Rulings on Motions
Re: Section 5(2) Notices

Appendix J

THE WALKERTON INQUIRY

LA COMMISSION
D'ENQUÊTE WALKERTON

RULING

On the Motion and Supplementary Motion on behalf of Michelle Zillinger

1. The *Public Inquiries Act*, R.S.O. 1990, c.P.41 ["the Act"] provides as follows:

   ….

   5(1) A commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest.

   (2) No finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel. [Emphasis added].

   ….

2. On February 6, 2001, Commission Counsel provided Michelle Zillinger with a Notice under s.5(2) [excerpted above]. The Notice provided:

   ….

   In his report(s) the Commissioner may find that:

As an Environmental Officer with the Ministry of the Environment, when you performed an inspection of the Walkerton water works on February 25, 1998:

(i) you failed to review the chlorine residual levels recorded in the daily operating logs at the three wells in other than a cursory manner, and as a result, you failed to note that the chlorine residual levels were consistently and suspiciously recorded as an almost constant .75 mg./l. or .5 mg./l. at the pump houses.

3. On April 3, 2001, Commission Counsel provided a further Notice to Ms. Zillinger. The only change from the original Notice was the addition of specific evidentiary references relating to the substance of the Notice. Since then, Ms. Zillinger has been informed of one further piece of evidence that may relate to the Notice.

4. On her motion, Ms. Zillinger seeks four types of relief:

a. An order quashing the s.5(2) Notice.

b. A declaration as to what constitutes "misconduct" within the meaning of s.5(2).

c. An order prohibiting any further Notices under s.5(2) or amendments to the Notice.

d. An order for disclosure should there be further allegations made against her.

The Motion to Quash

5. Ms. McCaffrey, counsel to Ms. Zillinger, made two arguments in support of the motion to quash.

6. The first has to do with an alleged lack of evidence to support the allegation set out in the Notice. Ms. McCaffrey variously states that there is no evidence or insufficient evidence to sustain any finding adverse to Ms. Zillinger based on the evidence introduced at the hearing. As part of this, she argues that there is no evidence to causally connect Ms. Zillinger's

conduct to the events in Walkerton. This part of her argument would have me evaluate and assess the evidence now, before final argument, and in effect screen out any possible finding of misconduct before my final report.

7. There are two reasons why this argument fails. First, it is premature. There is no procedure under the Act or in the Rules of Procedure and Practice for this inquiry providing for a motion of this sort. I have the discretion, of course, under s.3 of the Act to determine the procedure for this inquiry. In my view, however, it is not in the best interests of the inquiry to inject a new level of decision-making of the nature proposed, prior to hearing final arguments and before the issuance of my report.

8. Public inquiries, as this inquiry shows, can be very complex. Indeed, one of the most frequently heard criticisms of public inquiries is that they take too long and become bogged down in procedural wrangling and challenges. The public interest is served by having inquiries proceed in an efficient and timely manner.

9. That said, it is nonetheless imperative that all parties who could potentially be adversely affected by a finding in a report be granted procedural fairness. I am satisfied that this can be done without putting in place a procedure for the screening of potential findings prior to final argument. To establish such a procedure would in my view add an unnecessary layer of complexity, expense and potential for delay.

10. I am satisfied that Ms. Zillinger has received full procedural fairness. Ms. Zillinger, like other witnesses who received a s.5(2) notice, received details of the possible allegations, full disclosure of all the evidence that could adversely affect her, the opportunity to cross-examine witnesses and to call evidence relating to the possible allegations, and, finally, she will have the opportunity to make closing submissions.

11. It must be borne in mind that this is an inquiry, not a prosecution or a civil lawsuit. In my view, the screening procedure contemplated by Ms. McCaffrey, appropriate for those types of proceedings, is neither necessary nor desirable for a public inquiry.

12. The second argument that Ms. McCaffrey makes is that her client has suffered or will suffer prejudice by the manner in which her client was

provided with the s.5(2) Notice and the way in which evidence was led. I find no merit in this argument. Ms. McCaffrey suggests that Ms. Zillinger may have testified differently if she had been forewarned that a s.5(2) Notice was in the works. The answer to this is twofold. A s.5(2) Notice was not contemplated by Commission Counsel when Ms. Zillinger testified on November 6 and 7, 2000. Moreover, Ms. Zillinger testified again yesterday and has been repeatedly offered the opportunity to testify further, if she wishes, and has declined to do so.

13. Next, Ms. McCaffrey suggests that Ms. Zillinger only learned yesterday, when Ms. Kristjanson was testifying, what Commission Counsel intended by the Notice. I have some difficulty accepting this position. However, accepting for the sake of argument that it is the case, Ms. Zillinger has been offered the opportunity of giving evidence, cross-examining any of the witnesses who have given evidence, or calling new evidence to address what is now said to be her understanding of the content of the Notice. She has declined to do so. Further, Ms. McCaffrey does not point to any specific prejudice that has affected her client's ability to participate in the proceeding and to answer the substance of the Notice.

14. The argument that Ms. Zillinger has or will suffer prejudice if the Notice is not quashed is without merit.

Declaration as to what constitutes "misconduct"

15. In issuing s.5(2) notices, Commission Counsel took a broad view of the meaning of misconduct so as to afford witnesses and others who might be affected by findings in the report the fullest possible procedural protections.

