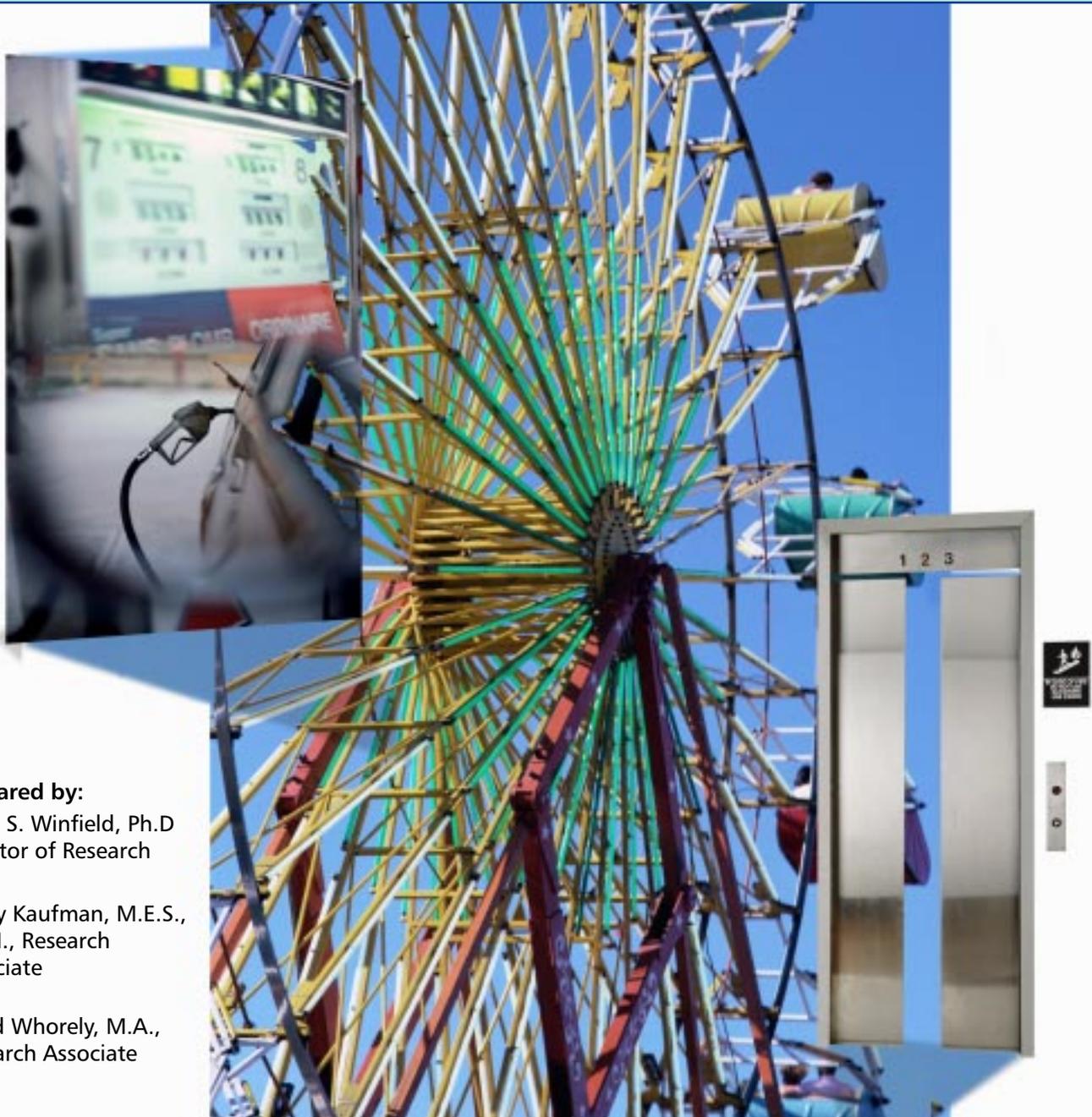


The 'New Public Management' Comes to Ontario

A study of Ontario's Technical Standards and Safety Authority
and the impacts of putting public safety in private hands



Prepared by:

Mark S. Winfield, Ph.D
Director of Research

with

Shelly Kaufman, M.E.S.,
L.L.M., Research
Associate

and

David Whorely, M.A.,
Research Associate



Canadian Institute for Environmental Law and Policy

www.cielap.org

ACKNOWLEDGEMENTS

The Institute would like to thank the Law for the Future Fund of the Canadian Bar Association and the Three Guineas and Jackman Foundations for its assistance in the completion of this report.

We would also like to thank the reviewers of this report for their helpful contributions. Any errors or oversights are, of course, the responsibility of the authors.

For further information on this report or the Canadian Institute for Environmental Law and Policy, please contact us at (416) 923-3529, or www.cielap.org.

Written by Mark Winfield, Ph.D., Director of Research, Shelly Kaufman and David Whorely

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ISBN 1-896588-01-8

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Canadian Institute for Environmental Law and Policy
517 College Street, Suite 400, Toronto, Ont., M6G 4A2
(416) 923-3529
(416) 923-5949 fax
www.cielap.org

This study has its origins in research for the Canadian Institute for Environmental Law and Policy's Second Year Report on Ontario's Environment and the "Common Sense Revolution." In the course of our work, we came across a little-noticed statute, the *Safety and Consumer Statutes Amendment Act*, (SCSAA) enacted in June 1996. Through this legislation, responsibility for the administration of a number of safety-related statutes, including the *Gasoline Handling Act* had been transferred from the Ministry of Consumer and Commercial Relations to a new organization called the Technical Standards and Safety Authority (TSSA).

Given the Institute's history of research on issues related to leaking underground storage tanks, we decided to investigate this transfer further. Shelly Kaufman, then a student in the joint LL.M./M.E.S. program at York University was asked to prepare a short report on the SCSAA and the Authority, the findings of which were included in our July 1997 Second Year Report.

We found that the Ministry's regulatory functions related to public safety, including elevators and amusement devices, boilers, pressure vessels, and fuels, had been transferred to a private, not-for-profit corporation, the majority of whose board of directors was made up of "representatives" of the regulated industries. Three similar entities had been created to assume other consumer-related regulatory functions of the Ministry, and a fifth "delegated administrative authority" was being established to take over the electrical-safety inspection functions of Ontario Hydro.

The new structures seemed to us to give rise to a host of major issues in public administration and administrative law. These ranged from the potential institutionalization of conflict of interest as an organizing principle of these organizations, to their status in relation to the political and legal accountability structures that normally applied to government agencies. Questions about the status and nature of the new organizations began to be expressed by officers of the Legislative Assembly as well, particularly the Ombudsman and Environmental Commissioner.

In recognition of the significance of the legal and public-policy issues raised by creation of the delegated authorities, the Law for the Future Fund of the Canadian Bar Association, and the Three Guineas and Jackman Foundations agreed to provide support for a more in-depth study of the TSSA.

We began our detailed research in the fall of 1999 with myself as lead author, and Shelly Kaufman providing the legal research. David Whorely, a Ph.D. candidate with the University of Toronto's Department of Political Science, joined us to provide perspectives on similar organizations in other jurisdictions, and the wider context of the restructuring of public services within which the TSSA and its companion organizations fit.

We were pleased to have the cooperation of the TSSA throughout the study. The Authority provided important documents and background information, and was always willing to provide prompt answers to many, often very detailed, questions about its structure and operations. We are also grateful to officials from provincial government agencies for their responses to our requests and inquiries.

We benefited from a strong group of external reviewers whose comments were of major assistance in refining and strengthening the study. Any errors or oversights remain the responsibility of the lead author.

It is our hope that this study will make a major contribution to the debates over the structuring of public services in Canada as we enter the new millennium.

Mark S. Winfield, Ph.D
Director of Research
April 2000

EXECUTIVE SUMMARY

This study investigates the impact on political and legal accountability of the transfer of government functions related to the protection of public goods to private entities, focusing on the case of Ontario's Technical Standards and Safety Authority (TSSA). It also assesses the effectiveness of the TSSA model in the delivery of public goods protection services and makes recommendations regarding its potential reform and future use.

The Ontario Technical Standards and Safety Authority (TSSA) is a private, not-for-profit corporation delegated responsibility for the administration of seven safety related statutes¹ previously administered by the Ontario Ministry of Consumer and Commercial Relations (MCCR). The delegation was achieved through an administrative agreement between the Authority and the Ministry, made under the *Safety and Consumer Statutes Amendment Act* (SCSAA) of June 1996.

The Authority, to which the functions, staff and assets of the Technical Standards Division of the Ministry were transferred in May 1997, is one of four delegated administrative authorities created for the purpose of assuming the safety and consumer protection regulatory functions of the Ministry. A fifth delegated administrative authority, the Electrical Safety Authority, was created through the *Energy Competition Act* of 1998.

The TSSA's responsibilities include inspection, approvals, and law enforcement in relation to the delegated legislation. Authority staff are identified as statutory directors and officers for purposes of the delegated legislation, although the SCSAA states they are not crown employees or agents and are not to present themselves as such.

The Authority is managed and administered by a board of directors, the majority of whom are drawn from and nominated by the industrial sectors whose activities it regulates. The Board also includes an Assistant Deputy Minister of MCCR, two consumer representatives who are ministerial appointees, and the Authority's Chief Executive Officer.

The TSSA model of transferring responsibility for the administration of government programs to a special purpose body is not unique. It reflects concepts in the restructuring of government agencies first seen in Britain and New Zealand in the 1980s. The models, which are applications of what is sometimes referred to as 'new public management,' centre on the separation of policy-making from its actual implementation and administration, and the reorganization of government agencies charged with administration and service delivery along the lines of private sector corporations.

The Government of Alberta began to bring these models to Canada in the early 1990s. At the same time, it took the approach a step further, by transferring "administrative" functions out of government altogether, to private, not-for-profit "delegated administrative organizations." The Government of Alberta also added a new dimension to the concept — self-management by the regulated industries — by providing that the boards of directors of the organizations consist primarily of representatives of these industries. The Ontario delegated administrative authorities carry the Alberta initiative a step further still, particularly in terms of the degree of autonomy from government that they have been granted.

The TSSA is a potential model for the further restructuring and transfer of the regulatory functions by the Ontario government, including those related to environmental protection. The Authority also actively promotes itself as a model for other governments to follow in the delivery of public services. These considerations, in

conjunction with the importance of the Authority's functions to public safety in Ontario, made an early independent review of its performance and structure essential.

The study identifies a number of weaknesses in the TSSA model. These include the failure of the government to provide the Authority with clear policy direction from the outset, through the SCSAA or Administrative Agreement. In the absence of such direction, the Authority has been left to define its own course. The one which has emerged clearly mixes regulatory and promotional roles with respect to the regulated industries, and contains significant gaps, such as the absence of references to the protection of the environment, despite the environmental implications of some of the Authority's regulatory functions.

In addition to the definition of its own substantive mandate, the Authority's work has engaged it in policy and standards development processes and potentially policy advocacy as well. These activities go beyond the "administrative" mandate for the Authority described by the Minister of Consumer and Commercial Relations to the Legislature when the SCSAA was enacted in 1996. At the same time, the government appears to have lost much of its capacity to give the Authority direction even if it wished to do so. This is a consequence of the transfer of almost all of its policy and technical expertise in public safety regulation to the TSSA.

The TSSA's Board of Directors is the centrepiece of the self-management model upon which the Authority is based. The Authority's Board is dominated, by design, by representatives of the industries regulated through the statutes that the Authority administers, although it also includes representatives of the Ministry and consumers' organizations.

The structure has some potential advantages over the traditional government agencies, particularly in terms of the speed with which senior level attention and approval for initiatives and decisions can be obtained, and the degree of direct input from non-governmental stakeholders in decision-making it provides. However, the structure suffers from a number of potential weaknesses as well.

In particular, the TSSA structure places the majority of the Authority's directors in a potential conflict of interest between their role as "representatives" of particular sectors, and their obligations as directors to the objects of the corporation. The situation is of particular concern given the lack of a clear mandate and policy direction for the Authority in either the SCSAA or Administrative Agreement regarding protection of public safety, and the 'dual' mandate contained in the corporation's objects. The problem is further highlighted by the silence of the SCSAA, MCCR/TSSA Administrative Agreement and the Authority's conflict of interest by-law on situations where directors are dealing with situations where economic or policy issues affecting their employers are before the Authority.

The transfer of the regulatory functions of a government agency to a private organization, as in the case of the TSSA, raises unique questions regarding political, legislative, administrative and fiscal accountability. Although the TSSA states that it is accountable to the Minister for its performance, the degree to which the Ministry can effectively oversee the Authority's activities, and if necessary control and direct them, is open to question.

A second, and perhaps more immediate concern is that the TSSA, as a private organization, escapes the normal application of the statutes that provide the foundation of the legislature and public's ability to oversee the activities of provincial government agencies and use of the powers granted to them. These include the *Audit Act*, *Ombudsman Act*, *Freedom of Information and Protection of Privacy Act*, *Lobbyist Registration Act* and *Environmental Bill of Rights*, and their associated legislative officers.

Provisions were made within the TSSA/MCCR administrative agreement regarding the freedom of information and the protection of privacy, the resolution of complaints and the provision of French language services. However, the Information and Privacy Commissioner and the Ombudsman have noted that these arrangements do not provide the same legal protections as those provided through the legislation that would normally apply to a provincial agency.

The accountability framework established by the Government of Ontario for the delegated administrative authorities is significantly weaker than that provided in other jurisdictions, including the United Kingdom, New Zealand, Alberta and the Government of Canada undertaking similar reforms. The step of formally bringing the Authority under the statutes that would normally apply to provincial agencies was taken with respect to the *Environmental Bill of Rights* in May 1997.

In addition to the differences in the political and administrative accountability framework for the TSSA relative to traditional provincial agencies, the establishment of the TSSA gives rise to an important set of questions around the legal accountability of private organizations to which government functions are delegated.

The legislation creating the TSSA and similar organizations in Alberta has been largely silent on the questions of the application of constitutional, statutory and common law requirements for fairness and justice in the administration of laws, policies and programs. It has been left to the courts to resolve the questions of the application of the Canadian *Charter of Rights and Freedoms* and statutory and common law requirements regarding government decision-making to private organizations to which government functions have been delegated.

Although there has been no litigation of this nature to date specifically involving the TSSA, the Supreme Court of Canada has dealt with a number of cases involving analogous delegations of government functions to private organizations, including self-regulating professional bodies. 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. This has been most clearly expressed by the Supreme Court in its 1998 *Eldridge* decision.

Consequently, It appears unlikely that the Authority will escape the legal accountability requirements that normally apply to provincial agencies. However, in the absence of specific litigation with respect to the status of the TSSA, any conclusions in this regard must remain speculative. At the same time, it should be recognized that the notion of what is a “governmental function” is subjective, and may not be static over time, as concepts about the role of the state evolve.

The delegation of full responsibility for the conduct of prosecutions for alleged violations of the statutes administered by the TSSA to the Authority raises a range of important questions. The TSSA states that it conducts prosecutions “on behalf of the Crown,” rather than being a private prosecutor under the *Provincial Offences Act*. However, there appears to be no basis on which the Minister of Consumer and Commercial Relations could delegate the conduct of prosecutions on behalf of the Crown to the Authority, as this responsibility clearly rests with the Attorney-General.

Furthermore, the situation with respect to the conduct of prosecutions by the Authority is in marked contrast to the structure put in place for the delegation of this responsibility to municipalities for certain minor offences through amendments to the *Provincial Offences Act*, adopted in 1998. These provide for the close oversight and supervision of municipal actions by the province. The arrangement for the TSSA also departs from the structure established in Alberta for the conduct of prosecutions by “delegated administrative organizations,” where the approval of the Ministry of Labour is required.

There appear to be no significant changes in the levels of incidents, inspections or industry compliance with regulatory requirements since the creation of the TSSA. Turnaround times for approvals do appear to have declined significantly since 1996. However, the reasons for this outcome, in the absence of increased technical staffing levels, are unclear.

There is also evidence of a change in direction with respect to law enforcement. There have been reductions in levels of penalties being obtained, although ongoing observation is required to reveal whether this is due to the nature of the offences in any given year, or a longer term trend. The character of the penalties being sought by the TSSA has also changed, to donations to the TSSA Education Fund, rather than fines.

In general, the TSSA is still at a very early stage of its existence. More substantive changes in direction may occur as turnover occurs among the staff at the operational and management levels over time, particularly as veteran public service personnel are replaced with new staff without government experience in relation to the subject matter of the legislation.

The principle strength of the delegated administrative authority model highlighted by the government is that it “is not constrained by jurisdictional fiscal policy,”² in that it can fully retain the revenues it realizes through licencing charges and fees. These revenues have risen significantly. This has not, however, translated into increased in front-line service delivery staff. Rather, the only changes in staffing levels in relation to the MCCR division have been the addition of managerial and professional staff to provide administrative and legal services previously supplied through the Ministry. These outcomes must raise questions about the efficiency of the TSSA model, which requires the reproduction of administrative functions previously carried out by the Ministry.

There is little evidence of a significant change in direction with respect to the policy decisions made by the Authority to date. These again have followed the directions set before the MCCR/TSSA transition, such as the introduction of a risk management approach to the agency’s inspection activities.

Bill 42, the proposed *Technical Safety and Standards Act, 1999*, does raise a number of serious policy issues. Most significantly, the proposed legislation would remove all of the substantive standards within the existing legislation, and replace them with general enabling authority for the Lieutenant-Governor in Council to make regulations.

Given the lack of technical and policy capacity within the MCCR in the areas delegated to the TSSA, the content of these regulations will inevitably rely on input from TSSA. This would effectively delegate policy and standard setting to TSSA. Such an outcome, would be contrary to the separation of administration and policy-making — rowing and steering — that was supposed to lie at the heart of the TSSA’s institutional design.

This report makes a number of recommendations to address the weaknesses identified in the design of the TSSA model. These include:

- ◆ the provision of a clear and specific statutory mandate, giving priority to the protection of public safety, health and the environment
- ◆ the restructuring of the board of directors to ensure that a majority of the directors are independent of regulated economic interests
- ◆ the adoption of strong conflict of interest rules where directors or their employers have economic or policy interests affected by TSSA activities and decisions.

The report also recommends that the TSSA and similar organizations be brought under the formal accountability framework normally applicable to provincial government agencies, including *Audit Act*, *Ombudsman Act*, *Freedom of Information and Protection of Privacy Act*, and *Lobbyist Registration Act*. In addition, it recommends that application of the *Charter of Rights and Freedoms* and other statutory requirements related to justice and fairness in governmental decision-making to the TSSA and similar entities be established by statute from the outset. Prosecutions undertaken by the Authority should be recognized as private prosecutions, and arrangements for the oversight of the Authority's conduct of prosecutions by the Attorney General established.

The report concludes by questioning the advisability of further expansion of the delegated administrative authority model, even subject to the changes that it recommends. The report notes that the goal of separating administrative and policy-making functions — rowing and steering — within the model has not been achieved in the case of the Authority. Furthermore, the structure has resulted in a significant loss of accountability relative to the situation of a conventional government agency. At the same time, there are no clearly evident gains in efficiency or effectiveness.

In addition, the report points out that the delegated administrative authority model also raises a number of deeper questions that must be considered before it is expanded. The transfer of governmental functions and authority to a private entity that is not under the effective control of government is of particular concern, as it removes the exercise of governmental power from democratic control. It also notes that the transfer of public functions to the private sphere diminishes the “political space” — the range of subjects which can be affected by the decisions of the electorate within our society, and with it important avenues for the public to express policy preferences to government. This has significant implications for the future health of our democracy, which need to be considered carefully before further steps are taken down this road.

ENDNOTES

¹ The seven statutes are: *the Amusement Devices Act*; *Boilers and Pressure Vessels Act*; *Elevating Devices Act*; *Energy Act*; *Gasoline Handling Act*; *Operating Engineers Act*, *Real Estate*; and *the Upholstered and Stuffed Articles Act*.

² The Hon. N. Sterling, Minister of Consumer and Commercial Relations, to the Standing Committee on the Administration of Justice, re: Bill 54, the *Safety and Consumer Statutes Amendment Act*, June 25, 1996.

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I. INTRODUCTION

On May 5, 1997, responsibility for ensuring public safety in relation to a range of products and devices, including the boilers and elevators in the buildings in which Ontarians live and work, ferris wheels and roller coasters at amusement parks, and underground storage tanks for gasoline at the corner service station was transferred from the provincial Ministry of Consumer and Commercial Relations to a private, not-for-profit corporation called the Technical Standards and Safety Authority (TSSA).

Although members of the public rely on and use these types of devices and systems every day, the changeover passed almost unnoticed by the public or the media. The establishment of the Authority, and delegation of the Ministry's regulatory functions to it, represents one of the most significant transfers of government activities to a private organization seen in Canada to date, and may set a precedent for similar reforms in the future. Despite its importance, the initiative has been subject to no significant independent evaluation to date. This study is intended to provide such an assessment.

The TSSA's creation is a manifestation of broader trends in public policy in Canada and around the world of restructuring government functions and responsibilities, and transferring these activities to the private sector, under the model of 'new public management.' Within this model, the role of government is seen to be chief policy setter and contract manager, but with a substantially diminished role in directly providing services to the public. Rather, it is thought that service delivery can be achieved with greater efficiency through contracting-out, privatization, pursuing public-private partnerships, and relying on special operating agencies.

Under the new public management framework, Government is said to "steer" by giving policy direction, but to assign "rowing" — the actual delivery of services, to the private sector.¹ The intention is to provide better public services at lower cost, while at the same time maintaining democratic control and accountability over the content of public policy.

These concepts had their origins in the United Kingdom and New Zealand in the 1980's. Reforms began to be adopted to structurally separate government policy-making from its administration. These changes were intended to address a number of problems believed to plague the traditional delivery of public services by government. These included the blockage of needed reforms due to unnecessary controls and management structures, the lack of attention given to service delivery by senior officials, and a focus on cost and expenditure control rather than outcomes.²

As a result, government agencies began to be re-structured along the lines of private sector corporations. Substantial power and freedom was delegated to agency heads, who were made responsible to Ministers for the achievement of stated targets for performance. The organizational, administrative and staffing requirements normally applicable to traditional government departments were removed, although agencies remained part of government, and their personnel remained public servants.³

The influence of these ideas began to be felt in Canada in the early 1990s. The federal government created a number of new agencies, such as the Canadian Food Inspection Agency, structured along the lines of the British and New Zealand models. The Government of Alberta, for its part, took the concept a step further and began to move service delivery and regulatory functions out of government altogether to private not-for-profit corporations. The Government of Alberta also added a new dimension to the concept — self-management by the regulated industries — by providing that the boards of directors of the corporations consist primarily of representatives of

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these industries. Examples of activities transferred to “delegated administrative organizations” in Alberta have included public safety and environmental protection regulation of boilers, underground storage tanks for fuels, elevators and amusement devices.

The Government of Ontario carried the model further still in creating the TSSA in 1997, granting the delegated agency a wider mandate and even further autonomy from government than was the case with the Alberta transfers. The Authority was one of four “delegated administrative authorities” (DAAs) created by the Government of Ontario under the 1996 *Consumer Safety and Standards Amendment Act*.ⁱ A fifth DAA, the Electrical Safety Authority (ESA), was created through the *Energy Competition Act, 1998*, to assume the electrical safety inspection functions of Ontario Hydro. Its design was heavily influenced by the TSSA model.ⁱⁱ

The adoption of these new models for public service delivery has been highly controversial in other jurisdictions. Major questions have been raised regarding the potential loss of democratic control and accountability for the provision of public services through such transfers.⁴ The effectiveness of organizations following the model have also been challenged in the context of a number of high profile failures in the United Kingdom and New Zealand resulting, in one case, in significant loss of life.⁵

The TSSA was selected from among the five “delegated administrative authorities” in Ontario for study due to the significance of its functions for public safety and environment. The Authority is charged with the delivery of almost a pure public good,ⁱⁱⁱ ensuring the safety of devices, such as elevators in public and private buildings, which members of the public have little choice but to use in their everyday lives.

Given the significance of the Authority’s functions for the protection of public safety it is important that it be subject to an early independent review. An assessment of the Authority is also needed in light of the potential precedent that the TSSA might provide for future delegations of the protection of public goods both inside and outside of Ontario. Indeed, the Authority actively promotes itself as a model for other governments to follow in delivery of public services,⁶ and has been strongly supported as an “alternative to government regulation” by the Co-Chair of the province’s Red Tape Commission.⁷

The TSSA’s 1998/99 Annual Report claims that “TSSA has successfully demonstrated that it protects the public interest, maintains government accountability and offers a highly attractive model to other jurisdictions seeking practical solutions to their service delivery challenges.”⁸ These claims need to be examined closely. This study reviews the TSSA in terms of two key criteria: its effectiveness in the conduct of its functions; and accountability to elected officials, the courts and ultimately the public, for its performance.

Effectiveness is defined for the purposes of this report as the ability of the agency to protect the public interest by carrying out the functions assigned to it. This must be a basic criteria for consideration, as if the Authority cannot perform the roles delegated to it, public safety will be at risk. Effectiveness will also be reviewed in terms of the ability of the TSSA to provide services at lower cost, as this has been central to the rationale for the creation of such agencies around the world. However, it must be recognized that, less than three years into the Authority’s existence, it is only possible to provide a preliminary assessment of the TSSA’s performance.

The core issue for this study, therefore, is the accountability of the TSSA for its performance. An effective accountability framework is essential for a body charged with the protection of public goods for a number of reasons. Such a framework should provide for the clear delegation of responsibility and authority, the establishment of a

ⁱ The other three DAAs are: The Motor Vehicle Industry Council (www.omvic.on.ca), established January 1997; the Real Estate Council of Ontario (www.reco.on.ca), established March 1997; and the Travel Industry Council of Ontario (TICO) established June 1997.

ⁱⁱ A detailed description of the ESA is provided in Appendix I.

ⁱⁱⁱ “Public goods” are generally defined as socially important objectives, such as occupational health and safety, consumer protection, environmental quality and the conservation of natural resources, which would be threatened if left to the marketplace. See for example, House of Commons Standing Committee on Finance, *Regulations and Competitiveness* (Ottawa: Queen’s Printer, 1993), pg.1.

base of objectives and expectations, the review of performance against those objectives, and the possibility of reward or sanction on the basis of performance.⁹

These structures are needed to ensure that an agency is actually carrying out the mandate it has been assigned, and to provide for the identification and resolution of problems, ideally before they reach the stage where actual harm to the public occurs. An accountability framework is also needed to provide for the appropriate assignment of responsibility in the event that something does go wrong in the delivery of public services. This is a basic requirement in any organization, but is particularly important in terms of the ability of the electorate to evaluate the performance of its elected government.

Furthermore, where agencies are charged with the exercise of statutory authority to regulate the behaviour of individuals or enterprises, and control their ability to earn a livelihood by engaging in certain economic activities, effective accountability frameworks are essential to ensuring fairness and justice in the use of these powers.

In Canada and other democratic societies in the developed world, extensive accountability structures have emerged to ensure the effective oversight of the activities by government agencies for these reasons. In Parliamentary systems such as Canada's, Ministers are provided authority to direct the activities of government agencies, and are held responsible to the elected members of the legislature, through such mechanisms as question period, and the work of legislative committees, for the performance and behaviour of those agencies. These structures are usually supported by the work of legislative officers such as Auditors-General and Ombudsmen, to provide independent and expert evaluations of the performance of government agencies. Freedom of information legislation has been widely adopted to ensure public access to government records and openness in decision-making.

Specific legal mechanisms have also emerged to ensure that governments only act within the boundaries of the authority granted to them by elected legislatures, and to provide for fairness and justice in government decision-making within that authority. These structures are underpinned by constitutional structures such as the *Canadian Charter of Rights and Freedoms*, and include both statutory and common law rules which provide for the appeal of government decisions to the courts which may be unconstitutional, illegal, unfair or arbitrary.

The applicability of these political and legal accountability structures to entities like TSSA, to which governmental functions, including regulatory activities, have been delegated, but which are explicitly identified as not being part of government, is unclear. In fact, the potential trade-offs between accountability and efficiency are a matter of major debate around the "new public management" models of public service delivery. Doing away with apparently costly accountability mechanisms may save money in the short term, and therefore appear to increase efficiency. However, there is a risk that the loss of these safeguards will reduce efficiency and cost money in the longer term. These potential outcomes have been highlighted by the recent controversy around job creation expenditures at Human Resources Canada.¹⁰

The objectives of this study are therefore twofold:

- 1) to investigate the issues of legal and political accountability raised by the transfer of government functions related to the protection of public goods to private entities, such as the TSSA, and to recommend changes to the appropriate legislation and policies to address any gaps or needs which are identified; and
- 2) to assess the effectiveness of the TSSA model in the delivery of public safety protection services, and make recommendations regarding the future application of the model by Canadian governments.

The study is structured into eight chapters, including this introduction. Chapter two briefly outlines the evolution of the “new public management” concepts of alternative government service delivery from their origins in the United Kingdom and New Zealand, to Alberta and Canadian federal government, and ultimately the TSSA and other “delegated administrative authorities” in Ontario. Chapter three provides an overview of the TSSA’s structure and functions.

Chapter four examines the TSSA’s institutional design, with particular focus on its mandate, and “representative” board structure. Chapter five looks at the issues of political accountability raised by the TSSA, particularly with respect to status of the structures normally applicable to provincial agencies, such as the principle of ministerial responsibility to the Legislature, oversight by legislative officers, and the requirements of statutes dealing with administrative procedure, environmental impacts, and minority language services. Chapter six examines questions of legal accountability, particularly the applicability of the *Canadian Charter of Rights and Freedoms* to both the policy decisions and behaviour of the Authority, the status of statutory and common law rules regarding fairness in decision-making, the conduct of prosecutions, and liability.

Chapter seven provides a review of the performance of TSSA to date. Although necessarily preliminary at this stage, this includes examinations of the substantive performance of the Authority with respect to public safety, and of the policy decisions that it has made to date. A discussion of Bill 42, the proposed *Technical Safety and Standards Act* is also provided. The report’s conclusions and recommendations are presented in Chapter eight.

ENDNOTES

¹ See generally D.Osborne and T.Gabler *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Plume Books,1993); M.Charih, and A. Daniels, eds., *New Public Management and Public Administration in Canada* (Toronto: Institute of Public Administration of Canada, 1997).

² See, for example, A.Flynn, A.Grey and W.Jenkins, “Taking the Next Steps: The Changing Management of Government,” *Parliamentary Affairs*, Vol.43, April 1990, pg.162.

³ See, for example, R.Mountfield, “Organization Reform within Government: Accountability and Policy Management,” *Public Administration and Development*, Vol.17, 1997, pg.72.

⁴ D.Woodhouse, “Ministerial Responsibility: Something Old, Something New,” *Public Law* Summer 1997), p.262-282.

⁵ R.Gregory, “Political Responsibility for Bureaucratic Incompetence: Tragedy at Cave Creek,” *Public Administration*, Vol.76, Autumn 1998, pp.522-523.

⁶ TSSA, *98/99 Annual Report*, pg.2

⁷ Frank Sheehan, Co-Chair, Red Tape Commission, remarks to TSSA Annual Meeting, September 15, 1999. The Commission is a body, originally consisting of government M.P.P.’s mandated by the cabinet to review regulations in Ontario.

⁸ TSSA, *98/99 Annual Report*, pg.2

⁹ This structure is drawn from *A Study of Management and Accountability in the Government of Ontario* (Prince Waterhouse Associates/The Canada Consulting Group Inc., 1985), pg.10.

¹⁰ See Internal Audit Bureau, *Final Report: Program Integrity/Grants and Contributions* (Ottawa: Human Resources Development Canada, January 2000).

II. THE TSSA IN A COMPARATIVE CONTEXT

1. Introduction

The TSSA is not an entirely unique entity. In Canada, program delivery has been delegated through statute to private organizations in the past. The Ontario New Home Warranty Program, for example, which has been described as a precursor to the TSSA model, is administered by a private, non-profit, non-share capital corporation, under the 1983 *Ontario New Home Warranties Plan Act*.¹ The majority of the corporation's directors are representatives of the Ontario Home Builder's Association.¹ Several professions, such as medicine and law, have been provided with the statutory authority to regulate the professional conduct of their members.

In the 1980's governments in a number of countries, lead by the United Kingdom and New Zealand, began to undertake wide-scale restructurings of their public services. A central feature of these changes was the reorganization of government agencies along the lines of private corporations, usually with chief executive officers hired entirely for the purpose of implementing government policy.

Beginning in the early 1990's, Canadian governments began to explore similar restructuring projects, and in some cases began to take the process a step further than the strategy pursued in the United Kingdom and New Zealand. These initiatives were led by the Government of Alberta, which began to transfer functions out of government altogether, to private, not-for-profit corporations called "delegated administrative organizations" (DROs) through the 1994 *Government Organization Act*. The Government of Alberta also added a new dimension to the concept — self-management by the regulated industries — by providing that the boards of directors of the corporations consist primarily of representatives of these industries. Among the most prominent of the transfers to delegated administrative organizations under taken by the Alberta Government have been the public safety functions of the Ministry of Labour related to petroleum storage tanks, boilers, elevating devices and amusement rides.

The Canadian federal government has also restructured certain functions, such as food safety inspection in a manner similar to the corporate model adopted in the United Kingdom and New Zealand. It has also followed the Alberta model of transferring government functions to private not-for profit corporation, with an industry-dominated board of directors, most notably with respect to the air navigation system. The TSSA, as outlined in the following chapter, takes these models a step further, in terms of the level of autonomy from government that it has been provided, and the scope of its mandate.

2. The United Kingdom and New Zealand

A central feature of the United Kingdom and New Zealand government reforms of the 1980s and early 1990's has been the wide scale restructuring of the public service to separate policy-making and administration, with the transfer of 'administrative' functions to various special purpose agencies, structured along the lines of private sector corporations.

i) United Kingdom — Executive Agencies

In Britain these efforts have focussed on the creation of "executive agencies." These bodies are charged with responsibility for administration and implementation of public policy, which is intended to continue to be set by Ministers. The executive agencies — or "Next Steps" agencies as they are often called in the UK — represent

¹ A detailed description of the program is provided in Appendix I.

