

## LETTERS RE: CABINET PRIVILEGE

### APPENDIX H (III)

# SMITH LYONS

BARRISTERS & SOLICITORS

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November 29, 2000

Mr. Paul Cavalluzzo  
The Walkerton Inquiry  
22<sup>nd</sup> Floor  
180 Dundas Street West  
Toronto, Ontario  
M5G 1Z8

Dear Mr. Cavalluzzo:

**Re: The Government of Ontario's Claim of  
Cabinet Privilege and Public Interest Immunity**

I am writing to you to follow up on discussions that you, Ron Foerster, Frank Marrocco and I had on Monday, November 20, 2000, regarding the most appropriate procedure to deal with the Government of Ontario's claim that certain documents sought by The Walkerton Inquiry are subject to Cabinet privilege and/or public interest immunity. You indicated to us that you were considering stating a case to the Divisional Court in order to obtain a determination as to whether the Government of Ontario has waived its right to claim Cabinet privilege and/or public interest immunity in respect of any documents sought by The Walkerton Inquiry by reason of the wording of the Order in Council establishing the Commission of Inquiry on June 13, 2000.

As you know, it is our client's position that the issue as to whether claims by the Government of Ontario that certain documents are subject to Cabinet privilege or public interest immunity is a matter which ought to be dealt with under the terms of the search warrants which have been issued by The Walkerton Inquiry. The search warrants specifically contemplate that the final determination of this issue will be made by the Judge who issued the search warrants at a hearing in private, as is the normal practice prescribed by the Criminal Code of Canada. It is, accordingly, our client's strongly held view that the issue which you wish to have determined by the Divisional Court should be determined by Justice Durno in accordance with the procedure prescribed by your own search warrants.

**SMITH LYONS**

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We discussed a number of alternative procedures and in the interests of ensuring that the Walkerton Inquiry does not become delayed by time-consuming and lengthy court applications our client is prepared to deal with this issue in the following manner:

Counsel for the Attorney General of Ontario and the Commissioner of The Walkerton Inquiry will apply to Justice Dumo for an order under section 4(b) of the search warrants allowing Commission Counsel to inspect all documents for which a claim of Cabinet privilege and/or public interest immunity has been advanced. This will enable you and your legal staff to determine in an expeditious manner which, if any, of these documents you wish to enter into evidence at the Inquiry in order to fulfil the Commission of Inquiry's mandate. Justice Dumo's order will make it clear (as do the terms of the search warrants) that the review of these documents by Commission Counsel does not constitute a waiver of the Government's claim for Cabinet privilege and/or public interest immunity and the document will remain privileged and inadmissible unless:

1. the Government of Ontario consents to its admission into evidence at The Walkerton Inquiry; or
2. Justice Dumo, after holding a hearing as contemplated under section 3(c) of the search warrant, dismisses the claim of Cabinet privilege and/or public interest immunity and orders the document to be admitted into evidence at The Walkerton Inquiry.

As discussed, we are optimistic that in respect of those documents that Commission Counsel wishes to utilize at the Inquiry we will either agree to waive the privilege otherwise attaching to them or agree on an alternative means of introducing into evidence the information contained in the documents in a manner that does not actually waive the privilege on the document itself (e.g. through affidavit evidence or document summaries).

In the event we are unable to agree on all of the documents which you wish to introduce into evidence at the Inquiry a hearing will be held before Justice Dumo to determine the issue including the "threshold issue" as to whether the Order in Council precludes the Government from making a claim for Cabinet privilege and/or public interest immunity in respect of any documents sought by the Inquiry.

Notwithstanding that your search warrants provide that the hearing before Justice Dumo is to be held in private we understand that you wish to notify all parties with standing at the Inquiry of the date and place of the hearing and it will be left to Justice Dumo to decide whether the hearing of the waiver issue should proceed in private or in open court.

As we have indicated to you in the past, the Government of Ontario remains committed to cooperating fully with The Walkerton Inquiry, particularly in relation to the production of documents and witnesses, however, the Government believes there is a strong public interest which requires it to protect Cabinet privilege and public interest immunity to the fullest extent possible.

SMITH LYONS

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Please let me know if the procedure outlined above is satisfactory to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Glenn Hainey', with a long horizontal stroke extending to the right.

Glenn Hainey

GH/iw

THE WALKERTON INQUIRY

LA COMMISSION  
D'ENQUÊTE WALKERTON

December 4, 2000

Smith Lyons  
Barristers & Solicitors  
Suite 5800 Scotia Plaza  
40 King Street West  
Toronto, Ontario  
M5H 3Z7

Attention: Mr. Glenn Hainey

Dear Sir:

**RE: The Government of Ontario's Claim of Cabinet Privilege and Public Interest Immunity**

Thank you for your letter of November 29, 2000 regarding the above-noted matter.

We have the following comments concerning your letter:

- i) In regard to the 1<sup>st</sup> paragraph on page 2, we assume that Commission Counsel including our legal staff will be permitted to inspect all documents for which a claim of Cabinet privilege and/or public interest immunity has been claimed.
- ii) In respect of the hearing before Justice Durno to resolve the "threshold issue" of whether the Government is precluded from asserting Cabinet privilege and/or public interest immunity, we assume that this hearing will be in public because it raises issues of public importance. As well, we will give notice to other parties to give them an opportunity to intervene before Justice Durno.

- iii) In the event that Justice Durno is asked to resolve the privilege and/or immunity issue in the context of a particular document, notice will be given to the other parties. Justice Durno will decide whether intervenor status will be granted and whether the hearing will be in camera.

Because of the general importance of this protocol, the Commissioner will call upon the parties for their views in writing within a limited time period. We feel this is important so that the procedure is transparent and open. After receiving these submissions, Commission Counsel will be in a position to finally agree upon this protocol.

We thank you for your co-operation and creativity in attempting to resolve this difficult issue.

Yours very truly,

Paul J.J. Cavalluzzo  
Commission Counsel  
/nc

THE WALKERTON INQUIRY

LA COMMISSION  
D'ENQUÊTE WALKERTON

December 20, 2000

Smith Lyons  
Barristers & Solicitors  
Suite 5800 Scotia Plaza  
40 King Street West  
Toronto, Ontario  
M5H 3Z7

Attention: Mr. Glenn Hainey

Dear Sir:

**RE: The Government of Ontario's Claim of Cabinet Privilege and Public Interest Immunity**

Further to my letter of December 04, 2000 this is to confirm our understanding that the Commissioner will not call upon the parties for their written views in accordance with the penultimate paragraph in that letter until such time as the parties reach an impasse in regard to any document which Commission Counsel wishes to introduce into evidence. It is agreed that until such time as the Commissioner has received and reviewed these written representations, Commission Counsel will not be in a position to finally agree upon this protocol. The inspection by Commission Counsel of all documents for which a claim of Cabinet privilege and/or public interest immunity has been advanced shall not be construed in any way as an agreement to the protocol.

Finally, we agree that any application to Justice Durno to resolve any dispute between the parties in accordance with the protocol which is finally agreed upon will be deemed to be a Rule 14.01 application.

Once again, thank you for your cooperation in this matter.

Yours truly,

Paul J.J. Cavalluzzo  
Commission Counsel  
/nc

