

# SIBLING RIVALRY: THE EXAMPLE OF THE PLANNING ACT AND THE CLEAN WATER ACT IN ONTARIO\*

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## INTRODUCTION

In any family, normally harmonious relations sometimes become acrimonious when the parents prefer, or appear to prefer, one of their offspring over another. For this reason, parents usually take particular care to ensure that their older children do not feel displaced in their affections when a new, and sometimes demanding, newborn appears on the scene. Favouritism, or the appearance of it, begets sibling rivalry.

What of legislative families? Does the same danger of sibling rivalry exist between statutes dealing with different aspects of the same general domain, so that legislative parents should take the same care and attention as natural ones when introducing a new member into the family? This is a classic question in the field of land use planning, where the general regime is sometimes supplemented and occasionally supplanted by sectorial legislation addressing such issues as the protection of agricultural land, heritage property, and natural landscapes.<sup>1</sup> In our example, the question is the relationship between the eldest child, the general land use regime under the Planning Act adopted in 1946,<sup>2</sup> and the baby of the family, a specialized drinking water source protection regime under the Clean Water Act adopted in 2006.<sup>3</sup> Unfortunately, the rules governing their relationship favour the

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\* Editor's Note: Citations herein generally conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). In order to make the citations more useful for Canadian practitioners, abbreviations and certain other conventions have been adopted from the CANADIAN GUIDE TO UNIFORM LEGAL CITATION [Manuel Canadien de la Référence Juridique] (McGill Law Journal eds., 4th ed. [Revue du droit de McGill, 4e éd.] 1998).

† The title of this paper was inspired by a remark of a young Brazilian scholar, Julia Santos of the Universidade Federal de Santa Catarina, at a conference on integrated water management (Université de Sherbrooke, June 2009), about the need for synergy between "les lois sœurs." Julia Santos Silva, Presentation at the International Forum on Integrated Water Management: Synergy of Sustainable Development Laws as a Tool for Water Governance (June 2, 2009), <http://www.cogesaf.qc.ca/rv-eau/fr/presentations/presentations.html>. An earlier version was presented to a conference at the Université de Nantes, France, June 2009.

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1. *An Act Respecting the Preservation of Agricultural Land and Agricultural Activities*, R.S.Q., c. P-41.1; *Ontario Heritage Act*, R.S.O. 1990, c. O.18; *Islands Trust Act*, R.S.B.C. 1996, c. 239. Canadian statutes and court decisions, both federal and provincial, are readily available on the Canadian Legal Information Institute's open website, <http://www.canlii.org>.

2. *Planning Act*, R.S.O. 1990, c. P.13 (first adopted as S.O. 1946, c. 71, which itself was grounded in still earlier legislation).

3. *Clean Water Act*, S.O. 2006, c. 22.

newer act in such a way that sibling rivalry between the two seems inevitable. This favouritism is explained in large measure by the circumstances leading up to the adoption of the Clean Water Act.

### I. ADOPTION OF THE CLEAN WATER ACT

The catalyst for the adoption of the Clean Water Act was the contamination of the treated drinking water supply of a small town in rural Ontario, Walkerton, by the deadly bacteria *Escherichia coli* (*E. coli*) in May 2000.<sup>4</sup> The consequences were devastating: nearly half of the total population of some 4,800 people became ill, with some suffering severe and permanent damage, and seven people died.<sup>5</sup>

The Ontario government responded immediately with the nomination of a Commission of Inquiry headed by the Associate Chief Justice of the Superior Court, Mr. Justice O'Connor, to investigate how things went so wrong in Walkerton and to make recommendations on how to ensure that it would not happen elsewhere.<sup>6</sup> The Commission issued its report in 2002 in two parts.<sup>7</sup> The first dealt with the events in Walkerton.<sup>8</sup> Although it strongly criticised the two municipal employees responsible for the drinking water system both for their manifest errors in running the system and for their failure to respond adequately to the crisis (notably in denying there was a problem with the water for several crucial days),<sup>9</sup> its most pointed

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4. DENNIS R. O'CONNOR, PART ONE REPORT OF THE WALKERTON INQUIRY: THE EVENTS OF MAY 2000 AND RELATED ISSUES 2 (2002), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/>. More precisely, the contaminating pathogens were *E. coli* O157:H7 and *Campylobacter jejuni*, which came from manure spread by a farmer near one of the wellheads. *Id.* at 3. The farmer had respected normal farm practices in doing so and was not held responsible for the unfortunate consequences which followed. *Id.*

5. *Id.* at 2–3.