Chapter II: The TSAA in a Comparative Context

New Zealand – “Corporatization”

an important effort to structurally separate government policy formulation from its administration. The intention of these reforms was to address a number of problems believed to plague public services. These included concerns that:

- ◆ the civil service was too large to manage as a single organization;
- ◆ ministerial overload diverted attention from management matters;
- ◆ current reforms were being frustrated at middle-management levels by unnecessary controls and interventions;
- ◆ senior levels were too concerned with policy work at the expense of an interest in service delivery; and
- ◆ current emphases were mainly on expenditure and resource control rather than on results.²

The agency model, which had its origins in the Prime Minister’s efficiency Unit, was intended to address these concerns by granting substantial power and freedom to agency heads and charging them with responsibility for implementing a discrete business line. The essence of these managerialist reforms was “delegation to a Chief Executive of responsibility to achieve stated, usually quantified, targets of performance, with delegations of powers to match, in such areas as organization, recruitment, pay and grading and so on.”³

However, unlike the TSSA, the staff of the executive agencies remained public servants, and the minister was still required to account for them before Parliament. These organizations, with their specified mandates, were intended to put public administration on a more business-like footing. Executive agencies were established to carry out such functions as the operation of Prison Services⁴ and Child Support Services.⁵

Concerns have been raised in the United Kingdom regarding this model, in that Ministers are likely to become involved with matters that may be notionally designated as administrative. When public attention is drawn to operational problems within a ministry, ministers are expected to take action. In this regard it has been suggested that “being able to put things right requires at least a reserve of executive dominance.” However, since the scope for ministerial action is circumscribed through various framework agreements or contracts between ministers and senior civil servants, “ministers can only tell MPs or interviewers that they have *asked* for the necessary operational changes and that they *hope* some notice will be taken,” a position which it has been suggested will not suffice politically.⁶

More broadly, concerns have been raised regarding the degree to which Ministers have deflected responsibility for maladministration to agency heads, even when the problems arose from Ministers’ failures to ensure that agencies were properly established, staffed, and resourced.⁷

Freedom of Information legislation currently before the British House of Commons would cover “public authorities,” including executive agencies.⁸

ii) *New Zealand — “Corporatization”*

In New Zealand, “Corporatization” of various agencies was achieved through the *State-Owned Enterprises Act* of 1986. The Act incorporated many State-owned trading enterprises under the *Companies Act*, and directed that these business be run as far as possible on business lines. Section 4(1) provided that the “principal objective” of every state-owned Enterprise (SOE) “shall be to operate as a successful business, and to this end to be”:

- (a) As profitable and efficient as comparable businesses that are not owned by the Crown; and
- (b) A good employer; and
- (c) An organization that exhibits a sense of social responsibility by having regard to the interest of the community in which it operates, and by endeavouring to accommodate or encourage these when able to do so.

Pursuant to the Act, a Board of Directors was appointed for each SOE, which is “accountable to two shareholding Ministers for the commercial performance of the SOE. In turn, those Ministers are “responsible” to the House of Representatives for their monitoring of SOE performance and for holding SOE management to account for that performance. SOE’s fall within the purview of Parliamentary select committees, and are subject to New Zealand’s freedom of information legislation, Ombudsman scrutiny and audit by the Auditor General.⁹

Agencies were to be headed by chief executive officers, hired entirely for the purpose of implementing government policy, while policy was left to ministers and their policy advisors. Ministers are responsible for setting out operational outcomes, and chief executive officers enter into contract with their respective ministers for those results. In order to enable them to achieve the agreed to outcomes, chief executives are granted authority over resources.¹⁰ Aucoin notes that the approach assumes the ability by ministers to be quite specific regarding which outcomes they desire, and the overall level of resources needed to achieve them. Accordingly, “ministerial intervention in the management and delivery of public services is meant to be restricted by these framework agreements.”¹¹

As with the United Kingdom executive agency model, concerns have been raised regarding how accountability is secured within this structure. In particular, under the terms of the contractual relationships between ministers and their chief executives, based on the “policy/administration” dichotomy, it has been argued that Ministers cannot not be held responsible for the failure of their chief executives and their staff to ensure that systems are in place to guarantee that programs and projects are carried out properly. In fact, Ministers have evaded responsibility for major failures, including one resulting in significant loss of life, on this basis.¹²

THE CAVE CREEK TRAGEDY

In April 1995 a wilderness area viewing platform at Cave Creek constructed by New Zealand’s Department of Conservation (DOC), a “corporatized” government department, collapsed, killing 14 people, leaving one a paraplegic, and injuring another three. The tragedy was unprecedented in New Zealand public administration. Its outcome demonstrated the difficulties in securing meaningful accountability within restructured agencies in cases of failure.

The cause of this catastrophic failure was found to be the department’s failure to conform with sound construction practices. However, the question of who should be held responsible within the department was never answered; neither the minister nor the chief executive officer resigned. An inquiry found that in spite of its negligence, DOC could not be criminally prosecuted given that it was a crown organization. Nor were the four people who built the structure found to have been negligent to the extent that they would be liable to prosecution.

As for the Minister, under the terms of the contractual relationship between the minister and his/her chief executive, based on a reassertion of the old “policy/administration” dichotomy, it was argued that he could not be held responsible for the failure of DOC’s chief executive and his staff to ensure that systems were in place to guarantee that the platform was correctly and safely built.

Alberta

Delegated Administrative
Organizations

3. Alberta

i) Delegated Administrative Organizations

The government of Alberta was the first in Canada to begin to pursue the types of public sector reforms adopted in the United Kingdom and New Zealand. However, the Alberta government has carried the model a step further than those jurisdictions. Rather than restructuring government agencies along corporate lines, as with “executive agencies” in Britain, and “corporatized” departments in New Zealand, the province instead chose to transfer ‘administrative’ functions out of government altogether, to private, not-for-profit corporations. The Government of Alberta also added a new dimension to the concept — self-management by the regulated industries — by providing that the boards of directors of the new organizations be consist primarily of representatives of these industries.

In 1994, the Government of Alberta embarked on its so-called “third option” of public administration. This was described as a method for steering a middle path in the delivery of public goods. In its discussion document on the establishment of delegated administrative organizations (DAOs) the government pointed out that “[t]here are, essentially, two options for delivering services to Albertans. Services can be delivered by government...or by business.”¹³ DAOs promised a way out of this simple choice since they would permit government “to retain a significant role in the ongoing provision of essential services, but the service itself would be provided and administered by an external, self-funded and not-for-profit organization operated by the users of the service.”¹⁴ DAOs are a “user-pay” form of organization, an approach that sees services in terms of customer-service rather than citizenship.

The theory behind DAOs squares with the new public management model’s enthusiasm for separating policy from administration. In this regard, the government pointed out that various DAOs would be established to “*administer* selected government programs and services. Governments would continue to make and monitor policy, legislation and standards.”¹⁵

Eventually the Alberta government established a number of DAOs including the Alberta Boilers Safety Association, the Alberta Elevating Devices and Amusement Rides Safety Association, the Alberta Propane Vehicle Administrative Organization, and the Petroleum Tank Management Association of Alberta. The DAOs were initially set up in association with the Department of Labour, though with the Alberta Government’s major restructuring effort in 1999, the delegating department has changed to the Department of Municipal Affairs.

The new organizations are part of a public-private partnership arrangement. The DAOs are not-for-profit organizations, registered under the *Societies Act* and operate at arms-length from the department.

Legislative Framework: The Government Organization Act, 1994

Authority to establish the DAOs is contained within the *Government Organization Act (GOA)*.¹⁶ The Act broadly enables ministers to “delegate any power, duty or function conferred or imposed on him by this Act or any other Act or regulation to any person”,¹⁷ where a “delegated person” refers to “an individual, corporation or municipality, other than a provincial agency.”¹⁸ Delegations are made by the Lieutenant Governor through regulation. Schedule 10 pertains to labour statutes delegation, under which the DAOs initially fell. The Act notes that once a minister delegates authorities “a reference in an enactment to the Minister or an official with respect to delegated powers, duties or functions is to be read as if it were a reference to the delegated person.”¹⁹

When authority is delegated under the schedule a clear break is established between the minister and the recipient of the delegated authority. The break with the elected official is further clarified in the Act with regard to the collection of funds. *The Financial Administration Act* does not apply if a delegated person collects money. That is, the money collected falls outside of the consolidated revenue fund and explicitly “belongs to the delegated person”²⁰ and is not on account to the Treasurer of Alberta.

Finally, the Act is quite clear that delegated persons are not crown agents, and notes “[w]ith respect to a delegation, a delegated person and the delegated person’s employee, agent, director or officer or member of a committee are not agents of the crown.”²¹

The GOA allows for ministerial oversight, and makes provision for audit and inspection by the minister or his/her designate, and requires that the delegated person submit an annual report to the minister regarding that person’s activities as set out in the Act. This report is laid before the Legislature.²²

The Act broadly enables a delegated person to make rules concerning: the carrying out of a delegated power; calling meetings; employment matters, including appointments, removals, pay and benefits, powers and duties; further delegations; and committees of various types. Rules made under the Act come into force with the approval of the Minister.²³

The GOA allows for the creation of regulations for the purpose of delegating ministerial authority to delegated persons. Each DAO has its own regulation that set out broad responsibilities and conditions of delegation.

The GOA was strongly opposed by both opposition parties in the Alberta Legislature at the time of its passage. The opposition argued that the legislation would erode the accountability of the government to the Legislature, and marginalize the Legislature as a policy and decision-making body.²⁴ The government’s responses to these concerns suggested that it regarded legislative oversight of government administration and decision-making as time-consuming and inefficient.²⁵

ii) The Petroleum Tank Management Association of Alberta

Overview

The Petroleum Tank Management Association of Alberta (PTMAA) was created in 1994 as a not-for-profit organization. The PTMAA grew out of early provincial efforts to address environmental and safety issues arising from storage tank leaks. Faulty system design, installation or operations can result in the release of harmful petroleum products into the environment.

Consistent with the GOA, the administrative agreement with the department notes that the relationship between the minister and the PTMAA:

“is that of an independent contractor acting at arms length...and as an accredited agency under the Act and nothing in this Agreement shall be construed as creating an agency, partnership, or employment relationship between the PTMAA and the Minister.”²⁶

Moreover the agreement is explicit in declaring that even though the association is engaged in carrying out delegated ministerial powers, it is not to be considered an employee of the province.²⁷

The PTMAA is intended to:

- ◆ register petroleum storage tanks subject to the Alberta Fire Code;
- ◆ issue upgrading directives for underground storage tanks

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- ◆ monitor the progress of individual storage tank upgrading in accordance with a schedule of completion in the Fire Code
- ◆ approve individuals to install and remove storage tanks and piping
- ◆ examine and approve plans for new storage tank installations
- ◆ maintain data of Alberta's storage tanks on the Tank Management System (TMS)
- ◆ issue data from the TMS in accordance with the Freedom of Information and Protection of Privacy Act
- ◆ provide information and advice to storage tank owners and the general public regarding options in meeting regulations.²⁸

Legal Delegation

Regulation 291/95, the *Storage Tank System Management Regulation*, sets out the delegation of authority to the Petroleum Tank Management Association of Alberta (PTMAA). Specifically, under section 2, powers and duties of the senior technical officer for fire standards, the fire commissioner, safety codes officer, and administrator under various acts including the *Alberta Fire Code* and *Safety Codes Act*, are delegate to the Association. The regulation also empowers the association to impose assessments, fees, and charges and to collect money arising from such action.²⁹

The PTMAA is an “accredited agency”ⁱⁱ as set out in the SCA. In conducting its work, the association recognizes the role of the Safety Codes Council — as established by the SCA — and the Fire Technical Council to “ (a) recommend codes, standards and regulations to the Minister; (b) promote a uniform safety standard; (c) accredit agencies, corporations and municipalities; and certify and designate Safety Code Officers; (d) conduct appeals of a technical nature as provided for in the Safety Codes Act; and (e) provide advice on request to the Minister.”³⁰

Objectives and Services

The administrative agreement with the ministry sets out the general goals of the Petroleum Tank Management Association of Alberta as

“the promotion and encouragement of safe management, maintenance or removal of petroleum storage tanks and to collaborate with and reflect the interests of industry, government, and the general public in its work”.³¹

The association has two broad operational areas: tank registration and underground tank system upgrading. The registration program allows for tracking and monitoring of tank upgrading. As of January 31, 1997 the PTMAA registry contained approximately 11, 640 aboveground and underground tanks.³²

Organization

Members of the association are appointed to one of four membership sectors: the Canadian Petroleum Institute; independent oil companies and retailers; industrial, commercial and government tank owners; and non-governmental organizations and associations with interests in the society's objectives.³³

The PTMAA has a Board of Directors made up of eleven members who are drawn from the various membership categories: five from the Canadian Petroleum Products Institute; two from independent oil companies and independent retailers; two from the industrial, commercial and government tank owners; one from non-governmental organizations; and one appointed by the minister from one of the four membership categories of the association.³⁴ The Board elects from itself a chairperson, treasurer, and secretary.³⁵

ⁱⁱ Under the *Safety Codes Act*, “On the application by a person an Administrator may by order designate the person as an accredited agency authorized to provide services pursuant to all or part of this Act [the SCA] with respect to any or all things, processes or activities to which the act applies” (26(1)).

The association is a not-for-profit organization that is funded through an initial registration fee of \$50.00 per storage tank. On an ongoing basis, the PTMAA has authority to establish an ongoing operating fee, payable by members, on the condition that “the operating fee payable for a given year will not exceed a maximum of 150% of the [PTMAA] operating budget” for carrying out its powers as set out in the regulation.

For the fiscal year ended January 31, 1998, total PTMAA revenues were \$653,907 with total expenditures of \$401,159. The primary source of revenue was tank registration fees, amounting to \$581,918, or nearly 90% of the organization’s total revenue.³⁶

Information Management/Access to Information

The *Storage Tank System Management Regulation* outlines the relationship of the association with the information it handles. While the administration of government policy is to be conducted at arms length, with the PTMAA working as an independent contractor, the government’s relationship with the information compiled by the association is much more intimate.

With regard to software and computer systems used or developed by PTMAA in the course of its business, the regulation points out that “the information on the software and systems and anything generated or capable of generation by them is owned by the Government of Alberta.”³⁷ Similarly, all records created or maintained by PTMAA in the course of performing its functions “become and remain the property of the Crown in right of Alberta.”³⁸ Moreover, the “management of the records must be under the direction of a public records officer who is an employee under the administration of the Minister.”³⁹ The administrative agreement also notes that the association will “maintain and destroy its records in accordance with the Government of Alberta disposition schedule approved by the Minister and the Government of Alberta Records Management Committee,⁴⁰ and that the Minister has full and unlimited access to PTMAA records.⁴¹

The association also enjoys considerable access to the computer systems of the departments of Labour and the Environment for the purpose of carrying out its work. The administrative agreement notes that such access “shall include full functionality including authorization to ‘read, write, modify, and delete’ data and files.”⁴²

Finally, the work of PTMAA is subject to the province’s *Freedom of Information and Protection of Privacy Act* (FOIPPA). Notably, requests for information made to the association under FOIPPA must be routed to the Freedom of Information Coordinator — a government employee appointed by the deputy minister. PTMAA is required to respond to FOIPPA requests as directed by the government’s FOI coordinator.⁴³

Appeal, Review, and Prosecution

According to the administrative agreement, there are two appeal streams for anyone affected by a PTMAA action or decision: technical, and non-technical. The agreement defines technical as “having to do with special facts, characteristics, rules, procedures, or interpretations of any of them, used in determining compliance with the regulations, codes, standards and practices for fire protection systems and equipment.”⁴⁴

For technical matters, an affected party may make appeal to the PTMAA Administrator “to provide a decision, interpretation, ruling, or order on the technical merits of the matter,” and may appeal “an order of the Administrator or of a safety codes officer to the Fire Technical Council, a sub-committee of the Safety Codes Council.”⁴⁵

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*The Alberta Boilers
Safety Association*

Under the SCA “an appeal lies from an order of the Council to the Court of Queen’s Bench only on a question of law or jurisdiction.”⁴⁶

For non-technical matters, the affected party makes a written request “that the Minister review the action or decision. At the Minister’s sole discretion, the Minister may choose to review the matter or not, and if not, the matter is denied.”⁴⁷ Ministerial decisions on non-technical matters are “final and binding on the PTMAA.”⁴⁸ The regulation notes that appeal decisions made by the Minister are final.⁴⁹

The PTMAA reports that no affected parties have ever made use of the organization’s appeal process. Association staff see the issuance of an order as the last stage of an iterative process in which they try to work with the user in achieving compliance.⁵⁰

Under the regulation, neither PTMAA nor its agents “may lay an information to prosecute any person under the Safety Codes Act, or regulations under that Act, without the consent of an Administrator in the fire discipline”,⁵¹ a sub-committee of the Safety Codes Council. This is intended to provide a check by the Ministry on the initiation of prosecutions by the Association. The Association has not conducted a prosecution to date, but states that it anticipates that a prosecution would be done through the PTMAA’s contracted private legal services.⁵² Offences under the SCA are set out in section 63 of the Act.

Activities

In fiscal year 1997, the PTMAA reports the following levels of activity in major areas of work:

Activity	Output
Tanks Registered	11,368
Reporting Information Requests (FOIPPA)	2
Tank Installers/Removers Certified	30
Upgrading Extensions Issued	184
Variance Applications Processed	17
Tank Test Methodology Approvals	1
Tank Closure Reports Received	180
Site Upgrading Reports Received	95
Tank Installation Plan Examinations	40
Report on Tank Searches from TMS	2,297

iii) The Alberta Boilers Safety Association

Overview

The Alberta Boilers Safety Association (ABSA) was created in 1995. Like the PTMAA it is a not-for profit organization established under the *Societies Act* and operates independently of the government with respect to its delegated powers.

The association emerged from the Alberta Labour Department. With the creation of the DAO, departmental staff related to boilers and pressure vessels who did not take early retirement became employees of ABSA.

Regulation of pressure vessels is an important function in Alberta, given that that province has the highest concentration in North America of pressure vessels on a per capita basis.⁵³ The association points out as well that “much of the equipment now in place is aging and is in need of inspection to ensure compliance with applicable codes and standards.”⁵⁴

Legal Delegation

The *Boilers Delegated Administration Regulation* (54/95) sets out the various powers of the association. Under section 2, ABSA is delegated the powers of an Administrator under *the Safety Codes Act* with respect to part 1 of *the Administration and Information Systems Regulation*ⁱⁱⁱ and the powers and functions of a safety codes officer under the *Pressure Welders’ Regulation*, the *Design, Construction and Installation of Boilers and Pressure Vessels Regulations*, the *Administrative and Information Systems Regulation*, and sections of the *Safety Codes Act* regarding pressure equipment.

ABSA is authorized to:

- ◆ impose and collect assessments, fees and charges on people who request or are provided with a service, including the issuance of permits, certificates, or by filing or registering designs with ABSA;
- ◆ provide advice to the minister as requested.⁵⁵

Also similar to the PTMAA, the association is an accredited agency, and thereby authorized to administer some aspects of the Safety Codes Act.

Objectives and Services

The general aim of ABSA is “to provide leadership in pressure equipment safety through professionalism and our commitment to excellence in service in cooperation with our stakeholders.”⁵⁶ As at year-end 1997, the association had responsibilities for almost 54,200 pressure vessels.

ABSA’s central functions are to:

1. Administer and deliver boiler and pressure vessel safety programs in the province of Alberta as delegated by the Province of Alberta.
2. Review, register and inspect pressure vessels constructed or imported into the province as well as review, audit and register Quality control programs for the use of these pressure components as regulated by the Safety Codes Act.
3. Provide examinations, testing, and certification of individuals as required under the Safety Codes Act of Alberta such as Safety Codes Officers, Power Engineers and Pressure Welders.⁵⁷

The association charges fees for design surveys; fitting registration; shop, initial, installation, and special inspections; engineers’ competency certifications; pressure welders’ competency certifications; as well as annual fees.⁵⁸

Organization

Membership in the association is open to individuals, corporations or unincorporated organizations. ABSA’s permanent Board of Directors is made up of five people, one representing the general public, one representing labour/educational institutions, one representing manufacturing, and two representing industry. Four of the directors are nominated via selection committee and approved and appointed by the current Board. The fifth is appointed by the minister.⁵⁹

ⁱⁱⁱ “An Administrator shall, if requested by the Minister, maintain an information system that includes the following information: (a) the registration, de-registration or recording of (i) designs and the approval of designs for new pressure equipment, (ii) obsolete or unsafe designs of pressure equipment, (iii) permitted procedures, including repairs and alterations to existing pressure equipment, (iv) inspection reports concerning the construction, installation, repair or maintenance of pressure equipment, (v) permitted welding procedures, (vi) refusals to register designs or to permit procedures, (vii) the location, ownership and inspection records of pressure equipment, and (viii) the maintenance of pressure equipment; (b) the registration of, testing for and issuance of certificates of competency to (i) power engineers, and (ii) pressure welders; (c) the registration of organizations having quality control programs and that are permitted to carry out activities related to pressure equipment under the Act; (d) recording reports of accidents and unsafe conditions involving pressure equipment and information on their investigation; (e) recording the issuance of orders related to pressure equipment; (f) recording the issuance of variances related to pressure equipment; (g) recording notices of appeals related to the carrying out of powers, duties, functions and authorizations under the *Boilers Delegated Administration Regulation*; (h) any other matter related to pressure equipment required by the Minister.”

The chairperson is elected from among board members. In addition the board is also required to elect from itself a secretary, treasurer and at least one vice-chairperson.

The Board's role is to "oversee and generally direct the affairs of the boilers Association in the name of and on behalf of the Association."⁶⁰

The association is a not-for-profit organization whose costs are funded "through fees paid by the industry and other users of ABSA's services."⁶¹ The fees are established by the Board and must be approved by the minister.

For the fiscal year ending October 31, 1997, total ABSA revenues amounted to \$7,268,251 — an increase of over \$1.4 million compared to the previous year — with total expenditures of \$5,899,919. The largest single source of revenue for the organization are annual boiler and pressure vessel registration fees, accounting for \$2,168,167, or approximately 30% of total revenues. The largest single expense for ABSA is salaries and benefits, amounting to approximately \$4.6 million or approximately 78% of total outlays.

Information Management/Access to Information

The *Boilers Delegated Administration Regulation* sets out the association's relationship with the information that it handles in carrying out its duties. Like the PTMAA, while operationally working at arm's length from the government, the government continues to have, by law, a close relationship with the information accumulated and managed by ABSA.

Concerning software and computer systems, ABSA's regulation contains precisely the same wording as PTMAA's. That is, in the conduct of its business "the information on them, and anything generated or capable of generation by them, is owned by the Government of Alberta."⁶² In addition, records created or managed by ABSA in the course of business "become and remain the property of the Crown in right of Alberta."⁶³ The management of the association's records is also required to comply with "the Public Records Regulation of Alberta...and the schedule pursuant to that Regulation that apply to the records as approved by the Public Records Committee" or any regulation that replaces that one. The by-laws also provide for governmental access of association records, and note that "the minister shall have full and unfettered access to all Boilers Association records at any time."⁶⁴

As with the PTMAA, the work of ABSA is subject to the provincial *Freedom of Information and Protection of Privacy Act*. The regulation points out that "if a request for information is made to the Boilers Association under the Freedom of Information and Protection of Privacy Act, the request must be directed to the Freedom of information Coordinator, and the Boiler's Association must respond to the request as instructed by the Coordinator."⁶⁵ The by-laws confirm the requirement to comply with FOIPPA, cooperate fully with the coordinator, and to provide information requested by the coordinator within seven days.⁶⁶

Appeal, Review, and Prosecution

Like PTMAA, ABSA also has a two-stream appeals process, one for technical matters and the second for non-technical matters. Section 1 (h) of the association's by-laws defines "technical" as matters "having to do with the special facts, characteristics, rules, procedures, or interpretations thereof, used in determining compliance with the regulations, codes, standards and practices for pressure equipment safety."

For technical appeals stemming from an action or a decision by ABSA, the affected person may "appeal to the official designated within the Association to hear appeals to provide a decision, interpretation, ruling, or order on the technical merits of the matter." Further appeal is available through the Boilers and Pressure Vessels

Technical Council, a sub-committee of the Safety Codes Council, as set out in the Safety Codes Act.

Under the SCA, appeal of a council order exists through the Court of Queen's Bench on matters of law or jurisdiction.⁶⁷

For non-technical matters, the affected party requests in writing that the minister review ABSA's action or decision. Ministerial decisions are final and binding on the Board.⁶⁸

Under the regulation, "neither the Boilers Association nor any safety codes officer employed or engaged by it may lay an information to prosecute any person under the Safety Codes Act, or regulations under the Act, without the consent of the Deputy Minister."⁶⁹ This provides a clear requirement for the approval of the Ministry before the initiation of prosecutions by the Association. Offences under the SCA are set out in section 63.

Activities

In fiscal year 1997, ABSA reports the following levels of activity in major areas of work:

Activity	Output
Total Inspections	35,324
Designs Submitted	8,389
Power Engineering Examinations	4,409
Welders/Operators Tests	1,304

4. Government of Canada

The Canadian federal government has adopted both the 'executive agency' / 'corporatization' models of Britain and New Zealand, and the Alberta practice of the delegation of governmental functions to private organizations in the past few years.

i) *Canadian Food Inspection Agency*⁷⁰

The Canadian Food Inspection Agency (CFIA) was created through the *Canadian Food Inspection Agency Act* of 1997. The Agency is the Canadian federal government's most ambitious effort to date to follow the United Kingdom 'executive agency' and New Zealand 'corporatization' models of government reorganization. The Agency is intended to consolidate all federally-mandated food inspection and animal and plant health services, currently carried out by a number of departments, including Agriculture and Agri-Food, Health, Fisheries and Oceans and Environment, in one agency.

The Act established the Agency as a departmental corporation, reporting to Parliament through the Minister of Agriculture and Agri-Food. The Act provided for the appointment of a President and Executive Vice-President by the cabinet to direct the day-to-day operations of the Agency. An advisory board for the Agency is to be appointed by the Minister. The President of the Agency is able to appoint and designate inspectors and other officers needed to administer the Acts for which the Agency is responsible.

The Agency is required to provide Parliament with a corporate business plan at least every five years. The staff of the Agency remain federal public servants, and the

Act names the Auditor-General as the auditor of the Agency. The legislation also makes it clear that the Agency remains subject to the federal *Access to Information Act*.⁷¹

The Agency's role and functions over the first two years of its existence have been highly controversial. The Agency has been severely criticized for its mixed mandate to both provide "safe food" and facilitate "market access."⁷² In fact, the Agency has been described by the Professional Institute of the Public Service of Canada as a "a failed experiment," which has abandoned its safety mandate in favour of industry promotion.⁷³ Ironically, one of the major reasons for the creation of the Agency was the concern over the conflicts of interest inherent in the regulatory and promotional roles of the Department of Agriculture and Agri-Food.⁷⁴

ii) NAV CANADA⁷⁵

NAV CANADA, incorporated in May 1995, follows the Alberta model of the transfer of a government function to a private corporation. NAV CANADA is a not-for-profit, corporation that owns and operates Canada's civil air navigation service (ANS). Responsibility for the country's ANS network and facilities was transferred to NAV CANADA on November 1, 1996. The role of NAV CANADA is to coordinate the movement of aircraft in Canadian domestic airspace and the international airspace assigned to Canadian control. NAV CANADA provides air traffic control, flight information services, weather briefings, airport advisory services, and air navigation and approach aids, and provides pilots with instructions and information through air traffic services facilities which include: area control centres; air traffic control towers; flight service stations; community aerodrome radio stations; and remote communications outlets.

NAV CANADA derives its authority under the *Civil Air Navigation Commercialization Act* (CANCA).⁷⁶ CANCA was brought into force on November 1, 1996 by an agreement between the Department of Transport and NAV Canada. The Act is administered by the Department of Transport. The Corporation referred to in the Act (NAV CANADA) is not considered an agent of the crown and the transferred employees cease to be employees of the Public Service.

The Act transferred civil air navigation services to the Corporation, which is governed by a fifteen member Board of Directors. Ten of the directors are nominated by stakeholders representing aviation users, bargaining agents and the federal government; four of the directors are independent; and the final director is the President and Chief Executive Officer. NAV CANADA also has an advisory committee, elected by associate members, whose role it is to analyze and make recommendations to the Board on any matter affecting the ANS.

Authority derived from this transfer includes the ability to charge for air navigation services on a cost recovery basis for air traffic control, flight information and other ANS services. These fees replace the former Air Transportation Tax that was abolished on November 1, 1998.

CANCA attempts, in parts, to limit the powers of the Corporation. Under sections 14 and 15, while the Corporation is empowered to make changes to civil air navigation services, it may only do so subject to the *Aeronautics Act*.⁷⁷ In addition, the Act limits the Corporation's ability to make changes to designated northern or remote services. The Governor in Council also maintains the power to give directions to the Corporation on certain matters.⁷⁸

Under the Act, the Corporation is prohibited from amending its letters patent without prior written approval of the Minister. The Corporation's ability to amend or repeal certain by-laws without the Minister's approval is restricted as well.⁷⁹ The Act also provides a right for a wide variety of persons to bring the Corporation or any of

its directors or officers to court for failure to comply with its letters patent or by-laws.⁸⁰ The scope of this section appears to extend the normal rights that would be available under corporate law. The CANCA expressly states that the *Official Languages Act* applies to the organization.⁸¹

NAV CANADA is required to report all operating irregularities to the Transportation Safety Board and to cooperate with TSB on all investigations into aviation occurrences. Transport Canada remains responsible for regulating the safety of the ANS. NAV CANADA announced the layoff of 1,000 of its total staff of 6,300 in October 1997 as part a corporate reorganization designed to increase efficiency.⁸²

5. Conclusions

The TSSA model of transferring responsibility for the administration of government programs to a special purpose body is not unique. Rather, it reflects concepts in the restructuring of government agencies first seen in Britain and New Zealand in the 1980s. The government of Alberta began to bring these models to Canada in the early 1990's, at the same time taking them a step further by transferring governmental functions to private, not-for-profit "delegated administrative organizations" rather than reorganizing government agencies along corporate lines as was done in the earlier models. The Government of Alberta also added a new dimension to the concept — self-management by the regulated industries — by providing that the boards of directors of the new organizations be consist primarily of representatives of these industries. Both the executive agency/corporatization model and the delegation model have been subsequently employed by the Government of Canada.

However, as the following chapters outline, there are a number of important differences between the TSSA and the models adopted in other jurisdictions. The Authority has been granted a higher degree of autonomy from government than the bodies established by other jurisdictions. This is particularly true with respect to law enforcement activities.

Furthermore, considerable attention has been paid to the establishment of accountability structures for the reformed and delegated agencies in other jurisdictions. Executive Agencies in the United Kingdom and 'corporatized' departments in New Zealand remained explicitly subject to direct parliamentary oversight. In New Zealand Parliamentary Officers, such as the Auditor-General and Ombudsman, continued to have jurisdiction over the restructured agencies, and they remained subject to freedom of information and protection of privacy legislation. Similar requirements were applied to the Canadian Food Inspection Agency.

In the case of Alberta, explicit provision was made for ministerial oversight, audits and inspection of the delegated administrative organizations. Any information in their possession remains property of the provincial government and subject to freedom of information and protection of privacy legislation. The one exception in this regard has been NAV CANADA, although it does not carry out any regulatory functions, and it is subject to regulatory oversight by the federal Department of Transport.

Even with these extensive formal accountability frameworks for 'executive agencies,' 'corporatized' departments and "delegated administrative organizations" serious questions have been raised in Britain, New Zealand, Alberta and at the federal level in Canada regarding the performance of these entities and their accountability to elected legislatures and the public for that performance. These questions can only be more serious in the case of the TSSA, for which, as will be discussed in the following chapters, a much weaker formal accountability framework was provided by the government than was the case with similar bodies elsewhere.

