

Chapter 7 The Roles of the Municipalities and Mayors

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Chapter 7 The Roles of the Municipalities and Mayors

7.1 Overview

In this section, I consider the role of the Town of Walkerton, the Municipality of Brockton (Walkerton's successor), and two of the mayors of those municipalities in the events of May 2000. The municipalities' roles were limited, given that at the relevant times the water system was operated by a public utilities commission. I focus on three occasions following which, it has been suggested, the municipality should have taken steps in relation to the drinking water system but did not do so: the November 1978 meeting at which Ministry of the Environment (MOE) representatives suggested land use controls for the area surrounding Well 5; the receipt of the 1998 MOE inspection report; and the issuance of the boil water advisory in the early afternoon of May 21, 2000.

I conclude that at the relevant times the Town of Walkerton did not have the legal means to control land use in the vicinity of Well 5. Further, the discussion in 1978 about controlling land use revolved primarily around the former Pletsch farm. In fact, however, the bacterial contamination of the Walkerton water system originated elsewhere.

Given that the control and management of the waterworks were vested in the Walkerton Public Utilities Commission (PUC), the Walkerton town council's response to the 1998 inspection report was not unreasonable. The council was entitled to rely on the public utilities commissioners to follow up on the deficiencies identified in the report.

Brockton's mayor, David Thomson, was in an ideal position to assist the Bruce-Grey-Owen Sound Health Unit in disseminating the boil water advisory on May 21 and May 22. Even though the mayor knew that the people of Walkerton were becoming ill, he did not offer to help inform them about the boil water advisory. But Dr. McQuigge did not request any assistance. Although others in Mayor Thomson's position might have done so, I am not satisfied that he should be faulted for having failed to offer assistance.

Further, I conclude that it was not unreasonable for Mayor Thomson and other members of Brockton's municipal council to refrain from invoking the Brockton Emergency Plan. Due consideration was given to taking this extraordinary step. The primary benefit of invoking the plan would have been

to assist in publicizing the boil water advisory. By the time the municipal council was considering whether the plan should be invoked, the existence of the boil water advisory was already well known within the community.

7.2 The Town of Walkerton's Failure to Control Land Use in the Vicinity of Well 5

Control of land use in the vicinity of Well 5 is also addressed in Section 9.2 of this report. In order to minimize the repetition of facts relating to this issue, I will refer here only to those facts that are essential in understanding the Town of Walkerton's role in this respect.

Walkerton's mayor at the time (an *ex officio* commissioner of the Walkerton PUC) attended the November 23, 1978, meeting at which the MOE's representatives recommended that "consideration should be given to controlling activities in areas adjacent to the new well which may contribute to aquifer contamination." The meeting's minutes show that the then mayor, Neil MacDonald, stated that "Mr. [Percy] Pletsch would probably be very hesitant to sell the farm to the PUC." Nonetheless, the PUC commissioners agreed that Mr. Pletsch "should be approached in order that the potential effects on the new well supply of land use activities on the Pletsch farm could be fully discussed."

Elsewhere I conclude that the commissioners' agreement cannot be characterized as an implied condition attaching to the Certificate of Approval issued to the Walkerton PUC in relation to Well 5. I now consider whether the Town of Walkerton can be faulted for not acting on the MOE representatives' recommendation.

Basic to this consideration is the fact that the Town of Walkerton lacked the legal power to control land use on the Pletsch property. Although Well 5 was in Walkerton, the Pletsch farm, only a few metres away, was in Brant Township. The Town of Walkerton lacked the power to control activities in another municipality.

Municipalities generally have the power to expropriate property for purposes related to making, maintaining, and protecting utility works. This power is apparently not limited to property within the geographical boundaries of the expropriating municipality. However, as long as the control and management

of the waterworks were entrusted to the Walkerton PUC, the PUC – not the municipality – was empowered to expropriate property in order to preserve the purity of the water supply.

