

# Justice Denied: Why Was There No Public Inquiry into the Lac-Mégantic Disaster?

Mark Winfield

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Quels enseignements avons-nous tirés de la catastrophe ferroviaire survenue à Lac-Mégantic  
Have the Lessons of the Lac-Mégantic Rail Disaster Been Learned?

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Article abstract

*This paper examines the reasons why, despite the magnitude and significance of the Lac-Mégantic disaster, no formal public inquiry was called into the tragedy. In doing so it explores the substantive and political rationales for establishing public inquiries in circumstances like Lac-Mégantic, and the reasons why the various investigations that have been undertaken by the Transportation Safety Board and others into the disaster do not constitute an adequate substitute for a formal inquiry. The paper then employs a modified institutional-ideological analytical framework to examine the landscape, ideational, societal, and institutional factors that have worked against the calling of an inquiry. The paper concludes that the concept of a formal inquiry likely faced major opposition at the political and official levels within the Government of Canada, as well as major non-governmental actors in the transportation and fossil fuel sectors. Finally, the paper discusses the implications of the decision not to call an inquiry in the Lac-Mégantic case for the role of inquiries in similar circumstances in the future.*

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## Justice Denied: Why Was There No Public Inquiry into the Lac-Mégantic Disaster?

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MARK WINFIELD\*

### ABSTRACT

*This paper examines the reasons why, despite the magnitude and significance of the Lac-Mégantic disaster, no formal public inquiry was called into the tragedy. In doing so it explores the substantive and political rationales for establishing public inquiries in circumstances like Lac-Mégantic, and the reasons why the various investigations that have been undertaken by the Transportation Safety Board and others into the disaster do not constitute an adequate substitute for a formal inquiry. The paper then employs a modified institutional-ideological analytical framework to examine the landscape, ideational, societal, and institutional factors that have worked against the calling of an inquiry. The paper concludes that the concept of a formal inquiry likely faced major opposition at the political and official levels within the Government of Canada, as well as major non-governmental actors in the transportation and fossil fuel sectors. Finally, the paper discusses the implications of the decision not to call an inquiry in the Lac-Mégantic case for the role of inquiries in similar circumstances in the future.*

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### KEY-WORDS:

*Lac-Mégantic, Public Inquiries, Transport Canada, Safety Management Systems (SMS), Transportation Safety Board.*

### RÉSUMÉ

*Le présent article examine les raisons pour lesquelles, malgré l'ampleur et l'importance de la catastrophe de Lac-Mégantic, aucune enquête publique formelle n'a été tenue à la suite de la tragédie. Ce faisant, l'article explore les raisons de fond et d'ordre politique qui justifient la tenue d'une enquête publique dans des circonstances comme*

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celles à Lac-Mégantic, ainsi que les raisons pour lesquelles les différentes enquêtes qui ont été menées à la suite du désastre par le Bureau de la sécurité des transports et d'autres ne remplacent pas adéquatement une enquête officielle. Puis, à l'aide d'un cadre analytique idéologique et institutionnel modifié, l'article scrute le paysage ainsi que les facteurs idéationnels, sociétaux et institutionnels qui ont joué contre la tenue d'une enquête. L'article conclut que la notion d'enquête officielle s'est vraisemblablement heurtée à une opposition vigoureuse aux niveaux politique et officiel au sein du gouvernement du Canada, de même que de la part des principaux acteurs non gouvernementaux des secteurs du transport et des combustibles fossiles. Finalement, l'article traite des conséquences qu'aura sur le rôle des enquêtes à l'avenir, dans des circonstances semblables, la décision de ne pas tenir une enquête sur ce qui est arrivé à Lac-Mégantic.

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**MOTS-CLÉS :**

*Lac-Mégantic, enquêtes publiques, Transports Canada, système de gestion de la sécurité (SGS), Bureau de la sécurité des transports.*

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## INTRODUCTION

The deadliest rail accident in Canada of the past century unfolded in the early hours of July 6, 2013. An unattended train of 73 carloads of crude oil from the Bakken shale formation in North Dakota, operated by the Montreal, Maine & Atlantic (MMA) Railway, ran away and then derailed, exploded and burned in the heart of the small Québec town of Lac-Mégantic. Forty-seven of the town's residents died in the ensuing inferno.

The Lac-Mégantic tragedy has been described as an incubated disaster,<sup>1</sup> an inevitable endpoint of a series of systemic failures on the part of the railway operator, but also on the part of railway safety regulators in Canada and the United States. Regulators on both sides of the border failed to respond to the safety implications of the dramatic increase in the transportation of crude oil by rail from 2010 onwards. These oversights were compounded by longer-standing failures to deal with well-recognized issues around railway tank car safety, and to establish and implement effective regulatory regimes for railway safety, particularly in relation to the transportation of dangerous goods.<sup>2</sup>

The scale and significance of the tragedy prompted calls for a formal public inquiry into the disaster from survivors and town residents,<sup>3</sup> the Town of Lac-Mégantic itself<sup>4</sup> and neighbouring municipalities,<sup>5</sup>

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1. Mark Winfield, "The Incubation of the Lac-Mégantic Disaster", *Ottawa Citizen* (25 July 2013) [Winfield, "The Incubation of the Lac-Mégantic Disaster"]. On the concept of "disaster incubation" see S Dekker & S Pruchnicki, "Drifting into Failure: Theorising the Dynamics of Disaster Incubation" (2014) 15:6 *Theoretical Issues in Ergonomics Science* 534.

2. See Transportation Safety Board of Canada (TSB), *Lac-Mégantic Runaway Train and Derailment Investigation Summary* (Ottawa: TSB, 2014) [TSB, *Lac-Mégantic Runaway Train*]; Bruce Campbell, "Willful Blindness? Regulatory Failures Behind the Lac-Mégantic Disaster" (18 August 2014) *Canadian Centre for Policy Alternatives* 17 [Campbell, "Willful Blindness?"]; Mark Winfield, "The Lac-Mégantic Disaster and Transport Canada's Safety Management System (SMS) Model: Implications for Reflexive Regulatory Regimes" (2016) 28:3 *J Envtl L & Prac* 299 [Winfield, "The Lac-Mégantic Disaster"].

3. Jacques Gagnon, "Le Comité citoyen de la région du lac Mégantic demande une enquête publique sur le déraillement de Lac-Mégantic", online: <[www.change.org/p/le-comité-citoyen-de-la-région-du-lac-mégantic-demande-une-enquête-publique-sur-le-déraillement-du-6-juillet-2013-à-lac-mégantic](http://www.change.org/p/le-comité-citoyen-de-la-région-du-lac-mégantic-demande-une-enquête-publique-sur-le-déraillement-du-6-juillet-2013-à-lac-mégantic)>.

4. City of Lac-Mégantic, Resolution no 15-296, *Commission d'enquête publique — Tragédie du 6 juillet 2013* (4 May 2015).