Chapter II: The TSAA in a Comparative Context

Endnotes

ENDNOTES

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- ¹⁵ *Ibid.*, pg.6.
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- ²² *Ibid.*, Schedule 10 s. 9 (1) - 10 (3)
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- ²⁵ See, for example, the comments of the Hon. Stockwell Day, Minister of Labour and Government House Leader re: Bill 41 the *Government Organization Act*, *Alberta Hansard*, October 31, 1994.
- ²⁶ *Administrative Agreement Between the Minister of Alberta Labour on Behalf of Her Majesty the Queen in Right of the Province of Alberta and the Petroleum Tank Management Association of Alberta*, 1996.
- ²⁷ *Ibid.*
- ²⁸ Petroleum Tank Management Association of Alberta, 1999 website <http://www.ptmaa.ab.ca>.
- ²⁹ *Administration and Information Systems Regulation*, s.3 (a), (b).
- ³⁰ Petroleum Tank Management Authority of Alberta, *1997 Annual Report* pg. 50.
- ³¹ *Administrative Agreement*, pg.49.
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- ³³ PTMAA by-laws, article 2.5.
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- ⁴⁴ *Ibid.*, s. 10 (4).
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- ⁴⁸ *Ibid.*, s. 10 (3).
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- ⁶⁷ *Safety Codes Act.*, S.A. c.S-0.5, 1991, s.49(1).
- ⁶⁸ ABSA by-laws, ss. 27 (ii) and 27 (3)).
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- ⁷⁸ CANCA, ss. 24 - 31.
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III. THE TECHNICAL STANDARDS AND SAFETY AUTHORITY: AN INTRODUCTION AND OVERVIEW

1. Introduction

The Technical Standards and Safety Authority (TSSA) describes itself as a corporation without share capital in the Province of Ontario, created to receive a designation for the administration of seven safety related statutes, previously administered by the Minister of Consumer and Commercial Relations, under the *Safety and Consumer Statutes Administration Act*, (SCSAA) enacted by the Legislative Assembly of Ontario in June 1996.¹

2. The Safety and Consumer Statutes Administration Act, 1996

i) Legislative History

Bill 54, *The Safety and Consumer Statutes Administration Act*, was introduced by the then Minister of Consumer and Commercial Relations, the Hon. Norm Sterling on May 16, 1996. The legislation proposed to permit the Lieutenant-Governor in Council to delegate the administration of eleven designated statutes, namely the *Amusement Devices Act*, *Boilers and Pressure Vessels Act*, *Cemeteries Act*, *Elevating Devices Act*, *Energy Act*, *Gasoline Handling Act*, *Motor Vehicles Dealers Act*, *Operating Engineers Act*, *Real Estate and Business Brokers Act*, *Travel Industry Act*, and the *Upholstered and Stuffed Articles Act*, administered by the Ministry of Consumer and Commercial Relations, to designated, non-profit corporations called “delegated administrative authorities.”²

In introducing the Bill for Second Reading, the Parliamentary Secretary to the Minister of Consumer and Commercial Relations, stated that “the job of government is to steer, not row, the boat” and that the purpose of the legislation was “to allow us to delegate to organizations outside of government the job of rowing their own boats.” The Parliamentary Secretary added that “Then we as government can concentrate our efforts on steering in the right direction. The government will safeguard the public interest by retaining full responsibility for safety standards through regulations and legislation.”³

The Bill was opposed by both opposition parties, who were critical of the move to self-regulation which they regarded as implicit in the structure of the proposed administrative authorities, whose boards of directors would be dominated by representatives of the industries which they were to oversee. Major concerns were also expressed regarding the loss of government accountability to the Legislature and the public for the protection of public safety and consumer interests which would occur as a result of the transfer of these functions to private entities.⁴

The Bill was referred to the Legislature’s Standing Committee on the Administration of Justice, and subject to only two days of public hearings and clause by clause review by the Committee. The strongest opposition to the legislation was from the Ontario Public Service Employees Union, which raised concerns over both the conflicts of interest within the industry self-management systems which would be established through the Bill, and the loss of public sector employment as a result of the transfer of the Ministry’s functions to private agencies.⁵ Consumer groups were split in their opinions of the legislation, with the Automobile Protection Association opposing the legislation’s self-management framework for industry,⁶ while the Consumers’ Council of Canada was generally supportive.⁷ The Commercial Registration Appeal Tribunal, which hears appeals under 20 different statutes including the real estate,

motor vehicle dealers and travel industry legislation proposed to be delegated through Bill 54, raised concerns over the status and procedure for appeals under the new structure.⁸ Industry witnesses appearing before the Committee were generally supportive of the legislation.⁹

In the course of the Committee's study of the Bill, opposition members noted that the government currently collected more revenues in licence and other fees under the legislation covered by the Bill, than it spent on the administration of these Acts by the Ministry of Consumer and Commercial Relations. This meant that the proposed delegations would result in a net loss of revenue for the government.¹⁰

Bill 54 was reported out of Committee without significant amendments, and received Third Reading and Royal Assent on June 27, 1996.

ii) Key Provisions

MCCR/Administrative Authority Agreements

The *Safety and Consumer Statutes Administration Act* requires the establishment of an Administrative Agreement between the Minister of Consumer and Commercial Relations and an administrative authority before the delegation of the administration of designated legislation can be made.¹¹ The Agreement is required to specify:

- ★ the part of the administration of the designated legislation which is delegated to the Authority;
- ★ the composition of its Board of Directors;
- ★ financial terms of the delegation including licence fees, royalties, reimbursement for transfer of assets and payment to the Crown;
- ★ the provision of resources to the Authority to carry out its duties;
- ★ that the Authority comply with the principle of "maintaining a fair, safe and informed marketplace;" and
- ★ liability and the retention of insurance for the authority in carrying out its duties.¹²

A designated Administrative Authority is required to carry out the administration of delegated legislation in accordance with the Act, the legislation whose administration is delegated to the Authority, and administrative agreements.¹³ The Minister maintains the authority upon notice, to amend or insert a term in the administrative agreement in relation to the administration of the designated legislation or if the change is in the public interest.¹⁴

Administrative Authorities — Boards of Directors

The Minister is permitted to appoint members to the board of an Administrative Authority so long as the Minister's appointees do not constitute a majority of the board.¹⁵ The Minister's appointees may include "representatives" of consumer groups, business, government organizations or other interests.¹⁶ The composition of the board is otherwise left to be articulated through the MCCR/Authority Administrative Agreements.

The duties of the Board in relation to the Minister include: suggesting amendments to any Acts or regulations it considers would contribute to the purpose of either the SCSAA or designated legislation; informing and advising the Minister of urgent matters likely to require action by the administrative authority or Minister to ensure the administration of delegated legislation is carried out; and advising or reporting to the Minister on matters the Minister may refer to the Board.¹⁷ The Board is also re-

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The MCCR/TSSA Administrative Agreement

quired to report to the Minister annually on its activities and financial affairs in a form satisfactory to the Minister.¹⁸ The annual report is to be submitted to the Lieutenant-Governor in Council and tabled before the Assembly either immediately or at its next session by the Minister.¹⁹

Status of Administrative Authority Staff

An Authority may employ persons to carry out any power or duty of the authority relating to the administration of legislation delegated to the Authority, including the power to appoint persons under the delegate legislation.²⁰ A consequential amendment to the *Ministry of Consumer and Commercial Relations Act* permits the delegation of the Minister's duties to an employee of an administrative authority.²¹ However, the Act states that employees of a designated administrative authority are not Crown employees or agents, and are not to hold themselves out as such.²²

Financial Provisions and Liability

The Act also states that money collected by an administrative authority in carrying out its functions is not public money within the meaning of the *Financial Administration Act*, and may be used by the authority to carry out activities in accordance with its objects or any other purpose reasonably related to its objects.²³ The Authority may, through its by-laws, require that all persons who, in order to carry out an activity governed by the legislation, need to obtain a licence, permit, certificate or other authorization, become members of the administrative authority on the terms it specifies.²⁴ The Act provides that the Crown is not liable for acts or omissions of administrative authority employees²⁵ and, subject to the administrative agreement, the Authority is required to indemnify the Crown for damages and costs incurred as a result of acts or omissions of either the Authority or its employees and agents.²⁶

Revocation of Delegation

The Lieutenant-Governor in Council maintains the authority, upon a notice requirement, to revoke designations if the administrative authority has failed to comply with the Act, the designated legislation or the administrative agreement.²⁷ The administrative authority is, however, given an opportunity to remedy a failure to comply²⁸. No revocation can be issued if a failure has been remedied within the time frame specified by the Minister,²⁹ although this limitation does not apply where the delegation is revoked "in the public interest."³⁰ A designated administrative authority may also request that its designation be revoked by the cabinet.

Penalties

The SCSAA provides for penalties of up to \$100,000 per day in the event that a designated administrative authority contravenes the Act, delegated legislation, administrative agreement or regulations made under the Act or delegated legislation.³¹ Directors or officers of designated administrative authorities who knowingly cause, authorize, permit or participate in the commission by an authority of such an offence, or who fail to take reasonable care to prevent the commission of an offence may be subject to fines of up to \$25,000 per day.³²

3. The MCCR/TSSA Administrative Agreement

The Technical Standards and Safety Authority received its Letters Patent as a not-for-profit corporation under the *Corporations Act* in August 1996, and an Administrative Agreement was signed between the then Minister of Consumer and Commercial Relations, the Hon. David Tsubouchi and the Authority on January 13, 1997. On May 5, 1997, the Authority assumed responsibility for the administration of the

*Amusement Devices Act, Boilers and Pressure Vessels Act, Elevating Devices Act, Gasoline Handling Act, Operating Engineers Act, and the Upholstered and Stuffed Articles Act.*ⁱ

i) TSSA Jurisdiction

The Agreement states that the TSSA is to be recommended by the Minister to the Lieutenant-Governor in Council to be the sole Administrative Authority, as defined in the SCSAA, responsible for the safety related Acts.³³ The parties acknowledge that the TSSA becomes responsible for the administration of all provisions in the Act(s), except those exempted, and the TSSA agrees to accept this responsibility.

After its designation, the TSSA becomes the authority with jurisdiction for the purpose of administering the Acts and for the purpose of recognition by other jurisdictions and standards organizations.³⁴ As a consequence of this jurisdiction, the Authority is responsible for appointing representatives to cross jurisdictional and standards organizations. While the Authority is authorized to make the representations and communications it deems to be appropriate for these purposes, this is subject to section 10 of the SCSAA, which states that employees of the Authority and the Authority itself are not Crown agents and cannot present themselves as such.

ii) Responsibilities of the Minister of Consumer and Commercial Relations

The Minister's role is sub-divided into three responsibilities. First, the Minister is expected to make reasonable efforts to consult with the Authority on relevant proposed legislation or policy, and to ensure, or to assist in ensuring, that the Authority receives any additional authority it may need to carry out its responsibilities.³⁵ Secondly, the Minister agrees to support recommendations of the Authority for legislative or regulatory change, if the Minister agrees with the recommendation.³⁶ Finally, the Minister is required, where he or she deems it to be appropriate, to: make amendments to the Act(s) and regulations; establish SCSAA regulations; review the business plan, annual report and audited financial statements of the Authority as well as the activities of the Authority in relation to administration of the Act; conduct policy, legislative and regulatory reviews; consult with the Authority on communication strategies; and conduct intergovernmental relations and negotiate intergovernmental agreements, in consultation with the Authority.³⁷

iii) Responsibilities of the TSSA

The responsibilities of the Authority are not described in as much detail. The Authority is required to carry out its delegation in accordance with the Agreement, all relevant legislation and the principle of ensuring a "fair, safe and informed marketplace that supports a competitive economy."³⁸ The Authority is also required to make and maintain all statutory appointments required by the Acts, and to carry out the Agreement.³⁹

The Authority is required to provide the Minister with all by-laws and amendments addressing the qualifications, terms and conditions of registration or membership and the conduct of persons required to be registered under the Act(s).⁴⁰ The Authority is also required to provide the Minister with a Business Plan within 90 days of its designation under the SCSAA and an annual report within 90 days of the end of each fiscal year.⁴¹

iv) French Language Services

The Business Plan is required to include an element addressing how French language services will be provided, with an analysis of the results of these efforts in the annual report.⁴²

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and Overview**

TSSA Jurisdiction

*Responsibilities of the
Minister of Consumer and
Commercial Relations*

Responsibilities of the TSSA

French Language Services

ⁱ With respect to the other delegated legislation, the administration of the *Travel Industry Act* was delegated to the Travel Industry Council of Ontario (TICO) in June 1997; the *Real Estate and Business Brokers Act* to the Real Estate Council of Ontario (RECO) in May 1997; and the *Motor Vehicle Dealers Act* to the Ontario Motor Vehicle Council (OMVIC) in April 1997.

Chapter III: The Technical Standards and Safety Authority: An Introduction and Overview

Complaints

Responsibilities of the TSSA Board of Directors

TSSA Staff/Board Relationship

Sale/Transfer of MCCR Property to TSSA

Fines, Revenues and Fees

Records and Access to Information

v) *Complaints*

The Business Plan must also include a process for dealing with complaints related to the delegated administration. Again, the annual report must address the results of the complaints process.⁴³

vi) *Responsibilities of the TSSA Board of Directors*

The Agreement sets out several obligations and requirements with respect to the Board. The Authority is required to set out the selection process and term of office of its appointees in its by-laws, including provision for reasonable “representation” of the industries governed by the Act.⁴⁴ The Minister is required to review the by-laws and must give the Authority authorization to change the composition and selection process.⁴⁵ The Board must also provide the Minister with its conflict of interest by-laws,⁴⁶ although these are not subject to ministerial approval. The Agreement reiterates that the Board shall include members appointed by the Minister under the SCSAA.⁴⁷ It also states that, unless another arrangement is made, the ministerially appointed Board members should be paid on an equivalent basis to all other members of the Board.⁴⁸

The Agreement requires that the Annual General Meeting, where the Board presents its annual report, must be open to the public and the Board is required to make reasonable efforts to inform the public of this meeting.⁴⁹

vii) *TSSA Staff/Board Relationship*

The Agreement requires that the Authority ensure the positions and functions of the Director or Chief Officer under the delegated legislation are exercised by an appointee of the Authority and not by a Board member or the Board itself.⁵⁰ The positions of chair and Chief Executive Officer (CEO) are to be separate⁵¹ and the Authority acknowledges that the Director or Chief Officer under the delegated legislation must be able to exercise his or her statutory duties independently of any interference by the Board.⁵²

viii) *Sale/Transfer of MCCR Property to TSSA*

The Agreement provides for the sale by the Minister to the Administrative Authority of intellectual property, furniture, equipment and supplies, and information, data, and records set out in Schedules attached to the Agreement.⁵³ Provision is also made regarding the transfer of human resources between the Ministry and Authority.⁵⁴

ix) *Fines, Revenues and Fees*

Through the Agreement, the TSSA gives its assurance that it will have adequate resources to fulfil its obligations under the Agreement, the Act(s) and the SCSAA.⁵⁵ The Agreement also makes it clear that any fines imposed by a Court cannot be collected or retained as TSSA revenue⁵⁶. The Authority is required to develop fees, administrative penalties, costs or other charges in accordance with a process and criteria approved by the Minister, to be set out in Schedule “I”,⁵⁷ although the Minister does not have direct approval authority over the fee levels set by the TSSA. The Authority is also required to pay to the Minister amounts as set out in Schedule “J” for services provided by the government such as regulatory and policy advice.⁵⁸

x) *Records and Access to Information*

All records of the Authority are to be its property, including the former records provided by the Minister, once the Authority takes custody of them. The Authority is required to develop an access and privacy code respecting access to and protection of information, including effective procedural remedies. Once approved by the Minister, the code is to be set out as a Schedule to the Agreement. Until such a code is adopted,

the Authority is expected to protect privacy and provide access to information in accordance with the principles of the *Freedom of Information and Protection of Privacy Act*.⁵⁹ The Authority's code was finalized in February 1998.

xi) *Liability, Litigation and Insurance*

The Agreement provides for the transfer of litigation in relation to the Acts in which the parties are involved.⁶⁰ There also are provisions for the wind-up or termination of the Authority's administration,⁶¹ and releasing the Crown from any demands or losses which are attributable to anything done or omitted by the Authority.⁶²

The Authority is required to protect itself from all potential claims by maintaining, at a minimum, comprehensive general liability insurance acceptable to the Minister and subject to limits of not less than \$10 million inclusive per occurrence. The insurance must include the Crown as represented by the Minister as an additional insured, as well as a cross liability or endorsement clause.⁶³

xii) *Amendments to the Agreement*

The Agreement between the Ministry and the Authority is to be a public document.⁶⁴ The process for amending the Agreement simply requires that any change be in writing, signed and dated by both parties and attached to the Agreement. The parties agree to attempt to accommodate the reasonable requests of each other. The parties are required to amend the Agreement to ensure it complies with any changes to any Acts or the SCSAA. The Agreement also states that the parties will attempt to negotiate any new terms, taking the TSSA's resources into consideration, before the Minister makes any unilateral amendments pursuant to its authority under s.4(3) of the SCSAA. This subparagraph also states the Minister will give the Authority a reasonable time to comply with any such changes.⁶⁵

4. *The Letters Patent and By-Laws of the Authority*

i) *Objects of the Corporation*

The August 1996 Letters Patent of the Technical Standards and Safety Authority,⁶⁶ establishing the Authority as a not-for-profit corporation under the *Corporations Act*, state the objects of the TSSA as including the following:

- (A) to promote and undertake activities which enhance public safety, including training, certification licensing, registration, audit, quality assurance, inspection, investigation enforcement and other public safety services;
- (B) to act in any capacity under all legislation and regulations designated and delegated to the Corporation under the *Safety and Consumer Statutes Administration Act*, and any other legislation or regulation under which responsibilities are delegated to the corporation;
- (C) to inform, educate and work with industry government and the public;
- (D) to promote and undertake activities that enhance the competitiveness of the Ontario and Canadian economies;
- (E) to promote and undertake activities which encourage the harmonization of technical safety standards and compliance practices; and
- (F) to encourage industry to responsibly enhance safety.

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Amendments to the Agreement

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Objects of the Corporation

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Board Mandate

Board Composition

*TSSA Structure and
Functions*

*Boilers and Pressure
Vessels Division*

*Elevating and Amusement
Devices Division*

Fuels Safety Division

ii) Board Mandate

The Authority's By-Law No.1 states "the board shall manage and administer the affairs of the TSSA, and may perform or direct the performance of all acts as may be necessary or of advantage to the attainment of the objects and proper operation of TSSA."⁶⁷

iii) Board Composition

By-Law No.4 states that the board of directors of the Authority must include: one person reflective of the amusement devices sector, two persons reflective of the boilers and pressure vessels sector, two persons reflective of the elevating devices sector, one person reflective of the natural gas sector, one person reflective of the operating engineers sector, one person reflective of the petroleum sector, one person reflective of the propane sector, and one person reflective of the upholstered and stuffed articles sector.⁶⁸ One director is to be not reflective of any of the sectors regulated by the TSSA.⁶⁹

In practice, elected members to the Board are nominated by the its Governance and Nomination Committee. The Committee is obliged to ask the Industry Advisory Councils (see below) for nominations, they are not obligated to forward the nominations or prevented from making nominations if none are forthcoming.⁷⁰

5. TSSA Structure and Functions

The staff of MCCR Technical Standards Division (223 persons)⁷¹ was transferred to TSSA on May 5, 1997. John Walter, the Assistant Deputy Minister of the Division became the Authority's President and Chief Executive Officer. The Authority's current budget is approximately \$25 million/year.⁷²

The Authority is divided into four divisions: Boilers and Pressure Vessels Safety; Elevators and Amusement Devices Safety; Fuels Safety; and Corporate Services. Each division is headed by a Vice-President, who is also designated as a Director for the purposes of the legislation relevant to each division.

i) Boilers and Pressure Vessels Division

The boilers and pressure vessels division is responsible for ensuring that pressure retaining equipment such as boilers, air conditioning systems and air compressors are safely designed, manufactured, installed, operated and maintained under the *Boilers and Pressure Vessels Act* and *Operating Engineers Act*. Under an agreement with the Atomic Energy Control Board divisional staff registers designs for pressure equipment and conducts inspections of Ontario's nuclear power generating facilities and research facilities.⁷³

ii) Elevating and Amusement Devices Division

The Elevating and Amusement Devices Division, regulates over 39,000 elevators, escalators, dumbwaiters, moving walks, lifts for people with disabilities, ski lifts and other lifts under *Elevating Devices Act*. Approximately 2000 amusement rides, water slides and go-karts are regulated under the *Amusement Devices Act*. The Division also administers and enforces the *Upholstered and Stuffed Articles Act*, which requires that every upholstered and stuffed article sold in the province is labelled with a standardized tag and contains only clean, new filling.⁷⁴

iii) Fuels Safety Division

The Fuels Safety Division regulates all fuel users and utilities, transport trucks and pipelines, and licences fuel distribution systems, bulk transporters and retail

outlets. Trades people such as propane and gas fitters are certified by the TSSA and fuels contractors must be registered. The Division administers two regulations under the *Gasoline Handling Act* and six regulations under the *Energy Act*. Under these acts and regulations, Division staff approve site plans for fuel outlets, revise technical safety codes and evaluate requests for deviations from technical codes. Divisional staff inspect new facilities such as gasoline stations prior to opening for business, and conduct audit inspections of operating facilities, tanker trucks and contractors.⁷⁵

iv) Corporate Services Division

The Corporate Services Division develops training and certification standards and administers processes for the examination of tradespersons for competence. The Division also administers the Authority's 'Risk Management' services.⁷⁶

v) Advisory Councils

Eight Industry Advisory Councils, representing the amusement devices, boilers and pressure vessels, elevating devices, natural gas, operating engineers, petroleum, propane and stuffed and upholstered articles sectors have been established. The Councils are described as voluntary industry-specific bodies, chaired by industry representatives, that provide advice to TSSA on a range of safety policy matters, provide feed back from and facilitate communications with their respective industries.⁷⁷ The other major function of the Councils is to nominate the sectoral representatives to the Authority's Board of Directors.⁷⁸

There is also a Consumer Advisory Panel that has a mandate to provide advice from the perspective of consumers and purchasers of products regulated by TSSA or affected by the safety of industries regulated by the Authority. In addition, the panel has responsibility for oversight of the TSSA's complaint handling process.⁷⁹

6. Memoranda of Agreement with Provincial Government Agencies

In addition to the MCCR/TSSA Administrative Agreement, the Authority has entered into a Memorandum of Understanding with the Office of the Fire Marshal,⁸⁰ regarding the roles and responsibilities of the Authority in relation to the Office. A similar Memorandum is under development with the Ministry of Labour,⁸¹ and the Authority has assumed responsibility for the MCCR component of an October 1996 Agreement with Ministry of the Environment regarding the Inspection of Stage 1 Vapour Recovery Equipment in relation to gasoline vapours in bulk transfers.⁸²

Notably, the Memorandum of Agreement with the Office of the Fire Marshal, and the draft Memorandum with the Ministry of Labour state that while both agencies may respond to an incident, the scene and exhibits collected during a joint investigation are to remain under the control and authority of the Fire Marshal's Office⁸³ or the Ministry.⁸⁴ The Draft TSSA/MOL Agreement also states that "TSSA is a law enforcement entity for the purposes of freedom of information legislation and search warrant requirements."⁸⁵

7. Conclusion

The TSSA is a not for profit corporation, delegated responsibility for the administration of seven safety related statutes, previously administered by the Ontario Ministry of Consumer and Commercial Relations. The delegation was achieved through an administrative agreement between the Authority and the Ministry, made under the *Safety and Consumer Statutes Act* of June 1996. The Authority, to which the functions, staff and assets of the Technical Standards Division of the Ministry were

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transferred in May 1997, is one of four delegated administrative authorities created for the purpose of assuming the safety and consumer protection regulatory functions of the Ministry.

The enactment of the SCSAA was strongly opposed by both legislative opposition parties and the Ontario Public Service Employee's Union. Consumers' groups were divided in their opinions of the legislation. The legislation and creation of the Authority were generally supported by the affected industries.

The Authority's responsibilities include inspection, approvals, and law enforcement in relation to the delegated legislation. Authority staff are identified as statutory directors and officers for purposes of the delegated legislation, although the SCSAA states they are not crown employees and are not to present themselves as such.

The Authority is managed and administered by a board of directors, the majority of whom are drawn from and nominated by the industrial sectors whose activities it regulates. The Board also includes an Assistant Deputy Minister of MCCR, two consumer representatives who are Ministerial appointees, and the Authority's Chief Executive Officer.

The TSSA is structured into three operational divisions: boilers and pressure vessels; elevating and amusement devices; and fuels safety, along with a corporate services division. There are also eight industry councils, and a consumer advisory council, through which the sectoral representatives on the board of directors are nominated.

ENDNOTES

¹ 98/99 Annual Report, Corporate Profile.

² *Safety and Consumer Statutes Administration Act, 1996*, s.3.

³ J.Flaherty M.P.P., Parliamentary Secretary to the Minister of Consumer and Commercial Relations, Ontario Hansard, June 17, 1996.

⁴ See, for example, the comments of B.Crozier, Liberal M.P.P., and P.Kormos, NDP M.P.P., on Second Reading of Bill 54, Ontario Hansard, June 17, 1996.

⁵ See the comments of Tim Little, Legislative Liaison Officer, Ontario Public Service Employees Union, to the Standing Committee on the Administration of Justice, Ontario Hansard June 25, 1996.

⁶ See the Comments of Michael Turk, Legal Counsel, Automobile Protection Association, to the Standing Committee on the Administration of Justice, Ontario Hansard June 25, 1996.

⁷ See, the Comments of Joan Huzar, President, Consumers' Council of Canada, to the Standing Committee on the Administration of Justice, Ontario Hansard, June 24, 1996.

⁸ See the comments of J.Killoran, Chair, Commercial Registration Appeal Tribunal, to the Standing Committee on the Administration of Justice, Ontario Hansard June 25, 1996.

⁹ See, for example, the comments of Russell Flatt, Vice-President, Paramount Canada's Wonderland, to the Standing Committee on the Administration of Justice, Ontario Hansard June 24, 1996.

¹⁰ See for example, the comments of J.Flaherty, Parliamentary Secretary to the Minister of Consumer and Commercial Relations, and G.Kennedy, M.P.P., in the Standing Committee on the Administration of Justice, June 25, 1996.

¹¹ SCSAA, s.4(1).

¹² *Ibid.*, s.(2).

¹³ *Ibid.*, s.7(1).

¹⁴ *Ibid.*, s.4(3).

¹⁵ *Ibid.*, s.8(1).

¹⁶ *Ibid.*, s.8(2).

¹⁷ *Ibid.*, s.8(5).

¹⁸ *Ibid.*, s. 13(1)(2).

¹⁹ *Ibid.*, s. 13(3).

- ²⁰ Ibid., s.9(1).
- ²¹ Ibid., s.22.
- ²² Ibid., ss.9 (2) and 10(1).
- ²³ Ibid., s.12(4).
- ²⁴ Ibid., s.8(6).
- ²⁵ Ibid., s.12(1)(3).
- ²⁶ Ibid., s.11 (4).
- ²⁷ Ibid., s. 6(1).
- ²⁸ Ibid., s. 6(2).
- ²⁹ Ibid., s. 6(3).
- ³⁰ Ibid.
- ³¹ Ibid., s.14(1).
- ³² Ibid., ss.14(3) and 14(4)
- ³³ MCCR/TSSA Administrative Agreement, s.2(1).
- ³⁴ Ibid., s.2(4)
- ³⁵ Ibid., s.3(1)
- ³⁶ Ibid., s.3(2).
- ³⁷ Ibid., s.3(3).
- ³⁸ Ibid., s.3(4).
- ³⁹ Ibid.
- ⁴⁰ Ibid., s.4.
- ⁴¹ Ibid., s.5(1)
- ⁴² Ibid., s.5(2).
- ⁴³ Ibid., s.5(3).
- ⁴⁴ Ibid., s..6(1)(2).
- ⁴⁵ Ibid., s.6(1)(3)
- ⁴⁶ Ibid., s.6(7).
- ⁴⁷ Ibid., s.6(4)
- ⁴⁸ Ibid., s.6(5)
- ⁴⁹ Ibid., s.6(6)
- ⁵⁰ Ibid., s.6(8).
- ⁵¹ Ibid., s.6(9).
- ⁵² Ibid., s.6(10).
- ⁵³ Ibid., s.7.
- ⁵⁴ Ibid., s.10.
- ⁵⁵ Ibid., s.8(1).
- ⁵⁶ Ibid., s.8(2).
- ⁵⁷ Ibid., s.8(3)
- ⁵⁸ Ibid.
- ⁵⁹ Ibid., s.11.
- ⁶⁰ Ibid., s.12.
- ⁶¹ Ibid., s.13.
- ⁶² Ibid., s.14.
- ⁶³ Ibid., s.15.
- ⁶⁴ Ibid., s.21.
- ⁶⁵ Ibid., s.20.
- ⁶⁶ By-Law No.1, as amended October 15, 1996.
- ⁶⁷ Ibid., Art.3.2.
- ⁶⁸ By-Law No.4, Art. 1.1.

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⁶⁹ Ibid., Art.1.2.

⁷⁰ Pers.Comm. David Scriven, TSSA Corporate Secretary, January 19, 2000. See also TSSA By-Law No.4, Art.3.1.

⁷¹ Figures provided to CIELAP by TSSA, November 1999.

⁷² TSSA 98/99 Annual Report.

⁷³ 98/99 Annual report, pg.15.

⁷⁴ 98/99 Annual Report pg.18.

⁷⁵ 98/99 Annual report, pg.22.

⁷⁶ 98/99 Annual Report, pg.25.

⁷⁷ 98/99 Annual Report, pg.33.

⁷⁸ Pers. comm., D.Scriven, Corporate Secretary, TSSA, November 1999.

⁷⁹ 98/99 Annual Report, pg.33.

⁸⁰ Memorandum of Understanding Between the Office of the Fire Marshal and the Technical Standards and Safety Authority, November 10, 1997.

⁸¹ Draft Memorandum of Understanding Between the Ontario Ministry of Labour: Occupational Health and Safety Branch and the Technical Standards and Safety Authority (draft provided by TSSA, November 1999).

⁸² Memorandum of Understanding Between the Ministry of the Environment, Operations Division and the Ministry of Consumer and Commercial Relations Technical Standards Division Regarding Inspection of Stage I Vapour Recovery Equipment, October 28, 1996.

⁸³ TSSA/OFM Memorandum, Sections 4 and 6.

⁸⁴ Draft TSSA/MOL Memorandum, Section 8.

⁸⁵ Ibid., pg.2.

IV. THE TSSA INSTITUTIONAL DESIGN: AN ANALYSIS

“Look Sir Humphrey. Whatever we ask the Minister, he says its an administrative question for you. And whatever we ask you, you say is a policy question for the Minister. How do you suggest we find out what’s going on? — Yes, I do think there is a real dilemma here, in that while it has been government policy to regard policy as the responsibility of Ministers and administration as the responsibility of officials, questions of administrative policy can cause confusion between the administration of policy and the policy of administration, especially when responsibility for the administration of the policy of administration conflicts or overlaps with the responsibility for the policy of the administration of policy.”

*Sir Humphrey Appleby on legislative oversight and the policy-administration dichotomy. From *The Complete Yes Minister*, 1984*

1. Introduction

The Technical Standards and Safety Authority describes itself as “a practical demonstration of how government, industry and consumers can partner and effectively share responsibility for the governance of public safety.”¹ Under the *Safety and Consumer Statutes Amendment Act*, the Authority is responsible for administration and enforcement of the seven statutes delegated to it, while the Government of Ontario is stated to “retain responsibility for oversight of safety and administration and public safety legislation and regulations.”²

As stated by the Parliamentary Secretary to the Minister of Consumer and Commercial Relations on Second Reading of Bill 54, the SCSAA, the Authority is to “row,” carrying out the administration of the delegated legislation, while the government “steers” by making policy and legislation. This distinction between administration conducted by the Authority and policy-making by government was also emphasized by the Minister in his statements to the Standing Committee on the Administration of Justice:³

“Self-management is simply the delegation of administrative and delivery mechanisms, not the delegation of rule-making or the setting of public safety standards.”

The ‘new public management’ concept of separating administration from policy-making, reflected in Britain’s executive agencies, New Zealand’s ‘corporatized’ departments and Alberta’s ‘delegated administrative organizations’ was central to the design of the TSSA. Under this approach, Ministers are to provide administrators with the general objectives and broad discretion for achieving the desired results. The day to day business of achieving the chosen goals is left to management. In fact, the Authority’s architects were sufficiently confident that management and administration could be divorced from policy that responsibility for administration and service delivery could be safely transferred to an entity whose board of directors was dominated by members drawn from the industries it was intended to regulate.

2. The TSSA Mandate

i) *The Policy/Administration, Rowing/Steering, Distinction*

Many students of public administration have pointed out that there are inherent problems involved in trying to separate policy-making from administration, the con-

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The TSSA's Legislative Mandate

cept that lies at the heart of the TSSA's institutional design, given that policy decisions can occur at all levels of an organization:

“lack of clarity in policy goals may leave considerable scope to administrators over their interpretation. Or the allocation of inadequate resources may require that decisions on priorities have to be made at the stage of implementation. Or the policy itself may intentionally leave considerable room for administrative discretion.”⁴

More broadly, policy or strategy can be viewed as an intended plan, rooted in a rational method where thought has preceded action. However, it has been suggested that rather than viewing strategy or policy as a fixed plan, it should be reconsidered as a pattern of action, whether intended or not. This reflects the possibility that an organization's actual behaviour may differ considerably from its original strategic intentions.

The divergence of actions from initial intentions may be explainable by the presence of an emergent strategy. That is, actors within an organization, sometimes spontaneously, pursue actions that might be quite different from senior executive intentions, and such actions may modify an organization's intended direction. All this suggests that “strategies can form without being formulated. Action can precede cognition, or parallel it.”⁵ According to this view, implementation decisions are substantive choices that can have an important influence on an organization's overall direction. That is, policy and administration — steering and rowing — are often indivisible.

Furthermore, issues that are sometimes described as being “administrative” or “technical” in nature, such as standards for underground storage tanks or elevators, often have significant policy content. Decision of this nature affect the level of safety provided to the public, and its relationship to the costs imposed on industry, rather than simply being value and interest free technical choices.

The distinction between policy and administration is additionally complicated by the consideration that government has not only to make policy, but also monitor how effectively and efficiently it is being carried out. The rowers can't be permitted to determine whether they are rowing in the right direction or at the right speed.

ii) The TSSA's Legislative Mandate

In the case of the TSSA, the problem of separating policy from administration is especially acute, in that the government failed to give the Authority, any clear direction in which to “row” in either the SCSAA or the TSSA/MCCR Administrative Agreement. The Act and the Agreement merely made reference to the goal of the creation of a “fair, safe and informed marketplace, that supports a competitive economy.”⁶ This vague and general direction, which was provided to all of the delegated administrative authorities created pursuant to the Act, is open to wide interpretation, which could be at least as much economically focussed as safety-oriented.

