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August 2, 2001

VIA COURIER

Mr. Ron Foerster
The Walkerton Inquiry
180 Dundas Street West
22nd Floor
Toronto, Ontario
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Dear Mr. Foerster:

Re: Walkerton Inquiry

Thank you for the opportunity to comment on Mr. d'Ombrain's Discussion Paper on the Machinery of Government for Safe Drinking Water in Ontario. Various Ministries have reviewed the paper and have provided a number of comments in response to specific paragraphs (attached). There are a number of factual errors in Mr. d'Ombrain's Discussion Paper which ought to be corrected. In particular, we have the following three key areas of concern: government decision-making; agency structure and accountability; and Ontario's public health legislative scheme. These factual errors appear to have erroneously shaped Mr. d'Ombrain's conclusions.

For example, the government's decision making process has been misdescribed particularly as reflected in paragraphs 291-293, 296, 299, 300-301 and 305 of the paper. These errors undermine the conclusions and some of the paper's recommendations including those identified in paragraphs 403-405 and 442.

The paper also incorrectly describes the structure and accountability of provincial agencies, boards and commissions as indicated in paragraphs 321-323, 327, 335 and 348-349.

In addition, much of what is contained in the sections entitled *Transparency* and *Crisis Management* at pages 102-104 of the paper inappropriately subsumes Ontario's public health

legislative scheme, public health authorities and the Ministry of Health and Long-Term Care's role in administering the scheme.

The paper also disregards the statutory mandate and the roles and responsibilities of public health authorities and the Minister of Health and Long Term Care under the *Health Protection and Promotion Act* ("HPPA") (the "*Act*"). Paragraphs 394 and 395 are examples of the critique within these sections that disregards the clear statutory mandate within the *Act* and the roles and responsibilities set out therein for public health authorities and the Minister of Health and Long-Term Care.

The following overview correctly describes the government's decision making process; agency structure and accountability; and Ontario's public health legislative scheme. The Commission may wish to review the following overview when contrasting Mr. d'Ombrain's Discussion Paper.

1. Government Decision-Making

a) Cabinet Decision-Making:

As the ultimate decision making body of government, Cabinet establishes the strategic directions that provide the framework for day-to-day operational decisions made by the various levels of government and the Ontario Public Service. It makes all the key policy, financial, resource and statutory decisions of government.

The Priorities, Policy and Communications Board ("PPCB") recommends to Cabinet the government's overall strategic directions and key priorities and provides a forum for integrated discussion of policy, legislative, communications and fiscal strategies.

Policy committees ensure a strategic and co-ordinated approach to policy discussion and decisions in order to achieve the government's policy objectives and to ensure consistency and cohesion in the implementation of the government's agenda as determined by PPCB.

Policy committees also ensure co-ordination and linkages with related initiatives and sectors, making policy recommendations to Cabinet and by setting the policy framework for the assessment of fiscal and program implications by Management Board of Cabinet ("MBC").

Items with financial and resource implications (except for capital implications) proceed to MBC for approval.

Capital decisions are made by the Cabinet Committee on Privatization and SuperBuild ("CCOPS"), with the support of the Ontario SuperBuild Corporation ("SuperBuild"). CCOPS also reviews and makes recommendations to Cabinet on privatization matters, with the support of SuperBuild.

The Statutory Business Committee of Cabinet ("SBC") deals with the majority of statutory decisions made by cabinet (i.e. draft legislation, regulations, petitions to the Lieutenant Governor, and certain Orders-in-Council).

b) Central Agency Roles and Responsibilities:

Strategic and integrated decision-making requires ministries to consider the policy, legislative, fiscal and communications facets of issues and initiatives from the earliest stages of policy development to ensure a comprehensive discussion by Cabinet and its Committees.

This requires strong working relationships among the central agencies and with line ministries throughout the cabinet submission development process to ensure that a thorough and balanced analysis is provided to decision makers.