5. Municipality of Nantes, Resolution 15-06-112 (adopted 15 June 2015).

legislative opposition parties at the federal level<sup>6</sup> and in Québec,<sup>7</sup> non-governmental organizations<sup>8</sup> and academic researchers.<sup>9</sup> These calls were met with steadfast refusals from the Conservative Government of Prime Minister Stephen Harper that was in office at the time of the disaster,<sup>10</sup> and silence from its Liberal successor. The Liberals, led by Justin Trudeau, had declined to address the issue in their 2015 election platform.

The refusal of the federal government to call a formal public inquiry into the Lac-Mégantic disaster is a significant departure from the past practice of Canadian governments in relation to events involving the death of a significant number of people, or major public impacts. Full public inquiries were called, for example, into the 1982 Ocean Ranger oil rig sinking, in which 84 crew members died, the 1986 Hinton, Alberta railway collision in which 23 people, mostly passengers on a VIA Rail train, were killed, and the 1992 Westray Mine Disaster, in which 26 miners lost their lives. Inquiries were also called into the May 2000 Walkerton drinking water disaster in which 7 people died and 2,800 became seriously ill, and the similar 2001 incident in North Battleford, Saskatchewan, in which between 5,800 and 7,400 people became sick. Most recently, the Government of Ontario called a judicial inquiry into the death of two people in the June 2012 collapse of the Algo Centre Mall in Elliot Lake. Internationally, the British Government called a formal inquiry into the June 2017 Grenfell Tower fire in the immediate aftermath of the disaster.<sup>11</sup>

This paper examines the reasons why, despite the magnitude and significance of the Lac-Mégantic disaster, no formal public inquiry was

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6. New Democratic Party, *Building the Country of our Dreams*, 2015 Federal Platform (Ottawa: New Democratic Party of Canada, 2015) at 41; Green Party of Canada, Press Release, "Elizabeth May Reacts to Transport Canada's Final Report on Lac-Mégantic, and Calls for Public Inquiry" (19 August 2014).

7. "Tragédie de Lac-Mégantic – Une enquête publique indépendante est essentielle", *CNW/Telbec* (3 July 2015).

8. Canadian Centre for Policy Alternatives, News Release, "Study Calls for Independent Inquiry into Lac-Mégantic Disaster" (20 January 2015).

9. Winfield, "The Incubation of the Lac-Mégantic Disaster", *supra* note 1.

10. Dave Seglins, "Lac-Mégantic Disaster Led to Transport Canada Shakeup, Says Minister Lisa Raitt. But Minister Rejects Inquiry into Transport Canada 'Failures' in Interview Marking Anniversary of Disaster", *CBC News* (1 July 2015), online: <[cbc.ca/news/canada/LacMégantic-disaster-led-to-transport-canada-shakeup-says-minister-lisa-raitt-1.3134120](http://cbc.ca/news/canada/LacMégantic-disaster-led-to-transport-canada-shakeup-says-minister-lisa-raitt-1.3134120)>.

11. Tom Peck, "Grenfell Tower fire: Theresa May Announces Full Public Inquiry into Fatal Disaster", *Independent* (15 June 2017).

called into the tragedy. In doing so it explores the substantive and political rationales for establishing public inquiries into circumstances like Lac-Mégantic, and the reasons why the various investigations that have been undertaken by the Transportation Safety Board (TSB) and others into the disaster do not constitute an adequate substitute for a formal inquiry. The paper then employs a modified institutional-ideological analytical framework<sup>12</sup> to examine the landscape, ideological, societal, and institutional factors that have worked against the calling of an inquiry. Finally, the paper discusses the implications of the decision not to call an inquiry in the Lac-Mégantic case for the role of inquiries into similar circumstances in the future.

## I. THE RATIONALE FOR PUBLIC INQUIRIES

The federal *Inquiries Act*<sup>13</sup> sets no specific criteria around when public inquiries should be called. Rather the Act merely states that the Governor-in-Council (i.e. federal Cabinet) may cause an 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,” wherever it would be “expedient” do to so.<sup>14</sup> Similarly the Ontario *Public Inquiries Act*<sup>15</sup> permits the Lieutenant Governor in Council to establish a commission to inquire into any matter considered to be in the public interest.<sup>16</sup> Given the wide discretion given to cabinets in the establishment of inquiries, the decision to establish an inquiry is essentially political.<sup>17</sup>

In practice, a number of factors drive the establishment of inquiries. These include the scale of the impacts of the events involved in terms

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12. Mark Winfield, *Blue-Green Province: The Environment and the Political Economy of Ontario* (Vancouver: UBC Press, 2012) at 3–9 [Winfield, *Blue-Green Province*]. See also G Bruce Doern & Glen Toner, *The Politics of Energy: The Development and Implementation of the National Energy Program* (Toronto: Methuen, 1985); Melody Hessing, Michael Howlett & Tracy Summerville, *Canadian Natural Resource and Environmental Policy: Political Economy and Public Policy*, 2nd ed (Vancouver: UBC Press, 2005) at 105–06.

13. *Inquiries Act*, RSC 1985, c 1-11.

14. *Ibid*, s 2.

15. *Public Inquiries Act*, SO 2009, c 33, Sched 6.

16. *Ibid*, s 4. Similar provisions exist in section 1 of the Québec *Act respecting public inquiry commissions*, CQLR c C-37.

17. Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at 105.

of lives lost or affected, or their economic or environmental consequences, with the implication that the regular machinery of government or the regulatory or policy processes around an event are potentially broken or have been subject to a serious failure that requires investigation.<sup>18</sup> In other cases inquiries have been invoked to resolve intractable economic, environmental or social issues. Examples of such policy-oriented inquiries include the Royal Commission on Health Services (also known as the Hall Commission),<sup>19</sup> Royal Commission on the Economic Union and Development Prospects for Canada (also known as the Macdonald Commission),<sup>20</sup> the Inquiry into the Decline of Sockeye Salmon in the Fraser River (also known as the Cohen Commission),<sup>21</sup> and the Royal Commission on Aboriginal Peoples.<sup>22</sup>

Establishing an inquiry involves a conscious decision to initiate a process outside of the normal structures and machinery of government. This choice may be a function of the need to investigate the operation of those structures themselves or the adequacy of existing legislation and policy. An inquiry may also have much greater freedom to engage with new ideas and perspectives than may be possible within the established institutions and processes of government. Public confidence in inquiries is closely related to their degree of independence from government, in combination with their investigative powers to “get to the bottom” of a problem.<sup>23</sup>

In some cases, the establishment of an inquiry can provide a government with the means of deflecting immediate opposition party, media and public criticism of its handling of an event and the decisions leading up to it.<sup>24</sup> Ontario Premier Harris’ decision to call an inquiry into the May 2000 Walkerton water contamination disaster is a leading example of such a strategy. The weeks leading up to the announcement of an inquiry were defined by intense pressures from both

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18. Gregory J Inwood & Carolyn M Johns, “Why Study Commissions of Inquiry?” in Gregory J Inwood & Carolyn M Johns, eds, *Commissions of Inquiry and Policy Change: A Comparative Analysis* (Toronto: University of Toronto Press, 2014) 3 at 8.

