Canada (Attorney General) *v*. Canada (Commission of Inquiry on the Blood System),

[1997] 3 S.C.R. 440

The Canadian Red Cross Society, George Weber,
Dr. Roger A. Perrault, Dr. Martin G. Davey,
Dr. Terry Stout, Dr. Joseph Ernest Côme Rousseau,
Dr. Noel Adams Buskard, Dr. Raymond M. Guevin,
Dr. John Sinclair MacKay, Dr. Max Gorelick,
Dr. Roslyn Herst and Dr. Andrew Kaegi and Bayer Inc.
and Baxter Corporation *Appellants*

v.

The Honourable Horace Krever,
Commissioner of the Inquiry on the Blood System in Canada *Respondent*

and

The Canadian Hemophilia Society,
the Canadian Aids Society, Canadian
Hemophiliacs Infected with HIV,
T-COR, the HIV-T Group (Blood Transfused),
the Toronto and Central Ontario Regional
Hemophilia Society, the Hepatitis C Survivors' Society,
the Hepatitis C Group of Transfusion Recipients
& Hemophiliacs and Janet Conners
(Infected Spouses & Children) Association *Interveners*

Indexed as: Canada (Attorney General) *v*. Canada (Commission of Inquiry on the Blood System)

File No.: 25810.

1997: June 25; 1997: September 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the federal court of appeal

Administrative law -- Judicial review -- Public inquiry -- Jurisdiction -- Notices of possible findings of misconduct -- Whether Commission had jurisdiction to make findings of misconduct -- Inquiries Act, R.S.C., 1985, c. I-11, ss. 2, 6, 12, 13.

Public inquiries -- Jurisdiction -- Notices of potential findings of misconduct -- Whether notices unfair.

The Commission of Inquiry appointed to examine the blood system after thousands contracted HIV and Hepatitis C from blood and blood products held exhaustive hearings governed by rules of procedure agreed to by all parties. Twenty-five interested parties were granted standing. The Baxter Corporation did not seek standing but subsequently participated in the proceedings by supplying relevant documents and providing witnesses. The Commission, on the final day of scheduled hearings, sent out confidential notices that the Commission might reach certain conclusions based on the evidence before it, that these conclusions might amount to misconduct with the meaning of s. 13 of the *Inquiries Act* (setting out jurisdiction to make findings of misconduct), and that the recipients had the right to respond as to whether the Commissioner ought to reach these conclusions. A number of the recipients of notices brought applications for judicial review in the Federal Court, Trial Division. That court declared that no findings of misconduct could be made against 47 of the applicants for judicial review, but otherwise dismissed the applications. Many recipients whose notices were not quashed appealed. The Federal Court of Appeal quashed one notice but dismissed the remaining appeals. At issue here are: (1) whether the Commissioner exceeded his jurisdiction by the nature and extent of the allegations of misconduct set out in the notices; (2) if the

Commissioner originally had such jurisdiction, did he lose it by failing to provide adequate procedural protections or by the timing of the release of the notices; (3) whether Commission counsel should be prohibited from taking part in the drafting of the final report because of their receipt of confidential information not disclosed to the Commissioner or the other parties; and, (4) whether the appellant Baxter Corporation should be treated differently from the other appellants.

Held: The appeal should be dismissed.

Several basic principles are applicable to inquiries. A commission of inquiry is not a court or tribunal and has no authority to determine legal liability; it does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe. A commissioner accordingly should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability for the public perception may be that specific findings of criminal or civil liability have been made. A commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals. Further, a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference. In addition, a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability. Finally, a commissioner must ensure that there is procedural fairness in the conduct of the inquiry.

Notices warning of potential findings of misconduct, if issued in confidence to the recipient, should not be subject to as strict scrutiny as the formal findings because

their purpose is to allow parties to prepare for or respond to any possible findings of misconduct. The more detail included in the notice, the greater the assistance to the party. The only possible harm would be to a party's reputation and this could not be an issue if the notices are released only to the party against whom the finding may be made. Even if the content of the notice appears to amount to a finding that would exceed the jurisdiction of the commissioner, it must be assumed that commissioners will not exceed their jurisdiction. The final report may demonstrate the assumption to be erroneous.

The Commissioner here stated that he would not be making findings of civil or criminal responsibility and, in the interests of fairness to the parties and witnesses, must be bound by these statements. It was not necessary, therefore, to deal with the ultimate scope of the findings that a commissioner might make in a report.

The Commissioner did not exceed his jurisdiction in the notices delivered to the appellants. The inquiry's mandate was extremely broad and the potential findings of misconduct covered areas that were within the Commissioner's mandate to investigate. The appellants' challenge was launched prematurely. As a general rule, such a challenge should not be brought before the publication of the report unless there are reasonable grounds to believe that the Commissioner is likely to exceed his or her jurisdiction. Further consideration of this issue might have been warranted if the Commissioner's report had made findings worded in the same manner as the notices. Even if the challenges were not premature, the notices would not be objectionable. While many of the notices come close to alleging all the necessary elements of civil liability, none appeared to exceed the Commissioner's jurisdiction. The use of the words "failure" and "responsible" in the notices does not mean, absent something more indicating legal responsibility, that the person breached a criminal or civil standard of conduct. The use of these words was not objectionable.

The procedural protections offered to parties to the Inquiry and to individual witnesses were extensive and eminently fair. The appellants could not have been misled or suffered prejudice as a result of any "misunderstanding" about the type of findings which would be made by the Commissioner.

Although the notices of potential findings of misconduct should be given as soon as it is feasible, it is unreasonable to insist that the notice of misconduct must always be given early. So long as adequate time is given to the recipients of the notices to allow them to call the evidence and make the submissions they deem necessary, the late delivery of notices will not constitute unfair procedure. The timing of notices will always depend upon the circumstances. Here, it was within the discretion of the Commissioner to issue notices when he did because, given the enormous amount of information gathered and the nature and purposes of this Inquiry, it was impossible to give adequate detail in the notices before all the evidence had been heard. The appellants were given an adequate opportunity to respond to the notices, and to adduce additional evidence, if they deemed it necessary.

It was premature to forbid Commission counsel from taking part in the drafting of the report. The Commissioner did not indicate that he intended to rely upon his counsel to draft the final report. In addition, it is not clear from the record what was contained in the confidential submissions reviewed by counsel.

Baxter Corporation should not be treated any differently than the other appellants. Although it must have realized that its conduct would be under scrutiny in the proceedings it took a calculated risk and elected not to seek standing before the Commission. It should not now be allowed to escape the consequences of that decision.

Cases Cited

Distinguished: *Re Nelles and Grange* (1984), 46 O.R. (2d) 210; *Starr v. Houlden*, [1990] 1 S.C.R. 1366; **considered:** *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Beno v. Canada (Commissioner and Chairperson,Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527; *Attorney General (Que.) and Keable v. Attorney General (Can.)*, [1979] 1 S.C.R. 218; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 5.

Canadian Charter of Rights and Freedoms, ss. 7, 13.

Inquiries Act, R.S.C., 1985, c. I-11, ss. 2, 6, 12, 13.

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Canada. House of Commons. Third Session of the Thirty-fourth Parliament, 1991-92-93. Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women. Sub-Committee on Health Issues. Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women. *Tragedy and Challenge: Canada's Blood System and HIV*. (Wilbee Report, May 1993.) Ottawa: 1993.