6. *Id.* at 2.

7. O'CONNOR, *supra* note 4; DENNIS R. O'CONNOR, PART TWO REPORT OF THE WALKERTON INQUIRY: A STRATEGY FOR SAFE DRINKING WATER (2002), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/>.

8. O'CONNOR, *supra* note 4.

9. The municipal employees, two brothers, had been working for the Public Utilities Commission (PUC) since their late teens; neither had formal training in utility management and owed their qualifications solely to grandfathering provisions. *R. v. Koebel & Koebel*, No. 04-584, 2004 CanLII 48879, at 2–5 (Ont. Super. Ct. Dec. 20, 2004). Both pleaded guilty to the charge of committing a common nuisance “by failing to discharge a legal duty which resulted in the lives, safety or health of the public being endangered[,]” an indictable offence carrying a maximum sentence of two years. *Id.* at 22. The elder (the PUC General Manager at the time of the tragedy) was sentenced to one year in jail; the younger (the PUC foreman) was sentenced to nine months of house arrest, including 200 hours of community service. *Id.* at 49–56. Both men lost their jobs but received generous, and controversial, severance packages (\$ CAD 98,000 and 55,000, respectively). *Walkerton Chronology*, CTV NEWS, Dec. 20, 2004, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1103559265883\\_98968465/](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1103559265883_98968465/).

remarks were directed at the provincial government.<sup>10</sup> In the Commission's view, the extensiveness of the disaster was directly attributable to the neo-liberal policies of budget cutting, administrative down-sizing, and deregulation followed by the Conservative government in power in the province at the time.<sup>11</sup> Policies of budget cutting and administrative down-sizing meant that government laboratories no longer had the capacity to provide municipalities with the service of routinely testing the quality of water samples as in the past; in addition, the Ministry of the Environment no longer had the staff necessary to fulfill its statutory duties of inspection and control.<sup>12</sup> And a policy of deregulation meant that private laboratories were neither subject to any accreditation procedure nor constrained in their mode of operation (such as being required to advise public health and environmental authorities directly of any adverse drinking water quality test results).<sup>13</sup>

The O'Connor Commission's recommendations form the backbone of the solutions eventually adopted: better management of the treatment and

10. O'CONNOR, *supra* note 4, at 3–4.

11. A class action against the provincial government (as well as the municipality [that is, the Municipality of Brockton, with which Walkerton had been amalgamated prior to the tragedy], the PUC, the regional health unit, and the two employees) was settled in 2001, with the Ontario government agreeing to provide those affected "full and complete compensation, without regard to fault" through "an efficient, timely, and impartial process[]" (the "Walkerton Compensation Plan"). Smith v. Municipality of Brockton, No. 00-CV-192173CP, at sched. 1 (Ont. Super. Ct. Mar. 19, 2001), *available at* [www.strosbergco.com/walkerton/documents/web-judgment-of-the-court.pdf](http://www.strosbergco.com/walkerton/documents/web-judgment-of-the-court.pdf) (judgment approving settlement of class action and implementation plan). Some \$ CAD 45 million had been distributed under the Plan by January 2004 and a significant number of claims were still outstanding then. Smith v. Municipality of Brockton, No. 00-CV-192173CP, 2004 CanLII 4999, at 3 (Ont. Super. Ct. Feb. 27, 2004); *see also* Smith v. Municipality of Brockton, No. 00-CV-192173CP, 2004 Can LII 19687, at 2 (Ont. Super. Ct. Mar. 30, 2004) (addressing procedures for processing outstanding claims under the Walkerton Compensation Plan); Smith v. Municipality of Brockton, No. 00-CV-192173CP, 2003 CanLII 9876, at 2–7, 10–11 (Ont. Super. Ct. Mar. 18, 2003) (addressing motions relating to implementation of the Walkerton Compensation Plan).