Furthermore, the Authority's formal mandate made no reference to wider goals which may be affected by its work, such as protection of the environment, an obvious concern in relation to such things as the handling and storage of fuels. Leaking underground storage tanks (LUSTs), for example, are a serious environmental problem. Ontario has close to 1200 reported leaks annually from tanks at gasoline stations and other operations.⁷ Small leaks of many substances stored in these tanks can cause extensive harm. A few litres of gasoline leaking from a tank into a sewer is sufficient to kill a human being exposed to the fumes. One litre of gasoline leaking from an underground tank into the groundwater can render one million litres of water unfit for use for up to 50 years.⁸

The issue of the Authority's mandate in relation to the environment was specifically raised by the Environmental Commissioner of Ontario in her 1996 Annual Report to the Legislature.⁹ It was subsequently partially addressed by the May 1997 delegation to the Authority of the Minister of Consumer and Commercial Relations' responsibilities under the *Environmental Bill of Rights*. These included compliance with the Ministry's Statement of Environmental Values under the Bill, in the administration of designated statutes.¹⁰ However, this is the only case in which the Minister of Consumer and Commercial Relations has taken steps to give specific policy direction to the Authority beyond the general statement contained in the SCSAA and Administrative Agreement.

iii) Self-Directed Rowing? The TSSA's Corporate Objects and Policies

More specific policy directions are contained in the Objects of the Corporation in the TSSA's Letters Patent. However, these were developed and adopted by the Corporation itself rather than the government. Perhaps most significantly, the Letters Patent mandate the Corporation "to promote and undertake activities which enhance public safety."¹¹ The Objects of the Corporation also mandate it to: "promote and undertake activities which enhance the competitiveness of the Ontario and Canadian economy."¹² The comments of the Chief Executive Officer at the Authority's September 1999 annual meeting made clear the dual nature of the Authority's mandate, to "promote safety" and "to promote growth in the regulated sectors."¹³

There is again no reference to the environment in the Corporation's Objects, despite the implications of its responsibilities for environmental protection, particularly with respect to the handling and storage of fuels.

More broadly, major concerns have been raised in recent years regarding the mixing of promotional and regulatory mandates within regulatory agencies. Justice Krever's report on the contamination of the blood system in Canada with the HIV virus and other diseases, for example, identified the mixing of mandates within Health Canada as a major factor in the tragedy, noting that:

"The relationship between a regulator and the regulated... must never become one in which the regulator loses sight of the principle that it regulates only in the public interest, and not in the interest of the regulated."¹⁴

References to the conduct of all operations in an environmentally responsible manner, and a number of other wider policy goals including the provision of equal opportunity, the prevention of sexual harassment, and ensuring occupational health and safety, are included in the Authority's Code of Business Conduct.¹⁵ Although laudable, these directions are again self-imposed by the TSSA, rather than having been provided by the Minister. As with the corporation's objects expressed in its By-Laws, these can be changed by the Authority's board of directors without the approval of the Minister.

iv) Ministerial Capacity to Give Policy Direction

The MCCR/TSSA Administrative Agreement permits the Minister, upon notice, to amend or insert a term in the administrative agreement in relation to the administration of the designated legislation or if the change is in the public interest.¹⁶ This potentially provides a mechanism through which more specific policy direction could be given to the Authority by the Minister. This procedure has not been used to date.

In reality, this mechanism may be of limited practical utility. Virtually all of the Ministry's policy capacity and expertise in the area of public safety regulation was transferred to the TSSA, when the Authority absorbed the staff of the Ministry's

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Technical Standards Division in May 1997. The Ministry's oversight resources are limited to a total of five staff members, who are charged with the monitoring of four other delegated administrative authorities, plus the Ontario Home Warranty Program and the Funeral Services Board, in addition to the TSSA.¹⁷ In fact, the government now appears to be dependant upon the Authority for policy advice on public safety matters under the jurisdiction of the legislation now administered by the Authority.

This problem will be further exacerbated if Bill 42, the proposed *Technical Standards and Safety Act*¹ is adopted, as it would remove all of the substantive policy content of the existing legislation, and replace it with authority for the Lieutenant-Governor in Council to make regulations on these matters instead. In the absence of any significant policy capacity within the Ministry, these regulations could only be drafted on the basis of the advice of the TSSA, or by hiring outside consultants, an option associated with significant costs, and potential conflicts of interest of its own.

It is also unclear what would happen in the event that the Authority disagrees with an amendment to the administrative agreement made by the Minister, or responds by threatening to dissolve itself, leaving the Minister with no capacity to administer the delegated statutes.

v) *The TSSA and Intergovernmental Relations*

Other aspects of the Authority's mandate also make it clear that distinction between "steering" and "rowing" in its design is far less clear than indicated by the government in its public statements. The MCCR/TSSA Administrative Agreement, for example, delegates to the TSSA recognition by other jurisdictions and national/international standards writing organizations, the right to appoint representatives to cross jurisdictional and standards writing organizations, and to make such representations and communications as it deems appropriate.¹⁸ Such processes are almost entirely focussed on policy and standards development. Direction for these activities is apparently provided by the board of directors rather than the government.¹⁹

The TSSA/MCCR Administrative Agreement implies that intergovernmental relations are to be carried out by Ministry and notes TSSA staff are not to present themselves as Crown employees or agents in this context.²⁰ However, it seems that the effective conduct of intergovernmental standards setting activities on behalf of Ontario has been left to the Authority on the basis of its own direction, particularly given the lack of remaining capacity to give policy direction within the Ministry. The Government of Ontario's own 1997 Alternative Service Delivery Framework describes intergovernmental relations as being an activity "requiring day-to-day policy direction and interpretation (that) cannot be effectively delivered by alternative mechanisms."²¹

vi) *Policy Advocacy*

In addition to the explicit aspects of its mandate and structure which seem to lead the TSSA into policy-making functions, the Authority appears to envision an explicit policy advocacy role for itself. The Authority's corporate objects, established in its Letters Patent, commit it to "promote and undertake activities which encourage the harmonization of technical safety standards and compliance practices."²² More specifically, the Authority's current business plan states that the "TSSA will initiate and drive a process to strengthen national co-operation on public safety service delivery... We intend to act as the "conscience" of the process."²³ The Authority's intention to act as a "catalyst" and "conscience" for this effort were further emphasized by its Chair at its 1999 Annual Meeting.²⁴

¹ A detailed discussion of this proposed legislation is provided in Chapter VII.

3. The TSSA Board of Directors

i) Board Composition

The question of the Authority's mandate and role is further complicated by the structure of its board of directors. The Authority's board of directors, as per the terms of its by-laws, consists of eight representatives of the regulated industries. There are also two consumer representatives appointed by the Minister, an Assistant Deputy Minister of the Ministry of Consumer and Commercial Relations, and the Authority's Chief Executive Officer.²⁵ The board of the Authority was designed "so that business and public interests will be represented."²⁶ The representatives of the regulated industries are nominated through the Authority's industry advisory councils.²⁷

The TSSA structure has some potential advantages over the traditional nature of government agencies. The board of directors provides a means through which senior level attention and approval for initiatives and decisions can be obtained more quickly than within a conventional ministry or department.²⁸ The model also provides for more direct input from non-governmental stakeholders in decision-making than is the norm within government agencies.²⁹ However, the structure suffers from a number of potential weaknesses as well.

ii) Conflict of Interest

The TSSA's "representational" board presents a number of possible problems. In effect, the structure appears to institutionalize conflict of interest as an organizing principle of the Authority, as the majority of the Board, charged through the Authority's By-Laws to "manage and administer affairs of Authority,"³⁰ are drawn from industries regulated by the Authority.

This problem is compounded by the lack of conflict of interest rules in either the SCSAA or Agreement, beyond the requirement that such rules be provided by the Authority's Board to the Minister, although they are not subject to ministerial approval.³¹ The rules are therefore self-defined and imposed. The conflict of interest rules in the Authority's By-Laws³² only address situations where a director has a proposed contract or contract with TSSA, and even then the director is only required to declare the conflict at a meeting of the directors. There are no limitations regarding situations where directors or their employers apply for or hold approvals, permits, registrations from the Authority, or have their personal or economic interests impacted by Authority policies or practices, or even where a director or his or her employer might be under investigation or prosecution by the Authority.

The Authority's Board Specific Code of Conduct, a policy adopted by the TSSA, but which does not form part of its By-Laws or Letters Patent, includes a statement that "Board members serve TSSA as a whole, rather than their personal interest or any other interests."³³ The Board Code of Conduct also requires that directors "disclose any possible conflicts to the Board in a timely fashion." However, it does not specify or provide examples of the nature of such "conflicts" and it is unclear if it is intended to include situations beyond the narrow circumstances contemplated by the conflict of interest provisions of the Authority's By-Laws.

A Conflict of Interest Policy has been adopted by the TSSA with respect to employees. This specifically identifies situations, among others, where:

- ★ an employee's activities or business interests interfere with, or reasonably be perceived to interfere with, the performance of his/her duties as an employee of the Authority;
- ★ the employee's activities or business interests place demands on the employees that are inconsistent with the employee's position or jeopardize the employee's objectivity or impartially; or

- ★ where the employee intends to participate as a private citizen in an organization which has dealings with the TSSA,

as potential conflicts of interest.³⁴ However, these conflict of interest rules are not explicitly applied to TSSA directors. Rather, the Board Specific Code of Conduct includes a general statement that director's actions are to be "consistent with the standard of conduct that is required of TSSA staff."³⁵

The MCCR/TSSA Agreement includes provisions intended to insulate the statutory Directors or Chief Officers under the legislation delegated to the Authority from direct interference by the Board of Directors.³⁶ However, the ability of these individuals to carry out their functions may be affected indirectly by administrative or policy decisions made by the Board.

iii) **Board Accountability**

The composition of the TSSA's Board of Directors and the means through which directors are nominated raises a number of questions regarding to whom the Board members are accountable for their management and administration of the affairs of the Authority. The SCSAA and the MCCR/TSSA Administrative Agreement are silent on this issue.

In Ontario, directors of non-share capital corporations, like the TSSA, are both through inference from certain provisions of the Corporations Act and the common law to be accountable to the members of the corporation itself, and only members are eligible to be directors. The basic test of accountability to members is determined by the re-election of the directors by the members. In the case of the TSSA, and other organizations where the directors and members of the corporation are the same individuals, this may have limited practical meaning. Directors of such corporations are also understood to have the same fiduciary role as directors of other corporations, or honesty, loyalty, care, diligence, prudence, and skill, as set forth in common law, and have a duty to advance the corporation's objects.

The TSSA's Board Specific Code of Conduct states that:

"TSSA's delegated responsibility makes the Board accountable to the Public for its safety mandate. In order to practically achieve this accountability, the Board is directly responsible to the Minister of Consumer and Commercial Relations, who is accountable for the delegated public safety legislation."

Unfortunately, with the exception of the MCCR representative and ministerial appointees on the TSSA board, there appear to be no mechanism to operationalize these stated lines of accountability. With the exceptions of the ministerial appointees, who serve at pleasure, there is no means for the Minister to remove directors from the board. Furthermore, the Minister is prevented, by the provisions of the SCSAA, from appointing more than a minority of board members. As discussed earlier, the Minister's capacity to give direction to the Board through amendments to the Administrative Agreement is also subject to significant practical limitations.

The effective lines of accountability for the directors who are nominated to the TSSA board through the Authority's industry advisory counsels,³⁷ and make up a majority of the board, are principally internal to the board itself. These members can only be removed by a vote of the other directors. There is also a line of accountability to the advisory councils, as re-nominations of these directors to the board are discussed with the councils,³⁸ although this would only happen once, as directors can only serve two consecutive terms.

These accountability arrangements may be sufficient for a typical not-for-profit corporation. However, they may not be adequate for an organization such as the

TSSA, which whose mandate includes primary responsibility for the protection of significant public goods in the province and the exercise of a range of regulatory, investigative, economic and prosecutorial powers. The use of such powers has traditionally been associated with government agencies subject to democratic control and accountability. The TSSA structure, on the other hand, provides no direct or indirect accountability linkage between the majority of the Authority's directors and the public for the Authority's use of the powers delegated to it.

The SCSAA does make provision for the imposition of penalties on TSSA directors contravene the Act, delegated legislation, administrative agreement or related regulations, or who knowingly cause, authorize, permit or participate in the commission by the Authority, for fail to take reasonable care to prevent such an offence. However, in practice, it is difficult to envision the government initiating such a prosecution except under the most extreme circumstances.

4. Conclusions

The concept of separating administration from policy-making was central to the design of the TSSA. The practicality of such a separation between administration and policy has been challenged by many students of public administration. Furthermore, in the absence of clear direction from the government, the TSSA is making public policy with respect to public safety, including the substantive definition of its own mandate and goals, and is also engaged in policy development processes and potentially policy advocacy.

These activities go well beyond the "administrative" mandate for the Authority described by the Minister of Consumer and Commercial Relations to the Legislature. In the language of the Minister's Parliamentary Secretary, the government is not "steering," rather it has provided the ship, but left the Authority to define its own course and speed. The direction which has emerged is one which mixes regulatory and promotional goals in relation to the industries regulated through the legislation which has been delegated to the Authority. This is despite the identification of such mixed mandates within regulatory agencies as a significant factor in recent public health and safety disasters, such as the contamination of the Canadian blood system with blood-borne diseases. At the same time, the government appears to have lost its much of its capacity to give the Authority direction even if it wished to do so, as a consequence of the transfer of almost all of its policy and technical expertise and capacity in public safety regulation to the TSSA.

The TSSA's board of directors is the centrepiece of the self-management model upon which the Authority is based. The Authority's board of directors is dominated, by design, by members drawn from the industries regulated through the statutes that the Authority administers, although there are also representatives of consumer organizations and the Ministry.

The TSSA structure has some potential advantages over the traditional nature of government agencies. The board of directors provides a means through which senior level attention and approval for initiatives and decisions can be obtained more quickly than within a conventional ministry or department. The model also provides for more direct input from non-governmental stakeholders in decision-making than is the norm within government agencies. However, the structure suffers from a number of potential weaknesses as well.

In particular, the structure places the majority of the Authority's directors in an potential conflict of interest between their role as "representatives" of particular sectors, and obligations to the objects of the corporation. The situation is of particular concern given lack of clear mandate and policy direction in either Act or Administra-

tive Agreement regarding protection of public safety, the 'dual' mandate contained in the corporation's objects, and the silence of the SCSAA, Administrative Agreement and Authority's of conflict of interest By-Laws regarding situations where directors or their employers may have economic or policy interests affected by TSSA decisions or activities.

ENDNOTES

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- ² Ibid.
- ³ The Hon. N.Sterling, Minister of Consumer and Commercial Relations, remarks to the Standing Committee on the Administration of Justice re: Bill 54, Ontario Hansard, June 24, 1996.
- ⁴ D.Beetham, Bureaucracy(Minneapolis, University of Minnesota Press, 1996), pg.94.
- ⁵ H.Mintzberg and J.Jorgensen, "Emergent Strategy for Public Policy," Canadian Public Administration, 1987, vol. 30, no.2, pg.220-2.
- ⁶ SCSAA, s.2.; MCCR/TSSA Administrative Agreement, s.3(4).
- ⁷ J.Swaigen, *Toxic Time Bombs: The Regulation of Canada's Leaking Underground Storage Tanks* (Toronto: Emond-Montgomery Publications Ltd. and CIELAP, 1995) xvii.
- ⁸ Ibid.
- ⁹ Environmental Commissioner for Ontario, Annual Report 1996, pg.22.
- ¹⁰ The Hon. D. Tsubouchi, Minister of Consumer and Commercial Relations, Environmental Bill of Rights 1993 - Section 117 - Delegation of Minister's Powers or Duties, May 1, 1997.
- ¹¹ Object (A)
- ¹² Object (D).
- ¹³ John Walter, CEO, to the Annual General Meeting of the TSSA, September 15, 1999.
- ¹⁴ Justice William Krever, Commissioner, Commission of Inquiry on the Blood System in Canada (Ottawa: Privy Council Office, 1998) Vol.III, pg.995.
- ¹⁵ TSSA, Code of Business Conduct, undated.
- ¹⁶ MCCR/TSSA Administrative Agreement, s.4(3).
- ¹⁷ Pers. comm., Robert Dowler, Director, Marketplace Standards and Services Branch, January 7, 2000.
- ¹⁸ Administrative Agreement, s.6.
- ¹⁹ TSSA 1999/2000 Business Plan.
- ²⁰ Administrative Agreement, s.3(3).
- ²¹ Management Board Secretariat, Alternative Service Delivery Framework (Toronto: Queen's Printer for Ontario, 1997), pg.13.
- ²² TSSA Letters Patent, object (E), August 1996.
- ²³ 99/00 Business Plan, pg.5.
- ²⁴ Glenna Carr, Chair, TSSA Board of Directors, to the Annual General Meeting of the TSSA, September 15, 1999,
- ²⁵ TSSA 98/99 Annual Report.
- ²⁶ MCCR, Backgrounder: Technical Standards and Safety Authority, February 6, 1997.
- ²⁷ Pers. comm., David Scriven, TSSA Corporate Secretary, January 19, 2000.
- ²⁸ Pers.comm. Dr. Joyce Feinberg, TSSA Director, March 23, 2000.
- ²⁹ Pers.Comm., Mike Lio, TSSA Director, March 24, 2000.
- ³⁰ TSSA By-Law #1.
- ³¹ Administrative Agreement, s.6(7).
- ³² By-Law 4, section 5.1.
- ³³ TSSA Board of Directors, Board Specific Code of Conduct, June 23, 1998.
- ³⁴ TSSA, Conflict of Interest Policy, January 28, 1998.
- ³⁵ TSSA, Board Specific Code of Conduct
- ³⁶ Administrative Agreement, s.6(10).
- ³⁷ Pers.comm., D.Scriven, TSSA Corporate Secretary, January 19, 2000.
- ³⁸ Pers.comm., David Scriven, TSSA Corporate Secretary, March 24, 2000.

V. THE TSSA: POLITICAL, LEGISLATIVE, ADMINISTRATIVE AND FISCAL ACCOUNTABILITY

1. Introduction

The traditional accountability structuresⁱ within our governments and economy contemplate institutions that exist in either the public or private spheres. In the public sector, political accountability has been grounded in the answerability of Ministers to the Legislature, and ultimately, the electorate, for the performance and behaviour of the public agencies for whose direction and administration they are responsible. Public institutions are also subject to a series of formal and judicially enforceable legal requirements, ranging from the *Canadian Charter of Rights and Freedoms* to specific common law rules intended to ensure the just and fair administration of public laws, policies and programs.

Private organizations are generally not understood to be answerable to the public in the same moral and political senses as public institutions, or subject to the same degree of public scrutiny of their affairs. Rather, they are understood to be primarily responsible to their owners and investors for their economic performance. Nor are private bodies subject to the same legal requirements for justice or fairness in their activities that apply to public entities.

Private enterprises may be subject to a form of public accountability through the marketplace, in the sense that consumers may choose not to purchase their goods or services if their quality, price or performance are not acceptable. However, this model assumes that consumers are in a position, both economically and practically, to make choices, and are provided with the information necessary to support such decision-making. This is rarely the case with the types of public goods regulated by the TSSA. Ontarians have little choice, for example, but to use the elevators in the buildings in which they live and work, and therefore have to rely on a regulator to ensure their safety. Consumers can't "buy" public safety on the marketplace.

For these reasons, the trade-offs between the potential losses of political and legal accountability to the public and expectations of increased efficiency, are a major issue in the debates about transfer of governmental functions to private entities. The rationale for the transfer of public functions to private organizations is that it will result in increased efficiency. Any losses of transparency and accountability will be outweighed by the benefits of this greater cost-effectiveness. The case of the TSSA, as a private entity mandated to administer public laws, and thereby existing in a grey area between public and private spheres, provides a unique opportunity to examine the nature of this trade-off in detail.

The following discussion examines the status of the Authority in relation to the political, legislative, administrative and fiscal accountability structures that would normally apply to an agency of the government of Ontario. The Authority's situation with respect to the legal accountability framework for government agencies, which emerges as being significantly different from its relationship to the political accountability regime, is reviewed in the following chapter.

2) Accountability Provisions within the SCSAA and the MCCR/TSSA Agreement

In recognition that the accountability of the TSSA was an important issue, a number of specific accountability measures were incorporated into the TSSA/MCCR Agreement. These included the following:

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Introduction

Accountability Provisions within the SCSAA and the MCCR/TSSA Agreement

ⁱ As outlined in Chapter one, for the purposes of this study, an accountability framework is understood to provide for the clear delegation of responsibility and authority, the establishment of a base of objectives and expectations, the review of performance against those objectives, and the possibility of reward or sanction on the basis of performance. From: *A Study of Management and Accountability in the Government of Ontario*, Price Waterhouse Associates/Canada Consulting Group, 1985.

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*Business Plans, Annual
Reports and Audits*

*Ministerial Authority to Amend
the Administrative Agreement*

Revocation of Delegation

Penalties

i) Business Plans, Annual Reports and Audits

The MCCR/TSSA Administrative Agreement requires that business plans and annual reports to be tabled in the Legislature.¹ A requirement that third party audits be provided as part of the annual report was included as well.²

ii) Ministerial Authority to Amend the Administrative Agreement

In addition to these reporting requirements, the Minister maintains the authority upon notice, to amend or insert a term in the administrative agreement in relation to the administration of the designated legislation or if the change is in the public interest.³ This is somewhat similar to provisions of the former *Power Corporation Act* permitting the Minister, with the approval of the Lieutenant-Governor in Council, to give policy direction to Ontario Hydro's Board of Directors.⁴ This may provide some accountability on the part of the Minister, as it provides a mechanism through which policy direction might be given to the Authority. However, as noted earlier, it is unclear what recourse the Minister might have if the Board of Directors were unwilling to continue under the amended Agreement.

In addition, with the transfer of the MCCR Technical Standards Division staff to the TSSA, it is open to question whether the Ministry retains the expertise and policy capacity to give such direction to the Authority, or more broadly, continue in a "watchdog" role over the Authority and industry performance, as suggested by the Minister as the time of the passage of Bill 54.⁵ The MCCR's Industry Self-Management Liaison Group, with a total staff of five, is charged with the oversight of the four other delegated administrative authorities as well as the Ontario Home Warranty Program and the Funeral Services Board.⁶

iii) Revocation of Delegation

The Lieutenant-Governor in Council maintains the authority, upon a notice requirement, to revoke designations if the administrative authority has failed to comply with the Act, the designated legislation or the administrative agreement or if it is considered advisable to do so in the public interest. This mechanism was strongly emphasized by the Minister of Consumer and Commercial Relations, as a key tool in ensuring the accountability of the Authority in his statements to the Standing Committee on the Administration of Justice regarding Bill 54.⁷

However, the exercise of this power is subject to limitations. Where it has failed to comply with the Act, designated legislation or administrative agreement, the authority must be given an opportunity to remedy a failure to comply with the requirements of the Act or an administrative agreement and no revocation can be issued if a failure has been remedied within the time frame specified by the Minister.⁸ However, this limitation does not apply where revocations are made "in the public interest."⁹

Perhaps more seriously, from a practical perspective, the use of the revocation procedure seems unlikely given that the TSSA has absorbed the staff of the Technical Standards Division of the MCCR. Consequently, there is no capacity left in place to resume the functions delegated to the Authority, except through the re-integration of the Authority's staff. Although there are provisions for the termination of the delegation in the TSSA/MCCR administrative agreement, including provision for the development of a termination plan,¹⁰ this would still be a potentially costly and disruptive exercise.

iv) Penalties

The SCSAA makes provision for the imposition of penalties on the TSSA and its officers and directors where a contravention of the Act, delegated legislation, administrative agreement or related regulations takes place.¹¹ However, in practice, it is diffi-

cult to envision the government initiating prosecutions for such matters except under the most extreme circumstances.

v) Gaps in the SCSAA and MCCR/TSSA Agreement Accountability Framework

The provisions of the SCSAA and MCCR/TSSA Administrative Agreement regarding annual reports and business plans, and the amendment of the administrative agreement and the revocation of delegations are acknowledgements of the accountability issues raised by the creation of the Authority. However, they do not fully address the issues raised by the exercise of regulatory powers of the provincial government by a private entity. The arrangement has significant implications for the principle of Ministerial responsibility to the Legislature for the administration of legislation and the operations of his or her department, the applicability of the accountability structures established by the legislature for provincial government agencies, and the applicability of legislation intended to ensure the consistency and fairness of government activities.

3. Ministerial Responsibility

Under the principle of ministerial responsibility within cabinet/parliamentary systems of government such as that in place in Ontario, the Minister is understood to be responsible and answerable to the Legislature for administration and enforcement of laws assigned to his or her Ministry.¹² The Minister is “the official public ‘face’ of the Ministry, and the focal point for accountability.”¹³

However, with the full delegation of responsibility for the administration and enforcement of the designated legislation to the Authority through the Administrative Agreement, it is unclear to what extent the Minister will accept responsibility to the Legislature for the TSSA’s actions, or simply attempt to direct blame for errors or wrongdoing towards the TSSA Board of Directors. The Board of the Authority, although now responsible for administration and enforcement of the law, for reasons outlined in Chapter IV, is not answerable to the Legislature or the public in any direct way. Rather, the most significant line of political accountability for the majority of the Authority’s directors appears to be to the industry sectors through which they are nominated.

Experience in the United Kingdom and New Zealand with agencies similar to the TSSA, suggests that Ministers are unlikely to accept responsibility for maladministration, even in situations where the Minister’s failure to ensure the agency was properly established, staffed and resourced directly affects the ability of the agency to operate effectively. Rather they have successfully deflected blame to agency management.¹⁴ This is despite the stronger accountability frameworks, including, in some cases, formal legislative statements of the Ministerial responsibility for monitoring agency performance, and holding management to account for that performance, than those put in place for the TSSA through the SCSAA.¹⁵ To date, however, there has been no significant discussion of the Authority’s performance in the Ontario Legislature.

4. Accountability to the Legislature and Its Officers

A second, and perhaps more obvious problem is that, as a private organization, rather than an agency of the provincial government, TSSA, escapes the normal application of the statutes, such as the *Ombudsman Act*, *Freedom of Information and Protection of Privacy Act*, *Environmental Bill of Rights*, *Audit Act*, and *Lobbyist Registration Act* and oversight by their associated Legislative Assembly Officers, such as the

Chapter V: The TSSA: Political, Legislative, Administrative and Fiscal Accountability

*Gaps in the SCSAA and
MCCR/TSSA Agreement
Accountability Framework*

Ministerial Responsibility

*Accountability to
the Legislature and
Its Officers*

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Ombudsman Act

Ombudsman, Information and Privacy Commissioner, Environmental Commissioner, Provincial Auditor, and Integrity Commissioner, which have come to constitute the cornerstones of accountability of provincial agencies to the Legislature and, ultimately, the public.

These Officers of the Assembly are usually provided with security of tenure and statutory guarantees of independence to enable them to provide objective advice without fear of political interference. This makes the ability of these officers to review the efficiency and effectiveness of regulatory agencies an important component of the accountability structure.

i) Ombudsman Act¹⁶

The issue of delegated administrative authorities, particularly the TSSA, escaping the application of accountability legislation applicable to provincial agencies was first raised by the Ombudsman in her 1996/97 Annual Report to the Legislature, noting that the SCSAA made no provision for the independent review of unresolved complaints.¹⁷

The Ombudsman is an officer of the Legislature, whose position is established through the *Ombudsman Act*. The Ombudsman's mandate is to investigate complaints made by Ontario residents against provincial government organizations. Where the Ombudsman identifies problems with government actions or decisions, he or she can make recommendations to the government to address the problem, and if these are not acted upon, report the case to the Legislature. The Ombudsman can help resolve complaints informally as well.¹⁸ In addition to these powers to deal with individual complaints, the Ombudsman can also undertake investigations of where there is evidence of systemic problems. Under section 11 of the *Ombudsman Act* the Ombudsman is required to make an annual report to the Speaker of the Assembly and the Assembly.

Section 14 of the *Ombudsman Act* defines its applicability in the context of decisions made by "governmental organizations." The scope of that term is determined in Section 1 of the Act which reads as follows:

"governmental organization" means a Ministry, commission, board or other administrative unit of the Government of Ontario and includes any agency thereof."

Based on this definition, the TSSA, as a private entity rather than an agency or administrative unit of the government of Ontario, does not appear to be governed by the Act. This conclusion was reflected the Ombudsman's comments in her 1996/97 Annual report to the Legislature.¹⁹

The TSSA Complaints Procedure

The MCCR/TSSA Administrative Agreement requires that the Authority's Business Plan include a complaints procedure and that the Authority's Annual Reports include information on its operation.²⁰ Under the procedure, each Division is responsible for the resolution of complaints, subject to appeal to the President and Chief Executive Officer.²¹ In the 1998 fiscal year 126 complaints were received, the bulk of which dealt with the TSSA's billing practices. Four were appealed to the CEO.²² The Authority's Consumer Advisory Panel is mandated to 'oversee' the complaints procedure.

However, the Authority's complaints procedure is not legally binding, and complaints are ultimately resolved by the CEO, who is an employee and officer of the TSSA. In contrast, the Ombudsman is an independent Officer of the Legislature who is able to report to the Legislature if a complaint is not adequately resolved.

ii) ***Freedom of Information and Protection of Privacy Act***²³

The purposes of the Ontario *Freedom of Information and Protection of Privacy Act*, (FOIPPA) as set out in section 1, are twofold:

- (a) *to provide a right of access to information under the control of institutions in accordance with the principles that:*
 - i) *information should be available to the public,*
 - ii) *necessary exemptions from the right of access should be limited and specific, and*
 - iii) *decisions on the disclosure of government information should be reviewed independently of government; and*
- (b) *to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.”*

The Act creates the Office of the Information and Privacy Commissioner, who is an Officer of the Legislature. Among other things, the Commissioner is mandated by the Act to provide an annual report to the Legislature on its implementation.

The Act provides for a general public right of access, upon request, to records under the control of “institutions” as defined or designated under the Act. Access may be denied if the ‘Head’ of an Institution believes the request is frivolous or vexatious or if the records are subject to one of the specific exemptions contained in the Act.ⁱⁱ The Act contains permits institutions to override some of these exemptions where there is a compelling public reason for disclosure.²⁴

The Act also addresses the protection of individual privacy,²⁵ regulating the collection of personal information on behalf of an Institution and disclosure of any such personal information. In cases where people who provide information have a reasonable expectation of privacy, these institutions generally may not invade their privacy by disclosing the information to other for purposes that are in compatible with the reasons for which the government obtained it. The Act, for example, places limits on the ability of institutions to sell their databases listing regulated individuals to commercial entities for marketing purposes.

In the event that a request for access to a record by a member of the public is denied, this decision may be appealed to the Information and Privacy Commissioner. The Commissioner has the authority under the Act to order the institution in question to provide access to the record in question, if the Commissioner determines that access was denied in a manner inconsistent with the exemptions provided by the Act. The Commissioner may also order that access be provided to a record if there is a compelling public interest in the release of the record.²⁶

The scope of the Act’s application flows from its definition of an “institution”. This is stated to include all ministries of the Government of Ontario as well as “any agency, board, commission, corporation or other body designated as an institution in the regulations.”²⁷ This definition leaves open the possibility that the legislation could be applied to institutions beyond those normally understood to be part of the provincial government, if the government makes a regulation designating them. However, as the TSSA is not a ministry of the government of Ontario, and has not been designated as an institution by Lieutenant-Governor in Council through a regulation, it appears that the FOIPPA does not apply to it.

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*Freedom of Information and
Protection of Privacy Act*

ⁱⁱ These exemptions include: cabinet documents; advice to government by public servants; records related law enforcement, relations with other governments; national or international defence; third party or tax-related information; the economic and other interests of Ontario; solicitor-client privilege; danger to safety or health; and personal privacy other than to the individual to whom the information relates; and information soon to be published. *Freedom of Information and Protection of Privacy Act*, ss.12-22)

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The Environmental Bill of Rights

Access to Information and Privacy in the MCCR/TSSA Agreement

Part 7 of the MCCR/TSSA Agreement deals with the transfer of information from the Ministry to the Authority. Part 11 addresses records and access issues. These provisions make it clear that, in contrast to the TSSA's counterparts in other jurisdictions, including Alberta, the *Freedom of Information and Protection of Privacy Act* (FOIPPA) will not apply to the TSSA, even to records that formerly belonged to the MCCR. Once the transfers have taken place, all information becomes the property of the TSSA. The Agreement requires that the TSSA develop and make public an access to information and protection of privacy code. This was finalized in February 1998.²⁸

The TSSA code appears to provide wider exemptions regarding access to information than the Act. The Code, for example, limits access to "aggregate accident and other sensitive aggregate data that identifies specific registrants,"²⁹ and data that would "compromise commercial or proprietary interests."³⁰ The Act, on the other hand limits such exemptions to records that would reveal trade secrets or scientific technical commercial, financial or labour relations information which has been supplied in confidence implicitly or explicitly, and where the release of the information would "significantly" prejudice the competitive position or negotiations of a person, group or persons or organizations.³¹

Furthermore, if access to a record held by the Authority is requested, and access is denied, a member of the public can no longer appeal that denial to the Information and Privacy Commissioner, who, when the records were held by the Ministry Consumer and Commercial Relations, could make an order requiring the release of the record if he or she determined that access had been denied in a manner inconsistent with the provisions of the Act. Rather, as with complaints, appeals are made to the President and Chief Executive Officer of the Authority, who is, of course, an employee and officer of the Authority.

The Information and Privacy Commissioner raised concerns over these arrangements in her 1998 Annual Report to the Legislature, noting that records, including inspection reports, may no longer be accessible to the public. The Commissioner also stressed the critical importance of privacy protection given that the Authority would be collecting personal information, and noted that the Commissioner's Office's efforts to secure these rights when the SCSSA was enacted were unsuccessful.³² iii Concerns over the impact of the delegation of government functions to private organizations on public access to information have been raised within the academic community as well.³³

iii) The Environmental Bill of Rights³⁴

The *Environmental Bill of Rights*, enacted in 1993, provides for public notice of proposed legislation, regulations, policies and approvals and other instruments related to the environment. Members of the public are required to be given a minimum of thirty days to comment on such proposals, and Ministries are required to consider the comments received in decision-making.³⁵ The Act also: permits members of public to request reviews of laws and policies³⁶ and investigations of suspected violations of prescribed laws;³⁷ creates a limited right of members to launch civil suits in relation to potential violations of designated legislation;³⁸ and provides protection for the protection of employees who report violations of environmental laws by their employers.³⁹ The position of Environmental Commissioner was established as an officer of the Legislative Assembly to oversee the Bill's implementation. The Commissioner provides an annual report to the Legislature on ministry compliance with the legislation.⁴⁰ The Ministry of Consumer and Commercial Relations and the *Gasoline Handling Act* were specifically prescribed as being subject to the Act.⁴¹

Concerns over the impact of the delegation of the Ministry's public safety functions to the TSSA were highlighted in the Environmental Commissioner's 1996

iii The Information and Privacy Commissioner has subsequently written to the TSSA, noting the Authority's Access and Privacy Code as a potential model for private sector firms in the adoption of fair information practices in dealing with their clients. Letter from Ann Cavoukian, Information and Privacy Commissioner to Margaret Kelch, Senior Vice-President, Corporate Services and Business Development, TSSA, February 17, 2000.

