

# Inquiries and the Goals of Citizens

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Inquiries, unfortunately, often involve tragedies that have affected people, their families and their communities. Pursuing the goals of justice by citizens in inquiries are often very similar to the goals they would have in Court. This paper will explore some of the advantages and disadvantages of public inquiries as a method of finding the truth and pursuing the goals of citizens as groups and individuals; how inquiries interact with the justice system; and considering the method of inquiries as an alternative to Court. My experience is with the Blood Inquiry<sup>1</sup> and I will use it for illustration.

## **I. INDIVIDUAL**

In order to fully understand the goals of groups and individual citizens and whether inquiries are a useful tool in pursuing those goals, we need to have some knowledge of these people and the tragedies that have affected their lives and our community.

Janet Connors was a lab technician at the Victoria General Hospital in Halifax. She had a young son from her first marriage when she met Randy Connors. Janet was a Sunday School teacher, Beaver and Cub leader, and a volunteer with the Canadian Literacy Council.<sup>2</sup>

Randy Connors was a computer scientist with the Federal Government who had a wonderful sense of humor. Randy was also a hemophiliac which is a genetic male disease. Hemophiliacs have a

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<sup>1</sup> Canada, *Commission of Inquiry on the Blood System in Canada: Final Report* (Ottawa: Canadian Government Publishing, 1997) [hereinafter *Krever Report*], conducted by The Honourable Mr. Justice Horace Krever (referred to as “Justice Krever”).

<sup>2</sup> See Janet and Randy Connors testimony before Justice Krever on March 22, 1994, transcript vol. 22; documents exhibits in vol. 34, Exhibit 89.

decrease in a clotting protein, either Factor VIII or IX. The degree of clotting protein reduction characterizes a hemophiliac as either mild, moderate or severe. Regular movement causes trauma in our joints. For most of us, our blood clots instantly and we do not know that any trauma has occurred. For hemophiliacs, this can cause bleeds in their joints, and may eventually cause arthritis. Randy was like most hemophiliacs, he bled only in his joints and did not have life threatening spontaneous bleeds in his organs.

Randy's treatment evolved over time as blood products became available. Initially, he would be treated with elevation and ice; whole blood transfusions; and then cryoprecipitate (a blood component). Eventually a freeze-dried product was produced from between 2,000 to 20,000 donations per production batch. If the product was sufficiently heat-treated,<sup>3</sup> during the process, it would kill the virus causing AIDS.<sup>4</sup> In 1979 Randy was provided with a repeatable prescription of this freeze-dried product with no need to return to his specialist, unless he had problems. He took this product on a prophylactic basis, three times a week. After 1979, he did not see his specialist again. Randy merely went to his local hospital to pick up his product. He was the only severe hemophiliac receiving product from that hospital in the early 1980s. Randy received non heat-treated product.

No one said anything to him, not the Red Cross, the hospital, public health personal, the doctor, etc. No one warned him his product might contain the virus causing AIDS. No one told him to only take it for a life-threatening bleed. No one told him to switch to cryoprecipitate, which would expose him to fewer donors (8).<sup>5</sup>

In 1986 Randy was diagnosed as HIV positive. Janet and he were in love. She was not prepared to leave him because he was sick. She would not have left him had he had cancer. They were married that year. Randy adopted Gus and he was the only father Gus knew. Gus was five years old.

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<sup>3</sup> Freeze-dried product must be heat-treated at 68° for several hours to kill HIV (*Krever Report, supra* note 1 at 755).

<sup>4</sup> AIDS means Acquired Immune Deficiency Syndrome, which denotes the last stage of a disease caused by HIV (Human Immunodeficiency Virus).

<sup>5</sup> Cryoprecipitate is a blood component made from a single donation. Randy may have needed eight donations to stop a bleed in his joints.

Although one of the first things known about AIDS was that it was a sexually transmitted disease, hemophiliacs were told that they were not passing it on to their wives<sup>6</sup> and that they could practice safe sex “if they wanted to.” No one ever explained the proper method of using condoms. Janet and Randy used Vaseline instead of water-based lubricants. Vaseline breaks down condoms. There were many breakages. In 1988, when Gus was just seven years old, Janet developed lumps and was being checked for breast cancer. However, she was also being tested regularly for HIV. She was told by her doctor’s nurse, on the street, that she was not seeing the breast cancer specialist the following day. Janet knew then, she was infected with HIV.

Their lives fell apart. Randy was devastated he had passed this disease on to his wife. He was devastated that when both of them died, their son would be orphaned. He was devastated that Janet would watch her own death as Randy’s health deteriorated. At the time, those with HIV experienced terrible discrimination. They coped with their pain and sorrow privately. They had trouble functioning. Money was an issue. Finally in 1989, the Federal Government offered a compensation package of \$30,000 a year for four years to those directly infected with HIV from blood.<sup>7</sup> It did not provide any money for the secondarily infected spouses and children. Many of those infected with HIV from blood would die during the next four years.

Janet and Randy were on the executive of the Nova Scotia branch of the Canadian Hemophiliac Society at the time. They knew the plight of other hemophiliacs. To fight for the compensation needed by all members of their association in Nova Scotia, they personally went public and fought for compensation from the province. Nova Scotia broke ranks with other provinces and did the right thing. It provided compensation.<sup>8</sup> Nova Scotia is the only place in the world that has provided the same amount of compensation to those directly infected with HIV from blood and the

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<sup>6</sup> There was no scientific basis for this statement. There had never been a sexually transmitted disease known to be transmitted through homosexual activities that was not transmitted by heterosexual activities (*Krever Report*), *supra* note 1 at 610).

