

## CHAPTER 1. NEW VISION, NEW MINISTER, NEW PLAN?

*“In February of this year, when the Ministry of the Environment accepted the report from Val Gibbons, entitled *Managing the Environment: A Review of Best Practices*, it signaled a fundamental shift in the way our province will go about protecting the environment”*

– Hon Elizabeth Witmer, Minister of the Environment

### I. Introduction: Confusing the Ends with the Means

The *Managing the Environment* report was refreshingly candid about its vision for environmental management in Ontario. As we undertake our sixth-annual report on Ontario’s environment, it is timely to reflect upon the course of environmental protection in Ontario and to learn the lessons from the Walkerton tragedy as we all strive to achieve sustainable development.<sup>1</sup> Seven people died and more than 2,000 fell ill in May 2000 when the southwestern Ontario town’s water system was contaminated by E-coli bacteria.<sup>2</sup> The much-anticipated Valerie Gibbons’ *Managing the Environment: A Review of Best Practices* report provided the background to, and rationale for, the government’s approach to environmental management in the wake of the Walkerton crisis.

The report compiles examples of flexible environmental-management models from other jurisdictions and combines them into a conceptual framework that relies heavily on cooperative agreements with the private sector that can take precedence over public interests. Under the current government, functions of public ministries and local governments, such as approvals, standard setting, monitoring and enforcement, have increasingly been devolved to the private sector. Since receiving the *Managing* report, the government has proceeded with a legislative agenda that implements an “integrated approach” to environmental governance where compliance is based on self-imposed industrial and agricultural management plans, self-screening for environmental assessment of new projects, emissions self-report-

ing and self-monitoring of environmental and public-health impacts.

Our review of the risks involved with this approach, including public health, environmental, trade-related and litigation impacts, indicates that extreme caution is in order. In general, we find that the report confuses the end with the means. Significant reliance is placed on the Dutch decentralized approach to sustainable development, where cooperation agreements with mature industrial sectors are often negotiated. It should be noted that these agreements began after a four-year national policy setting and scientific review process and were accompanied by financial transfers to local governments. The Dutch approach views self-regulation as a means to an end – sustainable development – not an end in and of itself.

This review found that:

- The report’s conceptual framework of “integrated compliance” would see self-regulation through cooperative agreements with industry replacing enforceable legal standards without a solid foundation in policy or a social consensus around this approach.
- The government is implementing the framework with “compliance assistance” in the form of government guidelines that industrial and agricultural sectors can redefine in management plans and which can override local by-laws.
- The report confuses the means with the ends of environmental protection through an inappropriate reliance on Dutch models of cooperative agreements with a mature industry operating within a well-grounded social consensus and environmental framework. This necessary pre-condition to an integrated approach to compliance assurance is absent in Ontario.
- Contrary to the contentions in the report, the alleged benefits of environmental-policy coherence, policy and technical innovation

and a growing acceptance of voluntary approaches to environmental governance are not self-evident. It is astounding that the report presented absolutely no evidence that voluntary approaches are either effective or cost-efficient.

- The remaining elements of public control in provincial ministries and local government may be important, however, in crafting legal and judicial responses to anticipated trade and other legal challenges. A later government may wish to regain public control over the delegation of authority to an unaccountable private sector to manage public goods such as clean air and water.
- There are significant public interests at risk with this approach to environmental management, including human health, environmental, trade-related and constitutional.

In summary, in recommending the further delegation of environmental responsibilities to the private sector, the report confused the end game of sustainable development with the means to get there. The government's reliance upon the Dutch approach to sustainable development with a mature industry is misplaced given the North American reality.

### 1. *Why this report?*

Valerie Gibbons' report was released on February 7, 2001<sup>3</sup>. The report was commissioned by the Ontario Premier as part of his response to the overwhelming public criticism surrounding the Walkerton disaster. The report is very lengthy — 329 pages, plus a 29 page executive summary and 12 appendices.<sup>4</sup> However, it avoids discussing the impact of the government's cuts on environmental protection in general and on the performance of the Ministry of the Environment (MOE) in particular. Instead, it offers a management analysis of the ministry in comparison to other environmental regulators, with an emphasis on adopting "flexible" management systems.

Some of the report's recommendations are not novel. Many of them have been made repeatedly by environmental groups, the Provincial Auditor and the Environment Commissioner of Ontario. For example, it was suggested that the ministry

should have a "vision" and create a high-level, government-wide approach to environmental management. "One of the single biggest issues facing the Ministry of Environment and the government is the absence of a vision for the future of environmental management in Ontario," says the report.

Among other recommendations were that the ministry should have, and use, measurable indicators of the effects of its policies and practices on public health and the environment, and focus on continuous improvement in environmental practices rather than just ensuring that only minimum standards are met. As well, the report suggested that the Ministry should monitor and report on Ontario's environmental status. This information should be transparent and accessible to the public. Further, governments should make better use of their data and link databases. Senior management should take time to develop high-level policy and to think about emerging issues. MOE should have a plan for environmental research, and should rebuild its links with the scientific community.

The government's main approach to environmental management, however, is a core belief that "command and control" enforcement should only be part of an "integrated compliance" plan that includes education, technical assistance, voluntary compliance and administrative penalties. A cornerstone of this "integrated approach" is that environmental protection should be implemented by a variety of ministries, not just by the Ministry of Environment. It is true that government cannot do it all. Indeed a number of recent laws and pending bills suggest the government is keen to continue with an integrated approach to environmental management and compliance assurance.

The government's response to Walkerton was to deny any responsibility<sup>5</sup> although it had privatized water-testing facilities, drastically cut the budgets of both the Ministry of Environment and Natural Resources, and did nothing to regulate the growth of intensive livestock operations in rural Ontario even after they became known public health hazards.

By retaining a management consultant to review

best management practices in other jurisdictions, the government could deflect criticism and be seen to have reacted immediately and decisively pending the outcome of four separate investigations around the Walkerton event. One of these is the judicial inquiry by Mr. Justice Dennis O'Connor into the contamination of Walkerton's water supply, which found, among other things, that the MOE's use of water-quality guidelines rather than legally binding regulations for chlorination and monitoring contributed to the tragic events in Walkerton.<sup>5b</sup> The *Managing* report provides a counterweight to the anticipated recommendations in Part II of the Inquiry's report that the province should return to an enhanced public system of water and public health protection to avoid future "Walkertons."

The current government has come under intense criticism for cutting environment ministry staff by more than 50 per cent (about 1,400 people) and cutting the budget by 44 per cent since coming into power in 1995.<sup>6</sup> Although some new resources have been allocated, these were for making governance change – the creation of an Office of Implementation – and not for front-line functions. Outsourcing of many operational and program delivery functions and further downloading to under-financed local and municipal bodies that lack the lawful capacity to properly govern on these issues has also occurred. Instead of building up the public sector, we have seen more public-private partnerships, more non-regulatory measures, and more voluntary initiatives.<sup>7</sup>

Since the release of the *Managing* report the government has created the Office of the Implementation and Transition Secretariat with a reported budget of \$4 million.<sup>8</sup> This office has been busy implementing at least parts of the report. Most importantly it has arranged for "compliance assistance" to the private sector based on the new management framework that features the further delegation of legislative authority to self-regulated entities.