12. O'CONNOR, *supra* note 4, at 4.

13. *See* Scott Prudham, *Poisoning the Well: Neoliberalism and the Contamination of Municipal Water in Walkerton, Ontario*, 35 GEOFORUM 343, 344–45 (2004) (arguing that a policy of neo-liberalism "antagonistic to state-centred environmental regulation" contributed to the Walkerton tragedy); Lauren Snider, *Resisting Neo-Liberalism: The Poisoned Water Disaster in Walkerton, Ontario*, 13 SOC. L. STUD. 265, 265 (2004) (exploring ways "resistance can destabilize dominant truths" by examining the disaster at Walkerton).

In the spring of 2000 Ontario, Canada's most populous and richest province, was in the fifth year of a neo-liberal social experiment under the aegis of Premier Mike Harris and his Conservative government. Elected in 1995, the government launched what it called a 'Common Sense Revolution', an ambitious, extensive programme to redesign governance, slash public spending, empower business, weaken unions and the public sector.

*Id.* at 268; *see also* Jamie Peck, *Neoliberalizing States: Thin Policies/Hard Outcomes*, 25 PROGRESS IN HUM. GEOGRAPHY 445, 445 (2001) (discussing attributes of neo-liberalism including deregulation and privatization).

distribution of potable water to the consumer and better protection of the sources of potable water. Of the two, the first was relatively easy to implement. The Safe Drinking Water Act of 2002 was adopted almost immediately and provides for such matters as provincial government oversight, accreditation and duties of both operating authorities and testing laboratories, inspections, and enforcement.<sup>14</sup> However, the second set of recommendations on the protection of drinking water sources was more difficult to deal with, and it was not until four years later, in 2006, that the Clean Water Act was adopted.<sup>15</sup> This Act was preceded by a parade of commissions, studies, reports, drafts, and consultations. In 2002, the Minister of the Environment created the Advisory Committee on Watershed-based Source Protection, which published a report in April 2003.<sup>16</sup> In November of 2003, the Ontario government designated two independent expert committees: a Technical Experts Committee to provide advice on assessing threats to drinking water sources and an Implementation Committee to advise on the tools and approaches to implement a watershed-based source protection regime.<sup>17</sup> In February 2004, the Ministry of Environment circulated a report on the topic for public consultation.<sup>18</sup> In November of 2004, the Implementation Committee published its report.<sup>19</sup> A draft act was circulated for public comment, entitled *Drinking Water Source Protection Act*,<sup>20</sup> a title more informative, albeit longer, than that of the version finally adopted in 2006—the Clean Water Act.<sup>21</sup> The Act came into force on July 3, 2007, but the regime is not expected to be fully operative until 2013 when the source protection plans required under the Act have been adopted.<sup>22</sup>

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14. *Safe Drinking Water Act*, S.O. 2002, c. 32.

15. *Clean Water Act*, S.O. 2006, c. 22. The two acts will eventually be complemented by the Sustainable Water and Sewage Systems Act, which envisages full recovery of the cost of providing potable water, including the costs of source protection, but which will not enter into force until a date to be set by proclamation. *Sustainable Water and Sewage Systems Act*, S.O. 2002, c. 29.

16. ADVISORY COMM. ON WATERSHED-BASED SOURCE PROT. PLANNING, PROTECTING ONTARIO'S DRINKING WATER: TOWARD A WATERSHED-BASED SOURCE PROTECTION PLANNING FRAMEWORK i (Apr. 2003), available at <http://www.ene.gov.on.ca/envision/techdocs/4383e.pdf>.

17. INTEGRATED ENVTL. PLANNING DIV., MINISTRY OF THE ENV'T, WHITE PAPER ON WATERSHED-BASED SOURCE PROTECTION PLANNING 3 (Feb. 2004), available at <http://www.ene.gov.on.ca/programs/3585e01.pdf>.