<sup>7</sup> This is known as the Extraordinary Assistance Plan (EAP).

<sup>8</sup> The Nova Scotia Compensation program provided \$30,000 per year from 1993 until the death of the infected person, plus a variety of other components including post-secondary education costs for children and caregivers, etc. Blood Inquiry Exhibit, vol. 22, Exhibit 89.

spouses and children that were secondarily infected with HIV from blood recipients.

Janet Connors did not wish to become a national/international spokesperson and advocate, but she did.

HIV is a horrible disease. The immune system deteriorates and as it does, a variety of sicknesses befalls its prey. A person with HIV does not know how they will feel on any given day. If they catch the flu, it can take six weeks to overcome it. The drugs they must take are numerous and nauseating. Janet Connors describes it as being on chemotherapy everyday.

In the last two years of Randy's life he wasted away. Gus says that this was the hardest thing to experience about his father's illness and subsequent death. Randy went down to 98 pounds. He required 24-hour care. He had long bouts of diarrhea, necessitating him to wear diapers and use bed pads. He was weak and nauseated. He was intubated in hospital for pneumonia and survived to testify before Justice Krever. He died a few months later at the age of 38. Gus was only 13 years old.

Janet was Randy's caregiver. He required 24-hour care which she provided. At the time of his death, she had full-blown AIDS. She too was beginning the wasting syndrome. Medication was causing her hair to fall out. She had to cut it and dye her hair to give it substance. When sick, Janet was and is still incapable of making meals or participating in her son's life.

The current treatments have kept Janet Connors alive, but sickness remains irregular and at times lengthy. As previously stated, everyday is chemotherapy. The drugs have affected her organs and last year she suffered a heart attack. The anti-viral drugs eventually stop being effective and the disease again ravages her body. Janet is on the last drug that will help her. Unless a new drug is developed, when her current drug stops being effective, she will die.

On the day we were to review the final draft of our submissions to Justice Krever for the Blood Inquiry, Janet did not arrive at my office. The next day I received a call from her. Uncharacteristically, she had cried all morning, picked Gus up from school, brought him home and hugged him. She talked to him about the things she hoped to accomplish before she died. She talked about the skills and guidance she hoped she could teach him and the memories she hoped they could share.

For most of Gus' young life, he has lived with the fact that both of his parents will die of HIV. He saw his father deteriorate before his eyes. He saw these similar signs begin in his mother. While in Junior High, a teacher commented to the class "they should put everyone with AIDS on an island and let them all die together." While Janet encouraged Gus to study his history courses, he responded "that isn't the history I am interested in."

Gus lost his innocence as a young boy. He had a childhood filled with grief. He does not know how to feel joy. Gus has lost faith in our society.<sup>9</sup>

Their story is similar to the story of the other 1,200 people who became infected with HIV from blood.

## II. PAUSE

I would like you to think about their lives. I would like you to imagine what it would be like to walk the rest of your life in their shoes. The constant illness, the fear of spreading this disease to your spouse, the things you wouldn't be able to share with your family, the activities and events you would miss. Assume your financial needs are taken care of. How much would I have to pay you, for you to become infected with HIV today? \$175,000? \$300,000?...

## III. STANDING

The Orders in Council appointing Justice Krever,<sup>10</sup> specifically included "an examination of the roles, views and ideas of relevant interest groups." Janet Conners applied to Justice Krever as an individual to receive standing to represent the interests of persons secondarily infected with HIV, the spouses and children,<sup>11</sup> who had been ignored by Canada's Blood System and Public Health. In addition to blood, HIV/AIDS may be transmitted sexually to a spouse; and to a child while in the uterus, at birth, and possibly through breast feeding.

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<sup>9</sup> Janet Conners comments about the affects of this tragedy upon her son.

<sup>10</sup> Justice Krever was appointed by the Governments of Canada, Ontario, Prince Edward Island and Saskatchewan (*Krever Report, supra* note 1 at 1079-1095).

<sup>11</sup> *Krever Report, supra* note 1 at 591.

Justice Krever granted her standing.<sup>12</sup> Others joined her. It was a group, but it was not an organization. The significance of this is that it had no other source of funding to do all of the work it did during the Inquiry. This included not only the fulfillment of its responsibilities before the Blood Inquiry, but the continuous lobbying for change which occurred during and after the inquiry.

#### IV. GOALS

The goals of the Secondarily Infected Spouses and Children with HIV were:

1. To find out the truth of what happened;
2. To make recommendations to correct the system; and
3. To ensure it never happens again.

The third goal was very important, as Janet knew she would be leaving her son alone in this world to fend for himself. She was determined that when she would not be here to protect him, hopefully, she would have done enough to change the blood system to ensure that he would be safe.

The goals of this group substantially mirrored the Orders in Council, creating this public inquiry.<sup>13</sup>

There were also unspoken hopes. These hopes were that during this inquiry those in the blood system would accept responsibility for their actions; say they were “sorry,” and correct the wrongs. My clients knew that these were not part of the inquiry process. However, these hopes naturally flow from one’s expectations of what caring institutions and a caring community ought to do once the truth is exposed.