Annual Report to the Legislature. The Commissioner expressed particular concern over the potential loss of Ontarians' right to be notified of instruments issued under the *Gasoline Handling Act* through the Environmental Registry, their right to comment, and to request reviews and investigations as a result of the delegation.⁴²

Under Section 117 of the *Environmental Bill of Rights*, a Minister may authorize in writing, any person or group of persons to exercise any of the minister's powers or duties under the Act. In May 1997, the MCCR formally delegated its fuel safety regulation responsibilities under the *Gasoline Handling Act*, and most of its other responsibilities under the EBR, including the requirements that decisions consider the Ministry's Statement of Environmental Values made under the Act, to the TSSA.⁴³ The MCCR continues to be responsible for posting Acts, policies and regulations on the Registry, and has coordinated these functions with the Authority.⁴⁴

In her 1997 Annual report the Environmental Commissioner concluded that, as a result of this delegation, the implementation of the TSSA alternative service delivery system did not appear to have altered the rights of the public under the EBR,⁴⁵ and highlighted the application of the Ministry's Statement of Environmental Values under the EBR in some of the TSSA's decisions.⁴⁶ However, the Commissioner noted that some coordination problems were starting to appear between the MCCR and TSSA with respect to the EBR.⁴⁷ An Instrument Classification Regulation for the *Gasoline Handling Act* was adopted by MCCR in June 1998.⁴⁸

iv) The Audit Act⁴⁹

The *Audit Act* provides for the establishment of an Office of the Provincial Auditor, as an officer of the Legislative Assembly. The role of the Auditor, as set out in section 9 of the Act, is to perform or review and oversee audits as follows:

- (1) *on behalf of the Assembly, to audit the accounts and records of the receipt and disbursement of public money forming part of the Consolidated Revenue Fund;*
- (2) *to audit any agency of the Crown whose accounts and financial transactions are not audited by another auditor and to direct the audits of an agency of the Crown where the accounts and financial transactions of that agency are audited by another auditor; and*
- 3) *to receive a copy of the audits of Crown controlled corporations where audited by other than the Auditor, to have the authority to request any information in respect of such audits, and to have the authority to request answers or explanations related to these audits.*

The purpose of these audits is to assist the Legislative Assembly in holding the government and its administrators accountable for the quality of the administration's stewardship of public funds and for the achievement of value for money in government operations.⁵⁰

The Auditor is mandated through the *Audit Act* to prepare an annual report for each fiscal year for the Speaker of the Assembly.⁵¹ The annual report is intended to provide details with respect to matters such as the work of the Office, examinations conducted, public accounts, special warrants issued, Management Board and Cabinet orders in excess of appropriations and other matters which in the opinion of the Auditor shall be brought to the attention of the Assembly. The Auditor may also perform inspection audits in respect of grants from the Consolidated Revenue Fund or from an agency of the Crown and creates an offence for the obstruction of any such investigation.⁵²

The Auditor has various other powers and duties under the Act including the power to attend at meetings of and assist the standing Public Accounts Committee of

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Lobbyist Registration Act

^{iv} Section 1 of the *Audit Act* defines an agency of the Crown as follows: An “agency of the Crown” means “an association, authority, board, commission, corporation, council, foundation, institution, organization or other body,

a) whose accounts the Auditor is appointed to audit by its shareholders or by its board of management, board of directors or other governing body,

b) whose accounts are audited by the Auditor under any other Act or whose accounts the Auditor is appointed by the Lieutenant Governor in Council to audit,

c) whose accounts are audited by an auditor, other than the Auditor, appointed by the Lieutenant Governor in Council, or

(d) the audit of the accounts of which the Auditor is required to direct or review or in respect of which the auditor’s report and the working papers used in the preparation of the auditor’s statement are required to be made available to the Auditor under any other Act,

but does not include one that the Crown Agency Act states is not affected by the Act or that any other Act states is not a Crown agency within the meaning or for the purposes of the Crown Agency Act.”

(continued on page 47)

the Assembly, perform special assignments as may be required, advise public service employees, and require access to information and records.

Value for money audits form a central element of the Auditor’s work with respect to expenditures from the Consolidated Revenue Fund and the work of Crown Agencies. These are in-depth, results-oriented examinations to assess whether government programs, services and resources are being managed cost-effectively and are in compliance with legislation and government policy.⁵³ The importance of these types of audits was highlighted by the Provincial Auditor’s 1992 review of the performance of the MCCR’s elevator inspection program. The Audit identified major deficiencies in the program’s delivery,⁵⁴ and lead to the implementation of significant changes to the program by the Ministry.⁵⁵

SCSAA makes clear that with the exception of fines collected in relation to offences under the Acts administered by the TSSA, TSSA funds, such as licencing fees, are not considered public money within the meaning of the *Financial Administration Act*,⁵⁶ and therefore are not subject to audit by the Provincial Auditor. Similarly, the Authority does not appear to fall within the definition of an agency of the Crown within the *Audit Act*,^{iv} although this is implied rather than explicitly stated within the SCSAA.⁵⁷

The Provincial Auditor noted the transfer of the responsibilities of Ministry of Consumer and Commercial Relations Technical Standards Division to a newly created private sector corporation, the TSSA in his 1997 Annual Report to the Legislative Assembly. The Auditor also noted the requirement that the Authority submit an annual report to the Minister, which includes performance measures, related to public safety.⁵⁸

The Auditor’s office states that it does not have jurisdiction to audit the TSSA. However, the office could conduct an audit of the Ministry of Consumer and Commercial Relation’s oversight and monitoring of the Authority’s operations.⁵⁹ The *Audit Act* does permit Ministers or committees of the Legislature to ask the Auditor to undertake “special assignments,” which might include an audit of the TSSA.⁶⁰

v) Lobbyist Registration Act

The *Lobbyist Registration Act* was enacted in June 1998. The Act requires that all persons meeting the definitions of a lobbyist register their activities on the lobbyist registry. The registry is administered by the Office of the Integrity Commission, who is an Officer of the Legislative Assembly and appointed under the Act as the Lobbyists Registrar.

Lobbying is defined under the Act as when a paid lobbyist communicates with a “public office holder” in an attempt to influence the development of legislation, regulations, policies, programs, grants, privatizations or contracts. The intention of the legislation is to provide a public record of who is lobbying the provincial government.

The Act defines a “public officer holder” as cabinet ministers, members of the Legislature and their staff, virtually all public servants unless exempted by regulation, officers, directors, and employees of provincial government agencies, boards and commissions, persons appointed to office by Order-in-Council and members of the Ontario Provincial Police. Federal, provincial, municipal, aboriginal and international Public officials acting in the official capacities are excluded from the requirements to register as lobbyists.⁶¹

As none of the TSSA Directors or staff appear to meet the definition of “public office holders,” and the SCSAA explicitly states that they are not Crown employees,⁶² individuals lobbying the TSSA would not be required to register under the Act.⁶³ The

TSSA's Directors and staff are also not required to register for the purposes of their dealings with the provincial government, provided that they are carrying out the Authority's legislative mandate. They would, however, be required to register for the purposes of any other dealings with the province.⁶⁴

5. Other Legislation Applicable to Provincial Agencies

i) *Environmental Assessment Act*

The *Environmental Assessment Act*, enacted in 1975 requires the environmental assessment of enterprises, activities, proposals, or programs undertaken for or by provincial agencies or municipalities except where exemptions are provided by the Cabinet.⁶⁵ Although the Act was significantly weakened through amendments adopted in 1996,⁶⁶ it continues to require the consideration of potential environmental effects of undertakings by provincial and municipal agencies.

As the TSSA is not considered a provincial agency, it does not appear to be subject to the Act's requirements, unless, as with any other private entity, a particular undertaking is specifically designated for review by Cabinet. It is conceivable however, that the Authority might be considered to be undertaking certain activities on behalf of the MCCR, and therefore considered subject to the Act for the purposes of those activities. The SCSAA and MCCR/TSSA Agreement make no provision regarding the environmental review of undertakings by the Authority.

ii) *French Language Services Act*⁶⁷

The purpose of this Act is to guarantee the use of the French language in institutions of the Legislature and the Government of Ontario. The Act guarantees everyone the right to services provided by government agencies in French in accordance with the Act.⁶⁸ The Act provides a guarantee to the right to use French or English in Legislative debates and proceedings and in public Bills.⁶⁹ Section 5 provides the specific guarantee with respect to the right to communicate and to receive available services in French. The guarantees in the Act are subject to reasonable and necessary limits.⁷⁰

The Act creates an Office of Francophone Affairs and defines its functions⁷¹ and requires that a French language services coordinator be designated for each government ministry.⁷² An annual report on the affairs of the Office is required to be provided to the Lieutenant-Governor in Council and the Legislative Assembly.⁷³

Section 1 of the Act defines a "government agency" as follows:

"government agency" means:

- (a) a ministry of the Government of Ontario, except that a psychiatric facility or college of applied arts and technology that is administered by a ministry is not included unless it is designated as a public service agency by the regulations,
- (b) a board, commission or corporation the majority of whose members or directors are appointed by the Lieutenant Governor in Council,
- (c) a non-profit corporation or similar entity that provides a service to the public, is subsidized in whole or in part by public money and is designated as a public service by the regulations,
- (d) a nursing home as defined in the *Nursing Homes Act* or a home for special care as defined in the *Homes for Special Care Act* that is designated as a public service agency by the regulations,

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Other Legislation Applicable to Provincial Agencies

Environmental Assessment Act

French Language Services Act

(continued from page 46)

The *Crown Agency Act*, R.S.O. 1990, c. 48 provides the following definition at section 1: "In this Act, "Crown agency" means a board, commission, railway, public utility, university, manufactory, company or agency, owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or the Lieutenant Governor in Council." The meaning of owned, controlled or operated must necessarily be interpreted to determine what this would require and the same requirement would need to be applied to the term "under the authority of". Judicial decisions that have interpreted whether entities are crown agencies under the Act have required a much higher level of control for an agency to fall within this definition than is the case under the legislation creating the TSSA.

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Administrative Statutes

Revenues and Finance

(e) a service provider as defined in the *Child and Family Services Act* or a board as defined in the *District Social Services Administration Boards Act* that is designated as a public service agency by the regulations; and

does not include a municipality, or a local board as defined in the *Municipal Affairs Act*, other than a local board that is designated under clause (e); and “service” means any service or procedure that is provided to the public by a government agency or institution of the Legislature and includes all communications for the purpose.”

The Lieutenant Governor in Council also has the authority to make regulations to specifically designate any public service agency as a “government agency.” However, the TSSA does not appear to fall into any of the definitions of a “government agency” provided in the Act, and therefore may be considered exempt from it.

French Language Services in the MCCR/TSSA Agreement

The MCCR/TSSA Agreement requires that the Authority’s Business Plan include a plan setting out the means by which services are provided in the French language, and that the TSSA’s Annual Report include an account of the results of this plan.⁷⁴ The Authority’s policy on French Language Services was adopted in September 1998.⁷⁵ The TSSA’s 1998/99 Annual Report states that “Consistent with our French Language Services Policy, TSSA responded in French to all requests received in French during 1998/99.”⁷⁶

iv) Administrative Statutes

The transfer of MCCR’s Safety and Standards Division to a non-governmental entity, the TSSA, also means that the operations and practices of the Authority are no longer subject to the rules and procedures regarding the collection and disbursement of funds, accounting and financial management practices, administrative and management procedures and policies, and personnel management practices established through the *Financial Administration Act*,⁷⁷ *Treasury Board Act*,⁷⁸ *Management Board of Cabinet Act*,⁷⁹ and the *Public Service Act*.⁸⁰

Increased efficiency through the removal of the management procedures and requirements established through statutes of this nature is one of the major goals ‘new public management’ or ‘alternative service delivery’ initiatives.⁸¹ However, it is important to consider that these statutes are intended to ensure the sound management of public monies, fairness, competence and consistency in the delivery government programs, and the maintenance of the merit principle in the hiring and promotion of personnel.

Moreover without the information generated by such procedures it is difficult to evaluate whether functions are being carried out efficiently. The recent controversies over spending by the federal Human Resources Development Department have highlighted the potential consequences of dispensing with the normal procedures related to monitoring and accounting for public expenditures.⁸²

6. Revenues and Finance

Section 12(4) of the Act makes it clear that any money collected by the administrative authority in carrying out its delegated functions is not public money and that the administrative authority may use it for its own purposes. This provision was highlighted as the most important feature of the TSSA by the Minister of Consumer and Commercial Relations in his remarks on Bill 54 to the Legislature’s Standing Committee on the Administration of Justice:⁸³

“...I guess the most important function of the new safety organization is that it will not be hampered by other pressures of government for a minister to reduce his expenditures column, the expenditures side of his ministry. The safety organization will be able to keep the revenues they get from elevator inspection, from approving designs for boiler and pressure vessels etc.

“What happened over the history of this ministry has been that the number of elevator inspectors, for example, has gone from 50 down to the low 20s. There are presently about 47 or 48 elevator inspectors there now. The reason they went down, Mr. Kennedy, was because the finance Minister of the day said to the ministry “you constrain.” They looked back into their ministry and said “yes we’ll constrain in the areas of inspection and enforcement.” The beauty of this particular organization is that they will not be constrained by that, and will be able to react to the real safety needs of consumers because they will have their own revenue generating organization.”

Figures provided to the Standing Committee on the Administration of Justice by the government for its review of Bill 54 indicated that for the 1995/96 fiscal year Safety and Standards Division of MCCR generated \$21.9 million in revenue through licence fees, and other charges. Direct operating expenditures for the Division were stated by the government to be 1995/96 fiscal year were \$16.7 million, plus \$2.3 to \$5 million for corporate services (legal, human resources, administration, accommodation, information technology), for an estimate of net revenues over direct and indirect expenditures of \$2.9 million.⁸⁴ Under the new model this difference could be retained by the Authority to support its operations.

Individuals and enterprises engaged in any activities regulated through the Acts delegated to the Authority are required to obtain approvals from the Authority. Inspections and reviews by the Authority are also required. The Authority is permitted to set its own fee levels for these services. In effect, the Authority is able to borrow the powers of the state to raise revenue to support its operations, but it is not subject to the same accountability mechanisms as government, such as approval by the Legislature and oversight by the Provincial Auditor, in its exercise of those powers. In the words of the Authority’s annual report, the “TSSA is not constrained by jurisdictional fiscal policy.”⁸⁵ To the degree to which there is an accountability structure in this regard, it is to the board of directors, and through it, to the regulated industry sectors, rather than to the Legislature, and ultimately, the public.

The Authority is required through the TSSA/MCCR Administrative Agreement to generate adequate resources to fulfil its obligations under the Agreement, Acts, and SCSAA.⁸⁶ There is also a requirement that fees be set in accordance with a process and criteria approved by the Minister.⁸⁷ However, the Minister does not approve the actual fee levels set by the Authority, and therefore cannot be said to be directly responsible to the Legislature or the public for them. This is in contrast to the situation in Alberta, where fee levels set by the delegated administrative organizations, like the Alberta Boiler Safety Association are subject to Ministerial approval.

7. Conclusions

The transfer of the regulatory functions of a government agency to a private organization, as in the case of the TSSA, raises unique questions regarding political, legislative, administrative and fiscal accountability. Although the TSSA states that it is accountable to the Minister for its performance, the degree to which the Ministry can effectively oversee the Authority’s activities, and if necessary control and direct them

is open to question. At the same time, it seems likely that, as has been the case in Britain and New Zealand with even less ambitious restructurings of public services, Ministers will be unwilling to accept responsibility to the Legislature and the public for the Authority's performance.

The TSSA also escapes the normal application of the statutes that provide the foundation of the legislature and public's ability to oversee the activities of provincial government agencies and hold the government to account for their performance. These include the *Audit Act*, *Ombudsman Act*, *Freedom of Information and Protection of Privacy Act*, *Lobbyist Registration Act* and *Environmental Bill of Rights*.

Similarly, other statutes, such as the *Environmental Assessment Act*, *French Language Services Act* and *Financial Administration Act*, which are intended to shape to behaviour of provincial agencies to ensure the protection of the environment, the maintenance of minority language services and fairness in the administration of public services, do not apply to the Authority.

Provisions were made within the TSSA/MCCR administrative agreement regarding the freedom of information and the protection of privacy, the resolution of complaints and the provision of French language services. However, as has been noted by the Information and Privacy Commissioner and the Ombudsman, these arrangements do not provide the same legal protections as those provided through legislation which would normally apply to provincial agencies. The step of formally bringing the Authority under the statutes that would normally apply to provincial agencies has only been taken with respect to the *Environmental Bill of Rights*. This could have been done regarding most of the other relevant legislation as well. However, these steps have not been taken by the government to date.

The accountability framework established by the Government of Ontario for the TSSA is significantly weaker than that provided in other jurisdictions undertaking similar reforms. Executive agencies in the United Kingdom and "corporatized" departments in New Zealand remained explicitly subject to direct parliamentary oversight. In New Zealand, restructured agencies remained under the jurisdiction of the Auditor-General and Ombudsman, and subject to freedom of information and protection of privacy legislation. Similar requirements were applied to the Canadian Food Inspection Agency. Even in the case of Alberta, the delegated administrative organizations and any information in their possession remained subject to freedom of information legislation and potential oversight by the Provincial Auditor.

The gaps in the formal accountability structures for the Authority are of particular concern given the public safety nature of the TSSA's mandate, and its relationship to the protection of other public goods, such as the environment. The importance of these structures were highlighted by the Provincial Auditor's 1992 review of the performance of the MCCR's elevator inspection program, which identified major problems, and led to the implementation of significant changes to the program.

Some of these issues could be resolved relatively easily through decisions of the Lieutenant Governor in Council to designate the Authority as an "institution" for the purposes of the *Freedom of Information and Protection of Privacy Act*. However, other problems, such as the lack of effective structures for the accountability of the Minister or board of directors to the public for the Authority's performance are more fundamental and flow from the Authority's basic institutional design

ENDNOTES

- ¹ MCCR/TSSA Administrative Agreement, Section 5.
- ² Administrative Agreement, Schedule “C”
- ³ *Ibid.*, s.4(3).
- ⁴ *The Power Corporation Act*, s.10.
- ⁵ The Hon. N. Sterling, Minister of Consumer and Commercial Relations, remarks regarding Bill 54 to the Standing Committee on the Administration of Justice, June 24, 1996
- ⁶ Pers. Comm., Robert Dowler, Director, Marketplace Standards and Services Branch, Ministry of Consumer and Commercial Relations, January 7, 2000.
- ⁷ The Hon. N. Sterling, Minister of Consumer and Commercial Relations, remarks regarding Bill 54 to the Standing Committee on the Administration of Justice, June 24, 1996.
- ⁸ *Safety and Consumer Statutes Amendment Act.*, s. 6.
- ⁹ *Ibid.*
- ¹⁰ MCCR/TSSA Administrative Agreement, section Art.13.
- ¹¹ SCSAA, s.14.
- ¹² See, for example, P.Hogg, “Responsible Government” in R.S. Blair and J.T.McLeod, *The Canadian Political Tradition* (Toronto: Methuen, 1987), pp.22-24.
- ¹³ J.R. Michell and S. Sutherland, “Relations between Politicians and Public Servants,” in M/ Charih and A. Daniels, eds., *New Public Management and Public Administration in Canada* (Toronto: Institute for Public Administration of Canada, 1997), pg. 189.
- ¹⁴ See, for example, D. Woodhouse, “Ministerial Responsibility: Something Old, Something New,” *Public Law*, Summer 1997, pp.262-282; Robert Gregory, “Political Responsibility and Bureaucratic Incompetence: Tragedy at Cave Creek,” *Public Administration* Vol.76, 1998.
- ¹⁵ M.Taggart, “Corporatisation, contracting and the courts,” *Public Law*, pp.352-352.
- ¹⁶ *Ombudsman Act*, R.S.O. 1990, c. O.6
- ¹⁷ Ombudsman Ontario, *1996/97 Annual Report*, pg.3.
- ¹⁸ Summary from www.ombudsman.on.ca/faq_en.htm.
- ¹⁹ Ombudsman Ontario, *1996/97 Annual Report*, pg.3.
- ²⁰ *Ibid.*, s.5(3).
- ²¹ TSSA, *TSSA Complaints Handling Policy*, August 17, 1998.
- ²² *98/99 Annual Report*, pg.33.
- ²³ *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. F.31
- ²⁴ *Ibid.*, ss.11 and 23.
- ²⁵ *Ibid.*, Part III.
- ²⁶ *Ibid.*, Part IV.
- ²⁷ *Ibid.*, s.2.
- ²⁸ TSSA, Access and Privacy Code, February 18, 1998.
- ²⁹ TSSA, Access and Privacy Code, s.III(2).
- ³⁰ *Ibid.*, s.III(3).
- ³¹ *Freedom of Information and Protection of Privacy Act*, s.17.
- ³² Information and Privacy Commissioner/Ontario, *Annual Report 1998*, pp.11-12.
- ³³ A.Roberts, *Limited Access: Assessing the health of Canada’s Freedom of Information Laws* (Kingston: Queen’s University School of Policy Studies, 1998).
- ³⁴ *An Act Respecting Environmental Rights in Ontario*, Ch.28, S.O. 1993.
- ³⁵ *Ibid.*, Part II.
- ³⁶ *Ibid.*, Part IV.
- ³⁷ *Ibid.*, Part V.
- ³⁸ *Ibid.*, Part VI.
- ³⁹ *Ibid.*, Part VII.

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Endnotes

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- ⁴⁰ *Ibid.*, Part III.
- ⁴¹ Ontario Regulation 73/94.
- ⁴² Environmental Commissioner for Ontario, *Annual Report 1996*, pg.22.
- ⁴³ The Hon. D.Tsubouchi, Minister of Consumer and Commercial Relations, *Environmental Bill of Rights -Section 117: Delegation of Minister's Powers and Duties*, May 1, 1999. Under Section 117 of the *Environmental Bill of Rights*, a Minister may authorize in writing any person or group of persons to exercise any of the ministers powers or duties under the Act.
- ⁴⁴ Environmental Commissioner of Ontario, *Annual Report 1998*, pg.141.
- ⁴⁵ Environmental Commissioner of Ontario, *Annual Report 1997*, pg.17.
- ⁴⁶ Environmental Commissioner of Ontario, *Annual Report 1997 Supplement*, pg.1.
- ⁴⁷ Environmental Commissioner for Ontario, *Annual Report 1997*, pg.17.
- ⁴⁸ EBR Registry Posting No.RD7E0001.
- ⁴⁹ *Audit Act*, R.S.O. 1990, c. A.35
- ⁵⁰ www.gov.on.ca/opa.en99/missionen99.html
- ⁵¹ *The Audit Act*, s.12.
- ⁵² *Ibid.*, s.13.
- ⁵³ www.gov.on.ca/opa/careerBR/careerBRen3.html
- ⁵⁴ Office of the Provincial Auditor, *1992 Annual Report* (Toronto: Queen's Printer for Ontario, 1992) pp.42-48.
- ⁵⁵ Office of the Provincial Auditor, *1997 Annual Report* (Toronto: Queen's Printer for Ontario, 1997), pg.241.
- ⁵⁶ SCSAA, Section 12(4).
- ⁵⁷ See, for example, SCSAA, sections 9, 10, and 12(4).
- ⁵⁸ Office of the Provincial Auditor, *1997 Annual Report*, pg.241.
- ⁵⁹ Pers.comm., John Sciarra, Executive Assistant to the Provincial Auditor, January 7, 2000.
- ⁶⁰ *The Audit Act*, s.17.
- ⁶¹ This summary is based on: Lobbyists Registration Office, *A Guide to the Lobbyist Registration Act* (Toronto: Office of the Integrity Commissioner, January 1999).
- ⁶² SCSAA, ss.9 and 10.
- ⁶³ Pers. Comm., Lynn Morrison, Lobbyist Registration Office, Office of the Integrity Commissioner, January 5, 2000.
- ⁶⁴ *Ibid.*
- ⁶⁵ *Environmental Assessment Act*, R.S.O. 1990, c. E-18, as amended by Bill 76, section 3.
- ⁶⁶ See Bill 76, *The Environmental Assessment Consultation and Improvement Act, 1996*.
- ⁶⁷ *French Language Services Act*, R.S.O. 1990, c. F.32
- ⁶⁸ *Ibid.*, section 2.
- ⁶⁹ *Ibid.*, Section 3.
- ⁷⁰ *Ibid.*, Section 7.
- ⁷¹ *Ibid.*, section 12.
- ⁷² *Ibid.*, section 13.
- ⁷³ *Ibid.*, Section 11.
- ⁷⁴ MCCR/TSSA Administrative Agreement, Art. 5(2).
- ⁷⁵ TSSA Corporate Policy: French Language Services, September 1998.
- ⁷⁶ TSSA, *98/99 Annual Report*, pg.33.
- ⁷⁷ RSO 1990, c.F-12; establishes procedures for the collection and disbursement of public money.
- ⁷⁸ SO 1991, c-14; provides for the establishment of procedures re: accounting, collection, management and administration of public money.
- ⁷⁹ RSO 1990 c.M-1; provides for the establishment of administrative and management procedures and policies.

⁸⁰ RSO 1990 c.P-47; establishes Public Service Commission, rules for hiring, classification of employees, political activities of public employees, provides for establishment of standards for recruitment regulations and working conditions.

⁸¹ See, for example, S.Borins, “New Public Management is Here to Stay,” Canadian Public Administration, Vol. 38, No.1, Spring 1995.

⁸² See, Internal Audit Bureau, Final Report: Program Integrity/Grants & Contributions (Ottawa: Human Resources Development Canada, January 2000).

⁸³ The Hon.N.Sterling, Minister of Consumer and Commercial Relations, to the Standing Committee on the Administration of Justice, Ontario Hansard, June 24, 1996.

⁸⁴ J.Flaherty, Parliamentary Secretary to the Minister of Consumer and Commercial Relations, to Standing Committee on the Administration of Justice, Ontario Hansard, June 25, 1996.

⁸⁵ TSSA, 1998/99 Annual Report pg.2.

⁸⁶ MCCR/TSSA Administrative Agreement s.8(1).

⁸⁷ Ibid., s.8(3).

Chapter V: The TSSA: Political, Legislative, Administrative and Fiscal Accountability

VI. LEGAL ACCOUNTABILITY

1. Introduction

In addition to the political, legislative, administrative and financial accountability structures outlined in the preceding chapter, 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.

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 such as the TSSA, is uncertain. Private corporations are generally not subject to the *Charter* or the statutory and common law requirements regarding fairness or justice in decision-making that apply to the state.

These questions are particularly important in the case of the TSSA, as it is the first instance in Canada where responsibility for law enforcement, including the conduct of prosecutions, has been fully delegated to a private organization by the state. The pursuit of prosecutions is one of the most significant powers exercised by governments, as it has the potential to stigmatize and to deprive individual citizens of their property and even their freedom.

Other issues raised by the TSSA's status as a private organization mandated to administer and enforce laws related to public safety include the potential for the Authority to be sued for regulatory negligence, and the nature of the defences that might be available to it in such situations. The potential liability of the provincial government for damages arising from the actions or decisions of the Authority must also be considered.

In the absence of litigation around these issues specifically involving the TSSA, any analysis of the Authority's status in relation to the legal accountability structures that normally apply to government agencies in Ontario must be speculative in nature. However, over the past few years, the Courts have dealt with a number of cases involving the delegation of governmental functions to private organizations, in ways that are analogous to the situation of the TSSA. These cases may provide some indication of how the Courts might respond to litigation regarding the Authority's decisions or actions. As one commentator has noted:¹

“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.”

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

2. The Canadian *Charter of Rights and Freedoms*

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,² protection from unreasonable search and seizure,³ and rights of those accused of violations of the law.⁴ *Charter* rights, which supersede any legislative authority, are enforceable by the courts and by some administrative tribunals. As such, legislation which contravenes the *Charter* may be declared to be of no force or effect, government agencies may be ordered to comply with *Charter* requirements in the administration of their programs, and evidence gathered in a manner which contravenes the *Charter* may not be permitted to be considered in a prosecution.

Section 32 of the *Charter* states that it applies, in addition to the federal government and legislation:

- b) *to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.*"

Given the *Charter's* application, it is clear that the SCSAA itself could be subject to a *Charter* challenge as it is an act of the Ontario Legislature. It is less clear how the *Charter* may apply to the activities and decisions of the TSSA, a private not-for-profit corporation that is expressly not a provincial government agency.

The reach of the *Charter's* application has been the subject of much judicial interpretation. There is authority to support the contention that the *Charter* applies to actions taken by some non-governmental entities under statutory authority. Professor Peter Hogg has noted that:

"Since neither Parliament nor a Legislature can itself pass a law in breach of the *Charter*, neither body can authorize action which would be in breach of the *Charter*. Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority."⁵

The 1998 decision of the Supreme Court of Canada in the case of *Eldridge v. British Columbia (Attorney General)* applies to this issue. *Eldridge* dealt specifically with the applicability of the *Charter* to private organizations carrying functions delegated to them by governments.⁶ The matter in 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."⁷

In the *Eldridge* case, the *Charter* was held to apply to private entities that implemented a specific government policy or program. Justice LaForest explained that the *Charter* may be held to apply in one of two different manners: (i) if it is determined that the entity is controlled by government to such a degree that it is characterized as government, then all of its activities are subject to the *Charter*; or (ii) if the entity only performs a particular activity normally ascribed to government, then it may only attract *Charter* scrutiny in respect of those activities. The Court ultimately found that the province was not allowed to define its objectives, in particular to guarantee access to medical services without charge, and then evade responsibility by appointing private entities to carry out those objectives.

This case is relevant to the situation of the TSSA for several reasons. First, the determination was made not on the basis of the impugned legislation infringing on the *Charter*, but based on the actions of particular entities exercising a discretion conferred by legislation.⁸ The key determination 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 do not readily admit of *a priori* elucidation.”⁹

This conclusion implies that the *Charter* may apply to the TSSA, and similar organizations, if their activities are found to be “governmental.” However, the Court's statement also indicates that determinations of what is “governmental” can only be made on a case by case basis. Furthermore, it is possible that the *Charter* may only apply to certain activities of the organization that can be characterized as being governmental in nature.¹⁰ To make these determinations, the scrutiny will inevitably focus on whether the act is truly governmental in nature.

The Supreme Court has provided some guidance on identifying activities as being “governmental” in nature. In approaching this question, the Court has relied on a test outlined by Justice Bertha Wilson in her dissent in the 1990 *McKinney v. University of Guelph*¹¹ case. Her test of “governmentalness” describes a series of questions where entities are not self evidently part of government:

- “1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest.”

The status of the TSSA under the first test is uncertain, as it might be argued that the Minister and Cabinet can legally exercise control over the Authority, as a result of their ability, through the SCSAA, to amend the MCCR/TSSA Administrative Agreement, or revoke the Authority's delegation. However, as argued in Chapters IV and V, the actual practicality of the exercise of this control is open to question.¹ It is also important to note that while the ‘control’ test was central in the Court's earlier determinations of “governmentalness,”¹² in more recent cases, such as *Eldridge*, it has

¹ In dealing with the question of the level of government control exercised over an entity to determine its “governmentalness,” the Supreme Court has focussed on the amount of control the executive branch is legally entitled to exercise rather than the amount of control actually exercised. See for example, *R.v.Eldorado Nuclear Ltd.* (1983) 2 SRC 551.

been 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.

The status of the TSSA under the latter two tests is clearer. The fact that the TSSA was created out of what was formerly part of a government department suggests that it performs a traditional government function. It also clearly acts under statutory authority granted to it by the government of Ontario for the purpose of promoting the broader public interest, specifically public safety.

The likelihood that the *Charter* will apply to the TSSA is further reinforced by the jurisprudence that applies the *Charter* to the regulatory activities of self-regulating professional bodies such as Law Societies.¹³ In *Costco Wholesale Canada Ltd. v. Board of Examiners in Optometry (British Columbia)*¹⁴ where the British Columbia Supreme Court considered applicability of the *Charter* to rules established by the professional body that prohibited business associations between optometrists and non-optometrists. In *Costco* the Court held the *Charter* to be applicable, in part, because if the role exercised by the professional body had not been delegated, the government would regulate the matter directly. The *Charter* was also considered to apply as the rules in question were created as part of a governmental scheme to maintain practice standards for the safety and well being of the public. This conclusion is most interesting in light of the public safety role of the TSSA and the authority to revoke the power of the agency for any public purpose, found in the SCSAA.¹⁵

The *McKinney* test and *Eldridge* and *Costco* decisions provide a basis for concluding that it is likely that the TSSA's activities and decisions with respect to the administration of the delegated legislation would be found subject to the requirements of the *Charter*. It would also follow that it is likely that the Courts would find the TSSA and similar bodies subject to the wider legal accountability structures normally applicable to government agencies.

It is, however, important to consider that the concept of what is "inherently governmental" or a "governmental function" is subjective, and may not be static over time, as concepts about the role of the state evolve. As ideas regarding the proper scope of governmental action change, so may the potential application of the *Charter*.

Specific issues related to the application of the *Charter* in relation to inspections and law enforcement activities of the Authority are discussed in the following sections.

3. Rights of Appeal, Fairness and Natural Justice in Decision-Making

The granting of the authority to issue licenses and other forms of approvals to the TSSA raises several issues in administrative law. As described in Chapter two the Alberta government delegated responsibility for the regulatory aspects of underground storage tanks to the Petroleum Tank Management Association (PTMMA) in 1994. In an article on what was then Alberta's first "delegated administrative organization," the question was raised as to where the principles of natural justice and procedural fairness fell in such an organization.¹⁶ The same questions arise with the Ontario TSSA.

