

Ten years after Walkerton, what still needs to be done to protect Ontario's drinking water?

It's been ten years since the Walkerton tainted water tragedy killed at least seven residents, sickened about 2,500 others, and single handedly curtailed the provincial government's 'self regulation' philosophy. The report of the Walkerton Commission laid out a detailed blueprint for rebuilding public confidence in the safety of our drinking water supplies. Many of Justice O'Connor's recommendations have been fully implemented. We now have mandatory drinking water standards, a source water protection planning process, better training and certification of operators, licensing of all municipal residential drinking water systems, regular review and revision of drinking water standards, the licensing, accreditation and inspection of testing labs, more vigilant enforcement, and greater public transparency through the annual reports issued by both the Minister of the Environment and the Chief Drinking Water Inspector.

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Canadian Lawyer recognizes Willms & Shier as top 'boutique' environmental law firm

Willms & Shier Environmental Lawyers LLP featured prominently in a story on the top boutique law firms in the country in the May 2010 issue of *Canadian Lawyer*. Willms & Shier was selected as one of the top five Canadian firms specializing in environmental law. According to *Canadian Lawyer*, "This Toronto firm has spent over 30 years helping companies and municipalities manage environmental law issues. Over that period, partners Donna Shier and John Willms have developed reputations as two of Canada's foremost counsel in the specialty area, and their firm now consists of a stable of 12 lawyers. Most of the boutique's clients are from the private sector, with the bulk of those matters involving issues with the Ontario Ministry of the Environment. Brownfields and contaminated lands work also helps keep Willms & Shier one of the country's busiest environmental law boutiques." The article also quoted senior partner John Willms extensively on the need to use effective marketing to gain visibility.

The Province has announced that all of Justice O'Connor's 121 formal recommendations have been implemented ... or at least the enabling legislation needed to implement them has been passed. However, the text supporting those recommendations also included a number of additional suggestions and sound guidance that would address several unresolved questions about drinking water.

First, who will pay for source protection implementation?

So far, the Province has largely paid the costs involved in developing source protection plans. However, there is no commitment to cover costs to implement those plans. The Walkerton Report recommended that the provincial government ensure that sufficient funds are available to complete the planning and adoption of source protection plans. Justice O'Connor did not recommend that these costs come exclusively from provincial coffers and recognized that components may have to come from municipal water rates charged to water users and effluent dischargers. Ontario has yet to develop a comprehensive plan to ensure the necessary funds are available.

Second, when will full-cost accounting be implemented?

Justice O'Connor devoted a number of pages to 'full-cost accounting and recovery' and its importance for ensuring safe drinking water in Ontario. Justice O'Connor recognized the linkage between full-cost accounting and recovery and safe drinking water, and the importance of financial sustainability to the health of all Ontarians.

Coincident with the Inquiry, the province passed the *Sustainable Water and Sewage Systems Act*, which would require municipalities to institute full-cost accounting and recovery for water and wastewater services. Aware of this legislation, Justice O'Connor had expected implementing regulations would follow. Notwithstanding the Act was passed back in 2002, the province has not passed the implementing regulations. This is one of the missing pieces in the clean water puzzle – full-cost accounting and cost recovery plans are important to financing source protection and infrastructure renewal.

The new *Water Opportunities Act* (see the story in this issue) would require water sustainability plans. These would provide for performance indicators and targets and financial plans and strategies to maintain and improve water service. These tools should assist the province and municipalities to implement full-cost accounting and recovery with less provincial prescription. They allow for consideration of issues faced by small, remote and rural municipalities.

Meanwhile municipalities are developing financial plans as required by the *Safe Drinking Water Act* regulations, currently being phased in, with the first plans in July.

Willms & Shier's Juli Abouchar is 'writing the book' on water law in Ontario

Canada Law Book has contracted with Willms & Shier Partner Juli Abouchar, along with Theresa McClenaghan and Anastasia Lintner, to write a looseleaf text on water law. An introductory chapter will set the context and background to the current water framework in Ontario, including the impact of the Nova water taking permit application on drinking water quantity rules and the Walkerton Tragedy on drinking water quality laws. The book will also review various local, provincial, federal and regional agencies and departments and their roles in regulating water in the Province of Ontario. The balance of the text will provide annotations of provincial legislation and key federal statutes and regional agreements. The expected publication date is mid to late-2012.

The authors are interested in what Willms & Shier newsletter readers view as "must mention" topics or cases. Please contact Juli at jabouchar@willmsshier.com



Third, what about water quality on First Nation reserves?