Concise Oxford Dictionary of Current English, 8th ed. Oxford: Clarendon Press, 1990, "misconduct".

APPEAL from a judgment of the Federal Court of Appeal, [1997] F.C.J. No 17 (QL), dismissing an appeal from a judgment of the Richard J., [1996] 3 F.C. 259, 115 F.T.R. 81, 136 D.L.R. (4th) 449, 37 Admin. L.R. (2d) 260, [1996] F.C.J. No. 864. Appeal dismissed.

Earl A. Cherniak, Q.C., *Kirk F. Stevens*, *Maureen B. Currie* and *Christopher I. Morrison*, for the appellants the Canadian Red Cross Society, George Weber, Dr. Roger A. Perrault, Dr. Martin G. Davey, Dr. Terry Stout, Dr. Joseph Ernest Côme Rousseau, Dr. Noel Adams Buskard, Dr. Raymond M. Guevin, Dr. John Sinclair MacKay, Dr. Max Gorelick, Dr. Roslyn Herst and Dr. Andrew Kaegi.

Randal T. Hughes, *Christopher D. Woodbury* and *Tracey N. Patel*, for the appellant Bayer Inc.

Philip Spencer, *Q.C.*, and *Tim Farrell*, for the appellant Baxter Corporation.

P. S. A. Lamek, Q.C., *Angus T. McKinnon* and *Michele J. Lawford*, for the respondent.

Bonnie A. Tough and *Kathryn Podrebarac*, for the intervener the Canadian Hemophilia Society.

R. Douglas Elliott and *Patricia A. LeFebour*, for the intervener the Canadian Aids Society.

William A. Selnes, for the intervener Canadian Hemophiliacs Infected with HIV, T-COR.

Allan D. J. Dick, for the intervener the HIV-T Group (Blood Transfused).

David Harvey, for the intervener the Toronto and Central Ontario Regional Hemophilia Society.

Philip S. Tinkler, for the intervener the Hepatitis C Survivors' Society.

Pierre R. Lavigne, for the intervener the Hepatitis C Group of Transfusion Recipients & Hemophiliacs.

Dawna J. Ring, for the intervener Janet Conners (Infected Spouses & Children) Association.

//*Cory J.*//

The judgment of the Court was delivered by

1 CORY J. -- What limits, if any, should be imposed upon the findings of a commission of inquiry? Can a commission make findings which may indicate that there was conduct on the part of corporations or individuals which could amount to criminal culpability or civil liability? Should different limitations apply to notices warning of potential findings of misconduct? It is questions like these which must be considered on this appeal.

Factual Background

2 More than 1,000 Canadians became directly infected with Human Immunodeficiency Virus (HIV) from blood and blood products in the early 1980s. Approximately 12,000 Canadians became infected with Hepatitis C from blood and blood products during the same time period. This tragedy prompted the federal, provincial and territorial ministers of health to agree in September of 1993 to convene an inquiry which would examine the blood system.

3 On October 4, 1993, pursuant to Part I of the *Inquiries Act*, R.S.C., 1985, c. I-11 (the Act), the Government of Canada appointed Krever J.A. of the Ontario Court of Appeal (the Commissioner) to review and report on the blood system in Canada. Specifically, the Order in Council directed the Commission to:

> . . . review and report on the mandate, organization, management, operations, financing and regulation of all activities of the blood system in Canada, including the events surrounding the contamination of the blood system in Canada in the early 1980s, by examining, without limiting the generality of the inquiry,
>
> - the organization and effectiveness of past and current systems designed to supply blood and blood products in Canada;
> - the roles, views, and ideas of relevant interest groups; and
> - the structures and experiences of other countries, especially those with comparable federal systems.

On November 3, 1993, an announcement of the Commissioner's appointment and a description of his mandate was published in newspapers across Canada. Subsequently, all those with an interest were provided with an opportunity to apply for standing before the Inquiry and for funding. Twenty-five interested parties were granted standing,

including the appellants, The Canadian Red Cross Society and Bayer Inc., the federal government and each of the provincial governments except for Quebec. The appellant Baxter Corporation chose not to seek standing, but subsequently participated in the proceedings by supplying relevant documents and providing witnesses.

4 The Order in Council authorized the Commissioner to "adopt such procedures and methods as he may consider expedient for the proper conduct of the inquiry". In consultation with the parties, the Commissioner adopted rules of procedure and practice. The rules, which were agreed to by all parties, provided that in the ordinary course, Commission counsel would question witnesses first, although other counsel could apply to be the first to question any particular witness. The rules included these procedural protections:

> all parties with standing and all witnesses appearing before the Inquiry had the right to counsel, both at the Inquiry and during their pre-testimony interviews;
>
> each party had the right to have its counsel cross-examine any witness who testified and counsel for a witness who did not have standing was afforded the right to examine that witness;
>
> all parties had the right to apply to the Commissioner to have any witness called whom Commission counsel had elected not to call;
>
> all parties had the right to receive copies of all documents entered into evidence and the right to introduce their own documentary evidence;

> all hearings would be held in public unless application was made to preserve the confidentiality of information; and
>
> although evidence could be received by the Commissioner that might not be admissible in a court of law, the Commissioner would be mindful of the dangers of such evidence and, in particular, its possible effect on reputation.

5 The Commission held public hearings throughout Canada between November 1993 and December 1995. In describing his mandate and intention, the Commissioner emphasized that the Inquiry "is not and it will not be a witch hunt. It is not concerned with criminal or civil liability". He said the reason the Inquiry was called was not to advance the interests of those involved with or contemplating litigation of any kind, and that he would not permit the hearings to be used for ulterior purposes. At the same time, he made it clear that he interpreted his mandate as including a fact-finding process focusing upon the events of the early 1980s and that he intended to "get to the bottom" of those events. "For those purposes it is essential to determine what caused or contributed to the contamination of the blood system in Canada in the early 1980's", he warned.

6 On October 26, 1995, Commission counsel delivered a memorandum to all parties inviting them to inform the Commission of the findings of misconduct they felt should be made by the Commission. The memorandum explained that under s. 13 of the Act, the Commissioner is required to give notice to any person against whom he intends to make findings of misconduct. The parties' submissions would help ensure that the notices gave warning of all the possible findings of misconduct which might be made by the Commission. These confidential submissions would be read only by Commission

counsel, and would be considered for inclusion in notices issued by the Commissioner. Only those possible findings which were supported by evidence adduced in the public hearings and which were anticipated to be within the scope of the Commissioner's final report were included in the notices.

7 On December 21, 1995, the final day of scheduled hearings, 45 confidential notices naming 95 individuals, corporations and governments, each containing between one and 100 allegations, were delivered pursuant to s. 13 of the Act. The notices advised that the Commission might reach certain conclusions based on the evidence before it, that these conclusions may amount to misconduct within the meaning of s. 13, and that the recipients had the right to respond as to whether the Commissioner ought to reach these conclusions. The recipients were given until January 10, 1996 to announce whether and how they would respond to the notices in their final submissions.

8 A number of the recipients of notices brought applications for judicial review in the Federal Court. On June 27, 1996, Richard J. ([1996] 3 F.C. 259) declared that no findings of misconduct could be made against 47 of the applicants for judicial review, but otherwise dismissed the applications. Many recipients whose notices were not quashed appealed. The Federal Court of Appeal, [1997] F.C.J. No. 17 (QL), quashed the notice against Dr. Craig Anhorn, but dismissed the remaining appeals.