Principles of natural justice dictate that those affected by governmental decisions have the right to know and to answer the cases against them, to bring evidence and make argument and the right to an unbiased decision-maker.¹⁷ These principles are fortified by the possibility of judicial review of governmental decisions, and the reversal of decisions where these principles have not been applied.

Under most legislation administered by the TSSA, appeals of decisions are to the statutory directors identified in the legislation, and then to the Ontario Superior Court of Justice. The two exceptions are appeals under the *Upholstered and Stuffed Articles Act*, which are to the Commercial Registration Appeal Tribunal (CRAT)¹⁸ and the *Boilers and Pressure Vessels Act*, where the appeal is to the Minister. The recently proposed *Technical Standards and Safety Act* would make all appeals under the legislation administered by the Authority to the statutory directors under those Acts — who are also the TSSA's Vice-Presidents - and then to the Divisional Court.¹⁹

Following its 1979 *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,²⁰ the Supreme Court began to expand the scope of judicial review, proclaiming that all administrative bodies owe a duty of fairness to regulated parties whose interest may be determined by that body. It is now well established that the duty to act fairly, although in varying degrees, will apply to any body authorized by statute to make a decision which may affect a person's right, interest, status or situation.²¹ The key question is whether the TSSA, as a private entity, will be held to the same standards of fairness and accountability as would apply when decisions were being made by the MCCR.

The *Statutory Powers Procedure Act*²² (SPPA) prescribes the minimum procedural rules for the conduct of administrative proceedings governed by the Act. The SPPA applies to procedures by tribunals in their exercise of a statutory power of decision unless otherwise exempt.ⁱⁱ A "Tribunal" is defined in the SPPA as:

"One or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute."²³

The *Judicial Review Procedure Act*²⁴ (JRPA) provides a unified procedure for obtaining a remedy of *certiorari*, prohibition, *mandamus*, declarations and injunctions where an application for judicial review has been commenced under Rule 68 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In Ontario, the JRPA applies when a "statutory power of decision" is exercised. Section 2(1) of this Act empowers the court to grant relief on an application for judicial review despite any right of appeal.

The application of both the SPPA and JRPA turn on the question of whether a "statutory power of decision" is exercised. A "statutory power of decision" is defined in the JRPA as follows:

"a power or right conferred by or under statute to make a decision deciding or prescribing, (a) the legal rights, powers, privileges, immunities, duties or liabilities or any person or party, or (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not, and includes the powers of an inferior court."²⁵

As a general rule, decisions made by private bodies are not considered to involve exercises of statutory powers, even if they derive some power from legislation, for example through incorporation.²⁶ Therefore, the applicability of these requirements to the TSSA, as a private entity, is not immediately clear.

The SCSAA itself only exempts application of the SPPA from the right of the Lieutenant Governor in Council to revoke a designation under the legislation. That Act does not state that the SPPA does not apply to legislation designated under the SCSAA in any general manner, nor does any of the designated legislation contain such a provision. While application of the duty of fairness may validly be limited through statutory provisions, nothing short of unequivocal statutory language will persuade courts that the legislature intended to authorize non-compliance with their duty.²⁷

ⁱⁱ Section 3(2) of the SPPA exempts proceedings before the Superior Court of Justice from its proceedings, which would preclude application to appeals under most of the legislation delegated to the TSSA, as the appeals under this legislation are currently to that court, although the Director would still have to follow the rules in the SPPA if he or she is acting as a "tribunal."

Section 16 of the *Ministry of Consumer and Commercial Relations Act*, as amended through the SCSAA, allows the Minister to delegate powers under any of the Acts administered by the TSSA to its directors, chief officers, chief inspectors and inspectors. This includes the powers to grant or renew licences, registrations, approvals or authorizations under the delegated legislation. These delegations have been provided through the issuance of a certificate of appointment bearing the Minister's signature.²⁸

These powers under the legislation administered by the TSSA appear to meet the definition of a "statutory power of decision" contained in the JRPA. Therefore, their exercise by the TSSA should be found to be subject to the JRPA and the SPPA. This conclusion is reinforced by the finding that statutory powers of decision have been found to be exercised in a variety of contexts by self-regulating professional bodies,²⁹ which are, in many ways, analogous to the TSSA.

However, not all of the TSSA's decisions are likely to be subject to judicial review. Commercial decisions by the Authority are unlikely to be subject to review,³⁰ although this exception may be somewhat circumscribed by the consideration that the nature of the Authority is one which supports important public principles.³¹ Similarly it seems unlikely that the establishment or modification of the Authority's by-laws would be considered an exercise of statutory power,³² although the establishment of by-laws requiring membership in the Authority as a condition of carrying out an activity governed by the delegated legislation, as provided by the SCSAA³³ may be reviewable.³⁴

In some ways, the question of the potential scope of judicial review is not unique to the TSSA, as it arises even in the context of government agencies entering into private contracts. What is new is that there are likely to be issues that will arise which could bring into question the traditional protection of the principles of natural justice through creation of the TSSA. If the Authority's corporate by-laws require all licensed individuals to be members of the corporation and then a by-law is created that restricts the right of certain individuals to renew a licence, will they be protected? These are the kinds of questions that can only be answered on a case by case basis.

4. Inspections and Enforcement

i) Inspections

Under Section 16(1) of the *Ministry of Consumer and Commercial Relations Act*,³⁵ as amended through the SCSAA, the Minister appoints the Directors, chief officers, chief inspectors and inspectors for each of the Acts administered by the TSSA. Each appointee is issued a certificate of appointment bearing the Minister's signature to be produced by the appointee upon request.³⁶ TSSA inspectors also have designated authority in accordance with the *Provincial Offences Act*.³⁷

These designations permit Authority inspectors to exercise a wide range of investigative powers under the legislation administered by the Authority, including the right to enter premises without a warrant, require the production of documents, prepare devices for inspection, require owners or operators to do anything necessary during an inspection, and require tests of devices at the owners' expense.³⁸ Similar and, in some cases, expanded powers would be exercised by TSSA staff under Bill 42, the proposed *Technical Standards and Safety Act*.

The delegation of these powers to employees of a private organization is unusual, although not unprecedented, in Canada. Again, this raises questions of the applicability of the rights of members of the public or regulatees in relation to inspections that have traditionally been carried out by agents of the state, when these

activities are conducted by employees of a private organization. The courts have expressed concern over the delegation of the state's investigative powers to private actors, given the potential for conflict of interest. In one case the court found that evidence obtained by a private entity for the Crown was contrary to section 8 of the *Charter* as an unreasonable search and seizure and that the admission of the evidence would bring the administration of justice into disrepute.³⁹

This and other cases, however, suggest that the *Charter* will apply to inspections carried out under regulatory legislation by employees of private organizations. The application of section 8 to private inspections conducted in the context of regulated industries has been specifically addressed by the Supreme Court of Canada in its 1994 *Comite paritaire de l'industrie de la chemise v. Potash* decision.⁴⁰

The *Comite* case dealt with the powers of inspection of a private agency responsible for implementing a government decree in a regulated industry. The *Act Respecting Collective Agreement Decrees*,⁴¹ ("the ACAD") makes all of the committees to which the Act applies corporations with the same general powers, rights and privileges accorded to ordinary civil corporations,⁴² including the ability to appoint a general manager, secretary and inspectors. The powers to appoint these individuals and to issue them certificates of capacity are in the hands of the *Comite* itself. The ACAD grants these individuals the rights to carry out inspections and to order the production of documents. These provisions are similar to inspection powers found in most of the statutes administered by the TSSA.

In finding that section 8 of the *Charter* applied to the activities of the *Comite*, Justice L'Hereux-Dube concluded that:⁴³

1. The various powers afforded the *Comite*, including the power to visit premises conferred under regulatory legislation and designed to regulate an industrial sector, do constitute either a search or a seizure;
2. The term search in section 8 is not limited to a search of a criminal nature, however the scope of the guarantee will vary depending on the nature of the search;
3. The powers are not unreasonable, having regard to an employer's reasonable expectation of privacy and the need for powers of inspection to ensure implementation of the social objectives set out to be achieved; and
4. The regulatory nature of the ACAD and the fact that it covers a regulated industrial sector qualify the interpretation and context of section 8.

If there is sufficient evidence of the exercise of a state power or a connection to government, then section 8 of the *Charter* will apply to the activity in question. The powers exercised by TSSA inspectors are defined under the SCSAA and they are delegated pursuant to the *Ministry of Consumer and Commercial Relations Act*. Notwithstanding the provisions of sections 9 and 10 of the SCSAA, which attempt to separate the Authority from government, it is difficult to see how someone who produces a document bearing the signature of a Minister of the Crown for the purpose of verifying their authenticity can subsequently suggest they are not an agent of the provincial government, and therefore not subject to *Charter* limitations.

Indeed, in the *Comite* case, the basic principle of whether the *Comite's* inspectors were exercising authority conferred by the state was never questioned. This case focuses on the scope of the rights afforded by section 8 and justifies a more narrow interpretation in a regulatory context. If employees of the TSSA acting as inspectors are not state agents, it invites the question what authority is vested in these individuals to conduct investigations and searches in the first place. A private corporation cannot, without some form of state sanctioned authorization, simply regulate the

behaviour of other individuals through search and seizure methods. Furthermore, even prior to the *Comite* decision, the case law on the application of section 8 in the context of self-regulating professional found that the *Charter* protection applied.⁴⁴

However, in the longer term, if inspection and policing powers are increasingly transferred outside of government, there is a risk that over time, these powers will begin to be seen as non-governmental, and judicial interpretations of the *Charter* may change to exclude them.

ii) Initiation and Conduct of Prosecutions

Part 12 of the Administrative Agreement makes it clear that the Administrative Authority will be responsible for the conduct of prosecutions under the statutes which it is to administer. The formal delegation of full responsibility for the initiation and conduct of prosecutions to a private body without direct government oversight appears to be unprecedented in Canada. As outlined in Chapter III of this report, the Alberta PTMAA and ABSA, for example, state that they have the authority to conduct prosecutions, although this is subject to approval by the Ministry of Labour.

The Authority has been actively pursuing enforcement actions since the transfer of responsibility of the administration of the delegated statutes to it in May 1997. Prosecutions are carried out by TSSA staff counsel, who state that they are “acting on behalf of the Crown.”⁴⁵ (See Enforcement Stats table on page 62.) This situation raises a number of important questions.

Validity of Delegation

The Minister of Consumer and Commercial Relations’ authority to delegate the initiation and particularly the conduct of prosecutions in the name of the Crown to the TSSA is uncertain. Ministers are understood to have the authority to conduct inspections and investigations under the statutes for whose administration they are responsible. A prosecution is initiated by the swearing of a document called an “information” before a Justice of the Peace in which one or more individuals allege that they have reasonable and probable grounds that someone has committed an offence contrary to a specific Act or regulation. This is typically done by a police officer or Ministry investigator, although it may be done by anyone.⁴⁶ It may be argued that the delegation of the Ministry’s inspection and investigation functions to the Authority included the delegation of initiation of prosecutions by the swearing of informations.

The conduct of prosecutions is a more complex question. The *Provincial Offences Act* does provide for the conduct of “private” prosecutions, by ordinary members of the public.⁴⁷ However, TSSA staff state that the prosecutions which they conduct are not private prosecutions in this sense, but are “on behalf of the Crown.”⁴⁸

The authority to conduct prosecutions in the name of the Crown rests with the Attorney General, rather than with individual Ministers. This is reflected in section 5 of the *Ministry of the Attorney-General Act*, which states:

5. The Attorney General...

(h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature.”

Consistent with this provision, provincial prosecutors associated with individual Ministries have been employees of the Ministry of the Attorney-General, on secondment to those Ministries. This is provided for by section 6 of the *Ministry of the Attorney-General Act* and section 6 of the *Crown Attorney’s Act*.⁴⁹

TSSA SUMMARY OF PROSECUTORIAL ACTIVITY — May 1996 to Present

ACTIVITY	1996/97	1997/98	1998/99
	TSD — MCCR PROSECUTION ACTIVITY	TSSA PROSECUTION ACTIVITY	TSSA PROSECUTION ACTIVITY
1. Total Prosecutions Completed	Total 16 16 Completed	Total 10 10 Completed (6 carried over from 1996/97)	Total 16 4 Completed (5 carried over from 1997/98) (11 initiated in 1998/99)
2. Fines/Penalties Levied	\$84,800.00	\$20,500.00	\$35,000.00
3. Program Areas			
(A) Fuels	<i>Energy Act — 11</i>	<i>Energy Act — 9</i>	Completed: <i>Energy Act — 1</i> In Progress: <i>Energy Act — 6</i> <i>Gasoline Handling Act — 2</i>
(B) Boiler & Pressure Vessels	<i>Boiler & Pressure Vessels Act — 1</i>		
(C) Elevating & Amusement	<i>Amusement Devices Act — 3</i> <i>Upholstered & Stuffed Articles Act — 1</i>	<i>Upholstered & Stuffed Articles Act — 1</i>	Completed: <i>Amusement Devices Act — 2</i> <i>Elevating Devices Act — 1</i> In Progress: <i>Amusement Devices Act — 2</i> <i>Elevating Devices Act — 2</i>
4. Category			
(A) Fatality/Injury/Property Damage	7 substantial property damage (2 personal fatality)	4 substantial injury or property damage	4 substantial injury or property damage (2 personal fatality)
(B) Challenge to Authority	2 challenge to authority	1 challenge to authority	4 challenge to authority or noncompliance with orders
(C) LRC Violations	6 LRC violations	5 LRC violations	
(D) Perceived Problems	1 problem area prosecution		
5. Miscellaneous Notes			<i>No fines levied, all penalties were payments into the TSSA Safety Education Fund.</i>

On the face of this legislation, it would not appear to be possible for an individual Minister to delegate responsibility for the conduct of prosecutions in the name of the Crown to a third party, such as the TSSA. In fact, in stating that they appear “on behalf of the Crown” when conducting prosecutions, TSSA counsel appear to contradict sections 9 and 10 of the SCSAA, which state that TSSA employees are not Crown agents and are not to present themselves as such.

Prosecutorial Discretion

Independence and fairness in prosecutorial decisions by the Crown is a fundamental principle of the Canadian justice system. In Ontario, this principle has traditionally been evident in that provincial prosecutors associated with individual Ministries have been employees of the Ministry of the Attorney-General⁵⁰ and understood to be answerable for their decisions to the Attorney-General rather than the Minister responsible for the agency with which they were associated. These arrangements were intended to ensure that there was no possibility of political interference in decision-making regarding the conduct of prosecutions. This reflects the seriousness of implications for the accused of being prosecuted by the state, with all of the resources available to it, and the consequent need to ensure justice and fairness in the use of this power by government.

Furthermore, decisions to conduct prosecutions in the name of the Crown were made on the basis of Directives on Prosecutions provided by the Attorney-General.⁵¹ These set thresholds for the continuation or termination of prosecutions and establish guidelines for their conduct, including such things as the disclosure of evidence to the accused. These arrangements provided a line of accountability with respect to the exercise of prosecutorial discretion through the Attorney General to the Legislature.

In the case of the TSSA, an attempt has been made to maintain the principle of independence in prosecutorial discretion by vesting responsibility for decisions to initiate prosecutions in the persons of the Directors and Chief Officers appointed under the various Acts administered by the TSSA.⁵² These individuals are also the TSSA’s Vice- Presidents. The MCCR/TSSA Administrative Agreement requires that the Director or Chief Officer be able to exercise his or her statutory duties independently of any interference by the Board of Directors,⁵³ which includes the Chief Executive Officer. This does however, leave the question of to whom the statutory Directors or Chief Officer are accountable for their decisions unanswered, as there is clearly no formal or informal link to the Attorney-General or the Minister.

In addition, the Directives of the Ministry of the Attorney-General regarding how prosecutions will be conducted do not apply to the TSSA. The Authority has adopted a policy of its own regarding the management of prosecutions. This outlines criteria for the initiation of prosecutions,⁵⁴ but does not address issues such as the thresholds for their continuation or termination, or the procedural issues, such as disclosure to the accused by the Crown of all relevant material to prepare his or her defence,⁵⁵ covered by the Attorney-General’s Directives.

In 1998, the *Provincial Offences Act* was amended to provide for the delegation of responsibility for the conduct of prosecutions in relation to certain types of minor offences, such as traffic tickets and parking violations to municipalities.⁵⁶ This is to be achieved through agreements between the Attorney-General and municipalities. These agreements are required to specify performance standards for the conduct of prosecutions which must be met by the municipality, and the municipality is to be subject to sanctions if it fails to meet these standards.⁵⁷ The Attorney-General is permitted to make orders directing municipalities to comply with agreements within a specified time, and to revoke or suspend the agreement if the municipality does not comply with the order within that time.⁵⁸ Like the SCSAA, these amendments to the *Provin-*

cial Offences Act state that municipalities acting under agreements made through them are not agents of the Crown in right of Ontario, or of the Attorney-General.

In effect, through these amendments, the provincial government provided for a much high level of oversight by the Attorney-General in the delegation of the conduct of prosecutions for minor offences to another level of government, than it provided for the pursuit of potentially more serious offences by the TSSA.

Charter Section 11 Issues

The formal delegation of law enforcement functions, including the conduct of prosecutions, raises a number of other unique issues. Section 11 of the *Canadian Charter of Rights and Freedoms* delineates the rights of the accused upon being charged. These provisions contemplated that the accused would be charged by the state. The question of whether the *Charter* will provide protection to parties “charged with an offence” by a non-governmental agency such as the TSSA is an important one.

In its 1987 *R v. Wigglesworth*⁵⁹ decision, the Supreme Court of Canada established a test for determining the circumstances under which *Charter* protection shall be afforded. Two tests were set out, either of which could afford protection under the *Charter*. Justice Wilson first concluded that a narrow interpretation should be taken to the word “offence”, guaranteeing section 11 *Charter* rights only to persons prosecuted by the state for public offences involving punitive sanctions, whether criminal, quasi-criminal or regulatory in nature.⁶⁰ Application is determined to include both criminal and penal matters. Alternatively, a person charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline and integrity or to regulate conduct in a private sphere of activity might also attract protection where there is the potential imposition of true penal consequences.⁶¹

The second test requires a determination whether the penalty was truly in the nature of a penal consequence. This demands a consideration of whether there is the possibility of imprisonment or a fine of such magnitude that it would appear to be imposed for the purpose of redressing a wrong to society and not just to maintain internal discipline within a limited sphere of private activity.

These tests appear to be met by the legislation administered by the TSSA, as all of the designated acts except the *Upholstered and Stuffed Articles Act*, provide for a penalty of up to a year in prison, which would fall into the “true penal consequence” category. The penalty under this last Act is only a maximum of \$2,000 for an individual or director and would only likely apply if it passed Justice Wilson’s first test and was found to be quasi-criminal in nature.

The first test appears to restrict the determination to prosecutions by the state. The question of the applicability of *Charter* protection in cases of prosecutions by private entities has not been considered by the Court to date. However, given the Supreme Court’s findings in *Eldridge* that governments cannot evade their *Charter* responsibilities through the delegation of their functions to private entities, and the ‘governmental’ character of these activities, it appears likely that the section 11 protections would be found to apply in such situations. Furthermore, the second test set out above, with its significant potential consequence, is still likely to guarantee protection.

iii) Fines and Penalties

While the TSSA has the authority to retain membership fees, all fines must be forwarded to the Ministry of Finance.⁶² It appears that administrative penalties, imposed under the responsibility of the Director, on the other hand, can bring in revenue which can be retained by the Authority. Administrative penalties can be effective and efficient if used appropriately.⁶³ However, the arrangement within the TSSA provides

strong incentives to apply administrative penalties rather than initiate prosecutions, even for serious violations, although the Authority has yet to establish a system of such penalties.

In the 1998 fiscal year, the TSSA moved from seeking fines for offences to a pattern of entering into plea bargains with alleged violators of the delegated statutes, seeking and obtaining donations to the Authority's safety education fund rather than the payment of fines. (See Stats Table on page 80.)⁶⁴ Although these arrangements have been sanctioned by the courts, they do appear to be at odds the intention of the provision of the Administrative Agreement that all fines imposed by a court in relation to proceedings undertaken by the Administrative Authority cannot be collected or retained as revenue by the Authority.⁶⁵

5. Regulatory Negligence and Insurance

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 for the safety of the public, limitations on its liability for the actions of the TSSA, as set out in the Agreement, raise questions as to where liability will ultimately be found.

Members of the public can sue the TSSA for damages arising from regulatory negligence. Furthermore, in its capacity to be sued, it may not have the same protection as the provincial government. Public authorities have a discretionary right to implement enforcement programs on the basis of established public policy and budgetary resources.⁶⁶ However, as a private entity, the TSSA may not be able to avail itself of this public policy defence against regulatory negligence actions. Consequently an action against the TSSA may have a greater chance of success than one initiated against the province. A successful suit might raise other issues which do not arise in actions against the Crown, particularly the possibility that a large damage award might bankrupt the TSSA.

It is also possible that government may be held liable for the delegation of functions that are performed negligently by the delegatee. 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.⁶⁷ Ontario's delegated administrative authorities have raised the comment that:

"...The structures of the Ontario self-managed organizations are obviously intended to avoid, to the greatest degree possible, a finding that the government is responsible for the actions of the self-managed organizations. It is uncertain, however, whether the government would continue to be liable for the adequacy of the delivery of a regulatory function where it clearly retains responsibility for the creation of regulatory responsibilities and powers. Furthermore, liabilities might arise in terms of the decision to delegate powers to a self-management organization and the ongoing monitoring of the self-management organization's operational functions, even though the government might not be liable for negligent inspections or enforcement per se."⁶⁸

The MCCR/TSSA Agreement has extensive provisions regarding the type of insurance which the authority must carry and the kind of protection it must provide for the Minister. Part 15(5) of the Agreement discusses the procedure in the event that the Minister imposes a new regulatory or legislative obligation on the Authority giving rise to exposure for which insurance is not available. The Authority has the power to identify, with the Minister, appropriate measures to resolve such potential liability

issues. However, the Agreement does not appear to require coverage for regulatory negligence, or coverage to deal with the known worst-case outcomes in the areas under the Authority's jurisdiction.⁶⁹

6. Conclusions

The establishment of the TSSA gives rise to an important set of questions around the legal accountability of private organizations to which government functions are delegated. Over the centuries, a body of judicially enforceable constitutional, statutory and common law has emerged designed to ensure fairness and justice in the administration laws, policies and programs by governments. These rules provide important limitations on the exercise of power by the state in a democratic society. The status of these principles, however, is unclear when government functions are transferred to private sector agents, to whom they are not normally understood to apply.

The legislation creating the TSSA and similar organizations in Alberta has been largely silent on these issues. It has been left to the courts to resolve the questions of the application of the *Charter* and statutory and common laws requirements regarding government decision-making to private organizations to which government functions have been delegated. Although there has been no litigation of this nature to date specifically involving the TSSA, the Supreme Court has dealt with number of cases involving analogous delegations of government functions to private organizations, including self-regulating professional bodies. These cases provide some indication of how the courts are likely to respond to such issues with respect to the TSSA and similar entities.

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. This has been most clearly expressed by the Supreme Court of Canada in its 1998 *Eldridge* decision.

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 whether the functions are carried out by entities which are in the public or private sectors. 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.

With respect to the application of the *Statutory Powers Procedure Act* and *Judicial Review Procedure Act.*, both turn on the exercise of a "statutory power of decision," regardless of whether the actor in question is a governmental or private agency. The types of decisions made by the TSSA under its delegated legislation, such as the granting and renewal of approvals for installations, appear to meet the definition of such power, and therefore this legislation can be expected to apply to the Authority, as it does to decision-making by self-regulating professions.

Consequently, the situation of the TSSA with respect to the legal accountability structures that apply to government agencies may be quite different from that regarding political and administrative accountability. As outlined in the preceding Chapter, the TSSA falls outside of almost all of the political, legislative and administrative

accountability structures that normally apply to a provincial government agency. Although in the absence of specific litigation with respect to the status of the TSSA any conclusions must remain speculative, it seems less likely that the Authority will escape the legal accountability requirements that apply to provincial agencies in the same way. The Authority is clearly exercising statutory authority in its regulatory functions, and seems likely to meet the test for “governmentalness” in the character of these activities developed by Justice Wilson in *McKinney*.

It is however, important to note that this outcome results from interventions from courts, rather than direction through the legislation establishing the TSSA and similar agencies. In effect, the courts are being asked to bring private entities to which governments have delegated their functions back under the legal accountability framework that normally applies to government agencies. The courts have apparently seen these steps as being necessary to prevent the erosion of principles established over centuries to protect the public from the arbitrary exercise of power.

At the same time, the concept of what is “inherently governmental” or a “governmental function” is subjective, and may not be static over time, as concepts about the role of the state evolve. As ideas regarding the proper scope of governmental action change, so may the potential application of the *Charter* and other judicially enforceable requirements for fairness and justice in decision-making and behaviour.

The delegation of full responsibility for the conduct of prosecutions for alleged violations of the statutes administered by the TSSA to the Authority raises a range of important questions. The TSSA states that it conducts prosecutions “on behalf of the Crown,” rather being a private prosecutor under the *Provincial Offences Act*. However, there appears to be no basis on which Minister of Consumer and Commercial Relations could delegate the conduct on prosecutions on behalf of the Crown to the Authority, as this responsibility clearly rests with the Attorney-General.

Decisions with respect to the pursuit of prosecutions are made by the Authority’s Vice-Presidents, and provisions of the Administrative Agreement are intended to insulate them from interference by the Authority’s Directors. This arrangement is intended to safeguard prosecutorial discretion. However, it leaves the question of to whom the Vice-Presidents are accountable for their decisions unanswered, as there is no formal or informal link to the Attorney-General or the Minister. In addition, the Directives of the Ministry of the Attorney-General regarding how prosecutions will be conducted by the Crown do not apply to the TSSA.

The situation with respect to the conduct of prosecutions by the Authority is in marked contrast to the structure put in place for the delegation of this responsibility to municipalities for certain minor offences through amendments to the *Provincial Offences Act* adopted in 1998. These required the establishment of formal agreements between the Attorney-General and municipalities for this purpose, and provided for the close oversight and supervision of municipal actions by the province. The arrangement for the TSSA also departs from the structure established in Alberta for the conduct of prosecutions by “delegated administrative organizations,” where the approval of the Ministry of Labour is required.

Like a government agency, the TSSA may be sued for damages arising from regulatory negligence. Furthermore, in its capacity to be sued, it may not have the same protection as the provincial government, in terms of the availability of policy-based defences. It is also possible that, notwithstanding the provisions of the TSSA/MCCR administrative agreement, the provincial government may be held liable for the delegation of functions that are performed negligently by the Authority.

ENDNOTES

- ¹ (Law Society of Upper Canada Conference Proceedings: Administrative Law: Dramatic Departures in a Downsizing State citing David Mullan at (1-7) (Toronto, December 12, 1997))
- ² *Canadian Charter of Rights and Freedoms*, ss.7 and 15.
- ³ *Ibid.*, s.8.
- ⁴ *Ibid.*, ss.8-14.
- ⁵ P.Hogg, *The Constitutional Law of Canada* (3rd ed) (Toronto: Carswell, 1992), pg.34.
- ⁶ *Eldridge v. British Columbia (Attorney General)*, [1998] 1 W.W.R. 50, (1997), 151 D.L.R. (4th) 577 (S.C.C.).
- ⁷ *Ibid.*, para 42.
- ⁸ *Ibid.*, para 19.
- ⁹ *Ibid.*, para 42.
- ¹⁰ *Ibid.*, Para 43.
- ¹¹ (1990), 76 D.L.R. (4th) 545 in dissent.
- ¹² See, for example, *R.v.Eldorado Nuclear Ltd.* (1983) 2 SRC 551.
- ¹³ *Klein v. Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.) at 528.); *Knutson v. Registered Nurses' Assn. (Saskatchewan)* (1990), 46 Admin L.R. 234 (Sask C.A.) at 238; and *Harvey v. Law Society (Newfoundland)* (1992), 2 Admin. L.R. (2d) 306 (Nfld. TD).
- ¹⁴ (1998) 157 D.L.R. (4th) 725 (B.C.S.C)
- ¹⁵ See SCSAA, ss. 4(2)(f), 4(3) and 6.
- ¹⁶ *Environmental Law Centre*, Vol. 11 No. 4 (Nov 4, 1996) at 7.
- ¹⁷ See, for example, *Nicholson v. Haldimand Norfolk Regional Board of Commissioners of Police* (1979) S.C.R. 311; and *Committee for Justice and Liberty v. the W.E.B.* (1978) S.C.R. 369.
- ¹⁸ Proposal for a New Legislative Framework for Public Safety: Stakeholder Consultation Paper: A Discussion Paper Developed by the Ministry of Consumer and Commercial Relations and the Technical Standards and Safety Authority, October 1997, pp.8-9.
- ¹⁹ Bill 42, *The Technical Standards and Safety Act, 1999*, ss.8-11.
- ²⁰ [1979] 1 S.C.R. 311.
- ²¹ *Bezaire v Windsor RCSS Bd* (1992), 9 O.R. (3d) 737 (Div. Ct.) at 747 citing *Hardy v. British Columbia (Minister of Education)* (1985), 67 B.C.L.R. 203 (S.C.).
- ²² R.S.O. 1990, c. S.22 (SPPA)
- ²³ *Ibid.*, s.1.
- ²⁴ R.S.O. 1990, c. J.1.
- ²⁵ *Ibid.*, s.1.
- ²⁶ *Iwasiw v. Essex Golf & Country Club* (1988), 64 O.R. (2d) 49 (H.C.J.) ; (*Pestell v. Kitchener-Waterloo Real Estate Board Inc.* (1981), 34 O.R. (2d) 476 (Ont. Div. Ct.).
- ²⁷ *Wakil v. Ontario (Medical Review Committee)* (1977), 15 O.R. (2d) 157 (Ont. Div. Ct.).
- ²⁸ *Ministry of Consumer and Commercial Relations Act*, s.16(7).
- ²⁹ *Stone v. Law Society of Upper Canada* (1979), 26 O.R. (2d) 166 (Div. Ct.); and *Forde v. O.S.S.T.F.* (1980), 115 D.L.R. (3d) 673 (Ont. Div. Ct.).
- ³⁰ *Re Ainsworth Electric Co. and Board of Governors of Exhibition Place et al.*, (1987), 58 O.R. (2d) 432 (Div. Ct.)
- ³¹ *Prysiazinuk v. Hamilton-Wentworth (Regional Municipality)* (1985) 51 O.R. (2d) 339 (Div Ct.)
- ³² *Tomen v. O.P.S.T.F.* (1986), 55 O.R. (2d) 670 (Div. Ct.) at 672.
- ³³ s.8(6).
- ³⁴ *Forde, supra.*
- ³⁵ R.S.O. 1990, c. M.21
- ³⁶ *Ministry of Consumer and Commercial Relations Act*, as amended by Bill 54, the SCSAA, s.16(7).
- ³⁷ R.S.O. 1990, c. P-33

- ³⁸ See, for example, *The Elevating Devices Act*, R.S.O. 1990, c.E-8,s.6(1).
- ³⁹ *R.v.Ouaida*, [1990] O.J. No. 962 (Gen. Div.) (Referred to in Legal Emissions, Vol. 9., No.2. Summer 1997).
- ⁴⁰ (1994), 115 D.L.R. (4th) 702 (S.C.C.).
- ⁴¹ R.S.Q. 1977, c. D-2
- ⁴² ACAD, s.22.
- ⁴³ *Comite*, *supra* at 728 to 732.
- ⁴⁴ *College of Physicians & Surgeons (British Columbia) v. Bishop* (1989), 56 D.L.R. (4th) 164; *Lambert v. College of Physicians & Surgeons (Saskatchewan)* (1992), 101 Sask. R. 81 (Q.B.), affirmed (1992), 100 Sask. R. 203 (C.A.), leave to appeal to Supreme Court of Canada refused (1992) 105 Sask. R. 80 n.; *Reich v. College of Physicians & Surgeons (Alberta) (No. 2)* (1984), 8 D.L.R. (4th) 696 (Alta. Q.B.); and *Hutfield v. College of Physicians & Surgeons (Alberta)* (1989), 96 A.R. 85 (C.A.).
- ⁴⁵ Pers.comm., Tom Ayres, TSSA General Counsel, December 1999.
- ⁴⁶ *Provincial Offences Act*, R.S.O. 1990, ,c P-33, s.23.
- ⁴⁷ On private prosecutions see generally J.Swaigen, “Private Prosecutions,” in J.Swaigen and D.Estrin, eds., Environment on Trial: A Guide to Ontario Environmental Law and Policy (Toronto: Canadian Institute for Environmental Law and Policy and Emond-Montgomery Publishers Ltd., 1993), pp.827-833.
- ⁴⁸ Pers. comm. Tom Ayres, Counsel, TSSA December 1999.
- ⁴⁹ *Crown Attorney’s Act*, R.S.O. 1990, c.C-49.
- ⁵⁰ See *Ministry of the Attorney General Act*, R.S.O. 1990, Ch.P.33 s.6.
- ⁵¹ Pers. comm., Jack Johnson, former Director, Legal Services Branch, Ontario Ministry of Environment, December 1999; Victoria Vidal-Ribas, Director Legal Services, Ministry of Consumer and Commercial Relations, January 20, 2000.
- ⁵² Pers. comm., Tom Ayres, TSSA Counsel, December 1999.
- ⁵³ MCCR/TSSA Administrative Agreement s. 6(10).
- ⁵⁴ TSSA, Prosecution Management Policy, undated.
- ⁵⁵ These provisions flow from the Supreme Court’s 1991 *Stinchcombe* Decision *R. V. Stinchcombe* (1991) 3S.C.R. 326, 68 ccc (3d) 1,8 C.R. (4th) .
- ⁵⁶ See *Provincial Offences Act*, Part X, established through amendments coming into Force June 11, 1998, (S.O. 1998 c.4).
- ⁵⁷ Ibid., s.162.
- ⁵⁸ Ibid., s.171.
- ⁵⁹ [1987] 2 S.C.R. 541.
- ⁶⁰ Ibid., at 307.
- ⁶¹ Ibid., at 312 and 313.
- ⁶² MCCR/TSSA Administrative Agreement, section 8(2).
- ⁶³ For a detailed discussion of the strengths and weakness of administrative penalty systems see J.Swaigen, Regulatory Offences in Canada: Liability and Defences (Toronto: CIELAP and Carswell, 1992), Ch.9.
- ⁶⁴ Pers. comm., Ayres, December 1999.
- ⁶⁵ MCCR/TSSA Administrative Agreement, section 8(9).
- ⁶⁶ J.M. Evans, H.N. Janisch, D.J. Mulligan and R.C.B. Risk, Administrative Law: Cases and Materials (Toronto: Emond-Montgomery Publishers Ltd., 1995), pp.1447-1484.
- ⁶⁷ *Lewis (Guardian ad litem of) v. British Columbia*, (1997), D.L.R. 4th 594 (SCC).
- ⁶⁸ M.Priest, *The Scope and Limits of Self-Regulation Theory and Case Studies* (Toronto: University of Toronto Faculty of Law, Centre for the Study of State and Market, 1997) pg.97, cited in K.Beattie, “Fairness, Openness and Self-Regulation: An examination of administrative law values and the use of voluntary and self-regulatory measures in environmental protection, Major Paper Requirement, LL.M. Program York University.
- ⁶⁹ The worst-case remediation costs for a leaking underground oil tank in Canada is \$35 million. Pers. Comm., J. Swaigen, June 1997.