The *Managing* report does make a number of positive recommendations. For example it says that a command-and-control approach to environmental management is "the essential backbone for the new tool kit" (p.30). It calls for greater trans-

parency and inclusiveness as well as improved ecosystem monitoring and public reporting of environmental and public health information.<sup>9</sup> A recent CIELAP report, however, revealed the ongoing inadequate state of water-quality monitoring in Ontario.<sup>10</sup> We wonder why the government has not yet taken the report's advice to ensure these fundamentals of environmental governance?

### A. The legislative implementation of the report

In addition to the public administrative functions of the Office of Implementation, the government has pursued a legislative agenda consistent with implementing the recommendations of the report. The government has, for example, enacted general enabling legislation that gives statutory authority to the Lieutenant Governor in Council (the cabinet), to set out in regulations the standards, if any, to apply to a particular sector or subject matter. Within this framework, regulatory standards are to be informed by so-called "management plans" that are to be developed by the industry itself. In many cases, explicit instructions are given in the legislation that these management plans can supercede higher local standards, such those contained in municipal by-laws.

That this delegation of legislative authority takes rule-making functions away from public ministries and gives them to the private sector without any further need for legislative debate is extraordinary.

While control often remains technically with government ministries, in practice there is currently not enough government staff to read — let alone analyze and prosecute where necessary — the compliance, monitoring and reporting data that is submitted by industry. (The remaining elements of public control will be an important factor, however, should a court strike down these schemes as unconstitutional.)

This review of the *Managing* report and its subsequent implementation builds upon previous CIELAP research into the legality of delegated legislative authority. Indeed, the trend to move the management of environmental governance from public ministries to a self-regulated private sector

may open the door to claims for regulatory negligence.

Since the *Managing* report, the trend in legislative design has tended toward a conceptual framework of environmental governance that features industry-led voluntary standard setting and compliance assurance. The proposed *Nutrient Management Act*, for example, which purports to respond directly to the health and environmental hazards associated with intensive livestock operations, is a case where private management plans can supersede both provincial guidelines as well as local by-laws.

The features of self-screening to determine environmental-assessment requirements for new electricity projects, including hydroelectric dams, on Ontario's waterways and self reporting and monitoring of air emission are also new legislative approaches that have arisen since the report. However, government and industry may have failed to consider the political and legal risks involved should the balance between private and public interests be determined by the electorate to be unsustainable and/or by the courts to be unconstitutional.

## B. The NAFTA connection

During any future election, there may be promises to restore environmental governance, standard setting and compliance operations in a well-funded and reinvigorated public sector. But because of the 1994 North American Free Trade Agreement (NAFTA) and the emerging General Agreement on Trade in Services (GATS), this promise may not be possible to fulfil or it may be much more costly to implement than expected.

Once public-service monopolies are "redesignated" into public-private partnerships or are delegated to the private sector altogether, national treatment obligations arise. These obligations require market access for non-domestic service providers and foreign investor compensation for the expropriation of anticipated profits should a later government decide to regain public control of key sectors such as water, transport or energy. The public-interest implications of the movement of environmental governance and

sustainable development decisions from democratically elected legislatures to the boardrooms of global private corporations are enormous.

The early implementation of the least controversial and, indeed positive, aspects of the *Managing* report should proceed immediately.<sup>11</sup> But some of the more controversial aspects require further consideration and public discussion. It is hoped that this review of the Gibbons' Report on Managing the Environment will contribute to an informed and lively debate. Building a social consensus is a necessary first step to achieve true sustainable development.

## II. Background to the Report

The *Managing* report was produced for a reported \$800,000 by a team of consultants led by Valerie Gibbons, a former Ontario deputy minister<sup>12</sup>. The specific mandate of the team changed over time. Generally the team's mandate was to review the Ministry of Environment and its policies and programs and to look at "best practices" in other jurisdictions.

This report was a response to public demands for an investigation into the safety of Ontario's water supply. An anonymous caller twice warned the Environment Ministry's Spills Action Centre (SAC), headquartered in Toronto, that there were problems at the Walkerton water treatment plant 24 hours before the Walkerton Medical Officer of Health made the news public. Normally, the SAC is supposed to respond immediately. However, it too, was suffering with a lack of adequate staff and insufficient budget. It was in no position to launch an immediate investigation.<sup>13</sup>

### A. Changing mandate for Gibbons?

The first announcement of the Gibbons' mandate, a government press release on June 16<sup>th</sup>, 2000, spoke of the need for specific water-testing standards, protocols and the communication of test results. The release said in part:

"Among other things, Gibbons' will provide counsel on standards and best practices to safeguard public and environmental health and safety and lead a team that develops guidelines to ensure

best practices and standards are communicated and enforced ...

Her action-oriented team will: Identify best environmental health and safety practices for the protection of water, land and air, drawing on the experience of both Canadian and international jurisdictions. Recommend improved practices including regulatory frameworks, **scientific and professional standards and education, guidelines, testing protocols and frequencies, and reporting and notification responsibilities...** (Emphasis added).

“The search for improvements must be an immediate and ongoing exercise,” said Premier Harris. The people of the province were assured that the government would immediately and directly address the public health crisis in Walkerton with specific water-testing standards and protocols.

When one looks at a later government press release announcing the completion of the Gibbons’ Report, the scope of the team’s mandate appears to have changed from one specifically addressing the Walkerton situation to one of recommending “new environmental management approaches” more generally. The February 7, 2001 press release read in part:

... “The Managing the Environment report recommends a new forward-looking government vision which will ensure that all ministries take responsibility for environmental protection... Specifically, to make strategic shifts from the status quo, the report includes the following recommendations: Move away from the decades-old, rigid, command-and-control organization towards a more effective and flexible set of tools and incentives. Instead of working under the assumption that government can do it all, move towards increased partnership with the public, the private sector and others. Instead of an out-dated, one-ministry approach, embrace a bold, government-wide, 21st century vision of environmental protection...”

To the government’s credit, it is quite clear about its intentions: “This report calls for a break from the way that the Ministry of the Environment has been run for many decades and represents a bold new vision for environmental protection,” said

Premier Harris. “We will begin reviewing the report to determine how to best implement this new vision. We will also forward it along to Justice O’Connor so he can include it in his deliberations in the Walkerton inquiry.”

It could be argued that the mandate of the *Managing* report changed from providing the public with assurances about “command-and-control” standards such as clear water- testing protocols and strict enforcement to an exercise in the further devolution of Ministry of Environment governance and operational functions to local governments and the private sector.