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<sup>12</sup> *Ibid.*, at 1107.

<sup>13</sup> *Supra* note 6.



## V. JUSTICE

In order to understand to what extent public inquiries fulfill the goals of justice of these individuals and groups, we have to first understand what is the public's perception of "justice." *Justice* is correcting a wrong. To achieve *justice* we must be able to fully explore all of the facts of what went wrong and then provide all of the remedies to correct that wrong.<sup>14</sup>

Our legal system is not that definition of *justice*. If *justice* is demonstrated as a plain sheet of paper, our legal system provides squares, circles and triangles within which one's case must fit. There are perimeters.<sup>15</sup> Those perimeters determine the relevant evidence or facts that will be explored in that specific case and the type of remedies that may be provided.

Each individual person's philosophy and value system determines how much the legal system's squares, circles and triangles, fulfill one's concept of Justice.<sup>16</sup>

## VI. WERE THE PUBLIC'S GOALS ACHIEVED THROUGH THE INQUIRY PROCESS?

### A. Goal No 1 – Truth

An inquiry has the potential of enabling a community to find out all of the facts relevant to a specific tragedy, unimpeded by the parameters of specific legal actions, such as mere negligence. This ability to explore all of the facts of a problem is the greatest advantage of an inquiry process. This is particularly so now because our society has become much more complex over the last century.

The complexity of our society is well illustrated by Canada's blood system. There were numerous players, in various jurisdictions, internationally and within Canada, combining public and private sectors in complex relationships intertwining numerous areas of the law.

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<sup>14</sup> *Supra* note 2 at 9-10.

<sup>15</sup> *Ibid.*, at 11-13.

<sup>16</sup> *Ibid.*, at 13.

The main player was the Canadian Red Cross. It is a non-profit organization which has as one of its founding principles, the principle of independence.<sup>17</sup> Within its own structure it had a complex system of 22 committees. A number of these lacked any independent expertise to analyze the information being provided to it about blood. Its national office set the policies. It had 17 centres across the country. Although most followed national policy, each operated independently. They did not share blood resources when one had an overabundance and another did not have a sufficient supply of blood.

The Provincial and Territorial Governments were and are responsible for health and the blood system. The Provincial Governments are responsible for health care in their jurisdictions including blood, blood products and public health.<sup>18</sup> The Provincial Governments provided 97% of the budget of the Canadian Red Cross for the blood system.<sup>19</sup> The Federal Government was responsible for regulating blood and blood products.<sup>20</sup> Provincial and Federal Governments established the Canadian Blood Committee to set policies and monitor the blood system, amongst other things.<sup>21</sup> The appointments to this Committee were often accountants.<sup>22</sup> In our opinion, this Committee lacked the expertise to monitor a blood system properly. Budgetary analysis, although a major focus, was misguided.

Blood products were made by Canadian and multinational corporations.<sup>23</sup> Political factors, including jobs for Canadians, influenced decisions about Canadian manufacturers despite concerns some had about the safety of the products.

Blood was distributed by hospitals under the direct order of doctors. Any doctor, regardless of his expertise and his knowledge of blood and transmission of infectious diseases through blood, is permitted to order blood for a patient. Although it has been described by some as the

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<sup>17</sup> *Krever Report*, *supra* note 1 at 51-58.

<sup>18</sup> *Ibid.*, 91 and 152.

<sup>19</sup> *Ibid.*, at 91.

<sup>20</sup> *Ibid.*, see also sections beginning at 111 and 149.

<sup>21</sup> *Ibid.*, at 90.

<sup>22</sup> *Ibid.*, at 96.

<sup>23</sup> *Ibid.*, chapter 4.

most dangerous drug we have available,<sup>24</sup> any physician may order it for a patient.

Another complicating factor in this inquiry was the reputation of the Canadian Red Cross. It saved peoples' lives during and since World War II. Its workers were on the front lines, risking their own lives to save others. Anyone who has given blood has experienced the wonderful people who are the current front line workers and volunteers at the Canadian Red Cross. It was an institution that could do no wrong. Despite the evidence, people would not believe it was true. As I repeatedly stated throughout the Blood Inquiry, trying to convince people that some people within the Red Cross did terrible things, was like trying to prove "Santa Claus was a pedophile."

**Extensive Investigation** To obtain the truth in a complex system is an extensive effort. Justice Krever conducted provincial hearings, national hearings, brought forth international experts, and had round-table expert sessions. It consumed 247 days of hearings, 474 witnesses, collected between 800,000 and 1 million pages of documents. Almost 100,000 pages of exhibits, in more than 436 volumes, were introduced. 50,011 pages of transcripts were produced.<sup>25</sup>

One truly did not have a full appreciation of the facts, the intricacies, the complexities and the problems, until the end of this inquiry. No trial or court proceeding could have accomplished this.

## VII. LIMITS ON TRUTH/DISADVANTAGES OF INQUIRIES

Public inquiries can be limited in their ability to find the truth. Most limits on the ability to fully explore the truth are a disadvantage to the process and its efforts in pursuing the goals of citizens in groups or as individuals.

**Orders in Council** The Orders in Council creating the public inquiry determine the breadth of the investigation and therefore the amount of truth that can be explored. The initial time and funding

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<sup>24</sup> Dr. Tom Asher, witness at Blood Inquiry on December 13, 1995. Affidavit included in Final Submissions of Secondarily Infected Spouses and Children, vol. 2.