Introduction

Public Safety Impact

Boilers and Pressure Vessels

VII. EFFECTIVENESS TO DATE

1. Introduction

The Technical Standards and Safety Authority has only been in operation for two and a half years, and therefore the data available to evaluate its performance to date is limited. Data regarding fatalities, serious injuries, reported occurrences, numbers of inspections and corrective orders given are available from the TSSA, covering the period from the early 1990s to the present.

It is important to note that the Technical Standards Division of the Ministry of Consumer and Commercial Relations was subject to strongly negative evaluations of its performance in the early 1990's. These included the results of an audit of the elevating devices program by the Provincial Auditor in 1992,¹ and a review of the Ministry's programs with respect to underground storage tanks by the Canadian Institute for Environmental Law and Policy in 1995.²

The Authority has made relatively few policy decisions to date. The most significant of these are related to the Authority's 'risk management' approach to the design of its inspection programs, and frequency of elevator inspections. Significant policy changes are contained in the proposed *Technical Standards and Safety Act*, which would both consolidate and substantially modify the legislation administered by the Authority.

2. Public Safety Impact

Statistics regarding the TSSA's activities and the numbers of incidents and occurrences in the regulated industries are provided in the TSSA's annual reports and its Quarterly Reports on the State of Safety.

The Authority measures performance within its operational divisions in terms of fatalities, serious injuries, and reported occurrences in relation to regulated activities and devices.³ Data is also provided in quarterly State of Safety Reports on inspection compliance and the numbers of inspections.

The results reported for the three operational Divisions of the Authority include the following:

*i) Boilers and Pressure Vessels*⁴

The Authority's 1998/99 Annual Report includes the following information:

- ★ total inspections conducted (15,629) approximately the same as last year although increase over 1996.⁵
- ★ one death, the first in four years; and 2 injuries, the same as last year reported.

A 23% reduction in design registration time is also reported.

The longer term data provided in the Fourth Quarter 1998/99 State of Safety Report⁶ indicates the following:

- ★ there are no significant trends in fatalities or serious injuries in the 1992-1999 period, which have remained consistently low (0-1 fatalities per year, typically less than 5 serious injuries per year).
- ★ there has been a strong downward trend in occurrences (explosions, leaks or fires) since 1994.

- ★ quarterly numbers of inspections have increased from 3,559 in 1996 to 4,439 in 1997 and have remained at approximately that level since then. The number of shop inspections has been increasing since 1996.
- ★ the number of operating engineers inspections has risen significantly from 1996.
- ★ the number of Directives per inspection (i.e. incidents of non-compliance) appears to be declining, although data only exists for one year (1998/99).

ii) *Elevating and Amusement Devices*⁷

The TSSA's 1998/99 Annual Report provides the following information regarding elevating and amusement devices:

- ★ reported inspections the same as 1997 (approximately 20,000) although there has been a dramatic increase in the number of inspections since 1994.
- ★ zero fatalities, and a 21 % decline in serious injuries from 1997.
- ★ there is a 12.3 % decline in reported incidents caused by equipment failure, although the downward trend appears to pre-date the TSSA.

A 30 % reduction in turnaround time for registration of design submissions was also reported.⁸

The longer term data provided in the Fourth Quarter 1998/99 State of Safety Report indicates the following:

- ★ there is a downward trend in fatalities since 1992, with none reported since 1997. The total number of fatalities has never exceed 2 per year.
- ★ there was an upward trend in serious injuries associated with elevating devices between 1992 and 1996. There has been a decline since 1996.
- ★ there has been an increase in device related (equipment failure) occurrences since 1992. This coincides with an increase in inspections from 1994 to 1997. There has been a 12 % decline in the number of inspection in 1998. The total number of occurrences has remained roughly steady since 1995.
- ★ there has been a decline in the number of directives per inspection since 1995.
- ★ there was a major increase in amusement devices occurrences between 1994 and 1998, although this was attributed to better reporting rather than a decline in safety.
- ★ there has been a downward trend in the number of directives per amusement device inspection since 1995.

It is important to note that the 1992 report of the Provincial Auditor was severely critical of the elevating devices program of the Standards and Safety Division of the Ministry of Consumer and Commercial Relations. The Auditor's findings included the following:⁹

- ★ although the Ministry's standards generally required elevators to be inspected every two years, inspections were being done on a five to six year cycle;
- ★ disciplinary action against elevator contractors who repeatedly violated important safety requirements was "inadequate;"
- ★ the Ministry need to improve its ability to set inspection priorities and optimize inspection resources, as some districts with histories of inspection backlogs, fatal accidents and contractor prosecutions did not have a full-time inspector on staff.

Chapter VII: Effectiveness to Date

Fuels Safety

Enforcement Activities

In his 1997 Annual Report, the Auditor note that the Ministry had substantially implemented all of his 1992 recommendations regarding the program, prior to the transfer of the Ministry's functions to the TSSA.¹⁰

iii) Fuels Safety¹¹

The TSSA's 1998/99 Annual Report provides the following information regarding fuels safety:

- ★ 3 fatalities reported, a five year low; and a 16% decline in serious injuries reported; and
- ★ a 49% rise in reported occurrences is noted, although this is attributed to changes in manner of reporting, investigating tracking and if necessary prosecuting groups that persistently damage natural gas pipelines, rather than an increase in the number of actual occurrences.¹²

The longer term data provided in the State of Safety Report indicates the following:¹³

- ★ a slight downward trend in fatalities since 1994 from 11 deaths to three in 1999;
- ★ a slight downward trend in serious injuries, particularly since 1997, although there is not enough data to indicate if this is a consistent pattern;
- ★ there has been a slight downward trend in occurrences since 1993, although there was a significant increase (73%) in fires and explosions involving propane between 1996 and 1997.
- ★ the total volume of inspections increased between 1996 and 1997, and declined slightly (6%) between 1997 and 1998.
- ★ there has been an slight upwards trend in Directives per Inspection since 1996.

The 1995 CIELAP study of the Ministry of Consumer and Commercial Relations' program for underground storage tanks noted that the Ministry had difficulty coordinating its efforts with the Ministry of the Environment in this area, and that the lack of coordination was compounded by inadequate resources. In some cases it was reported that MCCR staff had refused to provide Ministry of the Environment officials with the information necessary for the issuing of clean-up orders in relation to leading underground storage tanks, due to provisions of the *Gasoline Handling Code*. A protocol was agreed to between the two Ministries to improve coordination in this area.¹⁴

iv) Enforcement Activities

Data provided by the TSSA indicates that the total number of prosecutions undertaken by the Authority is similar to that pursued by the MCCR. However, the level of fines obtained for prosecutions appears to have declined significantly since the creation of the TSSA, from \$84,800 in 1996/97 for the MCCR, and falling to \$20,500 in 1996/97 and \$35,000 in 1998/99 for the TSSA. As noted earlier, the 1998/99 data also shows a shift to negotiating plea bargains with the accused resulting in penalties being payments to the TSSA Safety Education Fund rather than seeking fines.

Consequently, while the level of enforcement activity does not appear to have changed, the nature of the penalties being sought has been altered significantly from fines to contributions to the TSSA Safety Education Fund. The fines obtained in the past two years have also been lower than those seen in previous years. Continued observation is required to see whether this reflects particular circumstances in the past two years, or a longer term trend.

v) Assessment

The data related to occurrences and levels of inspections and compliance does not appear to show any significant change related to the MCCR/TSSA transition. The trends evident in the data appear to be consistent with the directions seen before May 1997, and in some cases reflects initiatives put in place before that date. This is especially evident with respect to the improvements seen in the elevating devices area, which flow from initiatives put in place by the Ministry in response to 1992 report of the Provincial Auditor.

Turnaround times for approvals do appear to have declined significantly since 1996. However, the reasons for this, in the absence of increased technical staffing levels, are unclear. It may reflect either increased efficiency or a lower level of scrutiny in reviews. At the same time, the level and nature of the penalties being obtained through prosecutions, which are lower, and of a different character than those sought by the MCCR.

It is important to note that there has been no independent verification of these results and, as noted earlier, the Provincial Auditor does not have jurisdiction to review the Authority's performance directly.

Efficiency/Cost Effectiveness

There have been no significant changes in staffing levels since the MCCR/TSSA transition, other than an increase in the number of management and other professionals. (See tables on page 74.) There has been no increase in the number of front-line staff, such as inspectors, over the levels present within the MCCR Division. This is despite the consideration that the Authority's revenues realized through licencing charges and fees have risen significantly, from \$22,164,000 in 1998 to \$25,803,000 in 1999.¹⁵

A portion of these additional resources appear to have been absorbed by the increases in management and professional staff needed to provide skills that were previously provided by the MCCR to its the Safety and Standards Divisions by the MCCR division. This has included such functions as human resources, accounting and legal services.¹⁶ These outcomes must raise questions about the efficiency of the TSSA model, which requires the duplication of administrative functions carried out by the Ministry.

Staff moral within the TSSA seems to be high, and there is a general belief among staff that they are doing a better job than when they were part of the MCCR.¹⁷

3. Policy Decisions

The Authority has undertaken relatively few policy initiatives to date. This also reflects the relatively 'mature' nature of the regulated industries and the TSSA's regulatory functions. Policy issues in the field appear to be driven by technological change. However, as noted earlier concerns were raised over the effectiveness of some of the Ministry's safety and standards programs in the past.

i) Risk Management

The most important policy direction taken by the Authority has been the move to a 'risk management' approach to set the frequency of in-service inspections and the evaluation of contractor performance, pre-dates the creation of the Authority, but its application within the Authority is accelerating.¹⁸ 'Risk management' involves the use of criteria to identify the most significant public safety risks, and to then target the use of resources towards reducing those risks.¹⁹

Chapter VII:
Effectiveness to Date

Positions/Quarter

POSITIONS/QUARTER — As at May 5, 1997												
	Managers		Engineers		Other Professionals		Inspectors		Support Staff		Total	
	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant
CEO office	5				1				3		9	
CSD	8		1		4				48		61	
EADSD	6		4				47		7		64	
FSD	3		5				25		4		37	
BPVSD	6		6		1		33		6		52	
Total	28	0	16	0	6	0	105	0	68	0	223	0
Grand total		28		16		6		105		68		223

POSITIONS/QUARTER (includes contract) — As at April 30, 1998													
	Managers		Engineers		Other Professionals		Inspectors		Support Staff		Total		Grand Total
	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant	
CEO office	6				2				3		11		11
CSD	11		1		5				49		66		66
EADSD	6		4		2		46		6	1	64	1	65
FSD	5		5	1	1		25		4		40	1	41
BPVSD	7		6		2		36		6		57		57
Total	235	0	16	1	12	0	107	0	68	1	238	2	240
Grand total		235		17		12		107		69		240	

POSITIONS/QUARTER (includes contract/temporary) — As at April 29, 1999												
	Managers		Engineers		Other Professionals		Inspectors		Support Staff		Total	
	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant	Filled	Vacant
CEO office	6	1			2				2		10	1
CSD	10	1		1	7				45	2	62	4
EADSD	6		4		2		43		7		62	
FSD	4	1	6		1		24		4		39	1
BPVSD	9		6		2		33		5		55	
Total	35	3	16	1	14	0	100	0	63	2	228	6
Grand total		38		17		14		100		65		234

In practice this is intended to ensure that inspection resources are focussed on what are identified as high risk devices, due to such factors as levels of non-compliance directives issued in the past, contractor performance, and the age of devices.²⁰ There is an implication that inspections of devices with established histories of good safety compliance will be reduced. A potential weakness with this approach that it relies on failure as a trigger for action, basing future action on the basis of retrospective information. The Authority may not know something is going wrong, until after it has happened.

ii) Elevator Inspection Frequency

There have been relatively few policy disputes with the regulated industries to date. The only such issue reported in the Authority's 1998/99 Annual report related to complaints from elevator manufacturers, owners and contractors concern over "inflexible, unfair and unnecessarily prescriptive" nature of the *Elevating Devices Act*, particularly as it relates to the frequency of inspections. In October 1998 the Authority issued a Director's ruling that "established consistent, performance based requirements for all manufacturers, owners and contractors in order to create a level playing field."²¹

In effect, this ruling permitted owners and contractors to agree to increase the intervals between routine maintenance of elevators. The Authority states that it "has developed inspection and enforcement processes which identify devices where extended maintenance intervals exist to ensure compliance with the Director's Ruling by all stakeholders. Periodic inspection frequency by TSSA on those devices where maintenance intervals are extended may be affected."²²

iii) Fees Re-balancing

The "re-balancing" of the TSSA's safety service fees has been identified as a priority of the Authority. The goal is to isolate and eliminate inequities inherent in the current fee structure. The result is intended to be a re-balanced fee policy that the Authority believes will be fairer and, at the same time, provides TSSA with a sustainable basis for public safety funding. Authority regards this as necessary to deliver public safety services that are "competitive" with international leaders in the field.²³

iv) Technical Standards and Safety Act, 1998

MCCR and the Authority have undertaken an effort to consolidate the seven statutes administered by the Authority into a single statute. The stated aim is to modernize Ontario's public safety legislation and achieve a more consistent, efficient, clear and responsive regulatory environment.²⁴ A discussion paper on the proposed legislation was presented by the MCCR and TSSA in October 1997,²⁵ draft legislation circulated for comment in October 1998,²⁶ and Bill 42, the *Technical Standards and Safety Act, 1999* introduced into the legislature and passed first reading in December 1999.

The October 1997 discussion paper proposed to consolidate the common features found in the seven statutes into one section, dealing with definitions, directors' powers, inspectors' powers, processes for licences, and appeals. Parts would then be included dealing with the specific subject matter regulated through the existing legislation (i.e. amusement device; elevating devices etc). Certain key elements in the existing Acts, such as requirements that licences be held to operate equipment, and prohibiting the operation of unsafe devices or tampering with devices would be retained in relation to each type of device or activity. However, the discussion paper also proposed moving many other key provisions, such as those dealing with the reporting of accidents, requirements that investigations be carried out when accidents are reported, the frequency of inspections, and tampering with equipment, from the legislation to regulations.

Conclusions

The October 1998 draft legislation went even further in this regard, and proposed to completely transfer all of the substantive requirements of the existing legislation to regulations. In effect, all standards with respect to public safety would be completely at the discretion of the Lieutenant-Governor in Council. This direction is reflected in Bill 42, as introduced into the Legislature.

The practice of removing substantive statutory requirements and replacing them with general enabling authority to the Lieutenant Governor in Council has been common in legislation enacted in Ontario over the past few years. It has been severely criticized for many reasons. The approach is seen to marginalize the Legislature as a policy-making body and to provide excessive discretionary power to the cabinet and bureaucracy.²⁷

The practice raises additional concerns with respect to the legislation administered by the TSSA. As noted earlier, with the transfer of virtually all the MCCR Safety and Standards Division staff to the TSSA, the Ministry is now heavily dependant on TSSA for policy and technical expertise and analysis. This means that the content of any regulations made under the proposed legislation would ultimately flow from the Authority. In effect, policy and standard setting functions would be delegated to the Authority. This would create the precise outcome that the Minister of Consumer and Commercial Relations stated would not happen when the TSSA was created.²⁸

4. Conclusions

There appear to be no significant changes in the levels of incidents, inspections or industry compliance with regulatory requirements since the creation of the TSSA. The trends which are evident in the available data reflect directions and policies which were set before MCCR/TSSA transition. This is not a surprising outcome, given that the Authority has the largely same staff, including senior management, as the MCCR Safety and Standards Division.

Turnaround times for approvals do appear to have declined significantly since 1996. However, the reasons for this, in the absence of increased technical staffing levels, are unclear. It may reflect either increased efficiency or a lower level of scrutiny in reviews.

There is also evidence of a change in direction with respect to law enforcement. Here there is evidence of changes in levels of penalties being obtained, which have been lower, although ongoing observation is required to reveal whether this is due to the nature of the offences in any given year, or a longer term trend. The character of the penalties being sought by the TSSA has changed, to donations to the TSSA Education Fund, rather than fines. This may reflect a change in relationship between the regulator and regulated industry.

In general, the TSSA is still at a very early stage of its existence. More substantive changes in direction may occur as turnover occurs among the staff at the operational and management levels over time, particularly as veteran public service personnel are replaced with new individuals without government experience in relation to the subject matter of the legislation.

The revenues realized by the authority through licencing charges and fees have risen significantly. However, this has not translated into increased in front-line service delivery staff. Rather the only changes in staffing levels in relation to the MCCR division have been the addition of managerial and professional staff to provide administrative and legal services previously supplied through the Ministry. These outcomes must raise questions about the efficiency of the TSSA model, which requires the reproduction of administrative functions carried out by the Ministry.

There is little evidence of a significant change in direction with respect to the policy decisions made by the Authority to date. These again have followed the directions set before the MCCR/TSSA transition, such as the introduction of a risk management approach to the agency's inspection agencies.

Bill 42, the proposed *Technical Safety and Standards Act, 1999*, raises a number of serious policy issues. Although presented as a consolidation and harmonization of the seven statutes currently administered by the Authority, the Bill proposes a number of important changes to the provisions of these laws. Most significantly, the proposed legislation would remove all of the substantive standards within the existing legislation, and replace them with general enabling authority for the Lieutenant-Governor in Council to make regulations.

Given the lack of technical and policy capacity within the MCCR in the areas delegated to the TSSA, the content of these regulations will inevitably rely on input from TSSA. This would effectively delegate policy and standard setting to TSSA. Such an outcome, would be contrary to separation of administration and policy-making - rowing and steering - that was supposed to lie at the heart of the TSSA's institutional design.

ENDNOTES

¹ Office of the Provincial Auditor, 1992 Annual Report, (Toronto: Queen's Printer for Ontario, 1992), pp.42-48.

² J.Swaigen, Toxic Time Bombs: The Regulation of Canada's Leaking Underground Storage Tanks (Toronto: Emond-Montgomery Publications Limited, 1995), ch.6.

³ TSSA 1998/99 Annual Report, pgs.16 and 19.

⁴ Ibid., pg.16.

⁵ TSSA, 97/98 Annual Report, pg.15.

⁶ TSSA, Report on the State of Safety to the Fourth Quarter 1998/99.

⁷ Ibid., pg.19.

⁸ Ibid., pg.21.

⁹ Office of the Provincial Auditor, 1992 Annual Report, pp.42-48

¹⁰ Office of the Provincial Auditor, 1997 Annual Report, pg.241.

¹¹ TSSA 1998/99 Annual Report, pg.23.

¹² Ibid.

¹³ TSSA, Report on the State of Safety to the Fourth Quarter 1998/99.

¹⁴ Swaigen, Toxic Time Bombs, pg.93.

¹⁵ TSSA 1998/99 Annual Report, pg. 28.

¹⁶ Pers. comm., David Scriven, TSSA Corporate Secretary, November 1999.

¹⁷ Various pers.comm., with TSSA staff over the course of this study.

¹⁸ TSSA, 1999/2000 Business Plan, pg.5.

¹⁹ TSSA 98/99 Annual Report, pg.25.

²⁰ TSSA: Risk Management in Action, undated.

²¹ TSSA 98/99 Annual Report, pg. 20.

²² TSSA Elevating and Amusement Devices Safety Division, Director's Ruling 99/92 Rev#3

²³ TSSA 98/99 Annual Report, pg.12.

²⁴ MCCR/TSSA Proposal for a New Legislative Framework for Public Safety.

²⁵ Ibid., pg.3.

²⁶ MCCR, Technical Standards and Safety Act, 1998 (Consultation Draft).

²⁷ See, for example, M.Winfield and P.Muldoon, "Democracy and Environmental Accountability," Research Paper Environmental Agenda for Ontario Project (CIELAP/OEN, April 1999).

²⁸ The Hon. N. Sterling, Minister of Consumer and Corporate Affairs, remarks to Standing Committee on the Administration of Justice, Re: Bill 54, Ontario Hansard, June 24, 1996.

VIII. CONCLUSIONS AND RECOMMENDATIONS

1. Project Objectives

This study set out to achieve two major objectives:

- 1) to investigate the impact on political and legal accountability of the transfer of government functions related to the protection of public goods to private entities, focussing on the case of Ontario's Technical Standards and Safety Authority (TSSA); and
- 2) to assess the effectiveness of the TSSA model in the delivery of public goods protection services.

The answers to these questions identified in this study lead to recommendations regarding: the structure and mandate of the TSSA and similar organizations; addressing gaps in the political and legal accountability framework created by the transfers of governmental functions to these entities; and with respect to the future use of the TSSA model for program delivery in other areas of government activity.

2. TSSA Background and Structure

The TSSA is a not for profit corporation, delegated responsibility for the administration of seven safety related statutes,ⁱ previously administered by the Ontario Ministry of Consumer and Commercial Relations (MCCR). The delegation was achieved through an administrative agreement between the Authority and the Ministry, made under the *Safety and Consumer Statutes Amendment Act* (SCSAA) of June 1996.

The Authority, to which the functions, staff and assets of the Technical Standards Division of the Ministry were transferred in May 1997, is one of four delegated administrative authorities created for the purpose of assuming the safety and consumer protection regulatory functions of the Ministry. A fifth delegated administrative authority, the Electrical Safety Authority, was created through the *Energy Competition Act* of 1998.

The TSSA's responsibilities include inspection, approvals, and law enforcement in relation to the delegated legislation. Authority staff are identified as statutory directors and officers for purposes of the delegated legislation, although the SCSAA states they are not crown employees or agents and are not to present themselves as such.

The Authority is managed and administered by a board of directors, the majority of whom are drawn from and nominated by the industrial sectors whose activities it regulates. The Board also includes an assistant deputy minister of MCCR, two consumer representatives who are ministerial appointees, and the Authority's Chief Executive Officer.

The TSSA model of transferring responsibility for the administration of government programs to a special purpose body is not unique. It reflects concepts in the restructuring of government agencies first seen in Britain and New Zealand in the 1980s. The models, which are applications of what is sometimes referred to as 'new public management,' centre on the separation of policy-making from its actual implementation and administration, and the reorganization of government agencies charged with administration and service delivery along the lines of private sector corporations. Such bodies are referred to as "executive agencies" in Britain and "corporatized" departments in New Zealand.

ⁱ The seven statutes are: *the Amusement Devices Act; Boilers and Pressure Vessels Act; Elevating Devices Act; Energy Act; Gasoline Handling Act; Operating Engineers Act, Real Estate; and the Upholstered and Stuffed Articles Act.*

The Government of Alberta began to bring these models to Canada in the early 1990's. At the same time, it took the approach a step further, by transferring "administrative" functions out of government altogether, to private, not-for-profit "delegated administrative organizations." The Government of Alberta also added a new dimension to the concept — self-management by the regulated industries — by providing that the boards of directors of the organizations consist primarily of representatives of these industries. The Ontario delegated administrative authorities carry the Alberta initiative a step further still, particularly in terms of the degree of autonomy from government that they have been granted.

Serious questions have been raised in Britain, New Zealand, Alberta and at the federal level in Canada regarding the trade-offs between accountability for performance and the exercise of governmental power by restructured or transferred agencies, and the improved quality and efficiency of public services that they are expected to deliver. There have also been a number of high-profile failures involving "executive agencies" in Britain and "corporatized" departments in New Zealand. These events have resulted in challenges to the effectiveness of 'new public management' approaches to the delivery of public services and protection of public goods.

The TSSA is a potential model for the further restructuring and transfer of the regulatory functions by the Ontario government, including those related to environmental protection. The Authority also actively promotes itself as a model for other governments to follow in the delivery of public services. These considerations, in conjunction with the importance of the Authority's functions to public safety in Ontario, made an early independent review of its performance and structure essential.

3. TSSA Mandate and Structure

i) Mandate

The concept of separating administration from policy-making — "rowing" from "steering" — was central to the design of the TSSA. The arrangement is intended to ensure that responsibility for policy-making remains with elected Ministers, who are accountable to the legislature, and ultimately, the public, while allowing for the use of potentially more efficient mechanisms for service delivery. However, many students of public administration have challenged the practicality of such separations between administration and policy. In the case of the TSSA, the situation is particularly problematic, as the government failed to provide any clear policy direction to the Authority in either the SCSAA or the MCCR/TSSA Administrative Agreement. Both simply refer to the maintenance of a "safe, fair and informed marketplace, that supports a competitive economy."

In the absence of any further direction from the government, the TSSA was left to define its own mandate and goals. The direction that has emerged is one that mixes regulatory and promotional goals in relation to the industries regulated by the Authority. This is despite the identification of such mixed mandates within regulatory agencies as a significant factor in recent public health and safety disasters, such as the contamination of the Canadian blood system with blood-borne diseases. There are also a number of gaps in formal mandate established through the Authority's corporate objects, most notably the absence of any reference to environmental protection.

In addition to the definition of its own substantive mandate, the Authority's work has engaged it in policy and standards development processes and potentially policy advocacy as well. These activities go beyond the "administrative" mandate for the Authority described by the Minister of Consumer and Commercial Relations to the Legislature when the SCSAA was enacted in 1996.

Chapter VIII: Conclusions and Recommendations

Board of Directors

Rather than “steering,” it appears that the government has provided the boat, but has left the Authority to define its own course and speed. At the same time, the government appears to have lost much of its capacity to give the Authority direction even if it wished to do so. This is a consequence of the transfer of almost all of its policy and technical expertise in public safety regulation to the TSSA.

Recommendation

1. *The SCSAA should be amended to provide specific mandates to each of the delegated administrative authorities established under it. In the case of the TSSA, this should provide clear direction to protect public safety, public health and the environment in the discharge of its responsibilities. In the interim, this mandate and direction should be incorporated into the MCCR/TSSA Agreement*

ii) **Board of Directors**

The TSSA’s Board of Directors is the centrepiece of the self-management model upon which the Authority is based. The Authority’s Board is dominated, by design, by representatives of the industries regulated through the statutes that the Authority administers, although it also includes representatives of the Ministry and consumers’ organizations.

The TSSA structure has some potential advantages over the traditional nature of government agencies. The board of directors provides a means through which senior level attention and approval for initiatives and decisions can be obtained more quickly than within a conventional ministry or department. The model also provides for more direct input from non-governmental stakeholders in decision-making than is the norm within government agencies. However, the structure suffers from a number of potential weaknesses as well.

In particular, the TSSA structure places the majority of the Authority’s directors in a potential conflict of interest between their role as “representatives” of particular sectors, and their obligations as directors to the objects of the corporation. The situation is of particular concern given lack of a clear mandate and policy direction for the Authority in either SCSAA or Administrative Agreement regarding protection of public safety, and the ‘dual’ mandate contained in the corporation’s objects. The problem is further highlighted by the silence of the SCSAA, MCCR/TSSA Administrative Agreement and the Authority’s conflict of interest by-law on situations where directors are dealing with situations where economic or policy issues affecting their employers are before the Authority.

Recommendation

2. *The SCSAA should be amended to provide that delegated administrative authorities have boards of directors upon which the majority of the directors are independent of the economic sectors that they regulate. The term of Ministerially appointed directors should be fixed, rather than at pleasure.*
3. *The SCSAA should be amended to require that the delegated administrative authorities created under it, including the TSSA, adopt conflict of interest by-laws specifically addressing situations where directors, or their employers, apply for or hold approvals, permits, or registrations from an Authority, have their personal or economic interests affected by Authority policies or practices, or are under investigation or prosecution by an Authority. These rules should be subject to approval by the Minister. In the interim, the TSSA should amend its conflict of interest by-law to address these types of situations.*

4. Accountability

i) Political Accountability

The transfer of the regulatory functions of a government agency to a private organization, as in the case of the TSSA, raises unique questions regarding political, legislative, administrative and fiscal accountability. Although the TSSA states that it is accountable to the Minister for its performance, the degree to which the Ministry can effectively oversee the Authority's activities, and if necessary control and direct them, is open to question. At the same time, it seems likely that, as has been the case in Britain and New Zealand with even less ambitious restructurings of public services, Ministers will be unlikely to accept responsibility to the legislature and the public for the Authority's performance. Rather, they will deflect blame for problems towards the TSSA's staff and board of directors.

A second, and perhaps more immediate concern is that the TSSA, as a private organization, escapes the normal application of the statutes that provide the foundation of the legislature and public's ability to oversee the activities of provincial government agencies and use of the powers granted to them. These include the *Audit Act*, *Ombudsman Act*, *Freedom of Information and Protection of Privacy Act*, *Lobbyist Registration Act* and *Environmental Bill of Rights*. Each of these statutes has an associated legislative officer, such as the Provincial Auditor, Ombudsman, Information and Privacy Commissioner, Integrity Commissioner and Environmental Commissioner, who are provided with security of tenure and statutory guarantees of independence to enable them to provide objective assessments and advice without fear of political interference.

Similarly, other statutes, such as the *Environmental Assessment Act*, *French Language Services Act*, *Financial Administration Act*, and *Public Service Act* which normally apply to provincial agencies, do not apply to the Authority. These laws are intended to shape the behaviour of provincial agencies, ensuring the protection of the environment, provision of minority language services, sound management of financial resources, fairness, competence and consistency the administration of public services, and maintenance of the merit principle in the hiring and promotion of personnel.

Provisions were made within the TSSA/MCCR administrative agreement regarding the freedom of information and the protection of privacy, the resolution of complaints and the provision of French language services. However, the Information and Privacy Commissioner and the Ombudsman have noted that these arrangements do not provide the same legal protections as those provided through the legislation that would normally apply to a provincial agency.

The accountability framework established by the Government of Ontario for the delegated administrative authorities is significantly weaker than that provided in other jurisdictions undertaking similar reforms. 'Executive agencies' in the United Kingdom and 'corporatized' departments in New Zealand remained explicitly subject to direct parliamentary oversight. Restructured agencies in New Zealand also remained under the jurisdiction of the Auditor-General and Ombudsman, and freedom of information and protection of privacy legislation.ⁱⁱ The federal government applied similar requirements to the Canadian Food Inspection Agency. Even in the case of Alberta, the delegated administrative organizations and any information in their possession remained subject to freedom of information legislation and potential oversight by the Provincial Auditor.

The gaps in the formal accountability structures for the Authority are of particular concern given the public safety nature of the TSSA's mandate, and its relationship to the protection of other public goods, such as the environment. The importance of these structures was highlighted by the Provincial Auditor's 1992 review of the per-

ⁱⁱ Freedom of Information legislation currently before the British Parliament would apply to "executive agencies" in their capacity as "public authorities." See www.publications.parliament.uk/pa/cm199900/cmbills/066/200066.htm.

Chapter VIII: Conclusions and Recommendations

Legal Accountability

formance of the MCCR's elevator inspection program. This identified major problems with the program, and led to the implementation of significant improvements to its delivery.

The step of formally bringing the Authority under the statutes that would normally apply to provincial agencies was taken with respect to the *Environmental Bill of Rights* in May 1997. This does not appear to have interfered with the TSSA's operations, and has strengthened its consideration of environmental factors in decision-making. The implementation of similar measures with respect to the other accountability statutes applicable to provincial agencies also seems unlikely to impede the Authority's work. At the same time, such steps could significantly enhance the credibility of the TSSA with the Legislature and the public as a regulator.

Recommendation

4. *The SCSAA should be amended to name the Provincial Auditor as the corporate auditor for the delegated administrative authorities created under it, including the TSSA. In the Interim, the Minister of Consumer and Commercial Relations should request that the Provincial Auditor undertake an audit of the TSSA as a "special assignment" under section 17 of the Audit Act.*
5. *The SCSAA should be amended to bring the delegated administrative authorities created through it under the jurisdiction of the Ombudsman Act.*
6. *The Lieutenant Governor in Council should adopt a regulation under the Freedom of Information and Protection of Privacy Act designating the TSSA and other delegated administrative authorities as "institutions" for the purposes of the Act.*
7. *The SCSAA should be amended to require that any persons lobbying the TSSA and other delegated administrative authorities register their activities on the lobbyist register under the Lobbyist Registration Act.*
8. *Any future delegations of functions of provincial agencies currently subject to the Environmental Bill of Rights (EBR) should be accompanied by a delegation of the agency's functions to the delegated agency under the EBR.*
9. *The Lieutenant Governor-in-Council should adopt a regulation under the Environmental Assessment Act designating appropriate undertakings of the TSSA and other delegated administrative authorities for review under the Act.*
10. *The SCSAA should be amended to bring the TSSA and other delegated administrative authorities under the requirements of the French Language Services Act.*

ii) Legal Accountability

In addition to the differences in the political and administrative accountability framework for the TSSA relative to traditional provincial agencies, the establishment of the TSSA gives rise to an important set of questions around the legal accountability of private organizations to which government functions are delegated. Over the centuries, a body of judicially enforceable constitutional, statutory and common law has emerged, designed to ensure fairness and justice in the administration laws, policies and programs by governments. These rules provide important limitations on the exercise of power by the state in a democratic society. The status of these principles, however, is unclear when government functions are transferred to private sector organizations, to whom they are not normally understood to apply.