The Gallon Environment Letter summarized: “In essence the Report means that the government plans to further embrace voluntary environmental measures and reduce the use of effective use of regulations. And it means that more and more of the power of the Environment Ministry will be eroded and given to municipalities which are ill-prepared to absorb the new responsibilities. It means that some of the Ministry’s enforcement responsibilities will be handed-off to the very ministries that have been complaining about having to comply with environmental law.”<sup>14</sup>

## B. Reactions to the Gibbons’ report

When the report was released, the *Globe and Mail*’s headline read: “Ontario Government has Failed to Protect People in the Province from Polluted Air and Contaminated Water, an analysis of the province’s Environment Ministry ordered by Premier Mike Harris says”<sup>15</sup>.

“It is apparent to us that Ontario is behind the progress [in environmental protection] in many other jurisdictions and that the gap continues to widen,” the *Managing* report warned. It called for a “new approach,” saying the environment should be a priority for all ministries and agencies but that they should work in co-operation with the industries being regulated and with the communities affected by pollution. Some environmentalists were highly critical of the study’s recommendations, saying they may lead to weaker oversight of pollution rules, shifting of responsibilities to municipalities and more reliance on voluntary measures by businesses.

The Globe and Mail pointed out that the report commented approvingly on jurisdictions that have “turned ministry functions such as enforcing pollution laws and monitoring polluters over to municipalities”. But Paul Muldoon, head of the Canadian Environmental Law Association, called the report a disaster and maintained that local governments are not in a financial position to handle these duties. The report also called for more monitoring of pollution-control activities to be left to businesses. Finally, the report called for a temporary increase in funds at the Ministry of Environment for the next three to five years.

Later, the premier confirmed that the report and Judge O'Connor's recommendations in the Walkerton Inquiry would guide the government in developing new policies for protecting the environment, and in revamping the Environment Ministry. He also conceded that the report did find fault with his government's record. “It's critical, I think, in suggesting that for the last couple of decades our Ministry of the Environment, including under our watch, has still been stuck in this old mould and had not progressed.” But he argued that the report was not critical of cuts in the Ministry. “There's not a recommendation on the amount of money. There's not a recommendation on staffing levels,” he said.

The only reference in the report to the severe budget cuts inflicted upon the Ministry was this indirect statement: “We saw an organization under considerable management and operations pressure, as the ministry makes every effort to balance the requirements of the day-to-day running of its business and programs for the public with the extraordinary circumstances of recent months.”

What makes the report remarkable is how clearly it articulates a very different vision of environmental protection and of sustainable development for Ontario. After the release of the report, the Office of Implementation was established at the Ministry to implement this untested vision by promoting a program of “compliance assistance” with industrial and agricultural sectors.

Some argue that the goal of this scheme is to achieve private-sector self-regulation without a

foundation in the principles of sustainable development. Management plans and self-reporting mechanisms would be used to indicate the performance made in meeting voluntary government “guidelines.” These guidelines might become enforceable standards in regulations at some future point or may not. Whether this “new management” approach is environmentally effective and maintains important elements of democratic oversight is discussed below. But first it is important to be clear about the terms used in the report. Only then can we examine the examples subsequently offered by various government ministers to show that integrated compliance will ensure environmental protection and sustainable development.

### III. Defining the Terms Used in the Gibbons' Report

Many of the terms used are reviewed in detail in the first appendix to the report entitled *Integrated Compliance Assurance*,<sup>16</sup> written in part by Bob Breeze, P. Eng., Associate Deputy Minister, in the Office of Implementation at the ministry. The compliance paper states that the old command-and-control approach to compliance “cannot effectively deal with today's complex environmental problems” and that while voluntary initiatives may be perceived as “weakening” environmental protection “their effectiveness may be superior in specific circumstances”. Importantly, however, no empirical evidence is ever presented to substantiate these claims in either the compliance paper or in the full report.

The report suggests a strategy called “integrated compliance assurance”. The features of this arrangement are said to be performance-based, focusing on continuous improvement, and engagement in a cooperative model with industry, government and communities to solve pollution problems. In developing an improved understanding of integrated compliance, the compliance paper dismissed the relevance of positioning “voluntary versus regulatory” instruments at opposite ends of a compliance-policy continuum. Instead, reference is often made to an “integrated approach” to environmental compliance in background information to legislative initiatives.

Compliance assurance is defined as both public and private mechanisms designed to compel firms (and individuals) to conform to formal environmental regulations and informal rules of conduct or social norms. This general definition is refined further in the compliance paper: "Compliance" implies that a government agency has an environmental policy in place, and that **this policy has a measure of authority, including, but not necessarily, the force of law**. It also implies that someone or some enterprise affected by the policy has an obligation (**not necessarily legal**) to take certain actions in certain circumstances" [emphasis added].<sup>17</sup>

### A. Voluntary Compliance

The compliance paper was quite clear that integrated compliance assurance does not depend upon the force of law, mandatory standards or enforcement. Rather, the tools to achieve integrated compliance emphasize cooperative and/or abatement agreements as well as compliance assistance. Cooperative agreements are defined as "agreements that require parties to meet binding information disclosure and performance outcomes in return for government incentives." Compliance assistance means offering information and government incentives to the affected parties to allow them to build the "capacity of regulated entities to comply with environmental laws". In Table 2-1 of the compliance paper, the government is clear that compliance assistance features voluntary codes of practice and government guidelines, but not enforceable legal standards.

### B. Delegation of Powers

Complementary to integrated assurance is the delegation of provincial government powers: "In some cases, the responsibilities to implement can be delegated to other levels of government, to the regulated community or to a third party; or, they can be shared. A successful compliance strategy would include elements of each."<sup>18</sup> The government's goal of maximum corporate flexibility is also clear: "While the goal is to maximize compliance flexibility for all parties, the basic premise is that the end determines the appropriate means".

**But the compliance paper appears to have**

**confused the means with the ends of environmental protection. It has placed an inappropriate reliance upon Dutch models of cooperative agreements with a mature industry that works within a well-grounded social consensus and environmental framework. This necessary precondition to a so-called integrated approach to compliance assurance is absent in Ontario.** We review the Dutch approach to sustainable development below.

#### 1. Weak Enforcement

The framework for environmental governance that the government intends to implement in Ontario is clearly illustrated in the compliance paper. It features the delegation of government authority to the private sector, with flexible and voluntary approaches to standard setting, as codified in cooperative agreements and management plans to assure compliance. Indeed the compliance paper dismisses the value and effectiveness of legally binding policy instruments and enforceable standards by offering assurances that: "regulatory enforcement can never be excised from an integrated compliance strategy".

In the end, however, another paper discussing environmental governance (see discussion next section) and appended to the Gibbons' report concedes, "a credible threat to use enforcement is part of the government's bargaining power to make voluntary initiatives work. Absent the plausible threat of enforcement, cooperative approaches to achieving compliance seem to have only limited effect on regulated entities."<sup>19</sup> (Crow et al 2000). **But given the state of the Ministry of Environment's reduced role in policy development, monitoring and data analysis as well as field operational capacity, the assurance of bottom-line government enforcement seems hollow.** This remaining element of public control may be important, however, in crafting legal and judicial responses to the purported delegation of authority to an unaccountable private sector to manage public goods such as clean air and water.