Relevant Statutory Provisions

9 *Inquiries Act*, R.S.C., 1985, c. I-11

> **2.** The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter

> connected with the good government of Canada or the conduct of any part of the public business thereof.
>
> . . .
>
> **12.** The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of an investigation, to be represented by counsel.
>
> **13.** No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

Decisions Below

Federal Court, Trial Division, [1996] 3 F.C. 259

10 The appellants made four principal arguments before Richard J. of the Federal Court, Trial Division. They argued that the notices contained conclusions of law in relation to their civil or criminal liability and that the Commissioner did not have the power to make such conclusions. Alternatively, if the Commissioner did have the power to make the conclusions set out in the notices, they submitted that he was precluded from exercising it because he had given assurances that he would not do so, and without these assurances the parties would never have agreed to the procedure for the conduct of the inquiry. Third, they said that delivering the notices at the very end of the proceedings violated the rules of procedural fairness. Finally, the Red Cross contended that Commission counsel should not participate in the preparation of the final report because they had assisted in preparing the notices and had thereby taken a position against the appellants, and because they had seen confidential submissions that were not brought to the attention of all the parties and persons concerned.

11 Richard J. noted that s. 13 of the Act clearly contemplates that an inquiry's investigation may lead to a finding of misconduct against a person. This, he stated, covers any conduct, regardless of whether or not it exposes that person to civil or criminal liability. In his view, the finding of facts, and in particular facts that reveal what went wrong or why a disaster occurred, can be an essential precondition to the making of useful, reliable recommendations as to how to avoid a repetition of the events under review. He noted that the Supreme Court of Canada has upheld many inquiries where the focus of the investigation was to uncover facts related to misconduct, including inquiries focused specifically on whether there was misconduct on the part of particular individuals. In none of these cases, he continued, did the Court question the jurisdiction of the inquiry to make findings of fact showing misconduct.

12 Richard J. found that the Inquiry had both an investigatory and an advisory role. In order to fulfil this role, the Commissioner had a wide discretion to determine the Inquiry's agenda and the procedures under which it would operate. He rejected the appellants' argument that they had a legitimate expectation, based on assurances given by the Commissioner during the hearings, that he would not make factual findings that could be interpreted as amounting to findings of legal liability. He held that the legitimate expectation doctrine was limited to procedural rights. In his view, it could not be used to alter the substantive jurisdiction of the Commission.

13 Richard J. found that the appellants had failed to show that they would be prejudiced by future criminal or civil trials. They were protected, in his view, by the limits on the use of their testimony in criminal proceedings provided by ss. 7 and 13 of the *Canadian Charter of Rights and Freedoms* and by s. 5 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5. He further noted that he had not been referred to any legal

authority for the proposition that the findings of the Commissioner, much less the contents of the notices, would be admissible in evidence in subsequent civil proceedings. In any case, he said, the trial judge will be better placed to determine whether the evidence in the report should be admitted into evidence and if so, what weight should be accorded to it.

14 Richard J. held that the challenges to potential findings of misconduct were, at this stage, purely speculative. The Commissioner had undertaken not to make any findings of civil or criminal liability, and all persons receiving notices are allowed full opportunity to argue against adoption of the allegations. He held that the Commissioner had not exceeded his mandate by conducting an investigation of the commission of particular crimes. He concluded that when released, the findings of the Commissioner might be set aside on the basis that they exceeded the mandate of the Commission. Here, he stated, all that was before him was the administrative decision to give statutory notice to affected parties.

15 With respect to the procedure adopted by the Commissioner, Richard J. found that s. 7 of the *Charter* did not apply to protect reputation, and even if it did, the issuance of the notices accorded with the principles of fundamental justice. The procedural safeguards recommended under the Act had been provided to the appellants. He rejected the appellants' complaints regarding the evidence accepted by the Commission, the confidential submissions, the timing of the notices, the fairness of the hearings and the conduct of Commission counsel.

16 Richard J. declared that no explicit findings of misconduct could be made against 47 of the persons who received notices. Counsel for the Commissioner had

confirmed that these persons would not be named in any adverse findings of fact resulting from the notices. He dismissed the remaining applications for judicial review. He further declared that all of the appellants were to be allowed to respond to the notices.

Federal Court of Appeal, [1997] F.C.J. No. 17 (QL)

17 Décary J.A., writing for the court, found that the challenge to the Commissioner's jurisdiction was not premature. In his view, the fact that the Commissioner had not yet prepared his final report was not significant. If the Commissioner did not have jurisdiction to make the findings in his final report which were being suggested in the notices, he would also be without jurisdiction to give notice that such findings might be made. Décary J.A. emphasized, however, that courts must show extreme restraint before intervening at this stage in order to avoid disrupting the work of inquiries. The courts should only intervene, he concluded, when it is clear that the Commissioner is about to exceed his jurisdiction.

18 Décary J.A. went on to examine whether the Commissioner had the authority to make the findings contained within the notices. He noted that public inquiries into tragedies inevitably tarnish reputations and raise questions about the responsibility borne by certain individuals. Consequently, Parliament and the courts have imposed strict limits on the use of these findings in civil and criminal trials. The findings made by a commissioner, moreover, are merely statements of the commissioner's opinion with respect to the conduct of a person. Such an opinion does not have the weight, force or effect of a judgment.

19 Décary J.A. noted that s. 13 of the Act expressly permits a commissioner to make findings of "misconduct". He concluded that this encompasses the power of a commissioner to find that an individual breached a standard of conduct. Since that standard may be moral, legal, scientific, social or political, a conclusion that someone breached a duty does not necessarily mean that the individual in question broke the law. It simply means that the individual failed to meet a standard proposed by the commissioner. To hold otherwise would completely muzzle public inquiries and would be inconsistent with s. 13.

20 Décary J.A. left open the question of whether a Commissioner could ever make a finding of civil or criminal liability, but found that in this particular case the Commissioner was precluded from doing so both by his own assurances that he would not and because of an absence of authority within the terms of the Order in Council appointing the Inquiry. The question, therefore, became whether the notices sent to the appellants contained findings or threatened findings of civil or criminal liability.

21 In *Re Nelles and Grange* (1984), 46 O.R. (2d) 210 (C.A.), the test adopted for this question was whether the findings would have the weight of a decision or determination of civil or criminal liability in the eyes of the public. This case was cited with approval by this Court in *Starr v. Houlden*, [1990] 1 S.C.R. 1366, at p. 1398. However, Décary J.A. said that approach should be restricted to inquiries into the commission of particular crimes. First, he said, the strict test would paralyse the work of most broad inquiries such as this one. In addition, he observed that the test is inconsistent with the approach taken by this Court in other cases, such as *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591, at p. 596, and *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97. Although

none of these decisions examined the actual findings made by a commissioner, he concluded that the Supreme Court would not have authorized inquiries leading inevitably to findings of fact that would determine responsibility in the eyes of the public if those findings were prohibited.

22 Décary J.A. noted that the Commissioner cannot make findings of civil or criminal liability, and he cannot escape this prohibition simply by using language that is less precise but essentially suggests the same thing. The more a commissioner uses terms with "hallowed legal meaning" (at para. 55), the more likely it is that a court will find the conclusions to be determinations of legal responsibility.