18. *Id.* at 4.

19. IMPLEMENTATION COMM., WATERSHED BASED SOURCE PROTECTION: IMPLEMENTATION COMMITTEE REPORT TO THE MINISTER OF THE ENVIRONMENT iv (Nov. 2004) [hereinafter IMPLEMENTATION COMM.], available at <http://www.ene.gov.on.ca/envision/techdocs/4938e.pdf>.

20. Environmental Registry, Government of Ontario, <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MjMxODQ=&language=en> (last visited Feb. 3, 2010).

21. *Clean Water Act*, S.O. 2006, c. 22.

22. South Georgian Bay Lake Simcoe Source Protection Region Timelines, <http://www.our>

Ontario thus now has two separate land use regimes in force, one set up under the older Planning Act and the other provided for under the newer Clean Water Act. What are the possibilities of sibling rivalry between them?

## II. SOURCES OF RIVALRY

In my view, geographic and functional overlaps between the two regimes make rivalry between them probable, and this probability is further exacerbated by the way the Legislature has chosen to deal with their institutional interrelationship.

### A. Geography

The key geographic unit of the Planning Act's land use regime is the municipality (local and occasionally regional), the territorial limits of which are fixed by law and reflect more fully historical, economic, and social influences than geographic ones. Where watercourses play a role, they usually mark the boundary between neighbouring municipalities, thereby fragmenting jurisdiction over watersheds (to say nothing of underground aquifers) between municipalities. On the other hand, the Clean Water Act's source protection regime is necessarily watershed-based: as the Implementation Committee observed in its report, "water knows no jurisdiction, and upstream activities affect downstream communities . . . ."<sup>23</sup> A watershed (i.e. "source protection area") therefore usually spans several municipalities, and a municipality can sometimes be divided between several watersheds.<sup>24</sup> While the boundaries of watersheds themselves can be clearly established and mapped, the jurisdictional line between watershed and municipality—which can perhaps be described as three-dimensional, vertical, and permeable—is much more difficult to trace and map.

### B. Functions

The general land use regime set up under the Planning Act is multi-functional and requires that decision-makers weigh competing perspectives

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watershed.ca/swp/timelines.php (last visited Feb. 2, 2010).

23. IMPLEMENTATION COMM., *supra* note 19, at vii.

24. Under the Clean Water Act, a drinking water source protection area is described as "[t]he area over which a conservation authority has jurisdiction under the *Conservation Authorities Act* . . . ." *Clean Water Act*, S.O. 2006, c. 22, s. 4(1). Under the latter act, a conservation authority has jurisdiction over a watershed (defined as "an area drained by a river and its tributaries") or part thereof as defined by the Lieutenant Governor in Council (i.e. the provincial Cabinet or executive branch of the provincial government). *Conservation Authorities Act*, R.S.O. 1990, c. C.27, ss. 1, 2(1), 3.

and requirements carefully and conciliate them as much as possible. This can be seen from the tenor of Section 1.1, which sets out the purposes of the Act in wide-ranging and general terms:

- (a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;
- (b) to provide for a land use planning system led by provincial policy;
- (c) to integrate matters of provincial interest in provincial and municipal planning decisions;
- (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
- (e) to encourage co-operation and co-ordination among various interests;
- (f) to recognize the decision-making authority and accountability of municipal councils in planning.<sup>25</sup>

It can also be seen from the description in the Act of an “official plan” (i.e. land use plan), a keystone document of the land use regime, as containing “goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic and natural environment of the municipality . . . .”<sup>26</sup> On the other hand, the drinking water source protection regime under the Clean Water Act is uni-functional and thus does not have the same obligation to balance and accommodate conflicting interests. This is illustrated by Section 1 of the Act, which states simply that the purpose is “to protect existing and future sources of drinking water.”<sup>27</sup>

This functional difference between the two regimes means that the uni-functional source protection regime is necessarily the more demanding of the two. Its terms of reference require it to focus solely on what is needed to protect drinking water sources to the exclusion of all other considerations, whereas the basic obligation of the multi-functional land use regime is to conciliate and accommodate conflicting demands—a difficult if not impossible task where one of the demanders is implacably insistent.