Finally, it must be noted that the Pletsch farm was the only specific property on which land use might have been controlled that was referred to by the participants at the meeting of November 1978. There does not appear to have been any discussion about controlling land use on the farm of Dr. David Biesenthal or about other possible sources where the *Escherichia coli* and *Campylobacter jejuni* bacteria that contaminated Walkerton's water system might have originated.

Given all of this, I conclude that the failure of the Town of Walkerton and its officials to act on the MOE representatives' recommendation to control land use activities on the Pletsch farm is not reasonably connected to the outbreak in May 2000.

7.3 The Town of Walkerton's Response to the 1998 Ministry of the Environment Inspection Report

As is discussed in Section 9.3 of this report, the 1998 MOE inspection report raised troubling issues concerning the operation of Walkerton's waterworks. Chief among them was the presence of *E. coli* – an indicator of unsafe drinking water quality – in treated water samples. As a consequence, the report's author, Michelle Zillinger, emphasized the need to maintain an adequate chlorine residual. The report alluded to other problems, including the failure to comply with the minimum sampling program under the Ontario Drinking Water Objectives.

A copy of the report was sent to Walkerton's clerk-treasurer, Richard Radford, and the report was placed on the agenda for the town council meeting of June 8, 1998, as an information item. At that meeting, Mary Robinson-Ramsay, a municipal councillor, expressed her concern about the PUC's non-compliance and the detection of *E. coli* bacteria. From her standpoint, the solution to these problems was to provide what she termed "regular and on-going technical expertise." She identified the options of either retaining a consulting engineer to take supervisory responsibility or hiring a municipal director of public works (either for the new municipality that was to come into existence on January 1, 1999, or to be shared with another municipality). But there was very little

reaction to the points she raised, except for the idea of passing a resolution concerning the role of the MOE. Ms. Robinson-Ramsay concluded that the options she had identified were not pursued because the council only had six months left in its mandate.

The council meeting minutes reflect the following under the heading, “Information”:

Min. of Environment — *Status Report — Walkerton Waterworks* — Council debated this report and supported a motion being brought forward to request MOEE controls on water quality be left in place on a province wide basis. Councillor Ramsay and the CAO¹ will work on this motion for presentation at a future meeting.

When the motion was brought before the council on June 15, 1998, it was for a resolution that council “urge the Government of Ontario to maintain the Ministry of the Energy and the Environment [*sic*], as the guardian of water quality, ensuring basic, healthy water standards for all Ontarians.” As a result, a letter was written by the town’s chief administrative officer to the Premier of Ontario. The Premier responded and thanked Mr. Radford for informing him of the council’s resolution. As reflected by the minutes, although the report was debated, the action taken by the town council did not directly address the serious deficiencies identified in the report.

Under section 41(1) of the *Public Utilities Act*, where a PUC has been created, the commission – and not the municipality – possesses all the powers, rights, authorities, and privileges that the statute would otherwise confer on the municipality.² This provision restricted the ability of the municipal council to address the problems identified in the 1998 inspection report.

In view of that fact, the question arises whether the Walkerton town council had a duty to act upon its receipt of the report. Normally, it would be sufficient for the council to satisfy itself that the PUC commissioners were aware of the situation and were taking what the commissioners considered to be appropriate steps to respond. The town council was entitled to rely upon the mayor, an *ex officio* PUC commissioner, to bring any problems to their attention. As he put it in his testimony, Mayor James Bolden was a PUC commissioner who

¹ In addition to being the clerk-treasurer, Mr. Radford was the chief administrative officer.

² *Public Utilities Act*, R.S.O. 1990, c. P 52, s. 41(1).

was “to represent town council on the commission.” Unfortunately, Mayor Bolden failed to follow up in order to ensure that the report’s most troubling findings were being properly addressed, and he did not bring any concerns about the PUC’s response to the inspection report to the attention of the town council.