23 Décary J.A. then applied this approach to the notices in this case. He acknowledged that the choice of certain expressions, such as "responsible for" and "despite knowing" indicated potential findings of legal liability, but he was not prepared to quash the notices on that basis alone. However, he went on to state at para. 69:

> I am certain that the Commissioner will understand that he would be venturing onto dangerous ground if, in his final report, he were to persist in using some of the terms he used in the notices and in adopting turns of phrase that bear too close a resemblance to the expression of a conclusion of law.

Subject to this caveat, he held that the Commissioner had the power to issue the notices and rejected the appellants' first argument.

24 Décary J.A. rejected the claim that the late delivery of the notices had violated rules of procedural fairness. He noted that the Commissioner had broad latitude and discretion in determining the Inquiry's procedures, and that those adopted were in

accordance with procedural fairness. He said he could see no objection to a commissioner's waiting until the end of the hearings to give notices. The appellants were given the opportunity to respond to the notices and to adduce additional evidence in a short but flexible time period, which they chose to ignore.

25 Décary J.A. then reviewed the situation of two appellants who were not parties to the inquiry, and were, therefore, unrepresented there; Baxter Corporation, and Craig A. Anhorn, a former employee of the Red Cross. They both claimed that since they were not parties they should have received their notices earlier, and the notices should have set out the evidence which was relied upon for the allegations of misconduct. Décary J.A. rejected Baxter Corporation's claim, holding that the company knew that it would be a likely subject of investigation and had deliberately chosen not to seek standing at the inquiry. Having taken this calculated risk, he stated, it must now bear the consequences. On the other hand, in light of the unique position of Craig Anhorn, he found that it was appropriate to quash the notices issued to him.

26 Finally, Décary J.A. turned to the submission that Commission counsel should be prohibited from participating in the final report because they had reviewed confidential documents which had not been disclosed to the other parties or the respondent. He seemed sympathetic to the appellants' claim, but held that it was premature, since the Commissioner had not stated any intention to rely on Commission counsel in the drafting of the final report. Décary J.A. cautioned that he did not think the Commissioner should seek advice from those of his counsel who knew of matters which he and the appellants did not.

27 Accordingly, he allowed the cross-appeal by Craig Anhorn, but dismissed all other appeals.

Issues

28 1. Did the Commissioner exceed his jurisdiction by the nature and extent of the allegations of misconduct set out in the notices?

2. If the Commissioner originally had such jurisdiction, did he lose it by failing to provide adequate procedural protections or by the timing of the release of the notices?

3. Should Commission counsel be prohibited from taking part in the drafting of the final report because of their receipt of confidential information not disclosed to the Commissioner or the other parties?

4. Should the appellant Baxter Corporation be treated differently from the other appellants?

Analysis

Did the Commissioner Exceed his Jurisdiction by the Nature and Extent of the Allegations of Misconduct Set Out in the Notices?

A. Introduction -- Commissions of Inquiry

29 Commissions of inquiry have a long history in Canada, and have become a significant and useful part of our tradition. They have frequently played a key role in the investigation of tragedies and made a great many helpful recommendations aimed at rectifying dangerous situations.

30 It may be of assistance to set out what was said regarding the history and role of commissions of inquiry in *Phillips*, *supra*, at pp. 137-38:

> As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed, although it is an unfortunate reality that their establishment is often prompted by tragedies such as industrial disasters, plane crashes, unexplained infant deaths, allegations of widespread child sexual abuse, or grave miscarriages of justice.
>
> At least three major studies on the topic have stressed the utility of public inquiries and recommended their retention: Law Reform Commission of Canada, Working Paper 17, *Administrative Law: Commissions of Inquiry* (1977); Ontario Law Reform Commission, *Report on Public Inquiries* (1992); and Alberta Law Reform Institute, Report No. 62, *Proposals for the Reform of the Public Inquiries Act* (1992). They have identified many benefits flowing from commissions of inquiry. Although the particular advantages of any given inquiry will depend upon the circumstances in which it is created and the powers it is given, it may be helpful to review some of the most common functions of commissions of inquiry.
>
> One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of

> government as a whole. They are an excellent means of informing and educating concerned members of the public.

Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society. A public inquiry before an impartial and independent commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed.

31 The inquiry's roles of investigation and education of the public are of great importance. Yet those roles should not be fulfilled at the expense of the denial of the rights of those being investigated. The need for the careful balancing was recognized by Décary J.A. when he stated at para. 32 "[t]he search for truth does not excuse the violation of the rights of the individuals being investigated". This means that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly.

The Background of This Inquiry

32 The circumstances which gave rise to this Inquiry cannot be forgotten. The factual background underlines the importance of the Commission and places the hearings in their proper context. More than 1,000 Canadians became directly infected with HIV from blood and blood products in the early 1980s, and approximately 12,000 more were infected with and exposed to the dangers of Hepatitis C. These infections were caused by the very system Canadians rely upon to restore their health in times of illness or accident. It is a system which operates throughout the country. The Wilbee Report (Report of the Sub-Committee on Health Issues of the Standing Committee of the House

of Commons on Health and Welfare, Social Affairs, Seniors and Status of Women, *Tragedy and Challenge: Canada's Blood System and HIV* (May 13, 1993)), a 1993 parliamentary study of the blood system, observed that every 20 seconds of every single day someone in Canada requires a blood transfusion. A great many Canadian families are touched in some way by the urgent and continuous need for blood and blood products. Clearly, the blood system is an essential part of Canada's health care system. The answers to questions as to how and why this vitally important system failed Canadians are crucial both to ensuring that this terrible tragedy never recurs and to restoring public confidence in our system of health care.

33 It is against that background that the assessment must be made of the jurisdiction of the Commissioner to issue notices indicating potential findings of misconduct against the appellants.

B. The Scope of a Commissioner's Power to Make Findings of Misconduct

34 A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set

out in *Beno v. Canada (Commissioner and Chairperson,Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:

> A public inquiry is not equivalent to a civil or criminal trial. . . . In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. . . . The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report". . . . Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding . . . is that reputations could be tarnished.

Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.

35 What then should be the result of the appellants' submission that a commissioner conducting a public inquiry does not have the jurisdiction to make findings that would be considered by reasonably informed members of the public to be a determination of criminal or civil liability? Since it is clear that a commissioner's findings cannot constitute findings of legal liability, it would appear that the appellants are asserting that in light of the potential harm to the reputations of parties or witnesses, a commissioner should not be permitted to allocate blame or assign responsibility for the events under scrutiny. While they acknowledge that a commissioner does have the authority to make findings of fact, they appear to challenge his ability to assess those facts or to evaluate what happened according to a standard of conduct. In order to demonstrate why this argument must be rejected it will be necessary to first look at the

Inquiries Act, and then at decisions which have reviewed the jurisdiction and authority of other commissions of inquiry.

The Inquiries Act

36 The *Inquiries Act* provides for two types of investigations. The first is described in s. 2 of the Act. It provides that when the Governor in Council deems it appropriate, an inquiry may be held "concerning any matter connected with the good government of Canada or the conduct of any part of the public business" of the government. The second is described in s. 6 of the Act. It provides for the appointment of "a commissioner or commissioners to investigate and report on the state and management of the business . . . of [a] department" of government or "the conduct of any person in that service". It is this second type of inquiry that is more often specifically concerned with the conduct of individuals.

