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CONSIDER THE SOURCE:

A Briefing on the Ontario's *Clean Water Act* and its Implications

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Introduction: The Legacy of an Environmental Tragedy

We are now approaching the 20th anniversary (May 2020) of one of Ontario's worst environmental catastrophes: the Walkerton tragedy that caused the death of seven people and significant health issues for 2,300 more when a municipal drinking water supply was contaminated with e-coli. This was followed by a two-year inquiry by Mr. Justice Dennis O'Connor resulting in a seminal report[1] that proposed sweeping regulatory changes to the way the Province protects municipal drinking water. The final component and most ground breaking legislative change was the passage of the *Clean Water Act,* 2006 SO 2006, c 22 (the "CWA") which established a complex, science-based, regulatory regime for protecting the sources of Ontario's drinking water (ground and surface water) from both water quality and quantity threats.

This paper will:

- Provide an overview of the legislative regime governing source water protection in Ontario including a briefing on:
  - source protection plans ("SPPs"), the key standard-setting document;
  - administrative tools for implementing SPPs;
  - enforcement powers; and
  - appeal rights;
- Provide an update on recent developments under the CWA over the past several years as the implementation phase of the CWA's regulatory program has finally hit the streets (Section 4); and
- Provide some thoughts on the implications of this evolving regulatory process for municipal and planning lawyers, and their clients (Section 5)

1. Briefing: Ontario's Source Water Protection Regime.

Many considered the CWA the ultimate slow-motion regulatory roll-out. The development of the key standard setting documents required to give the Act teeth, Source Protection Plans, took place over a decade, meaning these regulatory tools have really only been in effect in most parts of Ontario for less than four years.

[1] Report of the Walkerton Inquiry

The overall scheme of the Act combines a provincially-driven standard-setting process for source protection with municipal implementation. The province played a strong initial role in establishing the governing framework regulations and guidelines for SPPs; however the heavy lifting now falls to the municipal sector. Specifically, Part IV of the Act[2] shifts the onus to municipalities to carry through on the tough job of implementing and enforcing the new source protection rules.

The key regulatory pieces are summarized below.

1.1. Source Protection Plans:

SPPs are the key legal instruments governing the new regime. None of the implementing tools to actively protect source water were available until SPPs had been developed and approved by the Ministry of the Environment and Climate Change (now the Ministry of Environment, Conservation and Parks and referred to throughout this paper as the "MECP").

Before these SPPs could be approved, three steps were required:

- Create Source Protection Authorities: Ontario's conservation authorities were given the role of Source Protection Authorities and required them to establish Source Protection Committees ("SPCs") in each of the 19 Source Protection Areas / Regions established by the CWA. The SPCs include municipal representatives, agricultural representatives, environmental and public interest stakeholders, business and industry, landowners and the public at large. In some, but not all SPCs, First Nations are also represented.

- Produce Assessment Reports: SPCs were required to produce an Assessment Report ("AR") that identifies drinking water threats to both surface water (including the Great Lakes) and ground water sources[3]. The Act and its regulations provided specific guidance on how to carry out the assessment of drinking water threats. A number of approaches are permitted (e.g. threats based approach, issues based approach, event based approach, local threats) but the primary approach to assessing threats by SPCs is the "threats-based approach". Under the supervision of SPCs, experts mapped all

[2] CWA Part IV – "Regulation of Drinking Water Threats"
[3] CWA s 15 – "Assessment Reports"

municipal water intake protection zones (IPZs) and wellhead protection areas (WHPAs) and assigned them Vulnerability Scores from two to ten following the requirements set out in Technical Rules which were established by the Ministry of the Environment[4]. Then, using a list of twenty-one "prescribed drinking water threats" from the CWA regulation[5], they assigned Hazard Ratings from zero to ten to each activity. The Technical Rules then call for the Hazard Rating and Vulnerability Scores to be multiplied. If the total is between 80 and 100, the risk is deemed "significant", if it is between 60 and 79, it is considered "moderate" and if it is between 40 and 59 it is deemed to be "low". The regulatory requirements and Technical Rules gave little room for local flexibility since the provincially established Vulnerability Scores and Hazard Ratings essentially dictated whether an activity will be deemed a significant, medium or low threat.