<sup>25</sup> *Krever Report*, *supra* note 1 at 6-10.

allotments in the Orders are often too little to complete the task. If extensions and additional funding are not provided, truth is limited.<sup>26</sup>

**Commissioner's Rulings** The rulings of the Commissioner can limit the exploration of truth. In the Blood Inquiry we requested that Ministers of Health be witnesses in the proceedings. We thought it was important to know whether or not any of this information came to the attention of the Minister. Would these types of matters normally have come to the attention of the Minister? If not, why not? Knowing what we know now, should these matters be brought to the attention of the Minister? If not, why not? How should they be handled within the Department and the Government to provide proper safety? Justice Krever did not agree with our position on this point and the Ministers were not called. This portion of truth could not be pursued.

**Time** Even if extensions of time are granted, time itself is a limiting factor. The hearings of the Blood Inquiry spanned two years. Did every question get asked? No. A Commissioner must strike a balance between an exhaustive exploration of the truth and completing the investigation in a timely manner, so that changes can be implemented in a timely manner to protect society from immediate problems and further tragedies.

**Funding** Funding is critical if citizens as individuals or in groups are to have an opportunity to participate in an inquiry process. The group I represented, Janet Connors and other Secondarily Infected Spouses and Children with HIV, were not a formalized organization and had no other source of funding than that recommended by Justice Krever. The funding amounts provided were 50 hours of preparation prior to the commencement of the inquiry and then 10 days for each day I attended the hearings.<sup>27</sup> The fees were at Federal Government rates.<sup>28</sup> The work required to do this job properly went far beyond this money allocation. It compensated me for approximately one quarter of the legal services I

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<sup>26</sup> Somalia Inquiry.

<sup>27</sup> Our groups shared funding with the Canadian Hemophiliacs Infected with HIV. We were to divide our time at the hearings, that is we could not both be present at the same time unless the witness was of major importance. This increased our workload as it was necessary to prepare summaries to keep each other up to date. To keep abreast and adequately represent our clients we had to review some documents and transcripts from hearings we did not attend. None of this was compensated for.

<sup>28</sup> These rates are below all private practice rates.

provided to this group. Despite the insufficient funding, nine of the ten counsel representing citizens and interest groups gave 110 % of their efforts. Lawyers agreeing to represent individuals and interest groups before inquiries do so at a personal cost. Therefore, it is not always easy to obtain counsel to act for public interest groups. Without legal counsel, the goals of citizens cannot be obtained through inquiries.

**Court Challenges** Funding became a significant hindrance to finding the truth, when the Power Brokers brought court challenges against Justice Krever in an effort to silence him from disclosing his facts.<sup>29</sup> The Power Brokers included those involved with Canada's blood system: the Red Cross, most governments, multinational corporations, etc. They argued that Justice Krever should not be able to disclose any information that may lead the public to think that anyone, corporation or government, did anything which may be considered civilly or criminally wrong. In essence he could say nothing.<sup>30</sup> The ability to advise the public of the facts found through an inquiry process was at stake. The legal services provided for these court challenges were extensive. They included 63 volumes of materials, three weeks of cross-examinations on the affidavits and the challenge advanced through all three levels of court, to the Supreme Court of Canada.<sup>31</sup> The funding we were eventually

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<sup>29</sup> Section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11 states:

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.

<sup>30</sup> See section in this paper titled "Why?" for the facts behind the following comment made by Counsel for the Canadian Red Cross before the Federal Court, Trial Division, that all Justice Krever was legally allowed to report about the facts of the depletion of the non heat-treated Factor VIII concentrate was:

"[...] heat-treated products were known to have less risk; [...] heat-treated products became available over time;...for a two-month period both heat-treated and non heat-treated continued to be distributed in accordance with protocols by the Medical Scientific Advisory Committee of the Canadian Hemophiliac Society; [...] protocols were never revisited once inventory accumulated; [...] the distribution system could have been improved during that period." [...] The word "improved" was retracted and counsel further clarified: "He can simply say that as inventories became more generally available, the protocol could have been revisited and it wasn't."

As Justice Richard, of the Federal Court, Trial Division, rightly asked, if this is all the Commissioner is permitted to say, would any notices of misconduct be required?

<sup>31</sup> *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440.

provided with was five hours for only three days, of the eight days of hearings before the Federal Trial Division, that is 15 hours. The funding announcement was not made until after all of the affidavits were submitted and on the final days of the three weeks of cross-examinations.

The Power Brokers tried to starve out the citizens and nearly succeeded. Not all lawyers representing interest groups stayed to participate throughout all aspects of the court challenges. Only three of the ten did. It once again came at a personal sacrifice to lawyers. I slept on the floor of a colleague in Toronto. I gave up some of my capital in my firm. However, during the three years following the commencement of those challenges, the majority of my fees were paid through lobbying efforts of my client and public contributions. Representation of the interests of citizens should not be this uncertain.<sup>32</sup>

All initial funding recommendations for public interest groups should include funding for all court challenges initiated by others, regardless of whether the Government adopts this funding recommendation.

**Delays** The court challenges added almost two years onto the process. During that time many individuals with HIV and AIDS died and therefore never learned the truth or the facts of what went wrong and why they became infected. Bill Selnes, who represented another *ad hoc* group of citizens known as Canadian Hemophiliacs Infected with HIV, did not have one client alive at the time of presenting his final submissions to Justice Krever.