37 Justice Krever recognized from the outset that his inquiry was not to be directed at investigating misconduct of individuals, but rather was to be focused upon ensuring that there would be a safe, efficient and effective blood system in Canada. On November 22, 1993, he stated that:

> As I interpret the terms of reference, the focus of the inquiry is to determine whether Canada's blood supply is as safe as it could be and whether the blood system is sound enough that no future tragedy will occur. For those purposes it is essential to determine what caused or contributed to the contamination of the blood system in Canada in the early 1980's.

38 Section 13 of the Act makes it clear that commissioners have the power to make findings of misconduct. In order to do so, commissioners must also have the

necessary authority to set out the facts upon which the findings of misconduct are based, even if those facts reflect adversely on some parties. If this were not so, the inquiry process would be essentially pointless. Inquiries would produce reports composed solely of recommendations for change, but there could be no factual findings to demonstrate why the changes were necessary. If an inquiry is to be useful in its roles of investigation, education and the making of recommendations, it must make findings of fact. It is these findings which will eventually lead to the recommendations which will seek to prevent the recurrence of future tragedies.

39 These findings of fact may well indicate those individuals and organizations which were at fault. Obviously, reputations will be affected. But damaged reputations may be the price which must be paid to ensure that if a tragedy such as that presented to the Commission in this case can be prevented, it will be. As Richard J. stated in the Federal Court Trial Division, at para. 71:

> The finding of facts, and in particular facts that reveal what went wrong or why a disaster occurred, can be an essential precondition to the making of useful, reliable recommendations to the government as to how to avoid a repetition of the events under review.

And as Décary J.A. put it in the Federal Court of Appeal, at para. 35:

> . . . a public inquiry into a tragedy would be quite pointless if it did not lead to identification of the causes and players for fear of harming reputations and because of the danger that certain findings of fact might be invoked in civil or criminal proceedings. It is almost inevitable that somewhere along the way, or in a final report, such an inquiry will tarnish reputations and raise questions in the public's mind concerning the responsibility borne by certain individuals. I doubt that it would be possible to meet the need for public inquiries whose aim is to shed light on a particular incident without in some way interfering with the reputations of the individuals involved.

I am in agreement with these observations. In my view, it is clear that commissioners must have the authority to make those findings of fact which are relevant to explain and support their recommendations even though they reflect adversely upon individuals.

40 The appellants do not appear to challenge the power of a commissioner to make findings of fact; their objection is to the commissioner's assessment of those facts. However, in my view, the power of commissioners to make findings of misconduct must encompass not only finding the facts, but also evaluating and interpreting them. This means that commissioners must be able to weigh the testimony of witnesses appearing before them and to make findings of credibility. This authority flows from the wording of s. 13 of the Act, which refers to a commissioner's jurisdiction to make findings of "misconduct". According to the *Concise Oxford Dictionary* (8th ed. 1990), misconduct is "improper or unprofessional behaviour" or "bad management". Without the power to evaluate and weigh testimony, it would be impossible for a commissioner to determine whether behaviour was "improper" as opposed to "proper", or what constituted "bad management" as opposed to "good management". The authority to make these evaluations of the facts established during an inquiry must, by necessary implication, be included in the authorization to make findings of misconduct contained in s. 13. Further, it simply would not make sense for the government to appoint a commissioner who necessarily becomes very knowledgeable about all aspects of the events under investigation, and then prevent the commissioner from relying upon this knowledge to make informed evaluations of the evidence presented.

41 The principal argument presented to prohibit commissioners from making findings which include evaluations of the conduct of individuals is that those findings may harm the reputations of the named parties. However, I am not convinced that a

commissioner's evaluation of facts found to be unfavourable to a party will necessarily aggravate the damage caused to the reputation of the party by the unfavourable findings of fact standing by themselves. For example, suppose an inquiry made the following unfavourable factual findings:

> Company X learned by late summer or early fall 1984 that its manufacturing process for producing untreated factor concentrates was ineffective in destroying the causative agent of AIDS. A safer, viable process for producing heat-treated factor concentrates was available and in use. Company X did not withdraw its products produced by the ineffective and unsafe process.

Is the damage to the reputation of the party caused by these findings increased if the commissioner's evaluation of them is included, as in the following example?

> Company X learned by late summer or early fall 1984 that its manufacturing process for producing untreated factor concentrates was ineffective in destroying the causative agent of AIDS, and that a safer, viable process for producing heat-treated factor concentrates was available and in use. Despite its knowledge of the grave dangers to the public, Company X failed to withdraw those products produced by what it knew to be an ineffective and unsafe process. This was unacceptable conduct.

It cannot be said that there would be any real difference between the public's impression of Company X's conduct if the findings were phrased in the second manner rather than the first. The harm to the company's reputation must result from setting out the factual

findings. Since this is clearly within the commissioner's jurisdiction, I see no reason why the commissioner should be prevented from drawing the appropriate evaluations or conclusions which flow from those facts.

42 In addition, to limit a commissioner solely to findings of fact would require first the commissioner and, subsequently, the courts to wrestle with the difficult issue of distinguishing between fact and opinion. On my interpretation of the statute it is not necessary to consider that question. The wording of s. 13 by necessary inference authorizes a commissioner to make findings of fact and to reach conclusions based upon those facts, even if the findings and conclusions may adversely affect the reputation of individuals or corporations.

The Jurisprudence

43 The appellants contend that even if findings of misconduct are authorized by the Act, this power has been restricted by decisions of the courts. They argue that the judicial restriction is such that the authority cannot be exercised if the findings would appear in the eyes of the public to be determinations of liability. In support of their position, they rely on comments made by the Ontario Court of Appeal in *Nelles*, *supra*, which were favourably referred to by this Court in *Starr v. Houlden*, *supra*, at p. 1398. In *Nelles*, the court prohibited a provincially appointed commissioner from expressing his opinion as to whether the death of any child was the result of the action, accidental or otherwise, of any named persons. This restriction, the court held, flowed from the terms of the inquiry's authorizing order, which forbade the commissioner from expressing "any conclusion of law regarding civil or criminal responsibility" (p. 215). That provision stemmed from the concern that, in its absence, the inquiry would intrude

upon the federal criminal law power. The Court of Appeal described this concern in these words at p. 220:

> . . . the fact that the findings or conclusions made by the commissioner are not binding or final in future proceedings is not determinative of what he will decide. What is important is that a finding or conclusion stated by the commissioner would be considered by the public as a determination and might well be seriously prejudicial if a person named by the commissioner as responsible for the deaths in the circumstances were to face such accusations in further proceedings. Of equal importance, if no charge is subsequently laid, a person found responsible by the commissioner would have no recourse to clear his or her name.

The appellants rely upon this statement to support their position that a commissioner cannot make findings which would appear in the eyes of the public to be determinations of legal liability.

44 I cannot accept this position. The test set out above is appropriate when dealing with commissions investigating a particular crime. However, it should not be applied to inquiries which are engaged in a wider investigation, such as that of the tragedy presented in this case. I agree with the Federal Court of Appeal that if the comments made in *Nelles* were taken as a legal principle of law applicable to every inquiry, the task of many if not most commissions of inquiry would be rendered impossible.