- Develop the Plan: The development of a SPP builds on the scientific and technical assessment of risk in the Assessment Reports. Generally, the central objective of the approved SPPs is to reduce or eliminate significant threats and address moderate or low threats so that they do not become significant.

Once approved, SPPs become the spine of the CWA. SPPs, through detailed policy directions, prohibit and/or impose regulatory requirements, not only on future land uses, but also on existing approved land use activities in identified geographic areas within municipalities.

1.2. Implementation

Under Part IV of the Act, two new types of municipal officials were created to exercise these new implementation/enforcement powers: a Risk Management Official ("RMO") whose responsibilities include negotiating or establishing Risk Management Plans ("RMPs"), and a Risk Management Inspector ("RMI") to inspect and enforce the RMPs[6]. Their roles are discussed further below.

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[4] Pursuant to section 107 of the Act an Ontario Ministry of the Environment and Climate Change "Director", appointed by the Minister under Section 3 of the Act, is authorized to make rules establishing requirements for identifying drinking water threats.

[5] CWA O Reg 287/07, s 1.1 – "Prescribed drinking water threats"

[6] CWA s 52 – "Ontario risk management official and inspectors", s 47(6) – "Risk management official, risk management inspectors"

Here are the key implementation tools which have been rolled out across Ontario over the past four years:

1. Updating Land-Use Planning Documents: Once the SPPs are approved and in effect, municipalities must ensure that their official plans, zoning by-laws, and other planning decisions conform with the significant threat policies and Great Lake policies (if any), and have regard to moderate and low threat policies.[7]

2. Prohibiting Activities that Threaten Drinking Water (section 57, CWA): SPPs include policies that specifically prohibit certain activities, within specified areas, that constitute a significant drinking water threat. As a consequence, municipalities will now have ground-breaking authority to enforce prohibitions on specific land uses, including existing otherwise legally-operating long-standing businesses, in vulnerable areas where the SPP deems them a significant threat to source water[8].

   Shutting down existing businesses that are zoned and otherwise approved to operate a particular location is a powerful, seemingly draconian measure. It is likely for this reason that the regulations make it clear that a SPP may only prohibit a pre-existing use as a last resort "*where the source protection committee is of the opinion that the activity must be prohibited to ensure that it ceases to be a drinking water threat.*" Also, for existing activities, the SPP can set a date for phasing out the activity, but it cannot be less than 180 days after the SPP comes into effect. For new proposed activities, the prohibition has immediate effect.

3. Establishing Risk Management Plans (Section 58, CWA): RMPs are the key implementation document under the CWA. They are legally enforceable instruments that establish site-specific terms and conditions to mitigate activities that have been identified in SPPs as significant threat. Again, these can be established for both existing businesses and future proposed business activities. If the SPP identifies an activity in a specified geographic area as a significant drinking water threat, no person can engage in that activity unless they have

[7] CWA s 40 – "Official plan and conformity"; s 42 – "Zoning by-law conformity"; s 43 – "Prescribed instruments and conformity"

[8] CWA s 59 – "Restricted land uses"; s 22(3) – "Source protection plan – preparation – Contents relating to ss. 57 to 59"; s 22(8) – "Source protection plan – preparation – Prohibition and regulation of activity"

a RMP.[9] The CWA establishes a collaborative approach to the creating the content of RMPs. RMPs are to be developed through agreement. If, however, negotiations fail to produce an adequate RMP, one can be imposed through an Order from the RMO.[10] RMPs can include requirements to remediate conditions that exacerbate the threat posed by an action, and can also require the person carrying out the activity to put up financial assurances to address on-going risk management measures or monitoring requirements. An RMP cannot be transferred without the consent of a RMO and as outlined below, if the RMP is not complied with, the person engaged in the threat activity can be subject to notices, orders and prosecution.

4. New Approval Requirements (Section 59, CWA): SPP policies also impose new approval requirements on persons seeking to establish an identified activity in designated areas vulnerable to drinking water threats. Specifically for activities within areas designated under the SPP, no person may apply for an otherwise required planning approval (official plan amendment, zoning amendment etc.) or obtain a building permit, unless a RMO issues a notice either confirming that the activity is not prohibited and does not require a RMP, or if a RMP is required, that the RMP has been established.