In reaching the conclusion that subsection 41(1) of the *Public Utilities Act* limited the municipal council’s ability to respond to the report, I have considered whether the ability to dissolve the PUC created a duty on the council to act in the circumstances. It is true that although day-to-day PUC operations are not the concern of municipal councils, the decision to retain a PUC is. In that sense, Ms. Robinson-Ramsay was undoubtedly right when she recorded in notes she made in preparation for the June 8, 1998, town council meeting that in relation to the oversight of the PUC, “ultimately the municipality is responsible.” It is also true that as of 1998, municipal councils had been empowered to dissolve public utilities commissions without the necessity of holding a plebiscite. But that did not alter the PUC’s legal status, as discussed in Chapter 6 of this report. Had the legislature intended to alter the principle that a PUC exercises all the powers, rights, and privileges conferred on a municipality under the *Public Utilities Act*, it would have amended section 41(1) of the statute. It did not, and the fact remains that the town council’s authority in relation to the PUC was limited to the rather stark extremes of either dissolving the PUC or permitting it to remain in existence and assuming virtually no role in its daily operations.

I want to commend Ms. Robinson-Ramsay for the diligence with which she strove to bring the report’s troubling findings to the attention of other members of Walkerton’s town council.

7.4 Mayor Thomson’s Initial Response to the Boil Water Advisory

Brockton’s mayor, and by extension, the municipality, did not take an active role when the outbreak first came to light. At approximately noon on May 21, 2000, Dr. Murray McQuigge, the local Medical Officer of Health, telephoned Mayor David Thomson at his home. Mayor Thomson disputed Dr. McQuigge’s testimony that he told the mayor that the situation was serious and that people could die. However, Mayor Thomson agreed that in their brief conversation, Dr. McQuigge informed him that people in Walkerton were becoming ill. It

was Mayor Thomson's evidence that Dr. McQuigge did not mention *E. coli*, nor did Dr. McQuigge describe the symptoms to him.

The evidence of the mayor and Dr. McQuigge conflicted as to whether they spoke again on May 21. Testifying with the benefit of notes made at the time, Dr. McQuigge maintained that there was a single telephone call, placed by him to the mayor, at approximately noon. Mayor Thomson testified that Dr. McQuigge again telephoned him at approximately 1:30 p.m., about 90 minutes after the first call. Mayor Thomson recalled that in this conversation, Dr. McQuigge advised the mayor that he was issuing a boil water advisory as a precautionary measure and that it would be announced by radio. Mayor Thomson recalled Dr. McQuigge saying that he did not want to "set off any alarm bells."

Dr. McQuigge did not seek Mayor Thomson's assistance in publicizing the boil water advisory, nor did the mayor offer any. As Mayor Thomson put it in his testimony: "[T]hat wasn't a consideration because I felt Dr. McQuigge was looking after it and he was the person who had the authority to do that."

It is difficult to determine what actually passed between the mayor and Dr. McQuigge. It is clear, however, that by 1:30 p.m. on May 21, the mayor was aware that people were becoming ill, that a boil water advisory had been issued, and that information about it was being disseminated only on radio.

Moreover, there were indications that Dr. McQuigge considered the situation to be serious. The mayor was unaware of any other instance in which the Medical Officer of Health had telephoned him on a holiday weekend. He knew that Dr. McQuigge had returned to Owen Sound from his cottage because Walkerton residents were becoming ill. Mayor Thomson agreed that the issuance of the boil water advisory was an unusual event – one that would be unsettling for Walkerton residents.

After his telephone call from Dr. McQuigge, Mayor Thomson did nothing about the crisis for two days. He did not call emergency meetings of the municipal council or the PUC. He did not ask if he could help Dr. McQuigge. In fact, the council meeting of May 23 was convened at Dr. McQuigge's instance. For the balance of May 21 and on May 22, Mayor Thomson did not even telephone Stan Koebel, although it should be noted that Mr. Koebel's evidence was that the mayor called him the morning of May 21 and that he called the mayor later that same afternoon. Nor did Mayor Thomson contact the police

or the fire department, both of which might have been helpful in disseminating word of the boil water advisory. He did not contact anyone about Walkerton's drinking water following the issuance of the boil water advisory. Mayor Thomson explained his inaction by saying, "I felt that if there was a water problem, I likely would have heard from somebody on the Commission or somebody that was in charge or Dr. McQuigge." Unfortunately, many people in Walkerton did not become aware of the boil water advisory on May 21.

