

NOTES FOR COMMENTS TO LL.M IN ADMINISTRATIVE LAW

OSGOODE HALL LAW SCHOOL

MARCH 29TH, 2001

I - INITIATION OF THE INQUIRY

- CELA represents Concerned Walkerton Citizens at the Walkerton Inquiry, as you know. CELA is....
- CWC was formed in the wake of the Walkerton tragedy, and its primary mandate was to call for and participate in a public inquiry. CWC has about 500 members from the local community, and is broadly representative of the community and its concerns to find out what happened to lead to the tragedy and to ensure such a tragedy is prevented in the future, both in Walkerton and across the province.
- We requested that the inquiry be conducted under the *Public Inquiries Act*. This was because of the broad powers that a commissioner then has.
- On behalf of both CWC and CELA, we made a submission to the Attorney General, Jim Flaherty on June 8th, as to what the terms of reference should be. I've provided to you a copy of the letter to the Attorney General, behind the press release. We prepared that submission very quickly, because we expected the terms of reference to be announced

imminently. However, we believe that the submission was important to do, that it was taken seriously, and that it probably influenced the final terms of reference of the Commission. You will also notice that we asked for a broad approach to standing and for funding provisions to be included.

- In preparing our submission as to what should be included in the terms of reference, we relied upon CELA's long history of in-depth work on water issues, as well, of course, on incorporating questions and concerns that our clients were raising. The submission that we made on the terms of reference in those early days has stood up quite well and continues to guide us in our various communications with the commission, as I will explain.
- You have the terms of reference as they were announced by the Attorney General on June 13th, in your package from David McRobert. The commission was established under the Public Inquiries Act, and we were satisfied that the terms of reference and the mandate were broad enough to encompass the issues that we had detailed in our submission. I will discuss in more detail shortly, the process under which the Commission is pursuing its mandate under section 2(a), (b) and © of the Terms of Reference.
- You will notice the resources accorded to the commission, including the power to retain counsel, staff, investigators and expert advisers, as well as the power to make recommendations regarding funding to parties granted standing. However, there were

two limitations on this power: One, that the funding could be granted “to the extent of the party’s interest” and secondly, that the funding could be granted to such parties “where in the commission’s view, the party would not otherwise be able to participate in the inquiry without such funding.” (Section 5 of the terms of reference) The press release committed the government to comply with such recommendations.

- For your interest, the Walkerton Inquiry has its own web site:
www.walkertoninquiry.com, and you can read the detailed standing and funding decisions there.
- It’s of interest to note the comment of Justice O’Connor in the June 13th press release, where he said he was satisfied that he a sufficient mandate and sufficient powers to carry out the mandate. His conduct of the Inquiry, we think, is exemplary and thorough, although disciplined, and we are looking forward to strong recommendations for drinking water protection in Ontario from Justice O’Connor.
- At the same time that we were submitting the terms of reference for the Inquiry, CELA renewed its long-standing call for a Safe Drinking Water Act. CELA first called for a Safe Drinking Water Act in 1980, and has repeatedly urged the adoption of legislative protection for drinking water. CELA also, along with Toronto Environmental Alliance, submitted a formal Request for Review in June 2000, asking the Ministry of the Environment to review the need for safe drinking water legislation. In addition, at around

the same time, we made submissions as to the government's proposed new drinking water regulation (for which they did not accord a comment period; but we commented anyway), emphasizing that the proposed regulation only dealt with one aspect of the issue, but that the tragedy appeared to have resulted from many large gaps in the drinking water system in Ontario. The evidence at the Inquiry has certainly borne out that opinion. A somewhat revised drinking water regulation was later promulgated last August, replacing the prior guidance documents such as the Ontario Drinking Water Objectives and the Chlorination Bulletin.

PUBLIC INQUIRIES ACT

- When is the Public Inquiries Act used? Section 2 provides, “whenever the Lt. Gov. In Council considers it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or the administration of justice therein, or that the Lt. Gov. In Council declares to be a matter of public concern, and where the inquiry is not regulated by any special law...”
- What is the procedure under a Public Inquiry? Section 3 provides that the procedure is up to the commissioner, so long as the minimum requirements of the Act are met. Those minimum requirements are:

- According to section 4, that the Inquiry is open to the public [there can be some exception for public security or for personal intimate or financial matters, but these have not arisen at the Inquiry]
- The other minimum requirement under the Act is in section 5, which provides the minimum standing rule, that the commission must grant standing to anyone who has a “substantial and direct interest in the subject matter of its Inquiry” by giving such person an opportunity to give evidence and to call and examine or cross-examine witnesses. Given the breadth of the terms of reference of the Inquiry, we read the standing rule broadly as well. I will say more about the standing hearing later tonight.
- The Act prohibits the commissioner from making a finding of misconduct in its report against a person unless the person had notice and an opportunity to be heard in the inquiry. [We understand that some such notices have been issued, based on the evidence in part 1(a) of the Inquiry so far, but we have no details of such notices, nor do we know to whom they’ve been issued. We would expect the commissioner to be more inclusive in issuing such notices, rather than less, to allow him to make such findings as he concludes at the end of the day he must do, without restriction because of lack of the misconduct notices. Receipt of such a notice does not mean that the commissioner will in fact make such a finding at the end of the day; rather it accords procedural rights to the person; i.e. notice and an opportunity to be heard, before the commissioner makes final decisions on such findings.]