1.3. Enforcement

The Act also arms municipalities with a range of investigation and enforcement powers to ensure compliance with RMPs are fully implemented. These have been modelled after, and closely resemble, the broad range of powers available to the MECP to investigate and enforce compliance with environmental orders issued under the *Environmental Protection Act* ("EPA")[11] and *Ontario Water Resources Act* ("OWRA")[12].

Orders to Report: RMOs are empowered to require persons who engage in, or propose to engage in, an activity that could require a RMP to provide to the RMO a report that describes the details of the activity in question including any risk management measures proposed to be

[9] CWA s 58(1)
[10] CWA s 56(6) – "Interim risk management plans – Order establishing risk management plan"; s 58(10) – "Regulated activities – Order establishing risk management plan"
[11] EPA, RSO 1990, c E19, as amended, Part XV
[12] OWRA, RSO 1990, c O40, as amended

taken to protect drinking water sources.[13] This reporting requirement gives RMOs the ability to obtain the information they need to determine either the adequacy of an existing RMP or the need for and content of a new RMP for a particular activity which poses a significant drinking water threat.

Inspections/Investigations: Municipally-appointed RMIs have powers similar to provincial officers under the EPA and OWRA[14] to enter onto property for investigation/inspection purposes without the consent of the owner or occupier, where they have reason to believe that a regulated activity which could cause a significant threat to drinking water is being carried out[15]. Inspection powers include the authority to: make "necessary excavations; required owners or operators to run on-site equipment; take test samples; conduct tests or measurements; examine on-site documents or records and take copies of these; retain all samples and copies obtained for the purposes of enforcement; and require person to make written or oral statements."[16]

Enforcement Orders: RMIs are also empowered to issue orders requiring persons to comply with directions set out in the order which could range from enforcing the requirements of a RMP[17] to taking measures to prevent or remediate a drinking water threat[18] to ceasing operations at a business that constitutes a prohibited activity, contravenes a risk management plan or otherwise contravenes the Act[19]. Enforcement orders may also include specific directions with respect to monitoring and reporting on compliance efforts[20], or directing that a person seek an amendment to a RMP to address a compliance issue or drinking water threat.[21]

"Cause Things to be Done": Similar to the powers given to Directors under the EPA and OWRA[22], the Act also sets up mechanisms that empower RMOs to take matters into their own hands in cases of failure to comply.

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[13] CWA, s. 61
[14] EPA, Part XV
[15] CWA, s. 62, "Inspections"
[16] CWA, s. 62(8) Inspection "Powers"
[17] CWA, s. 63(4) "Enforcement of risk management plan"
[18] CWA, s. 63(1) 1. "Enforcement Orders"
[19] CWA, s. 63(1)2.
[20] CWA, s.63 (4), (5) and (6)
[21] CWA, s.63 (4) 2.
[22] EPA, Part XIV; OWRA, ss.80-89

Specifically, where a person who is subject to enforcement order either fails, or in the RMO's opinion, is unlikely, to comply with the order, the RMO can, with notice, arrange to carry out the work required to comply with the order.[23] The RMO can then issue an order requiring the person subject to the enforcement order to pay for the cost of completing this work.[24] Further provisions of the Act allocate liability to the person(s) who are the subject of the order.[25] The Act also provides for enforcement of orders to pay through the courts.[26]

1.4. Appeal Rights

Appeal rights for critical decision on source water protection under the CWA are limited. Importantly, there is no right to a hearing to challenge the approval of a SPP itself, and therefore no opportunity to appeal decisions on the types of activities which are prohibited under SPPs. Once the SPP is approved by the MECP, the fundamental parameters within which RMOs and RMIs must operate, and the basic rules of the game within a Source Protection Area are essentially in place.[27]

The legislative decision not to establish appeal rights for approval of SPPs is, perhaps, not surprising given that the Province, through the implementing Regulation[28] and rules set by the MECP Director[29], and other MECP guidance documents was provided such precise guidance on the content of SPPs. The decision to eliminate appeal possibilities is also not surprising given the extent to which the required supporting assessment reports and other studies, not to mention the complex black art of hydrogeology, that underlying the creation of SPPs lend themselves to endless technical challenges and lengthy potential hearings.