The compliance paper concludes that "In most leading jurisdictions the commitment to change and innovation is very strong and that the adoption of integrated compliance is rapidly accelerat-

ing”. The paper defines the phrase “integrated compliance” to mean voluntary compliance agreements, with non-binding government guidelines. The governance paper that follows this compliance paper, however, contradicts the claim that environmental policy innovation necessary follows from a delegated approach to environmental governance.

There is some acknowledgement in the compliance paper of the public interests involved: “The attendant risks of choosing one instrument over another are not easily quantifiable. Responding to the values of equity, inclusiveness, and full disclosure complicates the situation. That is why it has taken a decade or more for certain non-enforcement tools to become accepted and implemented.”

#### IV, Environmental Governance Models

After having set out the government’s approach to integrated compliance, the task of another background paper to the Gibbons’ report entitled: *Review of Governance Models in Environmental Management*<sup>20</sup> was to highlight flexible models of environmental governance for the consideration of the Ontario government. According to interviews with the Office of Implementation, the Dutch Covenants, cooperative government-industry agreements governing environmental compliance, inspired how Ontario’s new integrated approach to environmental management would be implemented. **The conceptual framework sought for Ontario from the Dutch model would see integrated compliance assurance implemented by private-sector self-regulation through cooperative agreements, replacing the need for enforceable legal standards.** The government would provide compliance assistance in the form of government guidelines, that industrial and agricultural sectors could redefine in management plans, and in the form of incentives, including facilitated engagement with non-governmental organizations (NGOs) for public outreach purposes.

##### A. Identifying environment-related governance functions

Having set out the governance goals, the task turned to identifying the remaining environment-

related government functions for distribution purposes. Environmental-protection responsibilities were said to comprise a continuum of functions that range from basic scientific research on environmental quality and ecosystems to the enforcement of specific regulations. In most cases, the environmental agencies examined tended to reserve the “upstream” functions in this continuum to themselves (i.e., research, standard-setting, policy development) and were more willing to delegate “downstream” activities such as point-source monitoring, inspections and enforcement.

The governance paper specifically looked for examples where governments had delegated maximum flexibility and responsibilities to industry. It noted the European public administration trend to create industry-wide cooperative agreements. A 1997 study by the European Environmental Agency estimates that there are more than 300 cooperation agreements in place, two-thirds of which are in Germany and the Netherlands.<sup>21</sup>

The paper recognized that: “Everywhere, delegation reflects national constitutional principles and political culture: where environmental powers are delegated to local authorities, it is likely that other powers are delegated as well. In other words, environmental governance seems to follow established trends rather than be precedent-setting.”<sup>22</sup>

It was observed that the Netherlands share the **policy development** function between orders of government, with the senior agency setting the overall policy direction and regional or provincial authorities having the discretion to adapt it to their priorities. In Canada, environmental jurisdiction is also shared, with the provinces addressing some areas (industrial licensing), the federal government addressing other areas (ocean dumping, export and import of hazardous waste, etc.), and the responsibility for some areas being shared (pollution prevention, toxic substances, air emissions, etc.).

##### B. Dutch Approach to Sustainable Development

The Netherlands’ model of environmental governance is based on the country’s federal government setting long-term environmental quality goals,



transferring resources to local governments and negotiating sectoral agreements with industry for how to achieve these goals. It is important to note that the Netherlands established a politically accountable policy-development process and an effective operational infrastructure before it ventured into this phase of sustainable development driven by cooperative agreements with industrial sectors. These covenants implement pre-existing and clearly articulated and financed government policy; they do not define it. **Unlike the current legislative trend in Ontario, the Dutch did not delegate standard setting and compliance assurance to industry before expectations were codified in enforceable standards with effective compliance measures. While the end of sustainable development may include cooperation agreements, they are not the means to get there.**

### 1. *Standard Setting*

The governance paper to the Gibbons' Report recognized that **standard setting** is often a function of the national environmental agency or a reflection of an overarching set of national environmental standards that may include formal input from lower levels of government. The Dutch government is legally required to produce a National Environmental Policy Plan (NEPP) every four years that provides a vision, identifies problems, sets objectives and targets, defines the roles and responsibilities of decision-makers and outlines how progress will be monitored.

Importantly the Netherlands has set the goal of becoming environmentally sustainable within one generation and has gone on to translate this goal into detailed, often numerical, targets and actions that apply at a government-wide level. The framework emphasizes the goal of sustainable development, rather than simply environmental protection, and is developed through an extensive public-consultation process culminating in the adoption of the necessary supporting measures by the parliament. The key feature that distinguishes the Netherlands is that it sets government-wide goals and decision-making processes that bind all government agencies, not just the environment ministry. A separate scientific body, RIVM (National Institute of Health and the Environment) is responsible for ambient and point-source monitor-

ing and state-of-the-environment reporting. The Environment Programme in the Netherlands continuously reports the progress made and gives an overview of plans for the coming four years.

While the NEPP articulates overall environmental-quality goals, the Ministry of Housing, Land-use Planning and the Environment apportions the responsibility for attaining these goals to various sectors. Each designated "target sector" is then given the opportunity to negotiate a long-term covenant describing how they will fulfill their obligations. Where it occurs, delegation of responsibility is rarely unconditional. Dutch Inspectorate for the Environment supervises how local authorities implement environmental policy.

### 2. *Capacity building for local governments*

The governance paper in the Gibbons' report also noted that effective delegation to lower levels of government requires a "conducive policy framework" often requiring a transfer of resources.<sup>23</sup> Since the Dutch have a strong commitment to administrative decentralization, a variety of measures are used there to ensure that local governments are staffed and trained to carry out their enforcement responsibilities. National subsidies are offered to local governments to increase their capacity for planning and enforcement and a government fund supports the majority of training program costs for municipal and local governments. Both municipal and provincial governments are organized into associations that represent them in dealings with the national government. The Association of Municipal Governments also maintains a professional staff that assists municipalities in discharging their environmental and other responsibilities.

### 3. *Cooperation agreements with industry*

Based upon this solid framework and cultural setting, agreements with individual firms or industry associations are often struck under which these sectors report on their environmental performance. The Dutch have been able to implement sustainable development strategies that have, as a component, cooperative agreements with industry, including some self-regulation.<sup>24</sup> Dutch Covenants do not, however, replace govern-

ment functions that set standards or effectively monitor for compliance.

According to the governance paper, these cooperation agreements are noteworthy on at least two counts: they have created greater policy coherence among government environmental-protection efforts by forcing the relevant ministries of the national government, the provinces and the water boards to agree to a common agenda; and they provide industry with considerable latitude for how to achieve environmental-protection objectives. Although the objectives are non-negotiable, **the latitude gives industry groups an effective say in regulatory design.** No other jurisdiction has gone as far as the Netherlands in the implementation of this model, but according to the paper, there were examples of negotiated agreements in most of the jurisdictions reviewed.