- The terms of reference also explicitly provided that the inquiry must not limit either the investigation of any criminal offences nor the prosecution of any criminal matters. We had originally imagined that there could be issues about production of documents or witnesses at the Inquiry for this reason, but such issues have not arisen so far. If they did arise, the commissioner would have to make rulings on the dispute and it would be possible for such rulings to be taken to judicial review, depending upon the grounds -- the forum for judicial review is the Divisional Court according to section 6 of the Act.
- How are witnesses brought before the Inquiry? Section 7 provides the commissioner with the power to summon witnesses to give evidence, and/or to produce documents in evidence, subject to the usual legal rules of privilege, both by statute and at common law. So solicitor-client privilege, cabinet privilege and police informants' privilege could all be claimed. So far in the Inquiry such issues appear to have been negotiated privately between witness's lawyers and commission counsel and no disputes as to privilege over a document that a party has wanted to introduce has arisen. This is also mitigated by the fact that all of the evidence is called by the commission, as I will discuss shortly.
- All witnesses are protected by section 9 of the Act against having his or her answers used against him or her in civil proceedings, regarding his or her civil liability. [Despite this, we have observed that many of the lines of questioning by some of the parties are directed at protecting the reputation of the client; or with a view to future civil or criminal

proceedings; in other words, presumably counsel for the parties wants a consistent line of evidence in view of potential lines of defence in such proceedings.]

- As to potential criminal proceedings, any witness can object because of section 5 of the Canada Evidence Act and then the answer to the question cannot be used against him or her in subsequent criminal proceedings.
- How does the commission obtain the evidence and documents that it needs to carry out its mandate? The Lt. Gov. In Council has the option of declaring Part III of the Act applicable, and then the commissioner may appoint investigators, obtain search warrants and apprehend witnesses who fail to appear. This Part has been declared applicable in the case of the Walkerton Inquiry, and for example, search warrants were issued to the Ministry of the Environment. In addition to documents that parties have provided to the commission voluntarily [and the commissioner has reminded parties that they have an obligation to produce relevant documents to the commission by virtue of their standing as parties], government departments such as the Ministry of the Environment have produced at least 150,000 documents to the commission under the search warrants. The Ministry of Environment has staff assigned to the job of meeting its obligation to provide relevant documents to the commission.
- It is because of the volumen of documents produced - for example, 90,000 documents were produced in February and March alone, that the Inquiry is presently on a six week

break while it screens the documents. The Commission has had to hire additional legal staff for this task.

- The Inquiry has chosen to produce the most relevant documents to the parties in CD ROM format. We have been in receipt of approximately 8 or 10 CD ROM discs, consisting of thousands of documents each, in varying sizes from 1 to 100's of pages each. The task of the parties with standing to cope with and make adequate use of these documentary productions is almost impossible, but they are available to us.
- However, in order to receive these documentary productions, parties, their counsel, and their expert advisors were required by the commission to sign confidentiality undertakings. Just because the documents are produced to us in this format does not mean that they are evidence in the Inquiry; nor are they public. Only once introduced as an exhibit at the Inquiry does the document become public. Therefore the documentary production will not provide us with a long term archive; the discs and any copies of documents that we have printed from it will have to be returned or destroyed at the end of the Inquiry, unless the document became an exhibit.
- The Public Inquiries Act has no applicable regulations.
- Examples of previous public inquiries include the Morin Inquiry in 1998; the Grange Commission regarding the deaths at the Hospital for Sick Children in 1984; the Patti Starr

inquiry into elections financing; an Inquiry into the safe use of fuels in 1981; a Police Practices inquiry; a 1979 inquiry into the confidentiality of health records in Ontario; a 1975 inquiry regarding the building industry; a 1977 royal commission on northern environment; a 1977 inquiry into Pickering land compensation, the Hryciuk inquiry into the removal of judges in 1996, and the 1990 Niagara Regional Police Force, to give you an idea of the range of issues potentially dealt with in an Inquiry process.