Appeal rights are provide, however, for businesses and property owners that seek to challenge decisions by RMOs to establish or amend RMPs, and for decisions to impose various types of enforcement orders. Also appealable are orders to report on activities, orders to pay for work

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[23] CWA, s. 64 "Risk management Officials may cause things to be done"
[24] CWA, s. 67 "Order to pay"
[25] CWA, s.67(7) –(11)
[26] CWA, s. 69"Collection of costs"
[27] Subject to future amendments pursuant to section
[28] O Reg 287/07 and CWA, s. 107
[29] See note 3 above

"caused to be done" by a RMO, or access orders under section 80 of the CWA.[30] In all cases, the appeal is to the Environmental Review Tribunal ("ERT").

2. Update: Recent Developments

2.1. Source Protection Plans

The 10-year gestation period for putting SPPs in place was due to the technical study and consultation process required to create these SPPs in 19 Source Protection Areas across the Province. This work was finally completed in 2016. Twenty-five Source Protection Plans are now approved and in full force and effect across Ontario's 19 Source Protection Regions.

In addition, over the past two years, a first round of amendments[31] to SPPs have been approved for 15 Source Protection Authorities, largely to address early administrative challenges in implementing SPPs and to respond to MECP's evolving regulatory guidance.

In some source protection areas, a second round of more significant changes may be coming. Current SPPs are focused on protecting against significant drinking water quality threats but do not directly address the threats to drinking water supplies water quantity which could be posed by competing commercial and industrial water users and climate change. The next round of SPP changes are envisioned to protect against Significant Drinking Water Threats related to quantity.

Work is well under way on this in the Grand River Source Protection Area. The Grand River Conservation Authority, with funding from MECP, is now in the process of finalizing a "Tier 3 Water Budget and Risk Assessment" for three municipalities that rely on groundwater for municipal drinking water purposes: the City of Guelph and the Townships of Centre Wellington and Guelph-Eramosa. The purpose of this risk assessment work is to address the water quantity component of significant drinking water threats by measuring the sustainability of municipal drinking water systems in the context of growing municipal water demand and climate

[30] CWA, s. 70
[31] SPPs can be amended pursuant to s., 34 (Source Protection Authority initiated) or s. 35 (Minister initiated) of the CWA.

change. The expected result is a series of new SPP policies to address significant drinking water quantity threats.[32]

2.2. Implementation

As noted above, municipal officials were handed a significant regulatory challenge following the approval of SPPs. Over the past four years, municipalities and RMOs have implemented multiple rule changes to fulfill the CWA obligations. These changes have potentially significant impacts not only future development approvals but also existing businesses. Here are some of the key developments:

- Municipalities have updated or are in the process of updating their official plans and zoning by-law to conform to/comply with SPPs;
- Risk Management Officials have issued hundreds of notices to property owners who are subject to the requirement to establish RMPs for their existing activities;
- Planning departments and building departments have instituted screening procedures to identify applications which could require the approval of a RMO or a RMP before obtaining planning approvals or building permits; and
- RMOs have established protocols, directions, procedures and forms (for formal notices and orders) to implement administrative and enforcement measures under the Act.

2.3. Enforcement/Appeals

So far, the municipal implementation efforts under the CWA has not translated into significant enforcement actions. RMOs have generally focussed on voluntary compliance and agreement with private property owners and commercial entities in implementing the policies of source

[32] For more information on the Tier 3 studies and SPP policy development work being done in these three municipalities it is recommend that the reader start by visiting the following links on the Lake Erie Source Protections Region website: Centre Wellington: https://www.sourcewater.ca/en/source-protection-areas/Grand-River-Centre-Wellington-Scoped-Tier-3.aspx; Guelph/Guelph Eramosa - https://www.sourcewater.ca/en/source-protection-areas/Guelph-and-Guelph-Eramosa-Tier-3.aspx

protection plans and the objectives of the CMA. In particular, RMOs focus on voluntary Risk Management Agreements and use mandatory orders only as a last resort, so far rarely required.