**Why?** Despite all of the information we obtained, we still do not fully understand why the people working within the system took some of the actions or inactions they did.

We can all speculate and have our theories, but knowing why remains a mystery. One of the devastating facts that became evident during the Blood Inquiry was the method of switching hemophiliacs from non heat-treated to heat-treated product. Shortly after the virus was identified in the summer of 1984, a scientific journal reported in September that heat-treating the product during production, at 68°C for several hours, could kill HIV.<sup>33</sup> The Red Cross, on that point and others in

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<sup>32</sup> *Supra* note 1 at 16-17.

<sup>33</sup> *Supra* note 3.

Canada's blood system, knew that every vial of non-heated product was likely contaminated with HIV.<sup>34</sup>

For the first six months of 1985, the Canadian Red Cross set out and did redistribute its non heat-treated product across Canada until it was depleted.<sup>35</sup> During that same period of time it stockpiled one-third of a year's supply of the safer heat-treated product. In the last week of June, the last vials of non heat-treated product from the national warehouse went to the Toronto Blood Centre and were distributed to the Toronto Hospital for Sick Children. 25 vials appear to have been used.<sup>36</sup>

On June 30, the day before a full conversion to heat-treated product, the Saint John, New Brunswick Red Cross Centre had over 700 vials of safer heat-treated product, when it handed out the last four vials of non-heated treated product to hemophiliacs in its area.<sup>37</sup> Dr. John MacKay, Medical Director of the St. John Canadian Red Cross Blood Transfusion Centre, testified about his knowledge during these months:

Q. You knew at the time that you were sending out these vials that these vials may have contained the virus that causes AIDS.

A. Yes.

Q. You also knew at that time that AIDS has killed people.

A. Yes.<sup>38</sup>

One Medical Director honestly answered, she supposed "they [the hemophiliacs] were all infected anyways."<sup>39</sup>

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<sup>34</sup> Dr. Roger Perrault was the National Director of the Blood Transfusion Service within the Red Cross. He was responsible for the Red Cross' operation of Canada's blood system. He testified the following:

Q. And that by December of 1984 it was estimated that all non heat-treated product may contain the HIV virus, as a result of that?

A. That was known.

Transcript, vol. 139 at 29770.

<sup>35</sup> Blood Inquiry Exhibit 631, CRC V28, T1, p. 50455, 50449, 24094; Exhibit 303, p. 101; Exhibit 636, T14.

<sup>36</sup> Blood Inquiry Exhibit 468.

<sup>37</sup> Blood Inquiry Exhibit 279, p. 355A.

<sup>38</sup> Transcript, July 14, 1994, at 12095.

<sup>39</sup> Transcript 32796.

A psychology study, more than 20 years ago, showed how Harvard students and the general public continued to do as they were told and administered electric shock to friends who pleaded for them to stop. Some continued this action even after the person was unconscious and in a dangerous situation. Those in the blood system were doctors. Well-educated people who had taken a Hippocratic oath “to do nothing to harm another individual.” Only two/three Red Cross Medical Directors of local centres changed hemophiliacs to safer cryoprecipitate and gave out the heat-treated product as it became available to them. But why didn’t all the others? We often asked during our cross-examinations, “If he were your son, what would you have done?” The Canadian Red Cross counsel always objected.

After knowing all the facts, Janet Connors comments, concluding why so many became infected with HIV from blood: “They all died for nothing.”

#### **A. Goal No 2 – Recommendations to Correct the Blood System**

Secondarily Infected Spouses and Children with HIV made 116 recommendations to Justice Krever. Other groups also made extensive recommendations to improve the blood system. Justice Krever made 50 general recommendations, with various sub-recommendations in his final report and 43 recommendations in his interim report.

This is the end of the advantages of inquiries into pursuing the goals of individuals and community groups. They knew most of the facts and recommendations were made.

#### **B. Disadvantages**

The greatest disadvantage of inquiries as a process to pursue the goals of citizens, is the fact that it provides absolutely no remedies. Recommendations can be made, but there is no ability to force their implementation. There is no mandamus application.

Too many important recommendations gleamed from public inquiries sit on shelves. Political change occurs slowly. In a number of inquiries, Governments bear a responsibility. Are Governments defensive? Do Ministers change too often? Do bureaucrats wield too much power? Is there a lack of initiative to change the status quo?



Another impediment is the lack of corporate memory in governments, and throughout the community. Once an inquiry is over, there is a feeling that it has been dealt with. The community moves onto the next inquiry or the next crisis.

Members of the community who have a specific interest in the topic are left to attempt to affect change through ongoing lobbying. For my clients this has included lobbying to ensure a fractionation plant was not built by the Red Cross in Nova Scotia, attempting to influence policies affecting the blood system generally, home transfusions, proper screening for CJD (mad cow disease), etc. These lobby efforts have been extremely time-consuming and costly. For *ad hoc* groups such as my clients, there is no funding. All are sick. This has not only consumed thousands of hours of my client's time, but also of mine. To fulfill this goal, the personal sacrifice of individual lawyers is required. Not all can afford, nor are prepared, to devote that amount of free legal services to assist in ensuring future change. The ability of citizens to encourage the implementation of recommendations is, therefore, very tenuous and unsatisfactory.