- A Commission of Inquiry is not a court, nor is it a branch of the judiciary. Commissions of Inquiry are appointed under the executive powers of the Lt. Gov. In Council, and their purpose has been held by the courts to be executive or administrative, although they adopt a judicial procedure. They can be characterized as the executive branch of government examining itself. [Terms of reference of an Inquiry can even be altered by the executive, even after the commission has commenced.]
- However, commissions are NOT subject to the direction of ministers or cabinet about how to interpret their terms of reference; nor about how to follow a particular procedure. The boundaries on the commission's legal authority are set by its terms of reference.
- Although we refer to those granted standing as "parties", the Ontario Crime commission case in 1963 held that the Public Inquiries Act does not have "parties" per se. This is relevant to the manner of participation by those with standing, as I will discuss.

- A public inquiry cannot determine civil or criminal responsibility, but it can inquire into matters that would be relevant in such proceedings (a ruling in the Nelles / Sick Kids case); rather relevance in the Inquiry is determined by the terms of reference of the Inquiry (a ruling in the Health Records Inquiry).
- If someone refuses to answer relevant questions, the commissioner's remedy is to send the matter to Divisional Court to determine the issue of contempt on a full hearing before that court.
- Because the participants are not "parties" in the adversarial sense, and because the Inquiry is that of the commission, all of the evidence is commission evidence. The witnesses are examined by commission counsel, and the right of examination in chief by the witness's own counsel is up to the commissioner. This has only happened once during the commission, when Stan Koebel's lawyer brought a motion to examine his client in chief.
- Similarly, there is no automatic right to call evidence on the part of the parties; rather the process is to suggest appropriate witnesses to commission counsel, and if they determine that the evidence is useful and necessary, then they call the witness as a commission witness. All of the witnesses receive only a \$50. Honorarium and travel expenses, unless they are retained as commission expert advisors.
- The grant of standing does not give unconditional cross-examination rights; it is up to the

commissioner to exercise discretion as to those rights. The commissioner dealt with the scope of cross-examination in his standing decision and further rulings, for example, limiting some of the parties to cross-examination only so far as their interests or involvement are directly affected.

THE STRUCTURE OF THE INQUIRY

- I have provided in the package I brought today, a copy of the Notice of Hearing, which outlined the mandate; sketched the two parts of the Inquiry, and gave notice of deadlines to apply for standing and to apply for funding. There were also Rules of Procedure and Practice, which commission counsel did circulate in draft before finalizing them; I did not bring them, but you can see them on the Inquiry's web site. I've also provided a copy of the August 18th memo from the commission, outlining the participation rights that parties with standing would have.
- The Commissioner has structured the Inquiry, in accordance with sections 2(a), (b) and © of his mandate, each with a separate procedural phase.
- Part 1(a) of the Inquiry, which was just completed in February, dealt with "the circumstances which caused hundreds of people in the Walkerton area to become ill, and several of them to die in May and June 2000, at or around the same time as Escherichia coli bacteria were found to be present in the town's water supply".

- Part 1(b) of the Inquiry commenced at the beginning of March, but adjourned for six weeks after the first week of evidence. It is scheduled to resume April 12th and will continue until June 29th. This is the second evidentiary phase of the Inquiry and is dealing the “the cause of these events including the effect, if any, of government policies, procedures and practices”.
- I have also included in the package I brought, the February 1, 2001 notice to the parties with standing in part 1(b), which is a memo outlining the issues to be canvassed in part 1(b). It is a broad, thorough and deep list of issues, and again, we were satisfied that it will allow the necessary issues to canvassed in part 1(b). Just as it is necessary to discuss with commission counsel the witnesses that should be called, it was also incumbent on us and other parties with standing in part 1(b) to advise commission counsel as to the issues that we felt needed to be canvassed in that part. We consulted with some of the other parties with part 1(b) standing, and made some joint submissions and some separate submissions to commission counsel. The commission’s issues list accordingly went through some revisions until the version you see was reached. I want to stress the distinction between a more usual tribunal process, where there might be some degree of issue determination and adverse parties meeting outside the hearing process to narrow and scope issues, but where the cases to be called remain up to the parties, compared to the Inquiry process where a party’s influence on the case to be heard before the commissioner depends upon how much work the party puts into identifying appropriate witnesses,

documents and issues, and then conveys those to commission counsel, along with supporting explanations.

- It does remain open to the parties, if commission counsel does not agree to call a witness whom a party strenuously feels is necessary to fill an information gap, to bring a motion to this effect before the commissioner. This has not yet been necessary for anyone to do. On the contrary, in general, commission counsel have almost always interviewed witnesses whom we have suggested, and often called those witnesses to testify. At the end of the part 1(a) evidence, our clients, CWC felt that there remained a gap in the absence of evidence from the hospital, and when we expressed that to the commission, that witness was called, to give one example.
- You will notice in the Issues list for part 1(b) that the commission is stressing that government policies will be explored vis a vis their effect on what happened in Walkerton; they have a difficult job to keep this section of the Inquiry appropriately focussed and manageable. No doubt there will be tensions about how far afield we have to go into policies to understand the implications for Walkerton.
- The third part of the Inquiry's structure is Part II. Part II is intended to deal with section 2(c) of the commission's mandate: "any other relevant matters that the commission considers necessary to ensure the safety of Ontario's drinking water, in order to make such findings and recommendations as the commission considers advisable to ensure the

safety of the water supply system in Ontario”.