Similarly, the appeal rights for RMPs imposed by order or other enforcement actions have not yet been tested. In the five years that have passed since the first SPP was approved, the ERT has not received a single appeal of any kind pursuant to the CWA. It is possible that this inactivity is due to the approach taken by municipalities and RMOs during the early days of CWA implementation: RMOs appear to prefer playing enabling and consensus building roles rather than aggressively wielding the available enforcement powers under the Act.

3. Some Implications for Municipal and Planning Lawyers and Their Clients

Although SPPs were developed through multi-stakeholder committees with business, industry and agricultural sector representation, the implementation phase has focussed these communities on the potential new financial risks and costs. Some specific implications for these stakeholders (and their legal representatives) are discussed below.

1. Clients with Existing Businesses and property owners:

Although some prior efforts have been made by the MECP and municipally appointed source protection officials to reach out to existing businesses and property owners who are likely to be facing new regulatory requirements and restrictions under the CWA, these efforts have by no means been comprehensive. Many businesses may not fully recognize the implications of the Act on their future operations until they are confronted with a notice from a RMO, issued pursuant to section 58(4) of the Act, advising that they have 120 days to agree to the terms of a RMP or they will be prohibited from continuing to carry out a regulated activity.[33]

Such notices have already been widely issued in many Ontario jurisdictions. Generally, the notices trigger the commencement of a dialogue between the affected business/property owner and the RMO on the content of a mutually agreeable set of management measures which will limit the risks that the activities pose to drinking water sources.

[33] CWA,s. 58(4)

For some businesses the practical implications of a RMP will be relatively minor: demonstrating that a spill prevention plan is in place or that certain best environmental practices have been implemented. In many cases such plans and practices would already be part of normal business operations or best practices.

In other cases, the risk management requirements may have serious economic consequences: for example establishing on-going sampling and testing requirements, installation of new pollution control measures, or remedial action to address a pollution source. If an agreement cannot be reached on a mutually acceptable RMP within 120 days, RMOs have the authority to impose the RMP, confronting the business property owner with a decision on whether or not to engage lawyers and experts launch an appeal and litigate the matter in a potentially lengthy and expensive ERT hearing on technical matters.

Developers and Clients Seeking Land use Approvals.

Section 59 of the CWA adds a new set of approval requirements for businesses and developers seeking to establish new uses, specified in SPPs within areas designated in SPPs. The new approval requirement could be triggered by an application under the *Planning Act*, for approval of the new use.[34] Even if no planning approval is required, where proposed change in use is for an activity regulated by an SPP, a simple Building Code application which involves the construction or a building or change of use of a building triggers the new approval requirement.[35]

If section 59 applies to a proposed change, the proponent of the change can neither apply for the planning approval, if required, or carry out the construction of the building or change the buildings use, until a RMO issues a notice[36] either confirming that the risk management plan is not required or that an agreed-upon or approved risk management plan is in place. The Act therefore compels affected businesses and developers to retain expertise and work with RMOs at an early stage to determine whether a risk management plan is required, and if so reach agreement with the RMO on the RMP.

[34] CWA, s. 59(1) (a)
[35] CWA, s. 59(1) (b)
[36] Ibid.

Municipal Clients

The SPP has introduced a number of implementation challenges for municipalities. Municipalities, RMOs and their staff must face the challenges of juggling implementation requirements with efforts to defend and enforce decisions on RMPs.

One challenge arises from the reality that SPPs have been developed and are applied on a watershed basis. Watersheds do not align with jurisdictional boundaries. This means some municipalities have to conform to more than one SPP. This can add complexity to the work of RMOs and planning departments who will need to consider the planning decisions in the context of multiple SPPs and policy areas. Second, if vulnerable areas requiring protection extend from one municipality into another, there will be a need for collaborative efforts as one municipality is effectively relying on a neighbouring municipality to protect its water supply.