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25. *Planning Act*, R.S.O. 1990, c. P.13, s. 1.1.

26. *Id.* at s. 16(1).

27. *Clean Water Act*, S.O. 2006, c. 22, s. 1. Section 22 of the Act, setting out the content of a source protection plan, is too detailed to reproduce here; suffice it to say that its provisions all focus on drinking water source protection. *Id.* at s. 22.

*C. Institutions*

Most importantly, the insipient rivalry attendant on the geographic and functional overlaps between the two regimes risks being crystallized by the fact that they come under the aegis of two different administrative hierarchies—the Minister of Municipal Affairs and Housing (Planning Act), on the one hand, and the Minister of the Environment (Clean Water Act), on the other. The key documents of each regime, the land use plan and the source protection plan, thus follow entirely separate adoption and approval routes. The former is adopted by an elected municipal council (local or regional) and approved by the next higher authority (regional council or Minister of Municipal Affairs and Housing)<sup>28</sup> with a possible appeal to the provincially appointed Ontario Municipal Board.<sup>29</sup> In contrast, the latter is prepared by an appointed source protection committee,<sup>30</sup> verified by an appointed source protection authority,<sup>31</sup> and approved by the Minister of the Environment.<sup>32</sup> Although the content of the source protection plan itself is not subject to appeal, enforcement orders issued under it may be appealed to the provincially appointed Environmental Review Tribunal.<sup>33</sup>

Even with this procedural separation, however, there are several ways in which institutional rivalry might be managed and the consequences attenuated.

## III. MANAGING RIVALRY

Institutional rivalry might be managed, or at least attenuated, in a number of administrative ways: differences between ministers could be ironed out formally in Cabinet meetings or informally in the Premier's office; ministerial portfolios might be defined to straddle different but related areas; a unified approach between related ministries might be hammered out in over-arching government policy statements (bridging documents); related ministries could be encouraged to coordinate their efforts through the creation of (high level) inter-ministerial committees or

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28. *Id.* at s. 17(1)–(4).

29. *Id.* at s. 17(36). The members of the Ontario Municipal Board are appointed by the Lieutenant Governor in Council. *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, ss. 1, 5.

30. The members are appointed by the source protection authority (itself appointed), and the Chair is appointed by the Minister of the Environment. *Clean Water Act*, S.O. 2006, c. 22, s. 7.

31. The source protection authority is usually, but not necessarily, a conservation authority established under the Conservation Authorities Act. *Conservation Authorities Act*, R.S.O. 1990, c. C.27; see *Clean Water Act*, S.O. 2006, c. 22, ss. 2(1), 4(2) (defining duties of the source protection authority).

32. *Clean Water Act*, S.O. 2006, c. 22, ss. 2, 10.

33. *Id.* at s. 70(4). The members of the Tribunal, like the Ontario Municipal Board, are appointed by the Lieutenant Governor in Council. *Environmental Review Tribunal Act*, S.O. 2000, c. 26, sched. F, s. 1(2).

working groups; administrative decisions at an operational level might be channeled through several ministries for their input; and appeals on related matters could be heard by the same tribunal.

Looking more specifically at legal tools, inter-legislative conflict might be resolved by invoking general principles of statutory interpretation,<sup>34</sup> such as “the more recently enacted provision prevails over . . . the earlier” or “[t]he specific [statute] prevails over the general”<sup>35</sup>—both of which would favour the Clean Water Act over the Planning Act. Or the statutes in question could contain statements of legislative priority,<sup>36</sup> and this is the case with both the Planning Act and the Clean Water Act.