### **C. Goal No 3 – Ensuring It Never Happens Again**

Although some recommendations have been implemented, very little has been done to achieve this goal. In regards to some of the key issues affecting safety, there appears to be little more than a name change. The usage of blood and decisions about blood screening, have changed very little and in my opinion insufficiently to protect the public from a reoccurrence. This will be discussed later.

At the end one asks, "Was the four years worth it?" Janet Connors says "Yes" mainly because public awareness was raised. The hearings of the Blood Inquiry were aired verbatim on CPAC (Canada's Political Channel). There was tremendous media coverage of the Blood Inquiry in all mediums.

Although public awareness was raised, there are impediments to this awareness. First, some, if not most, people would have paid little attention to the details of the Blood Inquiry, thinking it was an issue that did not concern them. They would have thought this, even though every 20 seconds a person in Canada receives blood. That person is someone's child, sibling, spouse, or parent.

Second, it may have been difficult for people to synthesize through all of the information to pull out the important pieces they needed to know to protect themselves and their loved ones. I will use you as an example.

Did you know that as a society we over utilize blood and provide it to people in non-life threatening situations?<sup>40</sup> Did you know that for most elective surgeries, including open-heart bypass surgeries and hip replacements, people could use their own blood (autologous)<sup>41</sup> without requiring the blood of a stranger (homologous)? Did you know that there are drugs that can be taken by an individual to increase her/his own body's blood production, enabling them to provide their own blood donation before surgery? Did you know that cauterizing during surgery reduces the amount of blood loss? Did you know there are machines that recycle blood during surgery?

Did you know that blood is the most dangerous drug we use?<sup>42</sup> It is a conduit for diseases. At the time of Justice Krever's interim report, there were 25 known diseases transmitted by blood.<sup>43</sup> Not all of them have tests, and no test is one hundred per cent. We test for the antibodies of HIV. This is significant because an individual's body can take between six weeks to six months to develop the antibodies. From the date of infection onward, a person can pass on this disease to others. Therefore, in this six week to six month "window period" our blood system cannot detect HIV in the blood, although the blood can infect a patient.<sup>44</sup>

We continue to have major blood drives at places like universities, where as a group, they generally engage in higher risk activities for HIV such as more than one sexual partner, sex without condoms, experimenting with intravenous drug use, and tattooing. HIV is still a risk in our blood system.

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<sup>40</sup> Canada, *Commission of Inquiry on the Blood System in Canada: Interim Report* (Ottawa: Communication Group, 1995) at 47 [hereinafter *Interim Report*]: "Testimony at the Inquiry and the few Canadian studies conducted on Blood consumption confirm that physicians continue to administer unnecessary transfusions to their patients."

<sup>41</sup> *Ibid.*, at 53.

<sup>42</sup> Dr. Tom Asher's deposition from blood trial, Connors Final Submission to Krever, vol. 2, Exhibit B, p. 32.

<sup>43</sup> Justice Krever's, *Interim Report*, *supra* note 40 at 21-29: see charts at 21, 22 & 29.

<sup>44</sup> *Ibid.*, at 23.

Did you know that Dr. Kain, an infectious diseases expert, testified at the Krever Inquiry that because of global warming and global travel, during this decade we will see an increase in the resurgence and emergence of infectious diseases?<sup>45</sup> Like AIDS, these diseases can be in the blood system for years before we identify the causative agent and are able to develop a screening test.<sup>46</sup>

You are a group within our community that had the ability to synthesize this evidence. Did you know all of these facts?

The third impediment is the nature of a patient-doctor relationship. When a person discusses blood with their physician, if the physician says “that was a problem in the 80s, we test the blood now, it is okay, don’t worry about it,” most people will not argue. The above statement is not accurate.

### **VIII. WILL IT HAPPEN AGAIN?**

Yes. Many things need to be implemented to reduce the over utilization of blood. As a result of failing to curb over usage of blood, the current system is making the same choice, as it did during the AIDS crisis.

An example is Creutzfeldt-Jakob Disease (CFD) in humans, known as “mad cow disease” in cattle. There is no test for blood or an individual to detect this disease. We know that the people who pose a risk to Canada’s blood supply system are those that used beef products from areas where cows was infected with mad cows disease. A large concentration of contaminated beef were found in England and to a lesser extent in the rest of Europe. A person who has been in these areas for a longer stay, is at a higher risk of consuming contaminated beef products. However, someone eating one hamburger from infected cattle is at the highest risk of infection. The blood system should be refusing anyone who has spent time in those heavily infected areas. The Canadian blood services will not do that because they anticipate they would lose 20 % of their current donors. If we reduced the amount of blood which we overutilize on people who do not need transfusions, we could take the proper safety measures.

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<sup>45</sup> Dr. Kain, Blood Inquiry Transcript, p. 44, 668.

<sup>46</sup> AIDS first appeared in hemophiliacs in 1978; the virus was not detected until the spring of 1984, (*Krever Report, supra* note 1, vol. 2, at 367; vol. 1 at XXIV).

Substantial measures must be taken to limit the use of blood, such as education of doctors, promoting bloodless surgery, etc.

In my opinion, ultimately, safety cannot be left to time-consuming committees and a democratic process often consisting of people without sufficient expertise. Lives are at stake. In our view, an infectious diseases expert, appointed to make decisions and to watch global trends of infectious diseases, independent of Government influences, needs to be able to make quick decisions to protect the public from emerging diseases which may be transmitted by blood.