45 The decisions in *Nelles* and *Starr* are distinguishable from the case at bar. In *Nelles*, the court found that the purpose of the inquiry was to discover who had committed the specific crime of killing several babies at the Hospital for Sick Children in Toronto. By the time the case reached the Court of Appeal, one criminal prosecution for the deaths had failed and an extensive police investigation into the deaths was still

continuing. When it established the commission, the government described it as an inquiry into deaths thought to have been the result of deliberate criminal acts. Further, the Attorney General had stated that if further evidence became available which would warrant the laying of additional charges, they would be laid and the parties vigorously prosecuted. The court clearly viewed the proceedings as tantamount to a preliminary inquiry into a specific crime. For the commissioner to have named the persons he considered responsible would, in those circumstances, have amounted to a clear attribution of criminal responsibility.

46 *Starr* can be similarly distinguished. The public inquiry in that case arose out of widely publicized allegations of conflict of interest and possible criminal activity by Patricia Starr and Tridel Corporation. The Order in Council establishing the inquiry named both Starr and Tridel and, without providing any requirement for making recommendations, mandated an investigation into their conduct in language virtually indistinguishable from the pertinent *Criminal Code* provisions. This Court concluded that the purpose of the inquiry was to conduct an investigation solely for the purpose of obtaining evidence, determining its sufficiency and deciding whether a *prima facie* criminal case had been established against either of the named parties. In the reasons, this observation was made at p. 1403:

> . . . there seems to be a complete absence of any broad, policy basis for the inquiry. This is not, for example, a commission of inquiry into the relationship of charities and public officials. There is no express mandate for the Commissioner to inquire into anything other than the specific allegations of the relationship between dealings by public officials with the two named individuals and any benefits that may have been conferred to the officials.

At page 1405, this conclusion was reached regarding the aim of the commission:

> There is nothing on the surface of the terms of reference or in the background facts leading up to the inquiry to convince me that it is designed to restore confidence in the integrity and institutions of government or to review the regime governing the conduct of public officials. Any such objectives are clearly incidental to the central feature of the inquiry, which is the investigation and the making of findings of fact in respect of named individuals in relation to a specific criminal offence.

The Court concluded that the inquiry was *ultra vires* the province.

47 Clearly, those two inquiries were unique. They dealt with specific incidents and specific individuals, during the course of criminal investigations. Their findings would inevitably reflect adversely on individuals or parties and could well be interpreted as findings of liability by some members of the public. In those circumstances, it was appropriate to adopt a strict test to protect those who might be the subject of criminal investigations. However, those commissions were very different from broad inquiries such as an investigation into the contamination of Canada's blood system, as presented in this case.

48 The strict test set out in *Nelles* has not been followed in other cases dealing with commissions of inquiry. In *Phillips, supra,* the Court refused, at para. 19, to suspend an inquiry which had the stated purpose of investigating the explosion at the Westray mine, including "(b) whether the occurrence was or was not preventable; (c) whether any neglect caused or contributed to the occurrence; . . . (f) whether there was compliance with applicable statutes, regulations, orders, rules, or directions. . . ."

49 In *O'Hara, supra,* an inquiry was upheld in circumstances where the commissioner was to report on whether a prisoner sustained injuries while detained in police custody, and if so, the extent of the injuries, the person or persons who inflicted

them, and the reason they were inflicted. The Court made a distinction between inquiries aimed at answering broad policy questions and those with a predominantly criminal law purpose. The inquiry was upheld, despite the fact that it would inevitably lead to findings of misconduct against particular individuals, because it was not aimed at investigating a specific crime, but rather at the broad goal of ensuring the proper treatment by police officers of persons in custody.

50 Nor was a strict approach taken in the earlier case of *Attorney General (Que.) and Keable v. Attorney General (Can.)*, [1979] 1 S.C.R. 218, at pp. 226-27, where this Court upheld an inquiry into "the conduct of all persons involved in . . . [an] illegal entry made during January 1973 . . . setting fire to a farm . . .[and] theft of dynamite".

51 Clearly, the findings that may be made in *Phillips* and that were made in *O'Hara* and *Keable* would fail the strict test set out in *Nelles* and referred to in *Starr*. Yet each of these commissioners has made or may make findings of misconduct, as authorized by the Act. This they could not and cannot do without stating findings of fact that are likely to have an adverse effect on the reputation of individuals. Nonetheless, the inquiries were upheld by this Court. It follows that the strict test advanced by the appellants cannot be of general application. A more flexible approach must be taken in cases where inquiries are general in nature, and are established for a valid public purpose and not as a means of furthering a criminal investigation.

What Can be Included in a Commissioner's Report?

52 What then can commissioners include in their reports? The primary role, indeed the *raison d'être*, of an inquiry investigating a matter is to make findings of fact.

In order to do so, the commissioner may have to assess and make findings as to the credibility of witnesses. From the findings of fact the commissioner may draw appropriate conclusions as to whether there has been misconduct and who appears to be responsible for it. However, the conclusions of a commissioner should not duplicate the wording of the *Code* defining a specific offence. If this were done it could be taken that a commissioner was finding a person guilty of a crime. This might well indicate that the commission was, in reality, a criminal investigation carried out under the guise of a commission of inquiry. Similarly, commissioners should endeavour to avoid making evaluations of their findings of fact in terms that are the same as those used by courts to express findings of civil liability. As well, efforts should be made to avoid language that is so equivocal that it appears to be a finding of civil or criminal liability. Despite these words of caution, however, commissioners should not be expected to perform linguistic contortions to avoid language that might conceivably be interpreted as importing a legal finding.

53 Findings of misconduct should not be the principal focus of this kind of public inquiry. Rather, they should be made only in those circumstances where they are required to carry out the mandate of the inquiry. A public inquiry was never intended to be used as a means of finding criminal or civil liability. No matter how carefully the inquiry hearings are conducted they cannot provide the evidentiary or procedural safeguards which prevail at a trial. Indeed, the very relaxation of the evidentiary rules which is so common to inquiries makes it readily apparent that findings of criminal or civil liability not only should not be made, they cannot be made.

54 Perhaps commissions of inquiry should preface their reports with the notice that the findings of fact and conclusions they contain cannot be taken as findings of

criminal or civil liability. A commissioner could emphasize that the rules of evidence and the procedure adopted at the inquiry are very different from those of the courts. Therefore, findings of fact reached in an inquiry may not necessarily be the same as those which would be reached in a court. This may help ensure that the public understands what the findings of a commissioner are -- and what they are not.

The Need for Procedural Fairness

55 The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party to the inquiry. Yet they must be made in order to define the nature of and responsibility for the tragedy under investigation and to make the helpful suggestions needed to rectify the problem. It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness. Further, every witness enjoys the protection of the *Canada Evidence Act* and the *Charter* which ensures that the evidence given cannot be used in other proceedings against the witness. Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.

Fairness in Notices

56 That same principle of fairness must be extended to the notices pertaining to misconduct required by s. 13 of the *Inquiries Act*. A commission is required to give parties a notice warning of potential findings of misconduct which may be made against them in the final report. As long as the notices are issued in confidence to the party

receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings. This is because the purpose of issuing notices is to allow parties to prepare for or respond to any possible findings of misconduct which may be made against them. The more detail included in the notice, the greater the assistance it will be to the party. In addition, the only harm which could be caused by the issuing of detailed notices would be to a party's reputation. But so long as notices are released only to the party against whom the finding may be made, this cannot be an issue. The only way the public could find out about the alleged misconduct is if the party receiving the notice chose to make it public, and thus any harm to reputation would be of its own doing. Therefore, in fairness to witnesses or parties who may be the subject of findings of misconduct, the notices should be as detailed as possible. Even if the content of the notice appears to amount to a finding that would exceed the jurisdiction of the commissioner, that does not mean that the final, publicized findings will do so. It must be assumed, unless the final report demonstrates otherwise, that commissioners will not exceed their jurisdiction.