19. Royal Commission on Health, *Services Report*, 2 vol (Ottawa: Privy Council Office, 1964).

20. Royal Commission on the Economic Union and Development Prospects for Canada, *Report* (Ottawa: Privy Council Office, 1985).

21. Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *Final Report* (Ottawa: Privy Council Office, 2012).

22. Royal Commission on Aboriginal Peoples, *Report*, 5 vol (Ottawa: Privy Council Office, 1996).

23. Ratushny, *supra* note 17 at 17.

24. *Ibid* at 105–06; Inwood & Johns, *supra* note 18 at 18.

legislative opposition parties and the media around the potential linkages between the Government's "common sense revolution"-inspired strategy of environmental deregulation and the disaster.<sup>25</sup> At the same time, many authors have highlighted the risks associated with such strategies, particularly the loss of control of the information given to the public and the way it is expressed. The release of information through an inquiry process may stir up further controversies.<sup>26</sup>

Once established, inquiries, particularly those following major disasters or other perceived regulatory or policy failures, are seen to have three major functions: truth seeking; justice seeking; and policy seeking.<sup>27</sup> Truth seeking is essentially the fact-finding dimension of an inquiry. An inquiry uses its investigative powers, including the ability to access documents and records, and compel testimony, under oath, from the key participants in the events under investigation, to establish the facts around the event, and an understanding of the roles, actions and motivations of the individuals and organizations involved. Part I of the Walkerton Inquiry and its resulting report<sup>28</sup> are widely regarded as providing excellent examples of these functions.<sup>29</sup>

With respect to policy seeking, inquiries may be called to provide as complete an understanding as possible of underlying causes of a disaster, with the intention of formulating recommendations for changes to legislation, policies and practices to prevent similar events in the future. These considerations are particularly important in situations where there are suspicions of systemic failures on the part of regulators or operators, as opposed to negligence or intentional malfeasance on the part of individuals. In this context, inquiries effectively function as mechanisms for policy evaluation,<sup>30</sup> and the formulation of future policies. Part II of the Walkerton Inquiry is often held up as a

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25. See e.g. Carolyn M Johns, "The Walkerton Inquiry and Policy Change" in Inwood & Johns, *supra* note 18, 214 at 222–23 [Johns, "The Walkerton Inquiry and Policy Change"]; see also Winfield, *Blue-Green Province*, *supra* note 12 at 124–34.

26. Liora Salter, "The Complex Relationship Between Inquiries and Public Controversy" in Allan Manson & David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 185 [Salter, "The Complex Relationship"]; see also Ratushny, *supra* note 17 at 205; Inwood & Johns, *supra* note 18 at 18.

27. Salter, "The Complex Relationship", *supra* note 26 at 189–97.

28. Dennis R O'Connor, *Report of the Walkerton Inquiry. Part I: The Events of May 2000 and Related Issues* (Toronto: Queen's Printer, 2002).

29. Ratushny, *supra* note 17 at 44; Johns, "The Walkerton Inquiry and Policy Change", *supra* note 25 at 214–43.

30. Hessing, Howlett & Summerville, *supra* note 12 at 241.



leading example of these types of work. In that case, the recommendations<sup>31</sup> of the inquiry regarding the prevention of future drinking water contamination incidents were accepted by the government and legislative opposition parties,<sup>32</sup> and ultimately provided the basis for new legislation and institutional arrangements around drinking water safety and the protection of sources of drinking water.<sup>33</sup>

Salter,<sup>34</sup> following Thibault and Walker,<sup>35</sup> links the justice-seeking function of inquiries closely to their truth-seeking function. Justice is seen to be fulfilled through the public identification of wrongdoing, and the assignment of blame to the individuals responsible, along with the resolution of disputes and conflicts among interest groups. Although these are important aspects of the justice-seeking function of inquiries, they may not fully capture the contributions that inquiries can make in providing justice to victims and survivors, particularly where major losses of life have been occurred.

Inquiries can play a significant role in the processes of grieving and healing within the affected communities. These functions flow from several dimensions of the inquiry process. Implicit in the decision on the part of a government to convene an inquiry is an acknowledgement of the significance of an event and its consequences for the affected communities. The Ontario Government of Premier Dalton McGuinty's decision to call an inquiry into the 2012 Algo Centre Mall collapse is a good example of such an acknowledgement. Beyond the loss of the life of two innocent bystanders, the mall played a central role in the life of the community of Elliot Lake and the surrounding area, and its loss had major impacts on the community.<sup>36</sup>

Secondly, the inquiry process can provide victims and members of the affected community with opportunities to tell the stories of their

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31. Dennis R O'Connor, *Report of the Walkerton Inquiry. Part II: A Strategy for Safe Drinking Water* (Toronto: Queen's Printer, 2002).

32. Johns, "The Walkerton Inquiry and Policy Change", *supra* note 25 at 214–43; Winfield, *Blue-Green Province*, *supra* note 12 at 124–34.

33. See the *Safe Drinking Water Act*, SO 2002, c 32 and the *Clean Water Act*, SO 2006, c 22. See also Dennis R O'Connor & Freya Kristjanson, "Some Observations on Public Inquiries" (Canadian Institute for the Administration of Justice Annual Conference, 10 October 2007), online: <[www.ontariocourts.ca/coa/en/ps/speeches/publicinquiries.htm](http://www.ontariocourts.ca/coa/en/ps/speeches/publicinquiries.htm)>.

34. Salter, "The Complex Relationship", *supra* note 26 at 189–94.

35. John Thibault & Laurens Walker, "A Theory of Procedure" (1978) 66:3 Cal L Rev 541.

36. See Paul R Bélanger, *Report of the Elliot Lake Inquiry* (Toronto: Queen's Printer, 2014).

own experiences and losses through a disaster on the formal record.<sup>37</sup> In the case of the Walkerton Inquiry, for example, Justice O'Connor has noted that "[i]t was very important in this town, at this time, to have a judge listen to their story."<sup>38</sup> To this end, the first public meeting of the inquiry focussed on the commissioner hearing directly from the victims about the impact of the disaster on their lives. This is again a formal acknowledgement of the significance of the event, and its impacts on individuals and community members. Finally, an inquiry process can contribute to bringing closure to the events under study. As noted earlier, the roles of those responsible are recorded on the public record, and pathways to prevent similar disasters in the future are identified. The identification and implementation of these types of measures can be a very important consideration in the mind of survivors and the families of victims.<sup>39</sup> For the purposes of this paper, the justice-seeking function of inquiries is defined to include these wider functions related to the acknowledgement of the significance of events, and their potential contributions to grieving, healing and closure in the affected communities.

## II. LAC-MÉGANTIC: A SERIES OF QUASI-INQUIRIES

In the case of Lac-Mégantic, there have been several formal and informal investigations of the disaster, but no formal inquiry has ever been mandated under the *Inquiries Act*, or under the inquiries provisions of the *Railway Safety Act*.<sup>40</sup> The studies that have taken place include the investigation of the accident by the TSB, two studies by the House of Commons Standing Committee on Transportation, Infrastructure and Communities (SCOTIC), audits of Transport Canada's railway safety regime by the Auditor General of Canada, and the

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37. Liora Salter, "The Public of Public Inquiries" in Laurent Dobuzinskis, Michael Howlett & David Laycock, eds, *Policy Analysis in Canada: The State of the Art* (Toronto: University of Toronto Press, 2007) at 7 [Salter, "The Public of Public Inquiries"].