### **IX. INQUIRIES INTERACTION WITH THE “JUSTICE” SYSTEM**

There is no direct interaction with the justice system by inquiries. Due to the balance that must be achieved in an inquiry process, it would be improper to permit a direct connection with the justice system. The evidentiary safeguards provided in our civil and criminal law system must be maintained. If people are to be found negligent or criminally responsible, it must still be through those processes.

Does that mean that we should not be able to name names? No. The naming of names was not actually the argument presented by the Power Brokers in the court challenges to the Blood Inquiry. Their argument was that Justice Krever should not be able to make any statement in his report that could lead someone in the public to think that they may be civilly or criminally responsible. To not be able to interpret the facts to state what went wrong is to say “nothing.” 50,000 pages of transcript and 100,000 pages of documents, without analyses, are useless.

Secondly, we cannot forget that the blood system was a public program. The conduct of those involved had the ability to kill people and it did. People involved in public programs must be publicly accountable for their actions or inactions at all times. Their decisions should always be open to the public and transparent. No one working in a public program should be able to hide the facts of their actions or inactions. If their reputations were harmed, they were by their own actions or inactions.

## **X. INDIRECT INTERACTION WITH THE JUSTICE SYSTEM**

There is an indirect interaction with the justice system because of knowledge. A public inquiry that enables a review of all of the facts in a system provides the public with knowledge of what went wrong. The public has the relevant documents, has heard information from people in the system and experts in the field. With this knowledge, the individuals and community groups were able to achieve out of court settlements for funds for the Secondarily Infected with HIV, class actions for those infected with Hepatitis C and CJD, and lay complaints to commence criminal investigations.

## **XI. JUSTICE AND CITIZEN'S ACCESS TO IT**

Inquiries are not satisfactory alternatives to courts. No process is a satisfactory alternative to courts. Our legal system is designed so the justice, as we define it, is provided in a court of law. Justice is not achieved outside of the courtroom.

To illustrate this point, I would like to compare what happened with those who received compensation for their HIV infection and those who had access to the Court for Hepatitis C infection. The compensation for those infected with HIV from blood was a poultry sum, occurring late in their lives. The Federal Government program was not implemented until 1989 and lasted for only four years. The sum was \$30,000 per year. For the last two years of Randy Conners' life, his drug costs alone were \$25,000 per year. Most died before the conclusion of these four years. Other than in Nova Scotia, no secondarily infected spouse or child received any monies for their own HIV infection from blood. The amounts were small.

The Hepatitis C 86-90 class action, within the span of three years, was successful in securing \$1.5 billion for the benefit of 10,000 Canadians infected with Hepatitis C from blood for the years of 1986-1990. The awards provided for in this court settlement are similar to that which the average person would have received had they been able to take this matter to court.

**People's participation in Justice** The critical question is why are people unable to participate in our court justice system? One of the main reasons is because the courts have closed their doors to the people of Canada. The Supreme Court of Canada did this in the Trilogy cases of 1978,<sup>47</sup> when it inappropriately limited non-pecuniary damages to \$100,000, a sum now worth \$275,000.

In *Andrews*, the Court rightly noted that *Andrews* would be “deprived of many of life’s pleasures and subject to pain and disability” for which he was entitled to compensation. “The award must be fair and reasonable...” The court also rightly pointed out that there was “no medium of exchange for happiness. There is no market for expectation of life. ... No money can provide true restitution.”<sup>48</sup> However, the court was wrong to conclude it is sufficient to adopt, as its paramount principle, compensating a person for their care. Rather than attempting to value the non-pecuniary losses such as pain, suffering, and loss of amenities, the Court instead adopted a “functional approach” which provided some additional funds for physical arrangements, which can make a person’s life more endurable.

Even if one were to accept these principles, it is inconceivable that anyone who has received HIV from blood deserves anything less than the maximum limit. However, our courts have used this functional approach to do even a greater disservice to the people of Canada. Now you get even less than the maximum, if you are older and are infected with this horrible disease.<sup>49</sup>

When I asked you how much would I have to pay you for you to be infected with HIV today, I mentioned the amount of \$175,000 or \$275,000. I am sure you were insulted. So are the people of Canada who come before the Courts for non-pecuniary damage awards for personal injuries. The awards are insulting.

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<sup>47</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [hereinafter *Andrews*]; *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287.

<sup>48</sup> *Andrews, ibid.*, at 260-261.

<sup>49</sup> *Pittman Estate v. Bain*, (1994) 19 C.C.L.T. (2d) 1 (Ont. Gen. Div.).

The Supreme Court of Canada in 1978 assumed high non-pecuniary damage awards would have a negative impact on our society.<sup>50</sup> Our non-pecuniary damage awards have been at the opposite end of the spectrum from American awards and, in my opinion, have had a negative impact on our society.

Multinational corporations operating in both the United States and Canada produce most goods used by the public of Canada, and this will likely increase with the North American Free Trade Agreement (NAFTA). The multinational corporations involved in Canada's blood supply system were the same companies that operated in the United States. Why do these corporations get to pay less to a person injured in Canada than a person suffering the same injuries in the United States? We need to ask: is the injured public of Canada subsidizing the damage awards of the United States?

These differing damage awards have been included in multi-jurisdictional product liability settlements.<sup>51</sup> The corporations will argue they will only pay what a country will provide to its injured public. There is no justification for these varying awards between Canada and the United States. These variations in general damage awards are offensive to the public of Canada.

