

TRAGEDY ON TAP: WHY ONTARIO NEEDS A *SAFE DRINKING WATER ACT*

Executive Summary

Submissions of the
Concerned Walkerton Citizens
and
Canadian Environmental Law Association
to Part II of the Walkerton Inquiry

Date: May 15, 2001

Prepared by:
Richard Lindgren
Lisa McShane
Grace Patterson
Anne Wordsworth

EXECUTIVE SUMMARY

Overview of Current Legal Regime in Ontario

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

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

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

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

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

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

Safe Drinking Water Legislation in Other Jurisdictions

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

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

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

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

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

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

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

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

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

The Need for Legislative Reform in Ontario

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

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

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

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

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

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

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

May 15, 2001

Tragedy on Tap: Consolidated List of Recommendations

RECOMMENDATION #1: Ontario should, to the greatest possible extent, entrench drinking water provisions into a single, integrated statute, rather than in regulation or policy. This statute should contain a paramountcy clause that provides that in cases of conflict between drinking water provisions and any other general or special Act, the drinking water provisions shall prevail to the extent of the conflict.

RECOMMENDATION #2: Ontario should systematically review and, where necessary, revise provincial laws, regulations and policies to ensure that they are consistent with the overall provincial priority of protecting drinking water and its sources.

RECOMMENDATION #3: Ontario's drinking water statute should include provisions that:

- (a) establish appropriate judicial and political accountability mechanisms, such as provincial monitoring/reporting and judicial review opportunities;
- (b) specify that the statute binds the Crown;
- (c) establish a new "Drinking Water Commission" that reports to the Minister of Environment, and that has the statutory mandate to develop and oversee the delivery of Ontario's drinking water program by (among other things) setting and enforcing provincial standards which implement the multi-barrier approach; and
- (d) clearly delineate lines of authority, responsibility and communication requirements between Ministry staff, the Drinking Water Commission, municipal officials, public utilities, and medical officers of health.

RECOMMENDATION #4: Ontario's drinking water statute should apply to all public and private water treatment and distribution systems in the province. In addition, the statute should impose appropriate testing and sampling requirements in relation to private individual wells in order to detect and remedy unsafe drinking water.

RECOMMENDATION #5: Ontario's drinking water statute should entrench a substantive public right to clean and safe drinking water. The statute should further state that its purpose is to recognize, protect and enhance the public right to clean and safe drinking water.

RECOMMENDATION #6: Ontario's drinking water statute should include provisions that:

- (a) impose a mandatory duty upon the Drinking Water Commission (or Minister) to set and maintain drinking water standards;

- (b) impose a mandatory duty upon the Drinking Water Commission (or Minister) to periodically review the adequacy of existing standards, and to make such revisions to the standards as may be necessary to protect human health and safety;
- (c) specify that the primary objective of drinking water standards is to protect public health and safety of all Ontarians, including those who may be particularly vulnerable to waterborne illness or disease;
- (d) entrench the precautionary principle as a mandatory consideration when drinking water standards are being drafted, reviewed or revised;
- (e) establish legally binding mechanisms for meaningful public participation in drafting, reviewing or revising drinking water standards; and
- (f) impose a mandatory duty upon the Drinking Water Commission (or Minister) to identify and evaluate new and emerging contaminants for which no standards exist in Ontario.

RECOMMENDATION #7: Ontario's drinking water statute should contain provisions that:

- (a) establish a self-contained process for the Drinking Water Commission to approve (or reject) applications for waterworks that supply drinking water, and to ensure full public participation in the approvals process;
- (b) clarify and strengthen existing requirements regarding operator licencing and training; and
- (c) retain existing requirements regarding the mandatory use of accredited laboratories for drinking water sampling and analysis.

RECOMMENDATION #8: Ontario's drinking water statute should include provisions that:

- (a) entrench current testing, treatment, notification and corrective action requirements into law rather than regulation; and
- (b) define "groundwater under the influence of surface water", and specify that surface water treatment requirements apply in such situations.

RECOMMENDATION #9: Ontario's drinking water statute should expressly require public and private water treatment and distribution system owners and operators to:

- (a) avoid drinking water sources that will, or are likely to, result in hazards to public health and safety due to pollution from activities within the watershed or sub-watershed;

- (b) assess and periodically review the vulnerability of their sources of drinking water to current or future contamination or degradation, and publicly report upon the results of such assessments;
- (c) develop and implement appropriate source protection measures where necessary to safeguard public health and safety;
- (d) involve the public in developing source assessment programs and source protection measures that will be implemented to safeguard public health and safety; and

RECOMMENDATION #10: Ontario's drinking water statute should amend existing laws (such as the *Planning Act*, *Municipal Act*, and/or *Conservation Authorities Act*) to ensure that municipal officials have sufficient legal tools to implement the measures specified in source protection programs.