### C. Corporate codes of conduct and self-certification

In addition to the Dutch approach, the governance paper examined several jurisdictions in which industry associations have developed mandatory codes of conduct for their members. These codes can cover a range of issues, including environmental performance, public reporting and community consultation. In Canada, examples of these codes include the Canadian Chemical Producers' Association Responsible Care program (also applied in 40 other countries). Although such codes do not represent an explicit delegation of government responsibilities to the private sector, the governance paper noted: **"they may pre-empt government regulation and encourage environmental protection authorities to focus their resources elsewhere. Where this is the case "they may represent de facto standard-setting".**<sup>25</sup>

In addition to codes of conduct, the paper considered forms of corporate **self-certification** as an alternative to direct government standard setting and inspection. The Massachusetts Environmental Results Program (ERP), for example, replaced "traditional command-and-control permits with performance-based standards and whole-facility self-certification". Facilities in three sectors (dry cleaning, photo processing, commercial printing)

are required to complete a self-certification checklist annually and submit it to government.

In fact, a full menu of options to further delegate government authority to the private sector was provided in the governance paper. But there were also some contradictions with the compliance paper.

### D. United States keeps command-and-control approaches

Unlike the Europeans, and despite the claim in the compliance paper that "integrated compliance assurance" and the voluntary approach is fast becoming the norm, the governance paper found that the majority of U.S. states practice traditional environmental governance and medium-based pollution control regulatory approaches.<sup>26</sup> It was pointed out that this traditional approach must be seen in the context of the American legal system, which imposes a more explicit liability on government agencies than is the case in many other countries. In a related vein, the American legal system also offers less discretion in the way regulatory authorities discharge their mandate.

The governance paper notes that changes in environmental governance are often driven by a broader political agenda that is usually independent of the actual nature of the environmental challenges confronting a particular country. Thus, the level of powers exerted by municipal governments and the creation of semi-autonomous subordinate agencies are matters generally resolved as machinery-of-government issues rather than environmental policy:

**"What little literature exists on this topic suggests that a decentralized structure does not necessarily promote innovation.** According to Rabe (1999)<sup>27</sup>, the United States has been much more active and effective in devising innovative approaches in four areas of environmental policy (cross-media permit integration, pollution prevention, disclosure of information and quality and use of environmental-outcome indicators) notwithstanding much greater environmental policy centralization at the federal level. Rabe points out that Canadian provinces have not taken advantage of the extensive bureaucratic discretion often

found in statutes to innovate”.

The governance paper concedes that the delegation of environmental responsibilities to lower levels of government and the private sector (eg. self reporting and certification) do not necessarily improve innovation, effectiveness or policy coherence.<sup>28</sup> These models suggest that the balance struck between the centralization and delegation of environmental responsibilities is as much rooted in cultural, constitutional or political considerations as in environmental-management considerations. In this regard, the governance paper concludes that the development of a comprehensive policy framework to guide all decision makers appears particularly valuable in reducing the inconsistent application of policies that is inherent with delegation.

In summary the Managing the Environment report confused the end game of sustainable development with the means to get there. **The benefits of policy coherence, policy and technical innovation and a growing acceptance of voluntary approaches to environmental governance do not appear to be self-evident.** The government's reliance upon the Dutch approach to sustainable development is misplaced given the North American reality. The first step in developing a sustainable development strategy is to identify the greatest needs for change and then develop a social consensus around the objectives for these areas<sup>29</sup>.

## V. Implementing the *Managing Report* – Examples of Initiatives

Having set out the background to the report, this paper now turns to the examples offered by various government ministers of the value of a new “integrated approach,” which is said to assure a “bold, government-wide, 21<sup>st</sup>-century vision of environmental protection”. While the Office of Implementation was at all times cooperative with this review, it was not able to provide any Ontario examples where the delegation of government powers to industry might more effectively promote policy innovation and environmental protection. While the Office of Implementation was unable to provide examples, both the Ministers of Environment and of Agriculture did pro-

mote a couple of initiatives they considered consistent with the Managing report.

### A. MERCury Switch-Out

According to Hansard reports of the provincial legislature, MPP Raminder Gill (Bramalea-Gore-Malton-Springdale) noted that Pollution Probe had announced Switch-Out, a program to recover mercury from recycled cars. Gill said this program seemed to be “an excellent example of a partnership between government and industry, as recommended by Val Gibbons in her report *Managing the Environment*” report. In response to his question about how this partnership compares to the ideas outlined in the Gibbons' report, Elizabeth Witmer, the Minister of the Environment, replied that such a partnership is “a very good example of what Gibbons talks about: moving forward voluntarily in order to ensure steps are taken in partnership to protect our environment”.

The MERC Switch-Out program is intended to reduce the amount of mercury that is emitted into the environment by removing car switches containing mercury before cars are recycled. It is a partnership between Pollution Probe, an environmental group, the Ministry of Environment, Environment Canada, Ontario Power Generation, the Canadian Vehicle Manufacturers' Association and the Ontario Automotive Recyclers Association. The Ontario environment minister described the initiative as a pilot project, which, she hoped, would be expanded across the province.

It is true that there are no laws or regulations in place that currently require the removal of mercury from switches when a car is recycled. And it is also true that all would applaud a successful example of voluntary action and partnership to enhance the environment. But where is the evidence of the cost and administrative effectiveness of this program that might make it an effective argument for a move away from command-and-control approaches to environmental protection?

### B. Nutrient Management Plans

Another example of improved environmental management based upon the Gibbons' approach is the draft *Nutrient Management Act*. In June

2001 the Ontario government introduced Bill 81, the *Nutrient Management Act 2001* purporting to “set and enforce clear, consistent standards for nutrient management on farms and protect the environment” in the words of Brian Coburn, the Minister of Agriculture, Food and Rural Affairs. New standards were promised for all land-applied materials containing nutrients related to agriculture, including livestock manure, commercial fertilizer, municipal biosolids, seepage and industrial pulp-and-paper sludge.

The proposed law would provide enabling authority for later regulations governing several areas, including: private-sector Nutrient Management Plans, **self certification** of commercial land applicators of materials containing nutrients, **guide-lines** setting out distance requirements for manure and biosolids application near wells and waterways, and a database system to record land applications of materials containing nutrients. (It is not known whether this database would be publicly accessible.)

It is significant that the government's announcement of the proposed legislation was said to be “consistent with the Environmental Commissioner's Special Report,”<sup>30</sup> responds to the *Managing the Environment Report*, and fits with the government's Smart Growth vision.<sup>31</sup> According to the background in the bill, the “key to this proposed framework would be the Nutrient Management Plan (NMP),” which is said to be “a science-based tool identifying how manure, commercial fertilizers, other nutrients and existing soil fertility are effectively managed in an environmentally responsible manner”. Many guidelines and other reference documents were said to have already been developed which could provide a good basis for these standards.