The legislation creating the TSSA and similar organizations in Alberta has been largely silent on these issues. It has been left to the courts to resolve the questions of the application of the Canadian *Charter of Rights and Freedoms* and statutory and common laws requirements regarding government decision-making to private organizations to which government functions have been delegated. Although there has

been no litigation of this nature to date specifically involving the TSSA, the Supreme Court has dealt with a number of cases involving analogous delegations of government functions to private organizations, including self-regulating professional bodies. These cases provide some indication of how the courts are likely to respond to such issues with respect to the TSSA and similar entities.

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. This has been most clearly expressed by the Supreme Court of Canada in its 1998 *Eldridge* decision.

The Supreme 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 whether the functions are carried out by entities which are in the public or private sectors. 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*.

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.

A similar approach has been taken by the courts with respect to the application of the *Statutory Powers Procedure Act* and *Judicial Review Procedure Act*. Both turn on the exercise of a “statutory power of decision,” regardless of whether the actor in question is a governmental or private agency.

Consequently, the situation of the TSSA with respect to the legal accountability structures that apply to government agencies may be quite different from that regarding political and administrative accountability. It appears unlikely that the Authority will escape the legal accountability requirements that normally apply to provincial agencies. However, in the absence of specific litigation with respect to the status of the TSSA, any conclusions in this regard must remain speculative.

It is important to note that this outcome results from interventions from courts, rather than direction through the legislation establishing the TSSA and similar agencies. In effect, the judiciary is being asked to bring private entities to which governments have delegated their functions back under the legal accountability framework that normally applies to government bodies. The courts have apparently seen these steps as being necessary to prevent the erosion of principles established over centuries to protect the public from the arbitrary exercise of power.

At the same time, it should be recognized that the notion of what is “inherently governmental” or a “governmental function” is subjective, and may not be static over time, as concepts about the role of the state evolve. As ideas regarding the proper scope of governmental action change, so may the potential application of the *Charter* and other judicially enforceable requirements for fairness and justice in decision-making and behaviour. Steps need to be taken to ensure that these requirements apply whenever governmental power is exercised by non-governmental actors.

Recommendation

11. *The SCSAA should be amended to state that the Canadian Charter of Rights and Freedoms applies to the activities and decisions of the TSSA and other delegated administrative authorities.*

12. *The SCSAA should be amended to state that the Statutory Powers Procedure Act and the Judicial Review Procedure Act apply to the decisions of the TSSA and other delegated administrative authorities under the delegated legislation.*

The delegation of full responsibility for the conduct of prosecutions for alleged violations of the statutes administered by the TSSA to the Authority raises a range of important questions. The TSSA states that it conducts prosecutions “on behalf of the Crown,” rather than being a private prosecutor under the *Provincial Offences Act*. However, there appears to be no basis on which the Minister of Consumer and Commercial Relations could delegate the conduct on prosecutions on behalf of the Crown to the Authority, as this responsibility clearly rests with the Attorney-General. Claims to be acting on behalf of the Crown have significant implications for the seriousness with which the courts are likely to take prosecutions being pursued by the Authority, and therefore must be subject to an appropriate accountability structure.

Decisions with respect to the pursuit of prosecutions are made by the Authority’s Vice-Presidents, and provisions of the Administrative Agreement are intended to insulate them from interference by the Authority’s directors. This arrangement is intended to safeguard prosecutorial discretion. However, it leaves the question of to whom the Vice-Presidents are accountable for their decisions unanswered, as there is no formal or informal link to the Attorney-General or the Minister. In addition, the Directives of the Ministry of the Attorney-General regarding how prosecutions will be conducted by the Crown do not apply to the TSSA.

The situation with respect to the conduct of prosecutions by the Authority is in marked contrast to the structure put in place for the delegation of this responsibility to municipalities for certain minor offences through amendments to the *Provincial Offences Act*, adopted in 1998. These required the establishment of formal agreements between the Attorney-General and municipalities for this purpose, and provided for the close oversight and supervision of municipal actions by the province. The arrangement for the TSSA also departs from the structure established in Alberta for the conduct of prosecutions by “delegated administrative organizations,” where the approval of the Ministry of Labour is required.

13. *The status of prosecutions conducted by the TSSA and other delegated administrative authorities should be clarified. The TSSA should conduct prosecutions as private prosecutions until a formal arrangement for the delegation of the conduct of prosecutions to delegated administrative authorities, similar to the provisions of Part X of the Provincial Offences Act regarding the delegation of the conduct of prosecutions to municipalities, is established. In the interim, the TSSA should enter into a memorandum of understanding with the Ministry of the Attorney General with respect to the application of the Ministry’s policies, contained in the Crown Policy Manual, regarding the conduct of prosecutions.*

Like a government agency, the TSSA may be sued for damages arising from regulatory negligence. Furthermore, in its capacity to be sued, it may not have the same protection as the provincial government, in terms of the availability of policy-based defences. It is also possible that, notwithstanding the provisions of the TSSA/MCCR Administrative Agreement, the provincial government may be held liable for the delegation of functions that are performed negligently by the Authority.

14. *The MCCR/TSSA Administrative Agreement should be amended to require that the Authority carry insurance for regulatory negligence, including coverage for the Crown for liability for the Authority’s actions, sufficient to deal with the known worst-case outcomes in the areas under the Authority’s jurisdiction.*

5. Performance to Date

i) Effectiveness

There appear to be no significant changes in the levels of incidents, inspections or industry compliance with regulatory requirements since the creation of the TSSA. The trends that are evident in the available data reflect directions and policies that were set before MCCR/TSSA transition. This is not a surprising outcome, given that the Authority has almost exactly the same staff, including senior management, as the MCCR Technical Standards Division. The weak record of the MCCR Division as a regulator must also be considered in any assessment of the Authority's performance. This history was highlighted by Provincial Auditor in his 1992 Annual Report regarding elevating devices safety, and the Canadian Institute for Environmental Law and Policy's 1995 study on the regulation of leaking underground storage tanks¹

Turnaround times for approvals do appear to have declined significantly since 1996. However, the reasons for this outcome, in the absence of increased technical staffing levels, are unclear. It may reflect either increased efficiency or a lower level of scrutiny in reviews. Further review is required to provide a complete assessment of this outcome.

There is also evidence of a change in direction with respect to law enforcement. There have been changes in levels of penalties being obtained, which have been lower, although ongoing observation is required to reveal whether this is due to the nature of the offences in any given year, or a longer term trend. The character of the penalties being sought by the TSSA has changed, to donations to the TSSA Education Fund, rather than fines. This may reflect a change in relationship between the regulator and regulated industry.

In general, the TSSA is still at a very early stage of its existence. More substantive changes in direction may occur as turnover occurs among the staff at the operational and management levels over time, particularly as veteran public service personnel are replaced with new staff without government experience in relation to the subject matter of the legislation. This will require careful oversight to ensure that there is no deterioration on the levels of public safety provided through the Authority, particularly in light of the record of performance of similar organizations in other jurisdictions. As noted earlier, the lack of oversight by legislative officers, such as the Provincial Auditor, and the apparent lack of monitoring, technical and policy capacity within the MCCR are of particular concern in this regard.

15. *The Provincial Auditor should undertake an audit of the Ministry of Consumer and Commercial Relations oversight and monitoring of the operations of the TSSA and other delegated administrative authorities.*

ii) Efficiency

The principle strength of the delegated administrative authority model, as stressed by the Minister of Consumer and Commercial Relations in his remarks regarding Bill 54, the SCSAA,² and by the TSSA itself, is that "TSSA is not constrained by jurisdictional fiscal policy."³ In other words the Authority is able to generate revenues to support its operations, regardless of the government's fiscal situation. However, this again raises the question of democratic control over the use of state power, in this case the ability to require the payment of taxes and fees. Individuals or firms engaged in activities regulated by the TSSA are compelled, through legislative requirements for approvals from the Authority, to pay the fees established by it associated with these approvals.

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Policy Decisions

Conclusions

A secure source of revenue to support the public safety regulation activities of the MCCR could have been established through the placing of existing licencing and inspection fees into a dedicated fund. This has been done by the Government of Ontario in a number of other instances in the past few years.ⁱⁱⁱ The creation of the TSSA was not necessary to achieve this outcome.

The revenues realized by the authority through licencing charges and fees have risen significantly. This has not, however, translated into increased in front-line service delivery staff. Rather, the only changes in staffing levels in relation to the MCCR division have been the addition of managerial and professional staff to provide administrative and legal services previously supplied through the Ministry. These outcomes must raise questions about the efficiency of the TSSA model, which requires the reproduction of administrative functions previously carried out by the Ministry.

iii) Policy Decisions

There is little evidence of a significant change in direction with respect to the policy decisions made by the Authority to date. These again have followed the directions set before the MCCR/TSSA transition, such as the introduction of a risk management approach to the agency's inspection activities.

Bill 42, the proposed *Technical Safety and Standards Act, 1999*, does raise a number of serious policy issues. Although presented as a consolidation and harmonization of the seven statutes currently administered by the Authority, the Bill proposes a number of important changes to the provisions of these laws. Most significantly, the proposed legislation would remove all of the substantive standards within the existing legislation, and replace them with general enabling authority for the Lieutenant-Governor in Council to make regulations.

Given the lack of technical and policy capacity within the MCCR in the areas delegated to the TSSA, the content of these regulations will inevitably rely on input from TSSA. This would effectively delegate policy and standard setting to TSSA. Such an outcome, would be contrary to separation of administration and policy-making - rowing and steering - that was supposed to lie at the heart of the TSSA's institutional design.

16. *Bill 42, the Proposed Technical Standards and Safety Act, should not proceed to second reading at this time. New legislation should be developed to address the gaps in accountability framework for the delegated administrative authorities identified through this report. If the statutes delegated to the TSSA are consolidated, the substantive requirements of the legislation delegated to the TSSA should be retained through the consolidation, except where it can be clearly demonstrated that provisions are outdated or spent.*

6. Conclusions

Ontario's delegated administrative authorities are private organizations to which important governmental functions have been transferred. The Technical Standards and Safety Authority (TSSA) has been the most significant of these transfers to date, given the scope of Authority's mandate and its centrality to the protection of public safety in the province. The TSSA model is clearly under consideration by the provincial government in terms of other regulatory functions related to the protection of public goods, including the environment.

Although still early in the TSSA's existence, the advisability of further expansion of the delegated administrative authority model, even subject to the changes that are recommended in this report, must be questioned. The goal of separating administra-

ⁱⁱⁱ Recent examples include the dedication of fishing and hunting licence fees to the Fish and Game Fund, created through January 1996 amendments to *The Fish and Game Act*. See Bill 26, the *Savings and Restructuring Act, 1996*.

tive and policy-making functions -rowing and steering – within the model has not been achieved in the case of the Authority. Furthermore, the structure has resulted in a significant loss of accountability relative to the situation of a conventional government agency. At the same time, there are no clearly evident gains in efficiency or effectiveness.

It is also important to consider that the performance of similar agencies in other jurisdictions, even where from the outset, much more extensive accountability frameworks have been put in place than those provided in Ontario, has not been strong. This implies a need for careful examination of the performance of TSSA and other delegated administrative organizations before steps are taken to extend the model's application.

Recommendation

17. *The government of Ontario should undertake a detailed, independent evaluation of the performance of the existing delegated administrative organizations, including TSSA, before further use is made of the model.*

The delegated administrative authority model also raises a number of deeper questions that must be considered before it is expanded. The transfer of governmental functions and authority to a private entity that is not under the effective control of government is of particular concern, as it removes the exercise of governmental power from democratic control. Under the TSSA model, this control is exercised by the TSSA's staff and through the Authority's board of directors, the regulated industries, rather than a Minister who is accountable to the Legislature and electorate.

Potential for greater discretion in use of governmental power, and a lack of openness and transparency in its use, in such a situation is significant. The establishment of limits, controls and accountability requirements on the use of power by the executive has been a central feature of democratic systems of government over the past three centuries. The potential for the reversal of this direction accounts, in large measure, for the response of the courts in drawing private entities to which governmental powers and functions have been delegated, back under the rules regarding the use of that power that apply to the state.

The lack of attention paid to these questions by governments, on the other hand, particularly in Ontario, has been troubling. The province should heed the courts' clear signal that organizations exercising governmental authority and functions should be brought under the accountability framework that applies to government agencies. Furthermore, the grant of powers to the Authority by the government for the purpose of carrying out its mandate indicates the TSSA and similar agencies are, in effect, agents of the Crown, regardless of the provisions of the legislation creating them, stating that they are not.

The protection of public goods, such as public safety and the environment have traditionally been seen as a central responsibility of government in our society. The transfer of these functions to private entities raises some even deeper issues. The private sector management model tends to regard the public as "customers" or "clients" to be serviced, rather citizens with interests and rights to be protected. The transfer of public functions to the private sphere also diminishes the "political space" — the range of subjects which can be affected by the decisions of the electorate within our society, and with it important avenues for the public to express policy preferences to government. This has significant implications for the future health of our democracy, which need to be considered carefully before further steps are taken down this road.

Chapter VIII: **Conclusions and Recommendations**

Endnotes

ENDNOTES

- ¹ J.Swaigen, Toxic Time Bombs: The Regulation of Canada's Leaking Underground Storage Tanks (Toronto: Emond-Montgomery Publications Ltd. and CIELAP, 1995).
- ² The Hon. N.Sterling, Minister of Consumer and Commercial Relations, to Standing Committee on the Administration of Justice, re: Bill 54, Ontario Hansard, June 25, 1996.
- ³ TSSA, 1998/99 Annual Report, pg.2.

i) Ontario New Home Warranty Program (website: www.newhome.on.ca)

The Ontario New Home Warranty Program (ONHWP) is a private, non-profit, non-share capital corporation that administers the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 as designated under section 2 of the legislation and the Ontario New Home Warranties Plan continued under section 11 of the legislation. ONHWP is completely financed by builders' registration, renewal and enrolment fees and receives no government funding. The legislation itself defines the coverage offered to individuals by the builder/vendor and the legislation outlines the roles and responsibilities of new home builders and vendors of new homes.

ONHWP replaced what was formerly called HUDAC (Housing and Urban Development Association of Canada), an organization that originally administered a voluntary home warranty program in the 1970's. HUDAC was designated to administer the Plan when the warranty program became mandatory under provincial legislation. In 1983 the organization was renamed the Ontario New Home Warranty Program.

The objective of the ONHWP is to provide specific consumer rights to people buying a new home or condominium units, safeguarding buyers against problems such as deposit loss, delayed closings, major structural defects, *Ontario Building Code* violations and construction defects. The objects of the ONHWP include administering the Ontario New Home Warranties Plan; establishing and administering a guarantee fund to pay compensation where necessary; assisting in the conciliation of disputes between vendors and owners; and improving communications between vendors and owners (section 2(2)). The organization states that over \$140 million in claims have been paid to new home and condominium owners since ONHWP's inception in 1976.

The ONHWP reports annually to the Minister of Consumer and Commercial Relations as required by section 5 of the Act. The Board of the organization is composed of fifteen members with significant representation from the housing industry. The Ontario Home Builders' Association (OHBA) nominates the Board of Directors. The Board includes eight representatives elected from the OHBA; two consumer advocates; two financial community representatives; one each from the provincial and municipal governments; and the ONHWP President. These guidelines are not provided for in the legislation and but are set out in the letters patent or by-laws of the Corporation.

Individuals can check with the ONHWP to ensure that their builder is registered to afford themselves some piece of mind. ONHWP has an Enforcement Group whose role it is to trace and prosecute rogue builders who try to avoid registering with ONHWP and enrolling each new home that they build for sale or which they build under contract with an owner. The maximum penalty for corporate non-compliance is \$100,000. The fines for individuals are lower.

Section 6 of the governing legislation requires all vendors and builders to be registered under the Act by the Registrar. The Registrar, by virtue of section 3, is appointed by the Corporation to perform the duties prescribed in the legislation. Deputy Registrars may also be appointed under this section to perform the same functions. The Act provides for a right of appeal to the Commercial Registration Appeal Tribunal, where the Registrar proposes to refuse to grant or renew a registration or proposes to revoke or suspend one. Every vendor who enters into a contract has an obligation to provide certain prescribed documentation and notices respecting the Plan. Under the legislation, every vendor of a new home makes certain warranties (section 13) and section 14 sets out the circumstances under which an individual is entitled to be paid out of the guarantee fund in respect of damages by a vendor.

Under Section 16 there is a right to a hearing before the Tribunal following receipt of notice of a decision made under section 14. The Corporation has the authority under the Act to appoint inspectors for the purposes of the legislation (section 18). Section 23 of the Act sets out the detailed circumstances under which the Corporation may make by-laws. By-laws made by the Corporation are deemed to be regulations under the Act (section 23(2)).

ii) *Electrical Safety Authority (website: www.esainspection.net)*

The Electrical Safety Authority (ESA) is a not-for-profit authority responsible for promoting the safe use of electricity in Ontario. This new authority took over responsibility for Ontario Hydro's Electrical Inspection division on April 1, 1999 when that organization dissolved as a consequence of the introduction of competition in the electricity business in Ontario. The ESA has taken over Ontario Hydro's former responsibility for electrical inspections in Ontario and ensuring compliance with the Ontario Electrical Safety Code to enhance public electrical safety in Ontario.

The Ontario Electrical Safety Code requires that the electrical work for all new construction and renovations be inspected. The ESA is now the provincial authority responsible for: wiring inspections; general inspections; Ontario Electrical Safety Code advice and information; and product approval inspections. The Authority is also supposed to provide other electrical safety services in the province.

The *Energy Competition Act, 1998*, S.O. 1998, c. 15 (Bill 35), delegates the authority formerly held by Ontario Hydro's Electrical Inspection division to an electrical safety authority. Under section 1 of the Act the Electrical Safety Authority is defined as "*the person or body designated by the regulations as the Electrical Safety Authority.*" This authority, the ESA, is intended to operate as a stand alone, financially self-sustaining safety business that is accountable to a Board of Directors that is comprised of representatives from the Electrical Industry, the Ministry of Consumer and Commercial Relations and the Public.

Part VIII, section 113 of the *Energy Competition Act, 1998* deals with the role of the Electrical Safety Authority. The ESA is empowered under section 113(1) to make regulations related to the Electrical safety code, subject to approval by the Lieutenant Governor in Council. The Authority may appoint persons to inspect, test and report on works defined by the regulations (113(3)); make orders relating to installations, removals, alterations and so on (113(5)); and appoint inspectors and officers for the purposes set out in section 113 (113(6)). The Authority has the power to set fees for permits, inspections and testing, subject to the approval of the Minister and to collect those fees (113(7) and (8)). Section 113(13) sets out offences for persons interfering with inspectors or officers, refusing to comply with the section or regulations made under it, or refusing to comply with orders issued by the Authority.

The ESA claims in their material provided on the ESA website, that they are essentially the same organization as the former Ontario Hydro division. They emphasize that the only change for customers is the new business name and logo. Otherwise they are the same people, they can be reached at the same number and they will continue to provide the same service at the same prices. They also state that they will maintain all the records of the former organization and they will continue to offer OESC Bulletins and technical advice.

As an organization that continues to have the authority to recognize contractors, the ESA also maintains the authority to suspend individuals from the Authorized Contractor Process for repeated Code violations, lack of improvements and defects that could pose threats to life or property.

APPENDIX II*

1. Elevating and Amusement Devices Safety Division

i) Accident Statistics — Elevating Devices — Occurrences

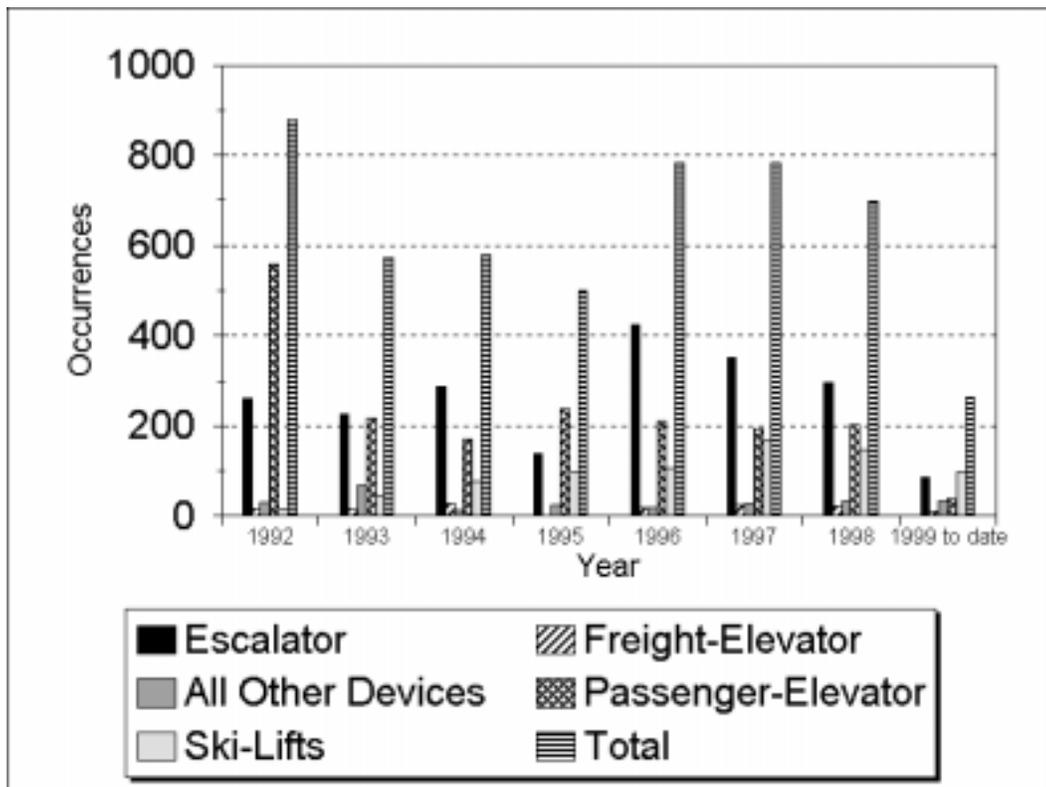
Objectives:

- ◆ To track reported occurrences in order to identify long-term trends.
- ◆ To act on trends and measure the results.
- ◆ To track relationship between device-related occurrences and periodic inspections.

Issues/Trends/Comments

- ◆ Delivery of the Safe T rider program, that explains elevator and escalator safety to 7 year olds, and a similar program for older adults (Safe Ride) has been intensified in 1998/99.
- ◆ A training and certification program for the ski industry is currently under development.
- ◆ Continued downward trend of occurrences caused by equipment failure for 1998 as a function of risk-based periodic inspections is encouraging.

Elevating Devices — Occurrences

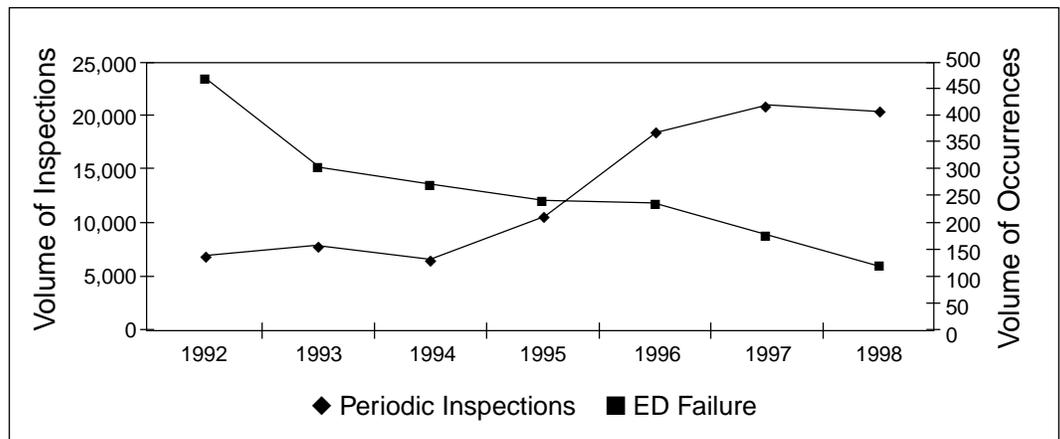


**Data source and commentary: Technical Standards and Safety Authority*

Appendix II

Accident Statistics – Amusement Devices – Occurrences

Device-Related Occurrences vs Periodic Inspection Volume



ii) Accident Statistics — Amusement Devices — Occurrences

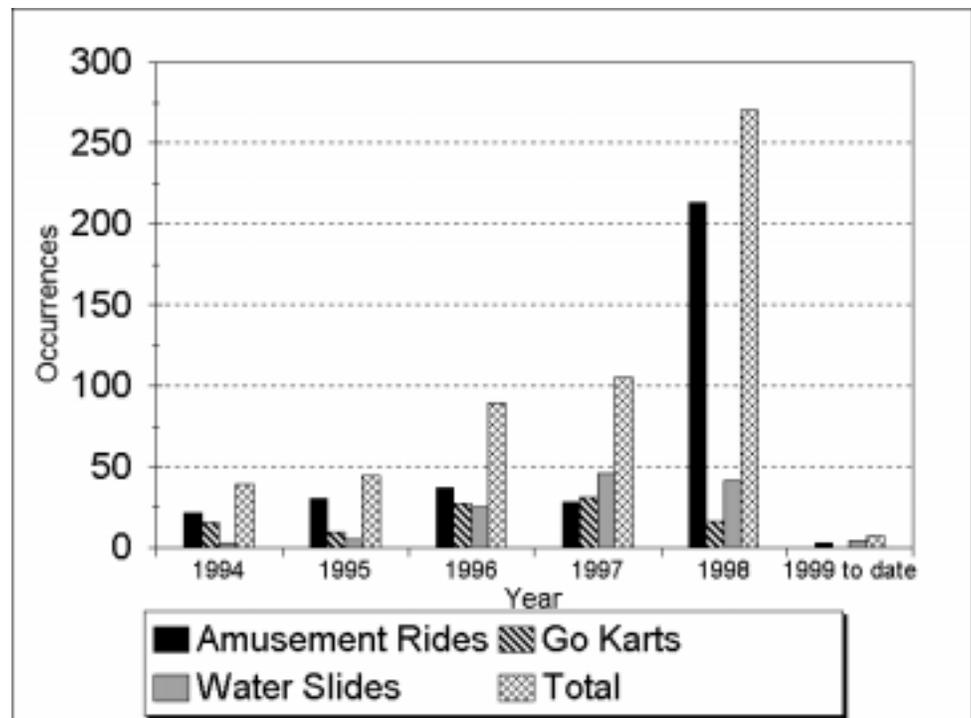
Objectives:

- ◆ To track reported occurrences in order to identify long-term trends.
- ◆ To act on trends and measure the results.

Issues/Trends/Comments

- ◆ Reported Amusement Ride occurrences went from 28 in 1997 to 213 in 1998, due almost entirely to increased reporting from one resort. This was in response to a better understanding of the reporting requirements rather than a decline in safety.
- ◆ Reported Go Kart occurrences declined from 31 in 1997 to 16 in 1998.

Amusement Devices — Occurrences



2. Fuels Safety Division

i) Accident Statistics — Occurrences

Objectives:

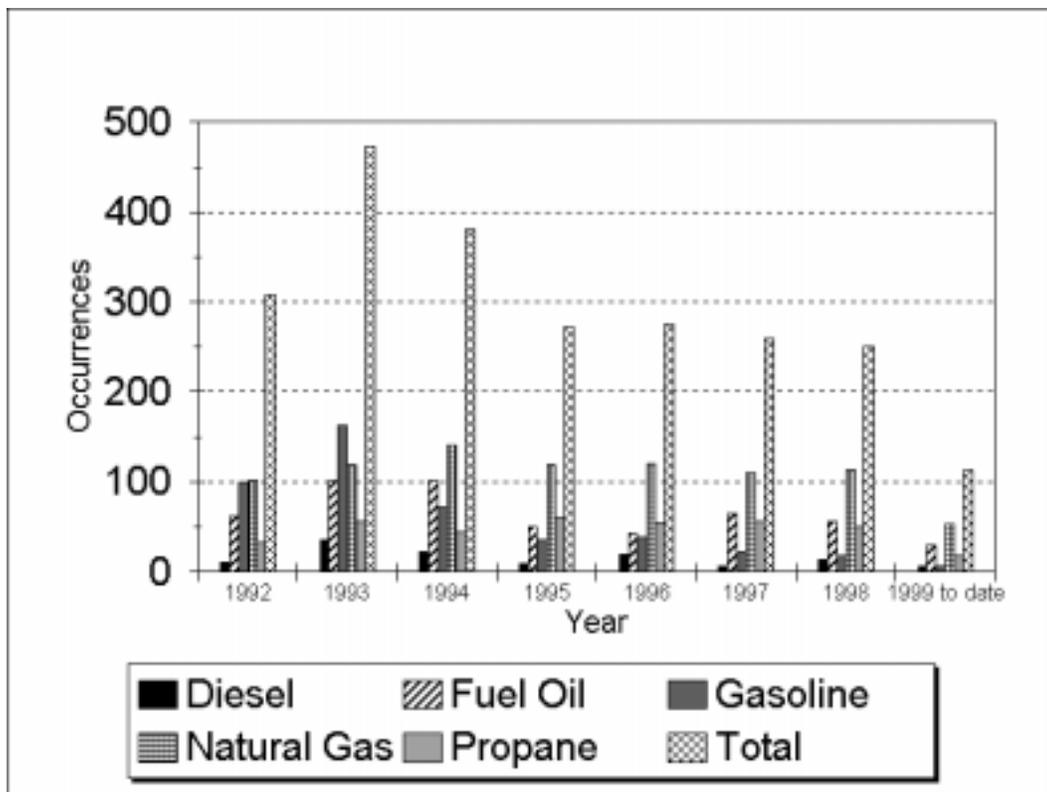
- ◆ To track occurrences in order to identify long-term trends.
- ◆ To act on trends and measure the results.

Issues/Trends/Comments

- ◆ TSSA responded to a 73% increase in fires and explosions involving propane between 1996 and 1997 by striking a joint TSSA/industry work group to develop a propane safety program in 1998. The draft public awareness strategy developed by the group and the action plan for 1999 was presented to the Propane Advisory Council in October 1998. The strategy is currently being refined.

Fuels Safety Division
Accident Statistics — Occurrences
Compliance Measures — Inspection Volume/Compliance

Fuels — Occurrences



ii) Compliance Measures — Inspection Volume/Compliance

Objectives:

- ◆ To show the trend in volume and types of inspections performed by inspectors.
- ◆ To show the trend in volume and types of directives.
- ◆ To show the trend in directives per inspection.
- ◆ To act on trends and measure the results.

Appendix II

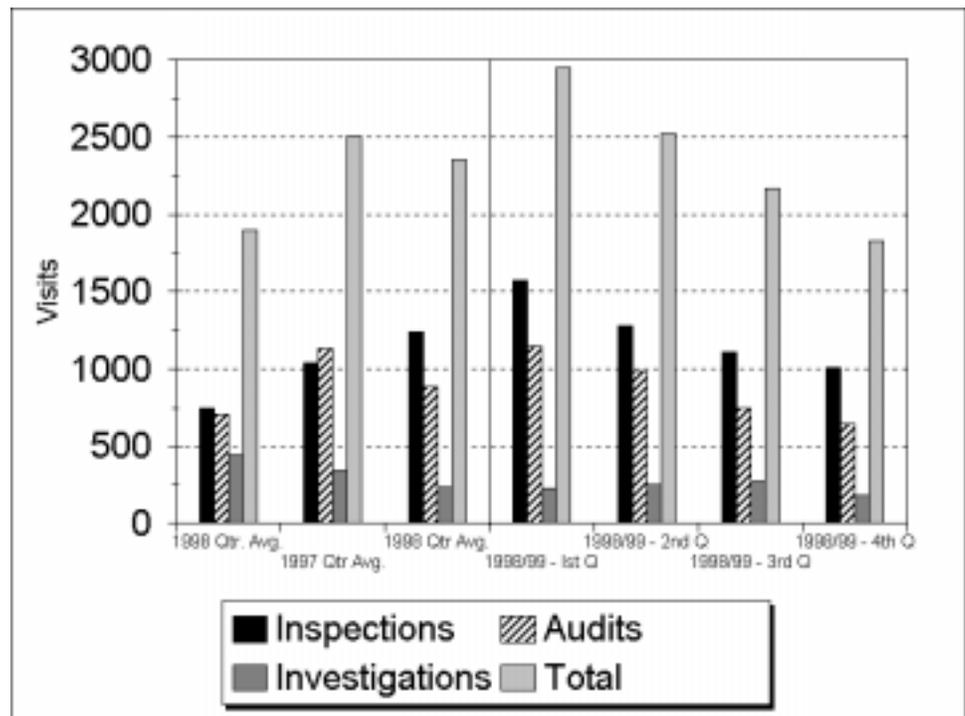
Boilers and Pressure Vessels Safety Division

Accident Statistics – Occurrences

Issues/Trends/Comments

- ◆ A new inspection program is being put into effect. Volumes were impacted by the retirement of 5 staff in 1998.
- ◆ Directives per inspection trends indicate a more focussed, performance-based inspection program.
- ◆ The peak in 1995 of directives/inspections was the result of the underground tank upgrade program.
- ◆ Hazard rankings of directives will be reported next year, as part of the deployment of risk-based inspections.

Fuels — Inspection Volume



3. Boilers and Pressure Vessels Safety Division

i) Accident Statistics — Occurrences

Objectives:

- ◆ To track occurrences in order to identify long-term trends.
- ◆ To act on trends and measure the results.

Issues/Trends/Comments

- ◆ Ammonia plants were targeted for inspection in 1996 in response to a rash of leaks in 1994 and 1995. The number of incidents decreased significantly in 1997 and continued to decrease in 1998.
- ◆ PBV are emphasizing the requirements for reporting of occurrences. This may result in an increase of occurrence volumes due to improved reporting over time.

Boilers and Pressure Vessels — Occurrences