Summary

57 Perhaps the basic principles applicable to inquiries held pursuant to Part I of the Act may be summarized in an overly simplified manner in this way:

(a) (i) a commission of inquiry is not a court or tribunal, and has no authority to determine legal liability;

(ii) a commission of inquiry does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe.

(iii) It follows from (i) and (ii) above that a commissioner should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability. Otherwise the public perception may be that specific findings of criminal or civil liability have been made.

(b) a commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals;

(c) a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference;

(d) a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability;

(e) a commissioner must ensure that there is procedural fairness in the conduct of the inquiry.

C. Application of the Principles to the Case at Bar

58 It must be remembered that in this case, the challenge brought by the appellants was triggered not by any findings of the Commission but by the s. 13 notices.

Therefore, these reasons are not concerned with any challenge to the contents of the commission report or any specific findings. It will also be remembered that the Commissioner very properly stated that he would not be making findings of civil or criminal responsibility. In the interests of fairness to the parties and witnesses, the Commissioner must be bound by these statements and I am certain he will honour them. It follows that it is not appropriate in these reasons to deal with the ultimate scope of the findings that a commissioner might make in a report. The resolution of this issue will so often be governed by the nature and wording of the mandate of the commissioner and will have to be decided on that basis in each case.

59 The question then is whether the Commissioner exceeded his jurisdiction in the notices delivered to the appellants; I think not. The potential findings of misconduct cover areas that were within the Commissioner's responsibility to investigate. The mandate of the Inquiry was extremely broad, requiring the Commissioner to review and report on "the events surrounding the contamination of the blood system in Canada in the early 1980s, by examining . . . the organization and effectiveness of past and current systems designed to supply blood and blood products in Canada". This must encompass a review of the conduct and practices of the institutions and persons responsible for the blood system. The content of the notices does not indicate that the Commissioner investigated or contemplated reporting on areas that were outside his mandate.

60 If the Commissioner's report had made findings worded in the same manner as the notices, then further consideration might have been warranted. However, the appellants launched this application before the Commissioner's findings had been released. Therefore, it is impossible to say what findings he will make or how they will be framed. Quite simply the appellants have launched their challenge prematurely. As

a general rule, a challenge such as this should not be brought before the publication of the report, unless there are reasonable grounds to believe that the Commissioner is likely to exceed his or her jurisdiction.

61 Even if it could be said that the challenge was not premature, the notices are not objectionable. They indicated that there was a possibility that the Commissioner would make certain findings of fact which might amount to misconduct. While they are not all worded in the same manner, the reproduction of some of them may help illustrate the basis for this conclusion. Many of the doctors and the Red Cross received notice of a general allegation that they:

> . . . failed adequately to oversee, direct and provide resources for the operation of the Blood Transfusion Service (BTS) and Blood Donor Recruitment (BDR) at both the national and local level, and as a result contributed to and are responsible for the failures set out below. . . .

This was followed by a series of specific allegations, such as the following:

> Red Cross
>
> 5. The CRC failed to implement in a timely manner, during January 13 - March 10, 1983, any national donor-screening measures to reduce the risk of transfusion-associated AIDS, this failure causing unnecessary cases of transfusion-associated HIV infection and AIDS to occur.

The notice served on the appellant Baxter contained only one allegation:

> 1. After becoming aware in 1982 and thereafter of the possibility or likelihood that its factor concentrates transmitted the causative agent of AIDS, Baxter failed to take adequate steps to notify consumers and physicians of the risks associated with the use of its products and to advise that they consider alternative therapies.

It will be remembered that the Commissioner, from the outset of the Inquiry, wisely emphasized that he did not have the intention or the authority to make any legal determinations. Rather, his stated goal was to examine what went wrong with the blood system in the 1980s and to assess ways of resolving the problems in order to protect the blood system in the future. Thus, it was clear from the beginning that his findings would have nothing to do with criminal or civil liability.

62 Further, while many of the notices come close to alleging all the necessary elements of civil liability, none of them appears to exceed the Commissioner's jurisdiction. For example, if his factual findings led him to conclude that the Red Cross and its doctors failed to supervise adequately the Blood Transfusion Service and Blood Donor Recruitment, it would be appropriate and within his mandate to reach that conclusion. Some of the appellants object to the use of the word "failure" in the notices; I do not share their concern. As the Court of Appeal pointed out, there are many different types of normative standards, including moral, scientific and professional-ethical. To state that a person "failed" to do something that should have been done does not necessarily mean that the person breached a criminal or civil standard of conduct. The same is true of the word "responsible". Unless there is something more to indicate that the recipient of the notice is legally responsible, there is no reason why this should be presumed. It was noted in *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 455:

> A fact taken by itself apart from any notion of legal obligations has no meaning in itself and cannot be a cause; it only becomes a legal fact when it is characterized in accordance with some rule of law. The same body of facts may well be characterized in a number of ways and give rise to completely separate causes. . . .
>
> [I]t is by the intellectual exercise of characterization, of the linking of the fact and the law, that the cause is revealed.

While the Court in *Rocois* was concerned only with facts, I believe the same principle can be applied to conclusions of fault based on standards of conduct. Unless there is something to show that the standard applied is a legal one, no conclusion of law can be said to have been reached.

63 There are phrases which, if used, might indicate a legal standard had been applied, such as a finding that someone "breached a duty of care", engaged in a "conspiracy", or was guilty of "criminal negligence". None of these words has been used by the Commissioner. The potential findings as set out in the notices may imply civil liability, but the Commissioner has stated that he will not make a finding of legal liability, and I am sure he will not. In my view, no error was made by the Commissioner in sending out these notices.

If the Commissioner Originally had such Jurisdiction, did he Lose it by Failing to Provide Adequate Procedural Protections or by the Timing of the Release of the Notices?

a. Procedural Protections

64 The appellants argue that they did not have the benefit of adequate procedural protections. As a result, they contend that the Commissioner has lost the authority to make the type of findings which are referred to in the notices. They submit that they interpreted comments made by the Commissioner during the Inquiry as assurances that he had no intention of making the type of findings suggested by the notices. If these assurances had not been given the appellants say that they would have insisted upon tighter evidentiary procedures, greater ability to cross-examine, and other procedural protections.

65 Yet the three corporate appellants were not uninformed bystanders. Rather, they had detailed and intimate knowledge of the blood system, of the terrible tragedy resulting from its contamination with HIV, and of the public outcry and investigation which followed. The Canadian Red Cross Society and Bayer Inc. participated in the proceedings of the Inquiry. As a result it is difficult to accept that they could have been surprised by the fact that the notices were critical. In fact, the prospect of the Commissioner's ultimately making findings adverse to a witness was specifically raised by counsel for the Red Cross during discussions among counsel in November 1993 concerning the procedural rules. In response, counsel for the Commission referred to s. 13 of the Act and indicated that a notice would have to be provided to any party who might face an adverse finding. No concern about the procedure was raised at that time. The third corporate appellant, Baxter Corporation, was not involved in the meeting and was not a party at the Inquiry. However, it knew about the Inquiry and its goals, and participated by offering witnesses and entering documentary evidence.