Low damage awards do not deter tortuous behavior. The cost of destroying, rather than depleting, the non heat-treated product with HIV, was approximately \$2 million.

Another example occurred with Armour Pharmaceutical Company. Armour had processed a heat-treated product using a shorter time period and lower temperature, insufficient to kill HIV. Armour abandoned its license in the United States for this short heat-treated product and was only licensed in the US for the safer longer heat-treated

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<sup>50</sup> There does not appear to have been a sufficient evidentiary basis for this statement. In my opinion, it has not been borne out.

<sup>51</sup> As one example: the Sixth Amended Disclosure Statement, March 28, 1988 of A.H. Robins Company, included a resolution of the claims of those injured by its Dalkon Shield, an IUD. Stated in its Dalkon Shield Trust Claims Resolution Facility, Annex 4, Plan Exhibit C, Section G6 at page CRF-5:

6. *Foreign Claims.* In evaluating and paying the claims of claimants residing in foreign countries, the Trustees shall take into consideration, but not be bound by, the laws as well as the treatment of claims in that country of claims such as that made by the claimant.

product. After this product was no longer being used in the United States, the short heat-treated product was still shipped and used in Canada.<sup>52</sup> Would they have done this had the damage awards been the same as in the United States? Damage awards affect behavior. In Canada, they fail to protect the public.

In 1978, the court alluded to the difficulty of placing a monetary amount on intangibles such as loss of enjoyment of life, loss of quality of life, loss of life, loss of time with one's family and community. Merely because it is difficult, does not mean that the courts should shy away from the task. It further does not mean it should diminish the awards to a mere "functional approach."

Low general damage awards prohibit the person from bringing their claim to court. If their main award is for their future care, they need every penny of that in order to provide for themselves and their families. Negative contingencies can result in the family having less to live off of than what they actually need. Courts do not order solicitor-client costs. A case against Canada's blood system is very complex and includes many parties and issues as previously noted. The cost of pursuing one of these HIV cases in Court includes disbursements of approximately \$200,000. The first trials lasted six months. They are mammoth. Most people are unable to access court because the awards they receive are too little for their costs of going to court.

To be fair to those who are injured in Canada, we must compensate them for the loss of the quality of their life, the years they lose, the little time they have with their children, spouse, family and community. To protect the public of Canada, we need to more closely mirror the American non-pecuniary damage awards.

## **XII. OTHER CHANGES**

Further changes are necessary in order to enable citizens to participate in the legal system. Awards for costs must be higher and ordered more often. When we were participating in the court challenges of the Blood Inquiry, it was very difficult. Organizations have limited resources; individuals have none. If the court has granted standing to a group, the costs should be awarded against the losing parties. The Power Brokers had all the money. They intended to starve us out. They did not

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<sup>52</sup> Blood Inquiry Documents, vol. 276, Tabs 5 and 12; vol. 279, Tabs 3 and 4.



succeed. But that is only because some lawyers decided to continue on without payment.<sup>53</sup>

**Class Actions** Class actions are critical to providing the public with access to the courts. As I have stated in previous presentations, class action legislation was one of the most significant and important pieces of legislation enacted in the 20th century.<sup>54</sup> Resources can be pooled to advance the litigation for group. An example of the advantages is products liability cases, like blood litigation, which are complex actions. They are very costly and time-consuming, with disbursements exceeding \$200,000. An individual rarely has those resources, even if the lawyer agrees to work for nothing and risks her/his fees for the eight years the case is in litigation. These costs are shared in a class action.

Class actions should be broadened to include all forms of wrongs against the public of Canada. It needs to include all actions and proceedings before the courts. It needs to embrace *Charter*<sup>55</sup> breaches. Although no frivolous case should ever come before the court, including frivolous class actions, areas of the law should not be excluded from class action proceedings.

## CONCLUSION

The fact that some citizens have an interest in a particular public topic does not mean these citizens' goals and focus are different from the community at large. Their claims and issues should not be considered a nuisance, annoying or an unnecessary extra. To the contrary, they will most often facilitate the completion of inquiries.

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<sup>53</sup> I provided approximately \$800,000 of free legal services to this *ad hoc* group of Secondarily Infected Spouses and Children fighting for compensation from Nova Scotia, Federal and Provincial governments; lobbying efforts; court challenges against Krever; and fees not paid from inquiry funding. I say this only to emphasize that representation of the goals of public cannot be dependent upon lawyers committing that level of volunteer time, as it provides no guarantee they can obtain representation.

<sup>54</sup> Canadian Bar Association National conference: *Class Action Experience in Canada*, August 2000.

<sup>55</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitutional Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

It would be best if tragedies did not occur. Unfortunately, they do. Public inquiries are an excellent process for understanding complex systems in our complex society. They assist in finding the facts, analyzing the system, and providing recommendations for solid policy change. Recommendations can sit on government shelves forever. They, however, are never an alternative to the court or the justice system as they provide no remedy and no direct link to the justice system.

Our legal system is designed to dispense justice in the courts. There are no alternatives. The courts need to make themselves available to the people. To do this, the Courts need to first change the amounts for non-pecuniary damage awards and the principles upon which they compensate the injured public. Other changes include, but are not limited to, awarding higher costs more frequently, and embracing and expanding the use of class actions.