- The manner in which the commission is approaching this, is that the commissioner appointed Dr. Harry Swain as chair of Part II, and he in turn struck an advisory committee of academic advisors. They then produced a draft list of study paper topics and posted that on the web site for consideration and comment. Once again, we took advantage of the opportunity to discuss the papers with commission part II staff and to comment on the study papers; after comments the study papers were revised and the final version can be viewed on the web site. The commission then proceeded to arrange for preparation of these papers, mainly by academic researchers, and the papers have begun to be posted on the web site, often in draft, for review and comment. It is open to the general public to comment, as well as to parties with standing in part II.
- In addition to the commission papers, the commission has recommended funding, and funding has been granted, to various of the parties in part II, to prepare papers on additional topics, beyond the study list, or to provide alternative points of view about those topics. These additional papers are also being posted to the web site for review and comment by the general public and by the parties.
- In that respect, CELA is preparing a paper on the need for a Safe Drinking Water Act, and is also, together with other parties, preparing a paper about private versus public drinking water system management and ownership.

- For your information, I included in the package a letter from CELA to Dr. Swain of September 22nd, responding to the study list and suggesting the additional topics that we felt should be considered.
- The commission has established a schedule of “expert” meetings to discuss the issues, in which the part II parties with standing and those who have prepared papers will participate. Following that process, then there will be “public” meetings on each of these topics. That schedule is also on the Inquiry’s web site. In addition to the topical meetings, the commission is also conducting “town hall” meetings across the province in different cities. The first one was in Waterloo on March 22nd. They are being televised across the province, as well as transcribed. These are open to any member of the public to seek to be registered to speak on water protection issues in general, or to relate experiences in their community that can assist the commissioner with his recommendations.

PUBLIC ACCESS TO THE PROCEEDINGS

- I want to spend a few minutes discussing the methods that the commission has used to ensure public access to the proceedings. There are several routes available, and I think the result is probably one of the most accessible public hearings of which I am aware to date.

- Firstly, the hearings, both evidentiary, town hall and topical are open to the public. The evidentiary phases of the hearing are all being held in Walkerton; this was obviously critical to our client group. People can come and go from the hearing room at will.
- Secondly, of course, media is welcome. Media can sit in the hearing room, and in addition, a media room with monitors was established separately. The commission has taken pains to accomodate media, without intruding on the giving of evidence.
- Thirdly, the proceedings are all televised on the local cable channel live, which repeats them in the evenings. Other television channels repeat all or parts of the hearing at various times throughout the province. Television cameras and news cameras, other than the cable cameras are not permitted in the hearing room during the proceeding, but now and then the commissioner accords a few minutes for them to obtain pictures and footage of the witnesses and participants in the hearing room before proceedings resume.
- Fourthly, the proceedings are all transcribed, and the transcripts are available the following morning on the internet to be viewed or printed. Originally for the first several weeks of the hearing, this was not the case and the commission eventually changed its reporter and its arrangement to provide this access, and now all of the transcripts, back to the beginning of the hearing are available. I believe that the public access to the transcripts is one of the most important aspects of the commission's public access to its proceedings.

- Fifthly, the commission makes excellent use of its web site to communicate with the parties and the public, and to provide a repository for its key procedural documents and rulings. As I have been mentioning, everything from rulings to schedules to witness and issues lists, study paper lists, the papers themselves, and much more is available on the web site, in a very usable format.

- Sixthly, the commission maintains offices in both Toronto and Walkerton, and any member of the public can make arrangements to view exhibits in either of those offices. Commission staff is readily available as well, which our clients have appreciated.

- In addition, as I have already described, the part II town hall meetings around the province, and the topical meetings are also all public and adding to the public's access to the proceedings and to the range of input that the commissioner will have for his findings and recommendations.

- I think that this aspect of the Inquiry - the several mechanisms for public access - is itself of enormous interest and importance in terms of the potential for opening up tribunal and other proceedings to the wider public. Given the importance of the issues being treated by the Commission, it is appropriate that its proceedings be available to all Ontario in these various ways.

WHAT'S TO FOLLOW THE INQUIRY?

- Recommendations to government
- Government choice what to do
- I'm expecting recommendations to be very thorough
- Gibbons report??
- Consolidation of water systems??
- More privatization??
- Safe Drinking Water legislation??
- More resources; better integration; stricter regulatory regime??
- Public awareness and involvement in water safety??