Municipal responsibilities are said to be “clarified” under the bill so that new standards as contained in the nutrient management plans would replace the so-called “patchwork of municipal bylaws regarding nutrient management”. Municipalities are reassured of their continued responsibility for land-use planning and building-code approvals. Local advisory committees would be created to promote awareness of the new rules, and mediate local nutrient management non-compliance related issues.

Administratively, the legislation provides for “**alternate delivery**” of the review and approval of NMPs and for the establishment of a registry for NMPs. It would provide the authority to establish fees for any activity undertaken. In the first two years, the Ministry of Environment would co-ordinate the review and approvals of NMPs and other requirements for large operations, while the Ministry of Agriculture would review and approve NMPs for mid-sized livestock operations.

At the first instance, it might appear that the government has finally acknowledged the link between intensive livestock operations, the spreading of vast quantities of manure on land, the contamination of surface and groundwater supplies and the resulting public-health disaster. But upon closer review, **this bill, through its “alternative delivery” mechanisms, delegates fundamentally important governance and standard setting actions for nutrient management directly to factory farms, bypassing the Ministry of Environment and higher local standards contained in municipal by-laws.** Such a delegation of powers by the government to the private sector is exactly what was contemplated in the Managing report.

To its credit, the government did not hide this fact. According to the backgrounder to the bill, Bill 81 “**provides authority for several functions including the review and approval of NMPs, education and training and certification to eventually be managed independently outside government**”. [Emphasis added].

But when environmental-governance functions are transferred to the private sector, the province becomes exposed to a number of trade- and investor rights-related challenges.

### 1. *The NAFTA connection to intensive livestock operations*<sup>32</sup>

For several years, a paradigm has been emerging in the Ontario livestock sector that espouses consolidation of livestock facilities into large concentrated sites called Intensive Livestock Operations (ILOs). In other jurisdictions throughout the world, ILOs have created significant environmental degradation and societal strife.

Government's need to take a lead in making decisions to effectively direct growth and regulate new development in order to ensure the well-being of the environment and rural communities.

Under the 1994 North American Free Trade Agreement, the parties accelerated tariff concessions for Canadian beef imported by Mexico. For example, Canadian and U.S. beef imported by Mexico receives a rate of "duty free" compared with a 25 percent ad valorem duty on non-NAFTA frozen beef and a 20 percent ad valorem duty on non-NAFTA fresh beef.<sup>33</sup> Thus the NAFTA tariff schedules have encouraged north-south flow in the trade in North American beef. Indeed your hamburger may have been produced in three countries!

The issue of drinking-water contamination and intensive farming has been considered a number of times by NAFTA institutions. The North American Agreement on Environmental Co-operation (NAAEC) provides that citizens can make submissions that a party is failing to effectively enforce its environmental law.<sup>34</sup> In 1997, the Commission for Environmental Cooperation (CEC) received a submission from a number of non-governmental organizations asserting that many livestock operations in the Province of Quebec are operating in violation of various environmental laws and causing significant harm to the environment and human health. The submission was supported in part by government reports, including a 1995-96 report to the National Assembly of Quebec by the Quebec Auditor General. After considering the submission and a response from the Government of Canada, the CEC Secretariat concluded that the development of a factual record was warranted.<sup>35</sup>

The Secretariat can only prepare a factual record if the CEC Council, comprised of representatives from each of the three parties to NAFTA, votes in favour of preparing such a record. The CEC Council voted by a two-thirds vote to instruct the Secretariat *not* to prepare a factual record with respect to the hog-farm submission, indicating the political nature of the submission process.

It is a reality in the agriculture sector today that farming is becoming more and more intensified with more animals being raised by fewer farms. In

1976, 18,622 Ontario farmers raised an average of 103 pigs each. By 1996, 6,777 managed an average of 418 hogs per farm. Two percent of Ontario's hog factories account for nearly one-quarter of the 5.6 million hogs produced each year in the province.<sup>36</sup> With increased trade in the beef and hog industries, these numbers are likely to increase as larger, more efficient farms grab a larger share of the market. These large operations are creating environmental challenges unlike anything that has been previously experienced by the industry, and yet they remain, for the most part, unregulated.<sup>37</sup>

Since 1995, when the current government came to power, the province's involvement in water quality has decreased substantially as it has sought to streamline the public sector, cut "red tape" and increase efficiency. The province's four government water-testing labs were closed and responsibility for water and sewage was pushed down to municipalities. There was no requirement for the private labs to report water-testing findings to the provincial authority. Instead, the provincial government had to rely on the municipalities to inform them of potential water-quality concerns.

## **2. NAFTA trade and investor challenges**

If the Ontario government pursues more schemes to privatize public services, such as water testing and treatment, the current NAFTA rules and emerging commitments under the General Agreement on Trade in Services (GATS) covering over 140 member states, will require national treatment to non-domestic water-service providers and investors, providing them with full access to these new markets.<sup>38</sup> Chapter 15 of NAFTA, entitled "Competition Policy, Monopolies and State Enterprises," requires that each party ensure that if government monopolies (defined to include government agencies) are "designated" (which could include redesignated agency partnerships) they must act solely in accordance with commercial considerations in their purchase or sale of the monopoly good or service (Article 1502.3.b)<sup>39</sup>; and must not discriminate against NAFTA investors (Articles 1502.c and Article 116.b) or service providers (Article 1503.3).

Thus when private-public partnerships evolve in cash-starved jurisdictions, the public sector is

required to strictly apply commercial policy and operating considerations, which constrain the political tradeoffs that might be made between the cheapest price and the highest quality of a service. **Moreover, when foreign investors and service providers gain market access, they may not adequately take into account local water-conservation objectives or ensure public access to clean and affordable drinking water supplies. Public concerns over the commodification and privatization of water and water services are indeed justified.**

### 3. *Ontario introduces the Nutrient Management Act*

The Walkerton Inquiry found that the contamination of Walkerton's drinking water by *E. coli* was related to well contamination by livestock manure.<sup>40</sup> Many other factors, however, have been identified as the root cause: the lack of clear allocation of responsibility for water testing, human error, a disruption to the chain of command in reporting the contamination to the appropriate authorities, MOE budget cuts and the voluntary nature of water-quality guidelines.

The Environment Commissioner, in its special report entitled "The Protection of Ontario's Groundwater and Intensive Farming," summarized the legal and policy framework protecting groundwater as "fragmented and uncoordinated."

<sup>41</sup> The commissioner further noted that within the past two years numerous counties and townships across rural Ontario have attempted to deal with the issue of contamination of drinking water by manure through by-laws, but have also urged the provincial government to take action.<sup>42</sup> The Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) has avoided using regulatory measures to address manure, promoting instead a voluntary approach.<sup>43</sup> Since Walkerton, numerous reports of drinking water *E. coli* contamination have surfaced in rural Ontario.