Recognizing that the inquiry was under the *Ontario Public Inquiries Act*, Justice O'Connor made some recommendations at the request of First Nations. He encouraged the federal government and First Nations to adopt drinking water standards applicable to reserves that are at least as stringent as standards off reserve in Ontario. Justice O'Connor observed that there were no legally enforceable drinking water standards for First Nations reserves. He also observed 22 high risk First Nation water systems. Noting the number of 'at risk' First Nation drinking water systems today (see below), things have changed very little in the past 10 years. There have been inexplicable delays, even in developing the simple enabling legislation. And 40 years later, the specter of mercury pollution in the English-Wabigoon may be rising again.

Ottawa to draft enforceable drinking water standards for First Nations communities under Senate Bill S-11

Ottawa hopes to make good on its long-standing promise that First Nation reserves will have access to the same quality of drinking water that the rest of us enjoy. On May 26, 2010, the federal government introduced Bill S-11, the *Safe Drinking Water for First Nations Act*, which will allow it to draft legally enforceable drinking water standards for First Nations communities. The enabling legislation would also allow for "regional flexibility," with the enabling regulations likely to vary from province to province.

In an unusual move, the government's proposed legislation was first tabled in the Senate, rather than the House of Commons. Background information on the Bill is posted prominently on the Indian and Northern Affairs Canada (INAC) website, and touted in government press releases, so we expect this is something the feds intend to pursue. (Note: Bill S-11 had not yet passed Second Reading when the Senate adjourned for its summer break.)

Although the federal *Protocol for Safe Drinking Water for First Nation Communities* already sets out standards for the design, operation and maintenance of drinking water systems, there is no legislative framework to ensure compliance. To fill this gap, Ottawa says it will review provincial and territorial regulations "to identify areas that can be adapted into federal regulations, while at the same time, allowing for regional differences, and recognizing the unique water challenges facing many First Nation communities." Bill S-11 would allow the adoption of a wide range of regulations

- ◆ standards for the quality of drinking water on First Nation lands
- ◆ protection of sources of drinking water
- ◆ location, design, construction, modification, maintenance, operation and decommissioning of drinking water and wastewater systems
- ◆ monitoring, sampling and testing of drinking water and wastewater, and the reporting of results

- ◆ emergency measures in response to the contamination of water on First Nation lands
- ◆ training and certification of system operators
- ◆ making remediation orders where standards have not been met.

Provincial and territorial drinking water standards could be incorporated by reference into the federal regulations to be promulgated under the Act. These harmonized rules could enhance opportunities for First Nations to coordinate training or even share water treatment and distribution systems with off-reserve communities.

The Act would automatically apply to all First Nation communities, except self-governing First Nations that are operating under comprehensive self-government agreements with the Government of Canada. However, self-governing First Nations could be made subject to the legislation following written agreement with the Minister.

Once the legislation receives Royal Assent, Ottawa will consult with First Nations, regional First Nation organizations, the provinces and territories, and other stakeholders on the development of the regulatory regime. These discussions would also address compliance and enforcement mechanisms. The proposed legislation follows at least some of the recommendations made by the Office of the Auditor General, the Expert Panel on Safe Drinking Water for First Nations, and the Standing Senate Committee on Aboriginal Peoples.

The Bill has already triggered some opposition. According to Assembly of First Nations National Chief Shawn A-in-chut Atleo, "First Nations [would] need infrastructure, training and support to meet the requirements of the new regulations. Regulations without the capacity and financial resources to support them will only set up First Nations to fail and to be punished for this. In my view, we must address the 'capacity gap' as well as the 'regulatory gap'."

Chief Atleo also said that Bill S-11 could negatively impact First Nations water rights. According to section 6 of the proposed legislation, regulations made under the Act prevail over any laws or by-laws made by a First Nation, as well as over the land claims agreement or self-government agreement to which a listed Aboriginal body is a party. These provisions were the subject of some concern during the recent First Reading debate in the Senate.

First Nations Water and Wastewater Action Plan extended

At the same time Bill S-11 was introduced, Ottawa announced a two-year extension of the First Nations Water and Wastewater Action Plan to invest an additional \$330 million in water and wastewater facilities. The Action Plan is also funding the National Assessment of First Nations Water and Wastewater Systems to provide a more accurate account of water and wastewater needs. The results of the assessment should be available later this year.