38. O'Connor & Kristjanson, *supra* note 33. The role of the inquiry from the perspective of the victims and survivors has been highlighted by many other observers. See Johns, "The Walkerton Inquiry and Policy Change", *supra* note 25 at 235; Colin N Perkel, *Well of Lies: The Walkerton Tragedy* (Toronto: McClelland and Stewart, 2002); Ratushny, *supra* note 17 at 45.

39. See Kim P Stanton, *Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies* (DJS Thesis, Faculty of Law, University of Toronto, 2010), online: <[tspace.library.utoronto.ca/bitstream/1807/24886/1/Stanton\\_Kim\\_P\\_201006\\_SJD\\_thesis.pdf](http://tspace.library.utoronto.ca/bitstream/1807/24886/1/Stanton_Kim_P_201006_SJD_thesis.pdf)>. See also Salter, "The Public of Public Inquiries", *supra* note 37.

40. *Railway Safety Act*, RSC 1985, c 32, s 40(1).

reports of the Québec Coroner's Office on the disaster.<sup>41</sup> There were also studies by the Canadian Centre for Policy Alternatives, academic researchers, and ongoing investigative coverage by a variety of media outlets, including the *CBC/Radio-Canada*, and the *Globe and Mail* and *Toronto Star* newspapers. Civil litigation has been initiated around the disaster, as well as criminal investigations. These investigations have produced important results, but all have been subject to significant limitations, particularly relative to what could have been achieved by a formal inquiry. None involved public testimony on the part of the principal actors involved in the disaster, or had complete access to information and documents. Their overall findings, although extensive, are fragmented, and the recommendations have not been integrated or consolidated.

The House of Commons Standing Committee on Transport, Infrastructure and Communities (SCOTIC) undertook two studies of the transportation safety regime. The first was completed towards the end of the Conservative Government in March 2015<sup>42</sup> and then an "update," focussed specifically on rail safety, was completed in June 2016,<sup>43</sup> following the October 2015 election. However, neither study focussed specifically on the Lac-Mégantic disaster. Rather, the disaster was treated as context for wider studies of marine, air and rail safety undertaken by the Committee. The studies did not include testimony from the principal actors involved in the tragedy, representatives of the victims and survivors, or academic or non-governmental researchers studying the railway safety regime. As is typically the case with parliamentary committee's inquiries,<sup>44</sup> the depth and scope of the Committee's work was also constrained by partisan considerations, given the Conservative and then Liberal governments' majorities on the

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41. Bureau du coroner du Québec, Press Release, «Déraillement de train mortel à Lac-Mégantic. Dépôt des rapports du coroner», 7 October 2014, online: <[www.coroner.gouv.qc.ca/medias/communiqués/detail-dun-communiqué/depot-des-rapports-du-coroner.html](http://www.coroner.gouv.qc.ca/medias/communiqués/detail-dun-communiqué/depot-des-rapports-du-coroner.html)>.

42. House of Commons, Standing Committee on Transport, Infrastructure and Communities (SCOTIC), *Review of the Canadian Transportation Safety Regime — Transportation of Dangerous Goods and Safety Management Systems* (Ottawa: House of Commons, 2015) [SCOTIC, *Review of the Canadian Transportation Safety Regime*].

43. House of Commons, Standing Committee on Transport, Infrastructure and Communities (SCOTIC), *An Update on Rail Safety* (Ottawa: House of Commons, 2016) [SCOTIC, *An Update on Rail Safety*].

44. Ratushny, *supra* note 17 at 114–20.

Committee and the apparent desire of both governments to avoid a specific study of the Lac-Mégantic disaster. That said, both reports highlighted concerns about Transport Canada's approach to safety regulation, particularly the role of the Safety Management System (SMS) regime versus direct inspection and regulation. Some Committee members did conduct a site visit to Lac-Mégantic as part of the June 2016 study and met informally with community members and officials.<sup>45</sup>

The Canadian Centre for Policy Alternatives (CCPA) undertook a number of studies on the railway safety regime in the aftermath of the disaster,<sup>46</sup> but had no capacity to compel testimony or demand access to documents and information other than those that can be requested under the *Access to Information Act*. The Centre, working in conjunction with the University of Ottawa Faculty of Law, hosted a conference on the Lac-Mégantic disaster in December 2016,<sup>47</sup> with the specific intent of giving voice to victims and survivors, as well as media, academic and non-governmental researchers working on railway safety, but the conference made no pretence of being a substitute for the profile and legitimacy of a formal inquiry.

A number of media outlets have followed the Lac-Mégantic story closely since the time of the disaster, including the *Globe and Mail*, the *Toronto Star*, *CBC/Radio-Canada*, the *National Observer*, and *DeSmog Canada*. However, all were also subject to the same constraints as those suffered by the CCPA in terms of status, legitimacy, and ability to compel participants in the events surrounding the disaster to speak on or off the record. Similarly, media outlets' access to documents and information was limited to what can be obtained under the *Access to Information Act*. That legislation limits access to third party documents, like railway SMS plans, to situations where those third parties agree to access.<sup>48</sup>

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45. SCOTIC, *An Update on Rail Safety*, *supra* note 43.

46. Campbell, "Willful Blindness?" *supra* note 2; Bruce Campbell, *The Lac-Mégantic Disaster: Where Does the Buck Stop?* (Ottawa: Canadian Centre for Policy Alternatives, 2013).

47. See University of Ottawa, Faculty of Law, Common Law Section, "Have the Lessons of the Lac-Mégantic Rail Disaster Been Learned?" (8 December 2016), online: <commonlaw.uottawa.ca/en/events/lac-MéganticRail>.

48. *Access to Information Act*, RCS 1985, c A-1, s 20 of the Act does permit the release of third-party information held by the government if it is determined to be in the public interest to do so s 20(6). Transport Canada has so far declined to invoke this provision in relation to railway SMS plans.

Perhaps the closest thing to a formal inquiry has been the work of the TSB. The Board conducted an extensive investigation into the Lac-Mégantic disaster and the events leading up to the disaster. In its report the Board identified a series of underlying failures on the part of the MMA Railway and Transport Canada, and made extensive recommendations regarding the railway safety regime.<sup>49</sup> The Board was established in 1990<sup>50</sup> as a form of permanent inquiry into transportation (rail, marine and air) occurrences.

The TSB has substantial investigative authority with respect to transportation accidents and occurrences. Where accidents or incidents do occur, the Board has the ability to interview witnesses as well as company and government personnel, and examine company, vehicle, government and other records. Although the TSB may grant “observer” status to persons with a direct interest in the subject matter of the investigation, and allow them to “attend” investigations, the process involves no public testimony, or cross-examination of principals in events, as would occur in a formal inquiry. The absence of a public dimension to the Board’s processes has been a point of criticism in relation to other transportation disasters involving the loss of life.<sup>51</sup> When it reports on accidents the TSB does not assign fault,<sup>52</sup> a further point of weakness relative to a formal inquiry. The Board can make recommendations to the Government of Canada based on its findings, but cannot compel the government or operators to comply with these recommendations.