Despite the assurances by the Minister of Agriculture that the draft *Nutrient Management Act 2001* will "set and enforce clear, consistent standards for nutrient management on farms and protect the environment," an analysis done by the Sierra Club of Canada found that the Bill in its present form can not be recommended for adoption.<sup>44</sup> First, the

definition of "Minister" does not specify which minister, or ultimately which ministry, will be responsible for the administration of the Act. The Sierra Club has consistently stated the view that the Ministry of the Environment (MOE) should be responsible for the enforcement of regulations pertaining to the permitting and operation of Intensive Livestock Operations. This assignment of responsibility to the MOE should be made express in the act since the ability of OMAFRA to effectively regulate the agricultural industry that it is also entrusted with promoting and developing places it in a conflict of interest.

Secondly, this bill enables regulations to set out specific standards at some later point in time, if at all.<sup>45</sup> Rather than this approach, the act should state that such regulations constitute a minimum standard and that municipalities are able to impose more stringent requirements reflective of the environmental and/or socioeconomic peculiarities of the municipal jurisdiction.

Most importantly, the Sierra Club takes issue with the delegation of powers relating to the review and approval of nutrient management plans to individuals and corporations found in Section 55 of the bill<sup>46</sup>. These plans can supersede municipal bylaws containing standards higher than those contained in private-sector management plans or even possible future regulations.<sup>47</sup> It is appropriate to include wording in this section that expresses the right of municipalities to pass bylaws whose measures exceed those of this act, where the purpose is to reflect local concerns and objectives.

Many municipalities have been forced by the lack of provincial leadership to develop bylaws and strategies to govern the location and operation of ILOs. The imposition of private-sector plans and minimal provincial regulations that supersede well-thought-out and widely supported local solutions will not result in the greatest protection of water resources and the environment at large and certainly will not bring any peace to the conflict over the imposition of large ILOs on communities.

However, given the government's expressed preference for an "integrated approach" that

features industry self-regulation, environmental management will be almost exclusively based on private-sector Nutrient Management Plans (NMP). The problem with this approach to environmental governance is that while NMPs are an appropriate tool for use in matching manure application rates to crop requirements, **NMPs are not capable of preventing ground- and surface-water degradation. NMPs do not account for the pathogenic organisms contained in animal manures, nor do they adequately assess the ultimate destination of the nitrogen fraction of animal manures. NMPs do not assess the subsurface geology and subsequent vulnerability of underlying water aquifers.**

While the Ontario government makes much of the fact that a new cabinet-level environmental policy committee has been established in response to the Gibbons' report, the lead for the design and implementation of the act appears to continue to rest with the Ministry of Agriculture. Despite interviews with Office of Implementation in the MOE, no information was available on the MOE's actual role in this critical piece of legislation; any questions were instead referred to the Ministry of Agriculture. The disconnect between these ministries undermines the claim that all relevant ministries cooperatively manage the environment at cabinet level.

### C. Self-screening for air emission monitoring and reporting

In a May 2, 2001 statement, Environment Minister Elizabeth Witmer said that when the Ministry of the Environment accepted the Managing report "it signalled a fundamental shift in the way our province will go about protecting the environment". As an example of the government's response to the report, the minister assured the Ontario Legislature that the MOE would establish a comprehensive system of air-emission standards, mandatory monitoring and reporting requirements in order to further encourage emission reductions in Ontario.<sup>48</sup> The minister added that in response to the *Managing the Environment Report*, the government would establish a comprehensive environmental monitoring and reporting strategy that included the capacity to conduct inspections.

In May 2001, Ontario's Ministry of the Environment introduced O. Reg. 127/01, a new regulation for air monitoring and reporting. After January 1, 2002, this regulation will affect large and small facilities from many sectors, which fall within the ministry's screening criteria and reporting thresholds for reporting. The total list of pollutants with an air-reporting requirement was increased to 358, including the full suite of greenhouse gases. This requirement makes the plan one of the most comprehensive in the world.<sup>49</sup>

As described in the air chapter, the key strengths of this regulation pertain to its comprehensiveness, while its weaknesses are its lax reporting requirements, the limited access it provides the public to reporting data, and the fact that the ministry might be ill-prepared to analyze the data reported.<sup>50</sup>

Under the new regulation, facilities have to report their annual output of up to 358 different pollutants, but there are a number of conditions that can dramatically reduce the number of pollutants that a facility must report. First, the owner of a particular facility must ensure that their facility falls into one of the three "classes" of facilities that this regulation is meant to affect. For a firm to be subject to any part of this regulation it must either be an "electricity generator," a "large facility" or a "small facility". If a firm falls into none of these classes, its owners would not be obliged to report its pollutants and O. Reg. 127/01 does not apply.

Furthermore, for the purposes of this regulation the Ontario government has divided the 358 substances into three groups. If, for any given substance emissions are equal to or greater than the threshold, the facility must report their emissions. However, if they are below that threshold, they do not have to disclose any of their emissions of that substance. Because there are so many criteria to determine if a firm needs to report a given substance, facilities that are eligible to report under O. Reg. 127/01 do not necessarily have to report all 358 contaminants on the MOE's list. Instead, they are required to report only those contaminants that self-screening criteria and reporting thresholds require them to include.<sup>51</sup>

In addition to the self-screening monitoring and reporting requirement, the limited number of staff at MOE may impair the ministry's ability to properly deal with the data inflow that O. Reg. 127/01 will provide. This regulation has the potential to provide the MOE with an immense amount of data, and it is very unlikely that the province will be able to delegate a sufficient number of trained personnel to analyze and manipulate it. This is an important issue according to all interviewees contacted, because this data will need to be aggregated at least on a sector-by-sector basis in order to be truly meaningful. An adequate number of staff will also be important in order to ensure compliance with the regulation.

#### D. Self-screening for environmental assessment of electricity projects

The same integrated approach to environmental management is apparent in the proposed Guideline on the environmental assessment and screening process for new electricity projects<sup>52</sup>. It appears from the proposal that the only mechanism for movement from a Level 1 screening to a more rigorous Level 2 screening is that of a decision taken by the proponent itself. While the guideline suggests that most screenings will probably go on to (at least) Level 2, it is nevertheless widely believed that it is inappropriate that the decision rests solely with the proponent, especially given the significant health and environmental impacts related to the generation of electricity.

Likewise the proposed Water Management Planning Guidelines allow private sector water-management plans for new hydroelectric projects to set out "how waterpower facilities and associated water control structures (i.e. dams on Ontario waterways) are to be designed and operated to balance environmental, social and economic objectives". Yet surely the balance struck and the decision to proceed or not proceed with a proposed hydropower project is a matter for public governance based on clear policy and enforceable standards? These matters of the public interests are *not* the exclusive subject matter of private-sector decision making and authority, based on voluntary government guidelines, which the proponent may or may not accept in management plans.<sup>53</sup>

The public health, environmental, trade-related and litigation risks involved with the government's "New Approach to environmental management" are great. No empirical evidence exists that this governance approach of delegating government authority to the private sector is effective. In fact, the evidence is the opposite. This conclusion is reinforced by the findings of the Walkerton Inquiry.