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First Nations people who addressed the Expert Panel on Safe Drinking Water for First Nations in 2006 raised the same concerns as Chief Atleo. The most recurring theme the Panel heard was the core problem of inadequacy of funding to run water and sewer systems and in many places, long capital funding waiting lists. In recognition of the likely continued reliance on INAC for operation and maintenance funding in the near term, the Expert Panel recommended that enforcement of any legislation apply to all participants, including INAC's funding and by extension design decisions. However, Bill S-11 does the opposite; a lengthy section 10 makes federal and provincial officials and bodies immune from liability for acts and omissions that occur during the exercise of powers under the Act. (The Expert Report can be found at <http://www.willmsshier.com/downloads.asp?category=9>)

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Between 2006 -2012, Ottawa will have invested over \$2.3 billion in First Nations water and wastewater infrastructure, including the First Nations Water Management Strategy (\$270 million), the Plan of Action for Drinking Water (\$60 million) and the First Nations Water and Wastewater Action Plan (\$660 million). Another \$183 million was allocated to drinking water and wastewater infrastructure projects to address health and safety priorities in 18 First Nation communities as part of Canada's Economic Action Plan. In addition, all First Nations community sites now have access to a trained Community Based Water Monitor or an Environmental Health Officer to sample and test drinking water quality at tap.

According to Indian and Northern Affairs Canada, as of March 2010, 114 First Nations communities across the country were under Drinking Water Advisories and 49 First Nations water systems were classified as "high risk," down from a peak of 193 high risk systems in 2006.

Bill 72 follows up on budget promise to promote the clean water sector & support water conservation

Bill 72, the *Water Opportunities and Water Conservation Act, 2010*, was introduced for First Reading May 18, 2010. The Bill would create the new, stand-alone *Water Opportunities Act, 2010*, as well as amend four other Acts to promote water conservation measures and to support the development, testing, building and operation of water and wastewater treatment technologies and facilities. The Act has also been posted on the Environmental Registry (#010-9940) for a 60-day public comment period that closed July 17, 2010.

The *Water Opportunities Act* establishes a new crown corporation, the Water Technology Acceleration Project, to support the water and wastewater services sectors with developing technologies, expanding markets, and collaborating and sharing ideas. Municipalities and other entities would be required to prepare and submit to the Ministry of the Environment water sustainability plans for municipal water, wastewater and stormwater services under their jurisdiction. If a regulated entity fails to meet certain performance indicators or targets, the Minister of the Environment could require it to submit a report detailing the strategies it will take to meet the target.

A water sustainability plan must contain

- ◆ an asset management plan for the physical infrastructure
- ◆ a financial plan
- ◆ a water conservation plan (if the plan is for a municipal water service)
- ◆ a risk assessment and plan to deal with any risks that may interfere with the future delivery of the municipal service (including the risks posed by climate change)

Summary of *Water Opportunities Act 2010*

Part	Purpose	Details
Part I	Sets forth the purposes of the Act	<p>The Act is to</p> <ul style="list-style-type: none"> ◆ foster innovative water, wastewater and stormwater technologies and services in the private and public sectors ◆ create opportunities for economic development and clean-technology jobs in Ontario ◆ conserve and sustain water resources for present and future generations. <p>To further the purposes of the Act, the Minister of the Environment may establish aspirational targets in respect of the conservation of water and other matters.</p>
Part II	Establishes a corporation without share capital named the Water Technology Acceleration Project	<p>The objectives of the corporation include</p> <ul style="list-style-type: none"> ◆ assisting in promoting the development of Ontario's water and wastewater sectors ◆ assisting the sectors to develop, test, demonstrate and commercialize innovative technologies for the treatment and management of water and wastewater ◆ assisting the sectors to expand their business opportunities nationally and internationally ◆ providing a forum for governments, the private sector and academic institutions to exchange information and ideas ◆ encouraging collaboration and co-operation in the sectors ◆ if requested by the Minister of Research and Innovation, assisting in the development of certification, labelling and verification programs for water and wastewater technologies.
Part III	Requires certain municipalities, persons and entities to prepare, approve and submit to the Minister of the Environment municipal water sustainability plans for municipal water, wastewater and stormwater services under their jurisdiction.	<p>The Minister may establish performance indicators and targets for those services, and such indicators and targets may vary for different municipal service providers and areas of the Province. If a regulated entity does not achieve an applicable performance target, the Minister may invite the regulated entity to provide information on the strategies and steps to be taken by the regulated entity to achieve the target and may direct the regulated entity to amend its municipal water sustainability plan.</p>
Part IV	Authorizes regulation making	<p>Regulations may be promulgated requiring public agencies (including municipalities and ministries of the Government of Ontario)</p> <ul style="list-style-type: none"> ◆ to prepare water conservation plans ◆ to achieve water conservation targets established by the regulations ◆ when acquiring goods and services or making capital investments, to consider technologies and services that promote the efficient use of water and reduce negative impacts on Ontario's water resources.
Part V	Authorizes regulation making	<p>Regulations may be promulgated prescribing information that must or may be included on or with a municipal water bill.</p>
Part VI	Requires public reporting	<p>Minister of the Environment, at least once every three years, must prepare a report on various matters related to the Bill.</p>

- ◆ strategies for maintaining and improving the municipal service, including meeting future demand, the more efficient use of water, and co-operation with other municipal service providers
- ◆ such other information as may be prescribed in regulation.