The reports of the Québec Coroner dealt with the circumstances of the death of the individual victims of the Lac-Mégantic disaster, and made recommendations for the strengthening of the railway safety regime, and endorsing the recommendations already made by the TSB.<sup>53</sup>

Finally, the Office of the Auditor General of Canada (OAG) published a study of the railway safety regime in the immediate aftermath of the

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49. TSB, *Lac-Mégantic Runaway Train*, *supra* note 2.

50. *Canadian Transportation Accident Investigation and Safety Board Act*, SC 1989, c 3.

51. Ratushny, *supra* note 17 at 101–02.

52. Transportation Safety Board of Canada, *Investigation Process* (Ottawa: Minister of Public Works and Government Services, 2012) at 1, online: <[www.tsb.gc.ca/eng/enquetes-investigations/e0163.pdf](http://www.tsb.gc.ca/eng/enquetes-investigations/e0163.pdf)>.

53. Bureau du coroner du Québec, *supra* note 41.

Lac-Mégantic disaster.<sup>54</sup> The Commissioner for Environment and Sustainable Development (CESD), a branch of the OAG, had completed a related study on the transportation of dangerous goods regime in 2011.<sup>55</sup> Like the TSB, the OAG and CESD have substantial powers to access government records and documents, but they cannot compel public testimony, and their ability to access to third party documents, like SMS plans, is limited. A review of the *Railway Safety Act* was announced by Transport Canada in April 2017,<sup>56</sup> although the process for the review has yet to be fully determined, and it is not intended to serve as an inquiry into the specific events at Lac-Mégantic.

A class action lawsuit was initiated against 25 companies connected to the disaster, including the MMA Railway and its parent company Rail World, CP Rail, Irving Oil (the intended recipient of the shipment involved in the disaster), and World Fuel Services (the shipper), and the federal government, on behalf of the victims and survivors of the disaster.<sup>57</sup> However, except for CP Rail,<sup>58</sup> the suit has been settled with a \$460-million fund being established for the victims. As a result, there will be no trial, no testimony, and no release of documents as a result of the litigation. The Province of Québec has also launched a so far unresolved, civil lawsuit against CP Rail and several other firms involved in the disaster, to recover clean-up costs.<sup>59</sup>

Following a criminal investigation by the *Sûreté du Québec*, one operations manager and three operational level former MMA employees were charged with criminal negligence causing death. Three of the cases have proceeded to trial in the fall of 2017.<sup>60</sup> The investigation has

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54. Auditor General of Canada, 2013 Fall, *Report of the Auditor General of Canada to the House of Commons*, Chapter 7: Oversight of Rail Safety — Transport Canada (Ottawa: Minister of Supply and Services, 2013) [OAG, *Report of the Auditor General of Canada to the House of Commons*, Chapter 7]. Field work for the study had been completed in June 2013, just before the Lac-Mégantic disaster.

55. Canada, Commissioner for Environment and Sustainable Development, 2011 December, *Report of the Commissioner for Environment and Sustainable Development*, Chapter 1: Transportation of Dangerous Products (Ottawa: Minister of Supply and Services, 2011).

56. See Transport Canada, “*Railway Safety Act Review 2017–18*”, online: <[www.tc.gc.ca/en/reviews/railway-safety-act-review-2017-18.html](http://www.tc.gc.ca/en/reviews/railway-safety-act-review-2017-18.html)>.

57. Andy Blatchford, “Lac-Mégantic Lawsuit Says Feds Failed to Rein in Worst Railway in North America”, *The Canadian Press* (13 February 2014).

58. Eric Atkins, “CP Rail Denies Responsibility in Lac-Mégantic Disaster”, *The Globe and Mail* (2 June 2017).

59. The Canadian Press, “Quebec Targets CP Railway for Lac-Mégantic Cleanup Costs”, *The Globe and Mail* (14 August 2013).

60. The Canadian Press, “Lac-Mégantic: Trial on Criminal Negligence Charges to Proceed for Train Driver Tom Harding”, *Montreal Gazette* (5 January 2017).

been criticized for its very limited scope, especially the strategy of targeting operational level staff, as opposed to focussing on senior management and wider systemic issues.<sup>61</sup> More broadly, the shortcomings of criminal investigations in providing full understandings of the events leading up to disasters like Lac-Mégantic are well described.<sup>62</sup>

Although many of the organizations and individuals pursuing investigations into the Lac-Mégantic disaster have done outstanding work, they have each been subject to significant limitations, and therefore cannot stand as substitutes for the truth-seeking, policy evaluation and formulation and justice-seeking functions of a formal inquiry. With respect to truth seeking, none of the investigations has involved public testimony, under oath, on the part of the principals involved in the accident, to say nothing of cross-examination of their testimony by commission council, or council representing other participants in an inquiry, such as the victims. All of the efforts have been subject to limitations in terms of their ability to access information, particularly from outside of government. As a result, none has been able to provide a complete picture and analysis of the events leading up to the disaster. Rather, the understanding of these events remains fragmentary and incomplete.

The work of the TSB, Auditor General as well as CESD, SCOTIC, CCPA, and others mean that many aspects of the policy evaluation and formulation functions that might have been carried out by an inquiry have been addressed in part. However, these efforts have also been fragmented and are only partially completed. There has been no opportunity or structure for the integration of their efforts, and the dynamic engagement of the expertise of different institutions, organizations and individuals as occurred, for example, in Part II of the Walkerton Inquiry.

The third potential function of an inquiry, justice seeking, and the associated contributions to community grieving and healing have been left, with the exceptions of the work of the Québec Coroner's Office and the December 2016 University of Ottawa conference, almost completely unaddressed. None of the processes so far has given an opportunity for victims and survivors to tell their stories on the formal

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61. Eric Atkins & Verity Stephenson, "Six Former Railway Employees Charged in Lac-Mégantic Disaster", *The Globe and Mail* (22 June 2015).

62. Ratushny, *supra* note 17 at 121-23.

public record, provided the kinds of conclusive assignment of responsibility needed to begin to bring closure to the disaster, or established a definitive set of recommendations on how to prevent similar tragedies in the future.

### III. WHY WAS THERE NO COMMISSION OF INQUIRY INTO THE LAC-MÉGANTIC DISASTER?

Calls for a formal inquiry into the Lac-Mégantic disaster emerged from a number of sources in the aftermath of the event. These included groups representing victims and survivors,<sup>63</sup> the Town of Lac-Mégantic itself<sup>64</sup> and the neighbouring Municipality of Nantes, the CCPA,<sup>65</sup> and the federal New Democratic Party (NDP)<sup>66</sup> and Green Party,<sup>67</sup> and the Parti Québécois opposition in Québec.<sup>68</sup> Despite the scale and significance of the disaster, Stephen Harper's Conservative Government was steadfast in its refusals to call a formal inquiry into the disaster.<sup>69</sup> The Justin Trudeau's Liberals, for their part, were silent on the matter in the 2015 election campaign, and beyond advancing a scheduled review of the *Railway Safety Act*, have made no moves to conduct a formal inquiry into Lac-Mégantic disaster.