66 The position of the intervener the Canadian Hemophilia Society is both illuminating and helpful on this point. Like the appellants, the Society received a notice of a potential finding of misconduct. The Society was a party to the Inquiry, and accepted and adapted to the same procedures as the appellants. However, unlike the appellants, it continues to support the Commissioner's right to make findings of misconduct. The Society submitted and confirmed that the practices and procedures adopted at the Inquiry were, in light of its mandate, fair and appropriate. As well, it emphasized that it knew from the outset of the Inquiry that there was a risk that the Commissioner would make findings of misconduct against the group as a result of its involvement in the Canadian blood system.

67 Significantly, the procedural protections offered to parties to the Inquiry and to individual witnesses were extensive and exemplary. The Commission, with the full consent of the parties, offered a commendably wide range of protections. For example;

> all parties with standing and all witness appearing before the Inquiry had the right to counsel, both at the Inquiry and during their pre-testimony interviews;
>
> each party had the right to have its counsel cross-examine any witness who testified, and counsel for a witness who did not have standing was afforded the right to examine that witness;
>
> all parties had the right to apply to the Commissioner to have any witness called whom Commission counsel had elected not to call;
>
> all parties had the right to receive copies of all documents entered into evidence and the right to introduce their own documentary evidence;
>
> all hearings would be held in public unless application was made to preserve the confidentiality of information; and
>
> although evidence could be received by the Commissioner that might not be admissible in a court of law, the Commissioner would be mindful of the dangers of such evidence and, in particular, its possible effect on reputation.

These procedures were adopted on a consensual basis, after a meeting with all parties to determine which protections would be required. I am not sure what further protections the appellants could have realistically expected. The procedure adopted was eminently fair and any objections to it must be rejected. Nor can I accept that the appellants could have been misled or that they suffered prejudice as a result of any "misunderstanding" about the type of findings which would be made by the Commissioner. That submission as well must be rejected.

b. Timing of the Notices

68 The appellants submit that because the Commissioner waited until the last day of hearings to issue notices identifying potential findings of misconduct which might be made against them, their ability to cross-examine witnesses effectively and present evidence was compromised. They submit that there is no longer any opportunity to cure the prejudice caused by the late delivery of the notices, and that they must therefore be quashed. For the following reasons, I must disagree.

69 There is no statutory requirement that the commissioner give notice as soon as he or she foresees the possibility of an allegation of misconduct. While I appreciate that it might be helpful for parties to know in advance the findings of misconduct which may be made against them, the nature of an inquiry will often make this impossible. Broad inquiries are not focussed on individuals or whether they committed a crime; rather they are concerned with institutions and systems and how to improve them. It follows that in such inquiries there is no need to present individuals taking part in the inquiry with the particulars of a "case to meet" or notice of the charges against them, as there would be in criminal proceedings. Although the notices should be given as soon

as it is feasible, it is unreasonable to insist that the notice of misconduct must always be given early. There will be some inquiries, such as this one, where the Commissioner cannot know what the findings may be until the end or very late in the process. So long as adequate time is given to the recipients of the notices to allow them to call the evidence and make the submissions they deem necessary, the late delivery of notices will not constitute unfair procedure.

70 The timing of notices will always depend upon the circumstances. Where the evidence is extensive and complex, it may be impossible to give the notices before the end of the hearings. In other situations, where the issue is more straightforward, it may be possible to give notice of potential findings of misconduct early in the process. In this case, where there was an enormous amount of information gathered over the course of the hearings, it was within the discretion of the Commissioner to issue notices when he did. As Décary J.A. put it at para. 79:

> . . . the Commissioner enjoys considerable latitude, and is thereby permitted to use the method best suited to the needs of his inquiry. I see no objection in principle to a commissioner waiting until the end of the hearings, when he or she has all the information that is required, to give notices, rather than taking a day to day approach to it, with the uncertainty and inconvenience that this might involve.

In light of the nature and purposes of this Inquiry, it was impossible to give adequate detail in the notices before all the evidence had been heard. In the context of this Inquiry the timing of the notices was not unfair.

71 Further, the appellants were given an adequate opportunity to respond to the notices, and to adduce additional evidence, if they deemed it necessary. The notices were delivered on December 21, 1995, and parties were initially given until January 10,

1996 to decide whether and how they would respond. This period was then extended following requests from the parties. The time permitted for the response was adequate. It cannot be said that the timing of the delivery of the notices amounted to a violation of procedural fairness.

> *Should Commission Counsel be Prohibited from Taking Part in the Drafting of the Final Report Because of their Receipt of Confidential Information not Disclosed to the Commissioner or the Other Parties*?

72 The appellant Red Cross Society argues that because Commission counsel received confidential documents concerning allegations against the appellants, they should be forbidden from taking part in the drafting of the report. This argument too is premature, because there is no indication that the Commissioner intends to rely upon his counsel to draft the final report. In addition, it is not clear from the record what was contained in the confidential submissions reviewed by counsel. If the submissions were composed merely of suggested allegations, then I do not believe that there is any merit to this complaint. However, in the unlikely event that the submissions also included material that was not disclosed to the parties, there could well be valid cause for concern. As Décary J.A. put it at para. 103:

> The method adopted at the very end of the hearings for inviting submissions from the parties was particularly dangerous in that it opened the door to the possibility that a person in respect of whom unfavourable findings of fact would be made in the final report might not have had knowledge of all of the evidence relating to that person.

If the submissions did contain new, undisclosed and untested evidence, the Commissioner should not seek advice regarding the report from counsel who received the confidential submissions.

Should the Appellant Baxter Corporation be Treated Differently From the Other Appellants?

73 The appellant Baxter Corporation argued that it should be treated differently from the other appellants because it was not a party before the Inquiry and was therefore unrepresented during the hearings. It submits that its position is analogous to that of Craig Anhorn, whose notice was quashed by the Court of Appeal because he took part in the Inquiry without realizing that he was a potential target of the investigation.

74 The Court of Appeal dismissed this argument, holding that Baxter Corporation's name had appeared in the Wilbee Report which preceded and prompted this Inquiry, and that it must therefore have realized that its conduct would be under scrutiny in the proceedings. Baxter Corporation, it held, took a calculated risk and elected not to seek standing before the Commission. It should not now be allowed to escape the consequences of that decision.

75 I agree with this conclusion. I believe that a private individual such as Craig Anhorn is in a very different situation from that of a large corporation which must have known from the outset what was at stake in the Inquiry, and made a calculated decision not to participate. I do not believe that Baxter Corporation should be treated any differently than the other appellants and would dismiss this ground of appeal.

Disposition

76 I would dismiss this appeal.

Appeal dismissed.

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Solicitors for the intervener the Canadian Aids Society: Elliott, Rodrigues, Toronto.

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Solicitors for the intervener the HIV-T Group (Blood Transfused): Goodman and Carr, Toronto.

Solicitor for the Intervener Toronto and Central Ontario Regional Hemophilia Society: David Harvey, Burlington.

Solicitors for the intervener the Hepatitis C Survivors' Society: Tinkler, Morris, Toronto.

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