Prescribed agencies, including municipalities and government ministries, could also be required to prepare water conservation plans, meet conservation targets and consider the efficient use of water when purchasing goods and services or making capital investments. A summary of the proposed Act is presented in the table on page 6.

Schedule 2 of the Bill amends the *Building Code Act, 1992* to require the Minister to initiate reviews of the Code with reference to standards for water conservation, at five-year intervals.

Schedule 3 amends the *Capital Investment Plan Act, 1993* to revise the objects of the Ontario Clean Water Agency to include

- ◆ assisting municipalities, the Government of Ontario and others to provide water and sewage services by financing, planning, developing, building and operating water and sewage works and providing services
- ◆ financing and promoting the development, testing, demonstration and commercialization of technologies for the treatment and management of water, wastewater and stormwater.

Schedule 4 to the Bill amends the *Green Energy Act, 2009* to add water and water use to the principles that guide the Government of Ontario in constructing, acquiring, operating and managing government facilities. The power to issue directives is expanded to include directives on water use, water conservation and the adoption of technologies and services that promote the efficient use of water and reduce negative impacts on water resources.

Finally, Schedule 5 to the Bill amends the *Ontario Water Resources Act* to prohibit the sale or lease of appliances and products prescribed by regulation unless they meet efficiency standards or requirements and are labelled to confirm compliance.

Ontario proposes first water efficiency standard

The Ministry of Energy and Infrastructure has proposed amendments to O. Reg. 82/95 introducing energy and water efficiency standards for various appliances and products, including dehumidifiers, swimming pool heaters, and compact fluorescents. Among the 14 new or amended standards is one for new tank type toilets: the water efficiency requirement would limit water consumption to a maximum of 6 litres per flush for all toilets sold in the province. The Ontario Building Code already restricts the installation of toilets using more than six litres per flush; the new proposal would make it illegal to sell them. It's estimated that replacing a 13 litre per flush toilet with a six litre

model would save an average household about 35,000 litres of water a year. If the new standards are adopted, compliance will likely be required by January 1, 2011. The proposals were posted on the Environmental Registry April 22, 2010 for a 45-day public comment period.

Ontario to 'revise and improve' its Public Policy Statement

Ontario is in the midst of a major, five-year review of the Provincial Planning Statement 2005 (PPS), which sets out the Ontario government's policy direction for land use planning and development. As authorized under the *Planning Act*, decisions on planning matters made by municipalities, the Province, the Ontario Municipal Board and other decision-makers "shall be consistent with" the PPS. In addition to accommodating economic, environmental, cultural and social factors in land use planning, the PPS is also designed to protect Ontario's natural heritage, water, agricultural, mineral and aggregate, petroleum, cultural and archaeological resources. According to a May 12th Environmental Registry posting (#010-9766), the government is particularly interested in receiving feedback on the following questions

- ◆ What policies of the current PPS are working effectively?
- ◆ Are there policies that need clarification or refinement?
- ◆ Are there policies that are no longer needed?
- ◆ Are there new policy areas or issues that the Province needs to provide land use planning direction on?
- ◆ Is additional support material needed to help implement the PPS?

The deadline for public comment is August 31, 2010.

Ontario scheduling hearings on its *Open for Business Act*

The Ontario Legislature's Standing Committee on Finance and Economic Affairs is scheduling two days of public hearings and two days of clause-by clause-review of Bill 68, the proposed *Open for Business Act, 2010*. The Bill was introduced for First Reading back on May 17, 2010, then passed Second Reading and was referred to committee on June 3. As we covered in our recent e-flash (<http://www.willmsshier.com/e-flash.asp?id=58>), Schedule 7 of the omnibus bill modernizes and streamlines the Ministry of the Environment's approvals process. If you're interested, there are also a couple of belated Environmental Registry notices that provide some additional context; see Registry #011-0317 announcing the Schedule 7 amendments (which wasn't posted until June 24) and #010-9143 summarizing some of the earlier public feedback on the proposed changes. The hearings will be held in Toronto, although at the time of writing, the dates had not been finalized. Information on the status of the committee hearings can be obtained from the Legislature's website at www.ontla.on.ca (click on "Committees" on the left-side menu) or from the clerk for the Standing Committee, William Short, at 416-325-3883 or by e-mail at william_short@ontla.ola.org

And finally, a (small) correction

Our May 19th e-Flash on the *Open for Business Act* stated that proposed amendments to the *Waste Management Act* would permit municipalities to appoint inspectors with enhanced inspection powers. The new inspection powers only replace powers already available to inspectors under Part I of the Act, which would be repealed.