This paper takes a modified institutional-ideological approach<sup>70</sup> to assessing the reasons why there has been no inquiry. Under this model, four major categories of variables are considered in understanding the public policy choices made by governments. The four categories are: 1) the physical, economic and environmental landscape within which

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63. See Gagnon, *supra* note 3.

64. City of Lac-Mégantic, *supra* note 4.

65. CCPA, Press Release, "Study Calls for Independent Inquiry into Lac-Mégantic Disaster" (20 January 2015).

66. The Canadian Press, "Mulcair Pledges Inquiry into Lac-Mégantic Disaster, Rail Safety", *CBC.ca* (16 October 2015), online: <[www.cbc.ca/news/canada/montreal/mulcair-visits-lac-megantic-in-ndp-campaign-stop-1.3274610](http://www.cbc.ca/news/canada/montreal/mulcair-visits-lac-megantic-in-ndp-campaign-stop-1.3274610)>.

67. Green Party of Canada, *supra* note 6.

68. *CNW/Telbec*, *supra* note 7. The Parti Québécois had formed the Government of Quebec at the time of the disaster, but was defeated in the 2014 provincial election.

69. Seglins, *supra* note 10. Provisions of the federal *Inquiries Act*, *supra* note 13 may preclude an inquiry when the subject matter is regulated by a special law, potentially such as that establishing the TSB (Ratushny, *supra* note 17 at 124), but that rationale for not calling an inquiry was never invoked by the federal government in the Lac-Mégantic case.

70. See Winfield, *Blue-Green Province*, *supra* note 12 at 3–9. See also Doern & Toner, *supra* note 12; Hessing, Howlett & Summerville, *supra* note 12 at 105–06.



decisions have occurred; 2) underlying norms and assumptions about the role of government, and appropriate policy paradigms in the area under consideration; 3) non-state/societal actors and influences, including major interest groups, public opinion and the media; and 4) institutional structures, including the formal location of decision-making authority, and legal and constitutional status of governmental actors, and the interests of major institutional actors in the decision-making process.

Landscape and institutional factors are generally regarded as relatively fixed, while the roles of non-state actors and underlying norms and assumptions are typically more fluid. Significant changes in landscape conditions or in institutional structures can substantially alter the power relations among institutional and societal actors and result in major changes in policy direction.<sup>71</sup> More generally, significant shifts in policy are understood to be driven by convergences of circumstances, and societal and ideational factors, which lead to the displacement of normally dominant governing and policy paradigms.<sup>72</sup>

#### IV. LANDSCAPE CONSIDERATIONS

A defining context for the July 2013 events in Lac-Mégantic was the dramatic growth in the transportation of crude oil by rail in North America from the end of 2010 onwards. The shift in oil transportation patterns was driven by a multifold growth in unconventional, specifically “fracked” or “light-tight” oil production in the United States. Production of these types of oil grew in the US from less than 500,000 barrels per day in 2008<sup>73</sup> to 2.5 million barrels per day in 2013. The process was driven by technological developments in hydraulic fracturing and horizontal drilling, allowing their widespread economic use.<sup>74</sup>

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71. Winfield, *Blue-Green Province*, *supra* note 12 at 185–97.

72. See generally Frank R Baumgartner & Bryan D Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993); John W Kingdon, *Agendas, Alternatives and Public Policies* (New York: Harper Collins College Publishers, 1995); Grace Skogstad, *Internationalization and Canadian Agricultural Policy: Policy and Governing Paradigms* (Toronto: University of Toronto Press, 2008) at 3–42.

73. Gregor Erhach, *Unconventional Oil and Gas in North America* (Brussels: European Parliamentary Research Bureau, 2014), Figure 4, online: <[www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140815/LDM\\_BRI\(2014\)140815\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140815/LDM_BRI(2014)140815_REV1_EN.pdf)>.

74. Energy Information Administration, “Hydraulic Fracturing Accounts for About Half of Current US Crude Oil Production”, *Today in Energy* (16 March 2016), online: <[www.eia.gov/todayinenergy/detail.php?id=25372](http://www.eia.gov/todayinenergy/detail.php?id=25372)>.

The sudden growth in unconventional oil production, in many cases in locations not well connected to existing North American pipeline networks, led to an increased reliance on rail tank cars to move crude oil to refineries or tidewater for export. The train involved in the Lac-Mégantic disaster was itself carrying crude oil from the Bakken shale formation in North Dakota to the Irving Oil facility in Saint John, New Brunswick.

Effectively, the rapid growth in unconventional oil production outstripped both the transportation and regulatory infrastructure on both sides of the Canada–US border. Several studies on the Lac-Mégantic disaster have highlighted Transport Canada’s failure to undertake any form of assessment of the risks associated with the crude-to-rail phenomena, particularly in the context of well-known safety issues regarding older DOT-111-type tank cars, which were being brought back into service to meet the need to transport oil.<sup>75</sup>

The increase in unconventional oil production was widely seen as contributing to North American energy security. In Canada, the transportation of crude oil by rail was also emerging as a way of overcoming pipeline route and capacity limitations on oil sands production in Alberta.<sup>76</sup>

Given the centrality of the expansion of oil sands production to the Harper Government’s overall economic strategy,<sup>77</sup> there was no desire on part of the federal government to interfere with these developments. Moreover, an inquiry could lead to questions around the government’s handling of the environmental and safety risks associated with the movement of oil by rail. An inquiry might also lead to recommendations for a strengthening of regulatory regimes around these practices. The potential for an inquiry to lead to such outcomes likely made it an unwelcome option for the federal government, and the fossil fuel and railway industries.

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75. See e.g. Campbell, “Willful Blindness”, *supra* note 2.

76. Jeff Lewis, “Bitumen-Only Trains Expand Oil Sands Reach”, *Financial Post* (1 August 2014).

77. Natural Resources Canada, Press Release, “Harper Government Announces Plan for Responsible Resource Development” (17 April 2012).

## V. IDEAS AND NORMS

One of the striking factors which emerged from the Lac-Mégantic disaster was the depth of commitment within the federal public service to meta-regulatory regimes<sup>78</sup> like the Transport Canada SMS system, in situations where the federal government is the primary safety and health regulator of economic activities. These types of regimes rely on requirements that regulated entities develop internal management systems to achieve the needed health and safety outcomes. Federal regulatory oversight is then focussed on the development and implementation of these management systems, rather than direct oversight of regulated activities. Rail, marine and air transport safety are high-profile examples of such situations on the part of Transport Canada. Similar regimes are employed, for example, by Health Canada with respect to food and drug safety.

An inquiry would have been almost certain to involve discussions about the effectiveness of these types of regulatory models and potential recommendations about their future role. As it has been, the TSB's recent investigations, including the Lac-Mégantic investigation,<sup>79</sup> the OAG's audits of transportation safety<sup>80</sup> and the SCOTIC's studies<sup>81</sup> have raised serious questions about the appropriateness of the balance being struck by Transport Canada between direct regulatory oversight activities versus paper oversight through the review of SMS plans and reports. An inquiry would have likely deepened these questions, and perhaps even challenged the wisdom of the underlying regulatory model.