A second set of practical challenges arise from the somewhat daunting roles and responsibilities given over to RMOs. The process of developing RMPs, including the negotiation of RMPs with existing owner/operators, is a new responsibility for municipalities. The onus is on the person engaged in the activity to prepare the RMP for review by the RMO. In many cases, the owner/operator may not know how to prepare a RMP and may not have or be prepared to obtain independent expertise. Affected parties will need clear guidance and direction to understand the expectations of the municipality. Further, the CWA includes a provision whereby the owner/operator can simply ask the RMO to prepare the RMP on their behalf. This provision could translate into a significant burden to staff in municipalities that have several hundred RMPs to complete. The challenges are multiplied in cases, such as Wellington County[37] where a RMO reports to multiple municipal councils and implements multiple SPPs, each with their own rules.

Third, money could become an issue. Funding source water protection has been a challenge from the beginning. Provincial funding has been reduced in the last number of years forcing municipalities to cover the administrative costs of the program. The CWA enables municipalities to charge fees for services associated with the program (similar to the *Building Code Act*), however, many municipalities are sensitive to burdening their constituents with additional fees.

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[37] The Risk Management Official in Wellington County is responsible for the implementation of five separate Source Protection Plans and reports to seven local municipal councils and County council.

Some municipalities are considering imposing charges for new developments only, while others are covering entire program costs through their water rates. Consultation with a municipal finance specialist could assist municipalities in identifying financing options.

Finally, the new CWA regulatory regime has had a spillover effect for Chief Building Officials and municipal building departments in rural municipalities. Changes made to the Building Code in 2011 established a "Mandatory Inspection Program" for any private sewage system located in an area identified in SPPs where the private sewage system *"is or would be a significant drinking water threat*".[38] Pursuant to these changes, municipal building officials are required to inspect all such sewage systems must check for compliance with construction and design standards. There is a five-year time limit set for completing all of these inspections sewage systems that existed at the time of approval of the Assessment Report for the SPP. Thereafter, new septic system that falls into this category must also be inspected within five years of construction.[39]

Summary: Key Areas where Legal Expertise is Required: The new responsibilities imposed on municipalities, and businesses, property owners and other stakeholders also come with a new set of legal challenges. There are at least three areas where legal services may be needed.

First, the negotiation and development of RMP for complex industrial development activities will very likely see the involvement of lawyers on the both sides of the negotiating table.

Second, as discussed above, the CWA allows individual property owners/ businesses to appeal RMPs and Enforcement orders to the ERT and the Tribunal has the power to confirm, alter or revoke the decisions of the RMO or RMI. Property owners and businesses subject to risk management requirements will required hearings lawyers to advise on, and potentially launch and provide representation on appeals, of RMO orders.

Third, municipalities and landowners may find themselves requiring legal services to defend decisions on RMPs, and enforcement orders that are appealed to the ERT. Related to this, CWA decisions, like any government decision that affects the rights, privileges or interests of an

[38] Ontario Building Code, Ontario Regulation 332/12, Division C, *Article 1.10.2.*
[39] Ibid, Division C, *Article 1.10.2.3(1)*

individual, are susceptible to an application to Divisional Court for a judicial review of the legality, reasonableness and fairness of the decision. As noted above, the crush of appeals of RMPs and enforcement orders has not yet materialized; however, this could change as this relatively new legal regime evolves and RMOs become more aggressive in wielding the potentially powerful implementation and enforcement tools under the Act.

Conclusion

The rubber is finally hitting the road on Ontario's ground-breaking new regulatory program to protect its sources of drinking water. The Province has now passed the torch over to municipalities, to take command of implementation and enforcement: the most difficult part of an uncharted road. So far the implementation phase has gone surprisingly smoothly. In this respect, the slow and methodical ten year lead up may have worked to the regulators' advantage. Challenges remain, however, as RMOs have not yet tackles some of the most difficult issues related to existing businesses that post potential drinking water threats. On-going monitoring and enforcement, and the expansion of the program to address groundwater quantity threats, will continue to pose a host of technical, financial and legal challenges and potential conflicts.

For both the municipally-directed regulators and the regulated stakeholders, surmounting these challenges will require access to specialized expertise, expenditure of (limited) resources, creativity, artful collaboration and negotiation and, potentially, adjudication.

Welcome to life on the frontlines in an unprecedented journey: from an environmental tragedy toward long-term regulatory protection of Ontario's drinking water sources.

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