the review and approvals role of MOEE staff, and giving municipalities the concurrent power to issue Part VIII approvals, may only serve to compound this land use planning problem.

Finally, it must be noted that with the transfer of Part VIII authority comes considerable legal

---

[27] Ibid.

[28] Ibid., p.126.

liability if something goes wrong under the new municipal regime under section 3 of Bill 107. More specifically, the MOEE has been successfully sued in civil cases where Part VIII systems were negligently inspected or approved by MOEE staff.[29] Indeed, this type of liability may have been a motivating factor in the MOEE decision to off-load Part VIII responsibilities to municipalities.[30] Presumably, this potential liability for "regulatory negligence" now rests with municipalities acting pursuant to section 3 of Bill 107. Accordingly, CELA and GLU trust that municipalities will act with due regard for their potential liability if Bill 107 proceeds.

For the foregoing reasons, CELA and GLU submit that section 3 must be deleted from Bill 107.

RECOMMENDATION #9: **If Bill 107 proceeds, section 3 must be deleted.**

Section 4 of Bill 107 amends the Regional Municipalities Act in order to permit the regional municipalities of Haldimand-Norfolk and Sudbury to receive the transfer of authority under section 3 of Bill 107. Because CELA and GLU have recommended the deletion of section 3, it follows that section 4 of Bill 107 should be deleted.
Section 5 (transitional provisions) and section 6(2) (coming into force) should be deleted for the same reason.

RECOMMENDATION #10: **If Bill 107 proceeds, sections 4, 5 and 6(2) must be deleted.**

SECTION 4.0 - CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

In his recent report on Ontario's water industry, Neil Freeman properly characterizes the fundamental issue in dispute as follows:

> Should Ontarians place their water resources and the quality of their drinking water in the hands of unaccountable private companies whose primary goal is maximizing profits?[31]

---

[29] See, for example, Gauvin v. Ontario et al. (unreported, August 29, 1995, Ontario Court (General Division) per Chadwick J.

[30] See, for example, "Ontario Prepares Negligence Defence: Environment Officials Fear Lawsuits", The Globe & Mail, February 18, 1997: "Other areas in which the [Ontario] ministry was developing regulatory negligence defences included septic tank rules...."

[31] Neil Freeman, op. cit., p.72.

For the reasons discussed in this brief, CELA and GLU submit that this question must be answered in the negative. Accordingly, CELA and GLU cannot support Bill 107 as drafted, and we request that this Bill be withdrawn unless it is substantially amended.

The specific recommendations of CELA and GLU regarding Bill 107 may be summarized as follows:

RECOMMENDATION #1: **The Ontario government should immediately withdraw Bill 107 unless it is substantially amended.**

RECOMMENDATION #2: **If Bill 107 proceeds, it must be amended to include an express prohibition against the privatization of water and sewage facilities, infrastructure or services in Ontario.**

RECOMMENDATION #3: **If Bill 107 proceeds, it must be amended to include provisions establishing an effective, efficient and independent regulator of water and sewage undertakings in Ontario.**

RECOMMENDATION #4: **If Bill 107 proceeds, it must be amended to include or entrench the essential elements of a Safe Drinking Water Act in order to ensure that Ontarians enjoy safe and adequate supplies of clean drinking water.**

RECOMMENDATION #5: **If Bill 107 proceeds, it must be amended to restore the previous statutory requirements under the Public Utilities Act and Municipal Franchises Act regarding electoral assent to proposals to dissolve or create utilities providing water or sewage services, or to privatize municipal facilities, infrastructure or services respecting water and sewage.**

RECOMMENDATION #6: **If Bill 107 proceeds, it must be amended to ensure that proposals to privatize municipal facilities, infrastructure or services are subjected to "full cost accounting" to ensure that the full range of short- and long-term consequences of privatization are quantified and discussed in an open and public process before final decisions are made.**

RECOMMENDATION #7: **If Bill 107 proceeds, the Municipal Water and Sewage Transfer Act must be amended so as to place restrictions on proposals to sell, transfer or otherwise dispose of municipally owned lands used for water works or sewage works.**

RECOMMENDATION #8:	**If Bill 107 proceeds, section 11 of the Municipal Water and Sewage Transfer Act should be deleted.**
RECOMMENDATION #9:	**If Bill 107 proceeds, section 3 must be deleted.**
RECOMMENDATION #10:	**If Bill 107 proceeds, sections 4, 5 and 6(2) must be deleted.**

In closing, CELA and GLU adopt and support Neil Freeman's concluding remarks:

> Allowing private market forces to shape the course of Ontario's utility systems is equivalent to abandoning the strategic control government has over industry. Water is a collective and indispensable public good that everyone needs in order to live. Long-range planning and policy development should not be subject to forces that place profits above customers. The provision of water must continue to be viewed as an essential public service. Only in this way will adequate provision for future generations be ensured and the exceptional record of water quality, service and at-cost rates be maintained.[32]

February 19, 1997

H:\BRIEFS\BILL107.TEX

---

[32] Ibid., p.73.