The Planning Act’s incompatibility clause is simple and direct: “In the event of conflict between the provisions of this and any other general or special Act, the provisions of this Act prevail.”<sup>37</sup> The Clean Water Act’s clause is less succinct but more subtle, saying essentially that in case of conflict the more protective provision prevails:

If there is a conflict between a provision of this Act and a provision of another Act or regulation or instrument made, issued or otherwise created under another Act with respect to a matter that affects or has the potential to affect the quality or quantity of any water that is or may be used as a source of drinking water, the provision that provides the greatest protection to the quality and quantity of the water prevails.<sup>38</sup>

However, other provisions of the Clean Water Act negate, in large measure, the generous subtlety of its incompatibility clause. These provisions relate to the legal effect (i.e. implementation) of source protection plans. For example, Section 39 provides in its first two subsections that:

(1) A decision under the *Planning Act* . . . made by a municipal council, municipal planning authority, planning board, other local board, minister of the Crown or ministry, board, commission or agency of the Government of Ontario, including the Ontario Municipal Board, that relates to the source protection area shall,

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34. See generally RUTH SULLIVAN, SULLIVAN ON THE CONSTRUCTION OF STATUTES ch. 10 (5th ed. 2008) (providing guidelines for how to achieve “coherence, overlap and conflict resolution” between statutes).

35. *Id.* at 343, 346.

36. *Id.* at 334.

37. *Planning Act*, R.S.O. 1990, c. P.13, s. 71.

38. *Clean Water Act*, S.O. 2006, c. 22, s. 105(1).



- (a) conform with significant threat policies and designated Great Lakes policies set out in the source protection plan; and
  - (b) have regard to other policies set out in the source protection plan. . . .
- (2) Despite any other Act, the source protection plan prevails in the case of conflict between a significant threat policy or designated Great Lakes policy set out in the source protection plan and,
- (a) an official plan;
  - (b) a zoning by-law; or
  - (c) subject to subsection (4), a policy statement issued under section 3 of the *Planning Act*.<sup>39</sup>

And Subsection 6 provides that:

- (6) Despite any other Act, no municipality or municipal planning authority shall,
  - (a) undertake within the source protection area any public work, improvement of a structural nature or other undertaking that conflicts with a significant threat policy or designated Great Lakes policy set out in the source protection plan; or
  - (b) pass a by-law for any purpose that conflicts with a significant threat policy or designated Great Lakes policy set out in the source protection plan.<sup>40</sup>

Section 40 further admonishes that the council of a municipality in an area covered by a source protection plan “shall amend its official plan to conform with the significant threat policies and designated Great Lakes policies set out in the source protection plan.”<sup>41</sup>

These provisions are thus most constraining in regard to “significant threat policies” (or “designated Great Lakes policies”) set out in the source protection plan, which policies are adopted for areas with present or possible “significant drinking water threat[s].”<sup>42</sup> A “significant drinking water threat area” is therefore a key jurisdictional boundary between the two regimes. However, its definition is less than clear,<sup>43</sup> and tracing it in a

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39. *Id.* at s. 39(1)–(2).

40. *Id.* at s. 39(6). Subsections 4 and 5 provide for a limited application of “the most protective provisions prevails” policy in a list of enumerated situations. *Id.* at s. 39(4)–(5).

41. *Id.* at s. 40(1).

42. *Id.* at s. 44(2).

43. Section 2(1) of the Clean Water Act defines a “significant threat policy” as “a policy set

given case is entirely within the purview of the source protection regime.<sup>44</sup> In the end, it is the Minister of the Environment who decides whether or not a municipality's official plan conforms with the significant threat policies set out in the source protection plan.<sup>45</sup> The Minister may "advise the municipality" of the particulars of non-conformity and "invite" the municipality to submit "proposals for the resolution of the non-conformity" within a stipulated time.<sup>46</sup> If the municipality does not respond to his liking, it may issue an order amending the official plan so as to resolve the non-conformity.<sup>47</sup> This last step is to be done "jointly with the Minister of Municipal Affairs and Housing[.]" but the Act does not say what is to be the procedure if the two ministers disagree.<sup>48</sup>

In other words, the various provisions governing the legal effect of source protection plans, particularly those dealing with "significant threat policies," allow the plans both to dictate the content of general land use plans and their implementing bylaws and to control the action of all actors involved in the adoption and implementation of the general plan, including the Minister of Municipal Affairs and Housing.