RECOMMENDATION #11: Ontario's drinking water statute should fully entrench "community right to know" principles, and in particular, should include provisions that require:

- (a) immediate public notice through appropriate means (e.g. news media, signs, internet, etc.) whenever:
 - (i) exceedances of prescribed standards or indicators of adverse water quality are detected including "presumptive" results;
 - (ii) treatment or testing equipment is inoperative or malfunctioning; or
 - (iii) required sampling and analysis is not being carried out;
- (b) preparation of comprehensive consumer confidence reports which are to be mailed to all consumers on an annual basis, and which address the following matters:
 - (i) source assessment/protection;
 - (ii) discussion of any regulated contaminants or unregulated substances detected in the raw or treated water;
 - (iii) discussion of any violations of contaminant limits or prescribed standards, and related public health concerns, particularly for vulnerable persons; and
 - (iv) discussion of the steps taken to address such violations, and measures proposed to prevent any future violations; and
- (c) require the Drinking Water Commission (or Minister) to establish and maintain an electronic drinking water registry that summarizes consumer confidence reports, discusses issues and trends arising from such reports, and otherwise serves as a public repository for significant drinking water information (e.g. approvals, prosecutions and orders, State of Drinking Water Reports, etc.).

RECOMMENDATION #12: Ontario’s drinking water statute should contain provisions that require the Drinking Water Commission (or Minister) to:

- (a) prepare and file annual “State of Ontario’s Drinking Water Reports” in the Legislative Assembly; and
- (b) establish and maintain provincial monitoring programs on drinking water matters, such as:
 - (i) quality and quantity of surface water and groundwater sources of drinking water;
 - (ii) sources of contamination of drinking water;
 - (iii) new or emerging pathogens and substances that may be present in drinking water and that may pose a threat to public health and safety in Ontario; and
 - (iv) compliance by water suppliers with parameter limits and other prescribed standards.

RECOMMENDATION #13: Ontario’s drinking water statute should contain provisions that:

- (a) impose a positive duty on the Drinking Water Commission (or Minister) to enforce the provisions of the statute on a “zero tolerance” basis;
- (b) impose a positive duty on the Drinking Water Commission (or Minister) to develop (with full public input) a compliance manual to provide detailed direction regarding the investigation and enforcement of drinking water provisions under the statute;
- (c) establish a broad range of mandatory abatement tools, including administrative penalties, stop orders and emergency orders;
- (d) create a streamlined right for Ontarians to require (not just request) investigations of suspected contraventions of drinking water requirements;
- (e) create a “citizens’ suit” mechanism that allows Ontarians to enforce drinking water requirements in civil court; and
- (f) create a new cause of action for persons who suffer loss, injury or damage as a result of a contravention of the statute or the regulations thereunder.

RECOMMENDATION #14: Ontario’s drinking water statute should include:

- (a) broad, “strict liability” offences that prohibit:

- (i) **owners/operators of public and private water treatment and distribution systems from providing users with drinking water that exceeds permitted contaminant levels or contravenes prescribed standards;**
 - (ii) **owners/operators of public and private water treatment and distribution systems from contravening the terms or conditions imposed under statutory approvals for such systems;**
 - (iii) **owners/operators of public and private water treatment and distribution systems from submitting false information or reports required by law;**
 - (iv) **owners/operators of public and private water treatment and distribution systems from failing to report threats to drinking water quality to the Minister and/or public health officials;**
 - (v) **any person from causing or permitting the release of contaminants into or near waterworks, drinking water sources, wells or well recharge areas, or attempting or threatening to do so;¹ or**
 - (vi) **any person from damaging, destroying, altering, or otherwise tampering with waterworks or wells, or attempting or threatening to do so; and**
- (b) severe penalties for contraventions, including:**
- (i) **minimum fines for a first conviction;**
 - (ii) **maximum fines of not more than \$6 million for a first conviction;**
 - (iii) **significant higher fines for subsequent offences, or for offences where the health of any person has been impaired as a result of the contravention;**
 - (iv) **jail terms for serious offences, such as where the health of any person has been impaired as a result of the contravention;**
 - (v) **stripping of any profits or monetary benefits acquired or gained by the defendant through the contravention;**
 - (vi) **orders of prohibition, restitution, or restoration, including orders to provide an alternate drinking water supply; and**
 - (vii) **such further orders or conditions that are necessary to prevent further offences or to contribute to the rehabilitation of the defendant.**

¹ For such an offence, it may be necessary to recognize a limited “statutory authority” defence for situations where, for example, a company is lawfully discharging contaminants into the environment in accordance with its certificate of approval.

RECOMMENDATION #15: Ontario's drinking water statute should establish a mandatory duty upon the Drinking Water Commission (or Minister) to:

(a) undertake and fund research programs such as:

- (i) identification, treatment and prevention of adverse public health effects from drinking water contaminants;**
- (ii) quality and quantity of water available to public and private water suppliers in Ontario;**
- (iii) current and future sources of drinking water contaminants, including unregulated substances;**
- (iv) controlling or avoiding the effects of intensive farming on sources of drinking water;**
- (v) identifying and protecting Ontarians who may be at special risk of waterborne disease;**
- (vi) watershed management and source protection measures; and**
- (vii) water conservation; and**

(b) establish and fund programs that provide technical and financial assistance to owners/operators of public or private water treatment and distribution systems in order to:

- (i) install, construct or upgrade equipment in the waterworks (or related infrastructure) in order to meet drinking water standards;**
- (ii) implement water conservation plans or programs;**
- (iii) undertake source assessment/protection programs; and**
- (iv) employee training;**

RECOMMENDATION #16: Ontario's drinking water statute should require the establishment of a public advisory committee to research and report upon drinking water matters to the Drinking Water Commission (or Minister).