The question arises whether the mayor should have done more to help publicize the boil water advisory. He was certainly in a better position than Dr. McQuigge to assess the best means for publicizing the advisory and to implement any needed steps. However, Dr. McQuigge was in charge and he did not ask Mayor Thomson to do anything. Dr. McQuigge possesses a commanding personality; as his own counsel put it, he is "no shrinking violet." As a consequence, I hesitate to criticize the mayor for his inaction in a situation in which Dr. McQuigge had authority and did not request assistance. Dr. McQuigge issued the advisory and had the primary responsibility to publish it so as to protect the health of the community. Although others in the mayor's position may at least have offered assistance, I am not able to conclude that Mayor Thomson should be faulted for his inaction.

7.5 The Failure to Invoke the Brockton Emergency Plan

During the crisis of May 2000, the Municipality of Brockton did not invoke the Brockton Emergency Plan, which had been approved in a bylaw passed less than seven months earlier on December 13, 1999. Municipal emergency plans are contemplated by the *Emergency Plans Act*, which enables municipalities to pass bylaws empowering the "head of council" (in Brockton's case, Mayor Thomson or his designee) to declare a state of emergency and to act as necessary to protect the health, safety, and welfare of their residents. One of the express aims of the comprehensive Brockton Emergency Plan was to ensure that prompt factual information was provided to all relevant officials, the news media, and concerned individuals.

The plan imposed specific duties on Mayor Thomson, including determining whether an emergency existed, calling a special council meeting so that a resolution could be passed, and, if an emergency were found to exist, notifying the Solicitor General of Ontario through Emergency Measures Ontario. If an

emergency were declared, the mayor was also under a duty to approve news releases and public announcements.

Dr. McQuigge thought that the emergency plan should have been invoked. It was his evidence that he expected this to occur after his telephone call to Mr. Thomson on May 21, 2000, in which he informed the mayor that the situation was serious. A staff member of the Bruce-Grey-Owen Sound Health Unit even contacted Emergency Measures Ontario on May 25 to inquire as to why it had not been invoked. In Dr. McQuigge's view, invoking the emergency plan would have helped communicate information about the outbreak. Although Dr. McQuigge could have requested that the emergency plan be invoked, he made no such request of Mayor Thomson and, as I said above, did not ask for help in publishing the boil water advisory.

At its meetings on May 23 and 24, 2000, Brockton municipal council discussed but decided against invoking the municipality's emergency plan. It is safe to conclude that by then nearly everyone in the community would have known of the boil water advisory. When asked to explain the rationale for not invoking the plan, Mayor Thomson said, "[W]e felt that we brought an engineer [Steve Burns] in, we were bringing all the experts in, we felt we had it under control ..." Furthermore, the municipality's discussions with Emergency Measures Ontario did not disclose any benefit to invoking the plan. Subsequently, Mayor Thomson was advised that this view was shared both by counsel in the Ministry of the Solicitor General's legal services branch and by Dr. James Young, who, in addition to being Chief Coroner of Ontario, is the assistant deputy solicitor general in charge of public safety.

Mayor Thomson and other members of Brockton's municipal council were under no duty to invoke the plan. Instead, their duty was to consider whether to do so. On the evidence, I am satisfied that they met this duty. Further, it has not been shown that invoking the plan would have achieved any benefit in managing the crisis. In practical terms, the potential benefit of invoking the emergency plan, insofar as limiting the outbreak, would have been to assist in publicizing the boil water advisory. However, as I have noted above, by the time the municipal council was convened and had considered the issue, the existence of the boil water advisory was well known. Finally, given that no request was made to Mayor Thomson by Dr. McQuigge on May 21 for assistance in publicizing the boil water advisory, I conclude that the mayor and municipal council should not be faulted for not considering the issue until May 23.