#### CONCLUSIONS

The younger, more demanding offspring thus appears to be favoured over the accommodating elder sibling, with acrimonious rather than harmonious relations being the probable outcome. What is particularly troubling about this is that the demanding offspring is the less democratic of the two.

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out in a source protection plan" that either: (1) "for an area identified in the assessment report as an area where an activity is or would be a significant drinking water threat, is intended to achieve an objective referred to in paragraph 2 of subsection 22 (2)[.]" *id.* at s. 2(2) (that is, an objective of ensuring that, in every such identified area, either "the activity never becomes a significant drinking water threat" or "if the activity is being engaged in, the activity ceases to be a significant drinking water threat[.]" *id.* at s. 22(2)), or (2) "for an area identified in the assessment report as an area where a condition that results from a past activity is a significant drinking water threat, is intended to achieve the objective of ensuring that the condition ceases to be a significant drinking water threat." *Id.* at s. 2(1). And it defines a "significant drinking water threat" as "a drinking water threat that, according to a risk assessment, poses or has the potential to pose a significant risk." *Id.*

44. Areas with significant drinking water threats are to be identified in an "assessment report" prepared by the source protection committee (admittedly after consultation with all the municipalities in the source protection area), reviewed by the source protection authority and approved (or perhaps modified) by a Director appointed by the Minister. *Id.* at ss. 2(2), 3, 15–17.

45. *Id.* at s. 10.

46. *Id.* at s. 41.

47. *Id.* at ss. 40–41.

48. *Id.*

As we have seen, decisions under the general land use regime are made by elected council members at the local and regional levels and approved by an elected Minister at the provincial level. Only the appeals tribunal is appointed. Decisions under the source protection regime, on the other hand, are made mainly by appointed members. The members of source protection committees are appointed by the source protection authority.<sup>49</sup> One third of the members reflect the interests of the municipalities located in the watershed.<sup>50</sup> One third represent the interests of the agricultural, commercial, or industrial sectors of the watershed's economy, including small businesses.<sup>51</sup> The remaining third represent interests including environmental, health, and other interests of the general public.<sup>52</sup> The members of source protection authorities are appointed by, but not necessarily from, their respective municipal councils (in proportions provided for in the Act).<sup>53</sup>

Moreover, the provisions concerning public participation are much weaker under the Clean Water Act than under the Planning Act. The Planning Act has a long tradition of providing for strong public input into all types of land use decisions, from the most major of adopting a land use plan down to the most minor of granting a zoning variance. Public meetings are the privileged way of providing for this input, and the Planning Act surrounds these meetings by a series of protective provisions requiring that that the meetings be held early enough in the process that the input can influence the decisions, that the public be given adequate notice and enough information to enable them to prepare for the meeting, that the public be provided adequate opportunity to make representations at the meeting, and that the decision-makers (normally the members of the municipal council) attend the meeting and hear the representations themselves.<sup>54</sup> The public

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49. *Source Protection Committees*, Ontario Regulation 288/07, s. 2.

50. *Id.* at s. 2(1).

51. *Id.* at s. 2(2).

52. *Id.* at s. 2(3). The Implementation Committee called for the plans to be "prepared jointly on a watershed basis by the stakeholders in that watershed." IMPLEMENTATION COMM., *supra* note 19, at vii (emphasis added).

53. *Conservation Authorities Act*, R.S.O. 1990, c. C.27, s. 14(3). Members, however, must be residents of a participating municipality in which the conservation authority has jurisdiction. *Id.* at s. 14(3). The Act does not specify membership rules in the same manner as the source protection committee regulation does. "Conservation Authorities are nonprofit organizations, each with their own Board of Directors with members appointed by local municipalities. The majority of Board representatives are elected municipal officials." Conservation Authorities of Ontario Mandate, Conservation Ontario, <http://www.conservation-ontario.on.ca/about/mandate.html> (last visited Feb. 3, 2010). A conservation authority has a legal personality as a "body corporate" under the Act. *Conservation Authorities Act*, R.S.O. 1990, c. C.27, s. 3(4).