## VI. Environmental Deregulation: The Risks and Legal Consequences

CIELAP engaged in an early analysis of the Ontario government's plan to delegate environmental authority to the private sector in its 1999 case study on the Technical Standards and Safety Authority.<sup>54</sup> Through the *Safety and Consumer Statutes Amendments Act* of 1996, responsibility for the administration of a number of safety-related statutes was transferred from the Ministry of Consumer and Commercial Relations to a new private-sector organization, the Technical Standards and Safety Authority (TSSA), comprised mainly of industry representatives. In the chapter on the legal implications of this scheme, the authors questioned the legality of the delegation of powers and speculated that the Canadian Charter of Rights and Freedoms may be deemed to apply to a private-sector entity that performs government functions. A brief review of the paper is provided to demonstrate that an "integrated approach" to environmental compliance that relies upon voluntary standards and reporting along with third-party monitoring and weak government enforcement also poses significant legal risks and instability should a reviewing court strike the scheme down as unconstitutional.

As the TSSA paper made clear, "government agencies in Canada are subject to a series of formal and judicially enforceable legal principles. These range from the fundamental rights and freedoms of Canadians outlined in the Canadian Charter of Rights and Freedoms to specific statutory and common law rules regarding fairness in decision-making. These rules have been built up, in some cases, over the centuries to ensure the just and fair administration of laws, policies and programs by the government. As such, they



represent an important restraint on the arbitrary exercise of power by the state”<sup>55</sup>.

These rules and rights were developed on the assumption that public laws would be administered and enforced by governments. The status of these rights where traditional state functions have been transferred to a private corporation is uncertain. Private corporations are generally not subject to the Charter or the statutory and common law requirements regarding fairness and justice in decision-making that apply to the state.<sup>56</sup>

However, over the past few years, the courts have dealt with a number of cases involving the delegation of governmental functions to private organizations. These cases may provide some indication of how the courts might respond to litigation. As one commentator has noted:

“discretionary power (also) allows the court to expand its scope of review where it believes this to be a just result. It has been suggested by some scholars that this will be the inevitable result as the common law is forced to provide new accountability mechanisms to check the current trend to deregulation, privatising and corporatising which may otherwise erode principles established over centuries to protect the public.”<sup>57</sup>

There is considerable evidence to suggest that the courts are moving in this direction.

The Canadian Charter of Rights and Freedoms, adopted in 1982, establishes constitutionally entrenched basic rights and freedoms of Canadians in relation to their governments. These rights affect the administration and delivery of government programs in many ways. The Charter, for example, establishes rights to equal treatment and equal benefit of the law, and protection from unreasonable search and seizure. Charter rights, which supersede any legislative authority, are enforceable by the courts and by some administrative tribunals.

The 1998 decision of the Supreme Court of Canada in the case of *Eldridge v. British Columbia (Attorney General)* applies to this issue.<sup>58</sup> *Eldridge* dealt specifically with the applicability of

the Charter to private organizations carrying functions delegated to them by governments. The matter at issue in *Eldridge* was whether deaf users of hospital services were discriminated against under section 15(1) of the Charter where there was a failure to provide them with paid interpreters for medical services.

**In its decision in *Eldridge*, the court held that governments cannot evade Charter responsibilities by delegating delivery of their policies and programs, in this case to guarantee access to medical services without charge, to private entities.** The court stated that “Just as governments are not permitted to escape Charter scrutiny by entering into commercial contracts or other ‘private’ arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.”<sup>59</sup>

In the *Eldridge* case, the Charter was held to apply to private entities that implemented a specific government policy or program. The key finding was that the power to make certain determinations was delegated to a subordinate authority and it was the authority’s decision that was challenged, not the legislation itself. The court distinguished between private bodies that are subject to the Charter, as a result of having been entrusted by government with the implementation of specific government policies, and other private corporations who derive power from statute simply through the process of incorporation. In its analysis, the court concluded that: “a private entity may be subject to the Charter in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is “governmental” in nature does not readily admit of a priori elucidation.”

The court is responding to the growing practice of delegating governmental functions and powers to private entities that are not subject to direct government control. Regulatory negligence suits give the public an avenue to sue government for failing to properly enforce its own rules and regulations. While the government appears to maintain some ultimate responsibility when it delegates authority to lower levels of government

and to the private sector, the question remains where will liability ultimately be found?

### A. Regulatory negligence: Suing government or corporations?

Members of the public can sue the government for damages arising from regulatory negligence. Public authorities have a discretionary right and defence in suits to implement enforcement programs on the basis of established public policy and budgetary resources.<sup>60</sup> It is also possible that government may be held liable for the delegation of functions that are performed negligently by the delegate. The British Columbia government, for example, was held liable for the actions of an independent contractor to whom the government's power to inspect and maintain highways was delegated.<sup>61</sup>

The court has relied on a combination of tests regarding the exercise of statutory authority and the "governmental" character of the functions in question to determine the applicability of the Charter, rather than examining whether the functions are carried out by entities in the public or private sector. In other words, the nature of the activity being carried out, rather than on the nature of the actor undertaking the activity, has been the central issue in the determination of the application of the Charter. It is important to note that while the level of control exercised by government over an entity was central in the court's earlier determinations of "governmentalness," in more recent cases, such as *Eldridge*, it has been much less prominent. This may be a consequence of the court seeing the need to respond to the growing practice of the delegation of governmental functions and powers to private entities that are not subject to direct government control.

In general, the courts have taken the view that governments cannot escape their responsibilities under the Charter and statutory and common law by delegating functions to private organizations. Indeed we may see litigation against both government and industrial sectors, including specific management plans to ensure that neither evade their responsibilities.

## VII. Conclusion

The conceptual framework of environmental management laid out for Ontario in the *Managing the Environment* report would see self-regulation through cooperative agreements with industry replacing enforceable legal standards. Compliance assistance to facilitate this transition is provided by voluntary government guidelines that industrial and agricultural sectors can redefine in management plans and which can override higher provincial and local standards.

The report takes much of its direction from the Dutch approach to sustainable development. However, Dutch covenants with mature industrial sectors implement pre-existing and clearly articulated and financed government policy; they do not define it. Unlike the current legislative trend in Ontario, the Dutch do not delegate standard setting and compliance assurance to industry before expectations based on a social consensus are codified within a solid environmental framework and the effective local capacity to govern has been assured.

The current Ontario government has confused the end game of sustainable development with a means to get there. The benefits of policy coherence, policy and technical innovation and a growing acceptance of voluntary approaches to environmental management do not appear to be self-evident. The risks – human health, environmental, trade-related and constitutional – are simply too great to allow an unaccountable private sector to manage public goods, such as clean air and water. While we recommend the quick implementation of the many positive aspects of the report, including ecological monitoring, greater public transparency and engagement, we suggest further empirical research and public discussion on the more controversial aspects of the Ontario government's approach to environmental management before any further steps are taken.