16. In her affidavit, Commission Counsel, Ms. Kristjanson, described the process as follows:

> As Commission Counsel, we will not make submissions on the evidence, and will not take any position as to findings to be made. Rather, it was our view that where the evidence might support a factual finding which, broadly construed, might be perceived as unfavourable or adverse to a person's reputation, including conduct

> that might be described as careless or an oversight, it would be most fair to the person to provide a section 5(2) notice. This was so the person would be put on notice, could avail herself of procedural protections, and could respond. Upon receipt of a section 5(2) notice, a person automatically gains limited standing for the purposes of that notice. This gives certain procedural protections to the person as set out in the Commission's Rules of Procedure and Practice… as well as by the operation of the *Public Inquiries Act*.

17. Having had the benefit of these procedural protections, Ms. McCaffrey now argues that I should make a declaration that misconduct be limited to behaviour that is morally reprehensible, necessarily involving the breach of an established and definite rule of behaviour. I note in passing that Justice Cory, in *Canada (Attorney General)* v. *Canada (Commission of Inquiry on the Blood System)* (1997), 151 D.L.R. (4th) 1 (S.C.C.), did not adopt this definition. Ms. McCaffrey goes on to ask that I also declare that misconduct is not inadvertence, negligence, carelessness, or even an error in judgment.

18. These declarations, in Ms. McCaffrey's submission, tie into her first request that the s.5(2) Notice be quashed. She argues that because there is no evidence of misconduct of the more egregious type, the result is that the Notice should be quashed.

19. This argument too must fail. This is an inquiry, not a prosecution or a proceeding alleging any particular outcome; in particular, misconduct. Were it otherwise, there may be merit in defining the scope of what needs to be proved.

20. The purpose of the s.5(2) notice is to ensure that those who may be affected by a finding receive procedural fairness. It also prevents a Commission from making a finding adverse to a person when such notice and procedural fairness has not been provided.

21. Given that both notice and procedural fairness have been provided to Ms. Zillinger, I do not think it either necessary or desirable that at this stage of the proceeding I make a declaration as to what may or may not constitute misconduct. It would be inappropriate to do so in advance of hearing arguments for all the parties who may be affected by the issue; in

particular, those who may wish, in their closing arguments, to make submissions about the conduct of others and how that conduct may have contributed to the events in Walkerton.

22. In this connection, I have repeatedly made clear that if any surprise or unfairness results from submissions during closing argument, an opportunity to address concerns of unfairness will be provided.

23. In passing, Ms. McCaffrey also asks that I make a declaration that misconduct must be causally connected to the tragedy. In particular, I am asked to define the scope of causation contemplated by the Order in Council. The interpretation of the mandate in the Order in Council, and in particular what constitutes causation, will likely be the subject of submissions in closing argument. It is premature to address this issue at this stage. It would operate unfairly to others with standing and I decline to do so.

Order prohibiting further Notices and amendments;
Order for disclosure should there be further allegations

24. These requests for relief are premature. I will address the propriety of any further notices if and when they are issued and I will of course address any concerns about procedural fairness at that time.

25. The Motion and Supplementary Motion are therefore dismissed.

DATE RELEASED: July 4, 2001

THE WALKERTON INQUIRY

LA COMMISSION
D'ENQUÊTE WALKERTON

Ruling

On the Motion on behalf of John Earl

1. Mr. Earl moves to quash the Section 5(2) Notice served on him. On his behalf, Mr. Barrie makes two points.

2. First, he argues that, because the evidence discloses no morally reprehensible behaviour or other conduct that could constitute "misconduct" on the part of his client, the Notice should be withdrawn.

3. As I said in my reasons disposing of Ms. Zillinger's motion, I do not think it is necessary or desirable at this stage to address the issue of what does or does not constitute misconduct, nor do I think I should assess the evidence as it relates to any particular individual before hearing the final submissions of all the parties. At that time, Mr. Earl, through his counsel, will be given a full opportunity to make submissions and to answer the arguments of others.

4. Mr. Barrie's second argument fails for the same reason. He asks that I now define the meaning of the causal connection in the Order in Council and rule that there is no such connection between his client's conduct and the events in Walkerton. This argument is also premature.

5. I do not see any advantage in adjourning this motion until final argument. If Mr. Barrie on behalf of his client wishes to renew the matter, he will be free to do so.

6. The motion is dismissed.

DATE RELEASED: July 4, 2001

THE WALKERTON INQUIRY

LA COMMISSION
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Ruling

On the Motion on behalf of Larry Struthers

1. Ms. Saxe, on behalf of Larry Struthers, asks for three orders. The first, having to do with ongoing disclosure, was satisfactorily resolved on the record in the hearing room.

2. Further, Ms. Saxe seeks an order or declaration as to the meaning of the word "caused" in the Order in Council and a declaration that mere error should not be stigmatized as misconduct.

3. Ms. Saxe very fairly recognizes that I am not required to make orders of this nature but suggests that, for purposes of clarity, it would be of benefit to do so. I appreciate the spirit in which she made her submissions. However, for the reasons set out in the Rulings regarding the motions of Michelle Zillinger and John Earl, I think it would be premature to make orders of this nature at this time.

4. The motion is dismissed.

DATE RELEASED: July 4, 2001