54. The provisions concerning official plans, for example, require that at least one public meeting be held prior to their adoption at which everyone who attends has the right to voice an opinion

meeting requirement is on occasion supplemented, but not replaced, by the possibility of submitting written comments prior to the decisions.<sup>55</sup> Finally, those who participated in the public consultation prior to adoption of the plan are entitled to participate in a more formal “hearing” before the Ontario Municipal Board in the event of an appeal.<sup>56</sup>

In contrast, the Clean Water Act provides only that, when the source protection committee completes each of the three stages of the procedure leading to the adoption of a source protection plan (that is, the adoption of terms of reference, of an assessment report, and of the plan itself), it shall publish the document in question on the Internet and invite anyone interested “to submit written comments to the source protection authority” within a prescribed time limit.<sup>57</sup> These comments (together with the authority’s own comments and any concerns raised by municipalities) are included when the relevant document is transmitted to the provincial authority for approval.<sup>58</sup> For source protection plans (but not the two earlier documents), this limited public consultation may be supplemented, should the Minister wish, by public hearings conducted by a hearing officer who then submits “written recommendations, with reasons” to the Minister for consideration and to the parties at the hearing.<sup>59</sup>

In my view, public consultation through a simple submission of written views is significantly different from one through a public meeting or hearing. The former is an individual act which takes place in isolation, with little or no possibility of learning the views of other people or of being sure that the points being made are understood. The latter is a collective act that takes place in a group, where all hear each other’s views, all can express an opinion about them, and all can be questioned by the hearing authority, if need be. Internet postings will never replace face-to-face contact.

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about the plan. *Planning Act*, R.S.O. 1990, c. P.13, s. 17(15). The public must be given at least 20 days notice of the meeting and must also receive adequate information and material within the same delay to enable them to prepare for the meeting. *Id.* at ss. 17(15)–(19). “Open houses” must sometimes be held at least seven days before to the meeting to give the public an opportunity to review and ask questions about the information and material. *Id.* at s. 17(19.4).

55. For official plans, for example, the statute provides that members of the public may make “written submissions” and “any person or public body that the council considers may have an interest in the plan” may submit “comments” on the proposed plan to the municipal council prior to its adoption. *Id.* at ss. 17(20)–(21).

56. *Id.* at ss. 17(36), (44)–(46).

57. *Clean Water Act*, S.O. 2006, c. 22, ss. 9(c) (terms of reference), 16(c) (assessment report), 23(d) (source protection plan). Terms of reference and source protection plans are approved by the Minister (Sections 10 and 29) whereas assessment reports are approved by a Director appointed by the Minister (Section 17). *Id.* at ss. 10, 17, 29.

58. *Id.* at ss. 10, 17, 25.

59. *Id.* at ss. 28–29.

Sarah Hartley and Grace Skogstad distinguish between representative, functional, and participative democracy.<sup>60</sup> Under a system of representative democracy, decisions are made by elected representatives of the people who are free to decide matters as they think best but are answerable to the people for their decisions at election time.<sup>61</sup> Functional democracy, on the other hand, refers to “the inclusion in policy-making processes of representatives of a constituency that performs economic or social functions linked closely to the policy issue or domain.”<sup>62</sup> The general land use regime is an example of representative democracy, and the source protection regime is an example of functional democracy. Hartley and Skogstad accept that representative government is not perfect, but they are wary of functional democracy as a substitute because the members are not accountable to the electorate and represent the points of view of particular groups rather than a broad spectrum of public opinion.<sup>63</sup> A weak system of public participation simply compounds the democratic deficit.

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60. Sarah Hartley & Grace Skogstad, *Regulating Genetically Modified Crops and Foods in Canada and the United Kingdom: Democratizing Risk Regulation*, 48 CANADIAN PUB. ADMIN. 305, 305–09 (2005).

61. *Id.* at 305–07, 321.

62. *Id.* at 306.

63. *Id.* at 324.