A second consideration relates to the role of railways in Canada as economic development infrastructure, and their close relationship to the Canadian federal government. One, the Canadian Pacific Railway (now CP Rail), was the federal government's central instrument for the

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78. On meta-regulatory regimes, see Neil Gunningham, "Regulatory Reform and Reflexive Regulation: Beyond Command and Control" in Éric Brousseau, Tom Dedeurwaerdere & Bernd Siebenhuner, eds, *Reflexive Governance for Global Public Goods* (Cambridge, MA: MIT Press, 2012) 85.

79. TSB, *Lac-Mégantic Runaway Train*, *supra* note 2; TSB, *Aviation Investigation Report A13W0120: Engine failure after takeoff and collision with terrain, Buffalo Airways Ltd*, 27 April 2015; TSB, *Watchlist 2016 – Safety Management and Oversight*, online: <[www.bst-tsb.gc.ca/eng/surveillance-watchlist/multi-modal/2016/multimodal-01.pdf](http://www.bst-tsb.gc.ca/eng/surveillance-watchlist/multi-modal/2016/multimodal-01.pdf)>.

80. See Auditor General of Canada (OAG), 2012 Spring, *Report of the Auditor General of Canada to the House of Commons*, Chapter 5: Oversight of Civil Aviation — Transport Canada (Ottawa: Minister of Supply and Services, 2012); OAG, *Report of the Auditor General of Canada to the House of Commons*, Chapter 7, *supra* note 54.

81. SCOTIC, *Review of the Canadian Transportation Safety Regime*, *supra* note 42.

colonization of the Canadian west, and another, Canadian National Railways, was a federally owned Crown corporation until 1995. These relationships have produced a high degree of deference on the part of the federal government towards the railways, and expectations of high levels of autonomy in the railway sector.<sup>82</sup>

## VI. SOCIETAL ACTORS AND FACTORS

The strongest calls for inquiry came from victims and survivors' groups within the community of Lac-Mégantic itself. These calls were endorsed by the Town of Lac-Mégantic, and the neighbouring Municipality of Nantes.<sup>83</sup> The community's calls for an inquiry were supported by the Canadian Centre for Policy Alternatives, members of the academic community,<sup>84</sup> and some federal and Québec opposition parties. The *Union des municipalités du Québec*, for its part, called for strengthened oversight of railway safety, but did not specifically call for an inquiry. Railway unions, and municipalities outside of Québec that saw themselves as being at risk for accidents like that in Lac-Mégantic due to the location of major freight rail corridors,<sup>85</sup> took similar positions. The disaster and a series of similar, non-fatal incidents involving the transportation of oil by rail<sup>86</sup> initially drew substantial media attention in Québec and across Canada.

Although successful in garnering some political support for an inquiry, the victims' groups were not able to generate the kind of intense mobilization of demands for a formal inquiry that occurred in the Walkerton case. Lac-Mégantic's location, a two- to three-hour drive from the major media centres in Montréal and Québec City, and even more distant from major anglophone media centres in Toronto and Ottawa, made sustaining media interest challenging. In addition, in the Walkerton case, the victims' groups benefitted from the early engagement of the Toronto-based Canadian Environmental Law Association (CELA), a legal aid clinic specializing in environmental and social

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82. Grant Robertson & Jacqui McNish, "Why Towns Are Powerless to Stop Another Disaster Like Lac-Mégantic", *The Globe and Mail* (4 December 2013).

83. Municipality of Nantes, *supra* note 5.

84. See Mark Winfield, "Opinion: One Year After Lac-Mégantic, Changes to Railway Safety Appear Mostly Cosmetic", *Montreal Gazette* (19 August 2014).

85. Jessica McDiarmid, "John Tory and Councillors Press Feds for Tougher Rail Safety Measures", *Toronto Star* (4 April 2015).

86. Winfield, "The Lac-Mégantic Disaster", *supra* note 2 at Figure 1.

justice law. CELA assisted the community in organizing its calls for an inquiry and ultimately represented the main victims' group in the inquiry.<sup>87</sup> There were no comparable supports available to the Lac-Mégantic victims.

Although the Canada's major railways, including Canadian National Railways and the Canadian Pacific Railway, never took public positions on the issue of a formal inquiry into the Lac-Mégantic disaster, it is unlikely that they would have supported such a development. An inquiry, particularly one with a mandate to consider the contributions of the underlying policy and regulatory framework for railway safety to the disaster, could lead to lines of inquiry with respect to Transport Canada's relationship with other railway operators, and safety and operating practices within those railways. These types of questions about the systemic origins of the accident would likely have been strongly supported by union and public participants in an inquiry. In addition to the revelation of potentially embarrassing details and incidents regarding the railways practices and relationship with Transport Canada, an inquiry could make recommendations for significant changes to the existing regulatory regime, one which the railways strongly support.<sup>88</sup> Such recommendations could go beyond those made by SCOTIC, the TSB and OAG in terms of changes to the existing regulatory and institutional framework around railway safety. Substantial constituencies from among those engaged in an inquiry could be mobilized in their support, as happened with the recommendations from Part II of the Walkerton Inquiry.<sup>89</sup>

## VII. INSTITUTIONAL STRUCTURES AND ACTORS

It is likely that the strongest opposition to a formal inquiry came from within the Government of Canada itself. As Canada's railway safety regulator, and more specifically the regulator of the activities of the MMA Railway, the Canadian Department of Transport's role in the disaster was an immediate focus of media and political attention.<sup>90</sup>

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87. Johns, "The Walkerton Inquiry and Policy Change", *supra* note 25 at 218.

88. See e.g. Canadian National Railway, Press Release, "CN Continues to Strengthen its Safety Management System to Improve Safety of Dangerous Goods Transportation" (25 March 2014).

89. See Johns, "The Walkerton Inquiry and Policy Change", *supra* note 25 at 214–43, Winfield, *Blue-Green Province*, *supra* note 12 at 129–34.

90. See e.g. Mike DeSousa, "In Lac-Mégantic Disaster's Wake, Watchdog Claims Ministry Failed to Spend Millions in Rail Safety Funds", *National Post* (12 July 2013).

The disaster was widely described as a catastrophic regulatory failure on the part of the Department.<sup>91</sup> Behind this were long-standing questions regarding the Department's approaches to railway safety and its relationships with the railway companies whose activities it was supposed to oversee.<sup>92</sup> Both the Department's specific interactions with the MMA Railway, and its wider approach to its safety regulatory responsibilities would have been an inevitable focus of intense—and from the Department's perspective unwelcome—public scrutiny before an inquiry. An inquiry could also make recommendations for major changes to the institutional and regulatory arrangements around railway safety, potentially significantly affecting the Department's role and mandate. In these circumstances, the Department is likely to have opposed an inquiry strongly, arguing that the TSB's investigations of the incident were sufficient.

The TSB and OAG for their part were likely neutral on the issue of a formal inquiry. They certainly would have been called upon to provide expert testimony and participate in the formulation of recommendations, and may have welcomed the possibility of public testimony, under oath, on the part of the principals involved. Other federal agencies and departments were also likely neutral on the question of an inquiry, given its likely overwhelming focus on the role of Transport Canada. However, there may have been concerns about the possibility of lines of inquiry into reliance of other federal agencies, particularly Health Canada, on meta-regulatory regimes,<sup>93</sup> similar in concept to the Transport Canada SMS-based system, and focussed on the establishment internal management systems by regulated firms, as opposed to direct regulatory oversight.

The Government of Québec, for its part remained silent on the issue of a formal inquiry into the disaster. The provincial government had provided support to the MMA Railway, including a 13% equity investment by the Québec pension fund, the *Caisse de dépôt et placement du Québec*. The MMA was seen as important to supporting economic activity in the region.<sup>94</sup>

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91. See e.g. Campbell, "Willful Blindness", *supra* note 2.

92. See e.g. Railway Safety Advisory Panel, *Stronger Ties: A Shared Commitment to Railway Safety* (Ottawa: Transport Canada, 2007).

93. On meta-regulatory regimes, see Gunningham, *supra* note 78.

94. Paul Delean, "Lac-Mégantic: What Is Montreal, Maine & Atlantic Railway?", *Montreal Gazette* (28 August 2013).

The situation at the political level was even less favourable to the concept of a formal inquiry. As the government of the day when the Lac-Mégantic disaster occurred, Stephen's Harper's Conservatives were likely to want to minimize the extent to which blame might be attributed to their administration. Although inquiries may be called to deflect immediate criticism of the government's handling of a specific situation or events, they do carry the potential for substantial political risks further on.<sup>95</sup> These can emerge through damaging testimony from principals and other witnesses in terms of specific decisions and actions, particularly on the part of actors at the political level. Current and past ministers, and even prime ministers, may be called to testify themselves, a situation of very high political risk, given the potential for media and public perceptions of implications of suspicion of wrongdoing on the part of the inquiry. Reliance on the TSB process, in which there could be no public testimony or involvement by political actors, and which was established as a form of standing inquiry anyway, would avoid at least some of these risks.

In the case of the Harper Government these concerns were likely reinforced by the presence of a number of senior ministers who had served as ministers in the Ontario Government of Premier Mike Harris in the 1990s. This group included Finance Minister Jim Flaherty, Treasury Board President Tony Clement, and Foreign Affairs Minister John Baird. All would have been very aware of the impact of the Walkerton Inquiry on the political fortunes of the Harris Government.<sup>96</sup> The Walkerton disaster and testimony by the Premier and several ministers at the inquiry, as well as its damaging findings, were widely seen as major factors behind the ultimate resignation of Premier Harris, and the Ontario Progressive Conservative's loss of the 2003 provincial election to Dalton McGuinty's Liberals. The prospects for an inquiry were further dimmed by the consideration that the Member of Parliament for the Lac-Mégantic area at the time of disaster, Christian Paradis, who was the Minister of Industry, declined to support the community petition demanding an inquiry.

Moreover, unlike the situation leading up to the establishment of the Walkerton Inquiry, where the Ontario Liberals and NDP were united in their calls for an inquiry, the parliamentary opposition was far less

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95. Ratushny, *supra* note 17 at 105–06; Salter, "The Complex Relationship", *supra* note 26.

96. Johns, "The Walkerton Inquiry and Policy Change", *supra* note 25 at 222–23; Winfield, *Blue-Green Province*, *supra* note 12 at 129–34.

united in its stance on the need for an inquiry into the Lac-Mégantic disaster. Interim Liberal leader Bob Rae was strongly critical of efforts by the NDP to point to the possibility of systemic failures behind the disaster from the outset.<sup>97</sup> As the architects of the SMS-based regulatory regime, through the 1999 amendments to the *Railway Safety Act* made under then Liberal Transport Minister David Collenette, the Liberal opposition may also have had reasons to be unenthusiastic about an in-depth investigation of the regime, likely including its origins and implementation prior to the 2006 federal election. The 2015 Liberal election platform was noticeably silent on the issue of an inquiry and on railway safety generally.

## VIII. SUMMARY

The establishment of a formal inquiry effectively changes the institutional landscape around a public policy issue, introducing a new and potentially disruptive, if temporary, actor into the process.<sup>98</sup> Existing institutions and dominant societal interests tend to have strong reasons to resist the establishment of inquiries for those reasons alone. In the case of Lac-Mégantic, Transport Canada and the major railways were strongly invested in the existing regulatory regime, and had little interest in setting in motion processes that might lead to major changes in the existing governing and policy paradigms around railway safety.

Beyond this there was strong opposition at political level with the federal government, particularly in light of the experience of key figures in the Harper Government with the Walkerton Inquiry while in government in Ontario. There was also a secondary consideration of a desire not to interfere with the role of crude-to-rail in the North American unconventional oil boom, including the expansion of the Canadian oil sands. The split among the major federal opposition parties, with the NDP and Greens supporting an inquiry, but the Liberals at best silent on the matter, further weakened the prospects for an inquiry. The silence of the Government of Québec had a similar impact. Against these factors, the victims of the disaster had little hope of success in their quest for an inquiry.

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97. "Lac-Mégantic Explosion: Thomas Mulcair's Criticism of Tories Sparks Controversy", *Huffington Post Canada* (8 July 2013).

98. Ratushny, *supra* note 17 at 17.



## CONCLUSION

There have been a variety of investigations and studies into the Lac-Mégantic disaster. Significant work has been undertaken by SCOTIC, the TSB, OAG, the Québec Coroner's Office, media outlets, non-governmental organizations and academics, but none has been able to fulfill all of the functions of a formal inquiry. None has been able to provide a full understanding of the events behind the disaster (truth seeking), an opportunity to evaluate the policy and legislative regime in place at the time of the disaster (policy evaluation), and formulate recommendations to prevent future catastrophes (policy formulation), and to provide recognition, justice and some form of closure to the survivors and victims (justice seeking). The picture that has emerged through these efforts is therefore ultimately fragmentary, and lacks the essential truth- and justice-seeking elements of public testimony and cross-examination, under oath, of the principal actors involved in the disaster and events leading up to it, as well as access to all of the relevant documents and records.

The story has implications for the role of inquiries itself. In this case, the argument for a formal inquiry was a victim of the success of previous inquiries into similar events. In the end, from the viewpoint of the political decision makers involved, the downstream political risks of testimony from officials and ministers, and adverse findings, outweighed any desire to understand the causes of the disaster and how to prevent future disasters, provide closure for victims and survivors, or even to deflect short-term criticism of the government's handling of the tragedy.

Sadly, the moment for an inquiry into the Lac-Mégantic disaster has likely now passed. The memories of the key participants may be fading, and important documents and records lost or destroyed. In the result, we are left with an incomplete understanding of why and how the events of July 6, 2013 happened and, despite the enormity of the disaster, no justice or closure for the community of Lac-Mégantic.