In addition, there is increasing need for horizontal policy development, multi-ministry initiatives, and sector-based approaches. This requires increased emphasis on integration within and across government to develop options and recommendations that facilitate effective decision-making.

Staff of the central agencies work together as a team to assess the various implications of a cabinet submission to provide integrated and comprehensive advice to Cabinet committees.

Central agencies co-ordinate and provide support to the Cabinet decision-making system and policy development process. They include Cabinet Office ("CO"), Management Board Secretariat ("MBS"), Ministry of Finance ("MOF") and SuperBuild.

CO staff provide policy advice and analysis to the Premier and policy committees of Cabinet. CO staff also liaise with their MBS, MOF and SuperBuild counterparts on a regular basis on all policy under development that may have fiscal or financial implications.

MBS provides strategic advice to support MBC decision-making and provides ministries with advice on financial and resource implications.

MOF provides Cabinet and its committees with advice and assistance in setting and achieving the government's fiscal plan, taxation, and economic policies and the implications of ministries' proposals on the government's fiscal plan.

SuperBuild supports CCOPS and provides advice on all initiatives related to capital and privatization.

c) Policy Process:

The policy process has 7 stages:

1. Setting the policy agenda – as determined by PPCB

2. Policy development - Ministries develop policy proposals in consultation with central agency advisors and relevant ministries throughout the process.

- CO helps to ensure that the approach being taken in development of the policy is consistent with the corporate policy agenda, the government's stated priorities and the fiscal, legislative and communications agenda.

- CO ensures that the appropriate linkages are being made with: the communications planning process; MBS, MOF and SuperBuild regarding potential fiscal, policy, and financial/resource implications; and other relevant ministries.

- PO may provide advice on whether proposals are consistent with the government's overall priorities and communications objectives.

3. Policy review – Ministries' cabinet submissions are forwarded to CO for a co-ordinated review by central agencies prior to review at the appropriate policy committee. CO staff provide context and summarize the ministry proposal. The sponsoring Minister and senior ministry officials speak to the proposals. Policy committees make recommendations to Cabinet for approval.

4. Financial Approval – Policy items with financial or resource implications require MBC and/or CCOPS approval.

5. Cabinet Approval - The recommendations of policy committee(s) and the MBC and/or CCOPS minutes proceed to Cabinet for decision. Under the doctrine of collective responsibility, all ministers support all decisions taken by Cabinet.

6. Implementation Approvals/Statutory Drafting – Approved policy items that require legislation or regulations must go to Statutory Business Committee for review for consistency with Cabinet direction and technical correctness prior to proceeding to Cabinet for approval.

7. Operationalizing - It is the ministry's responsibility to implement the approved policy direction, along with the related communications plan.

2. Agency Accountability Structure

The Agency Establishment and Accountability directive provides a policy framework of administrative and financial responsibilities for the government and classified agencies. The directive deals only with the management of the organization of agencies. It does not attempt to exert control over the area of responsibility of agencies.

The directive, as a policy framework, is also the basis on which legislation or regulation to establish a new agency should be based. Where legislation differs from the provisions of the directive, the statutory requirements are paramount. The legislation should set out the responsibilities and authority of both the agency and the minister, recognizing the agency's

operational responsibility to deliver the service on behalf of government and the minister's accountability to Legislature to answer for the performance of the agency in relation to its legal mandate.

The directive intentionally avoids the term "arm's length" because the term fails to convey the clarity required to understand the accountability relationship between the government and an agency.

The directive speaks to the Minister's responsibility to "inform an agency's Chair of the government's priorities and broad policy directions for the agency." The directive also recognizes the need to provide overall strategic direction to allow the agency to fulfil its statutory mandate. The government's obligation to answer for the performance of the agency is achieved through four key accountability tools: an annual business plan, a Memorandum of Understanding ("MOU"), an annual report, and audited financial statements (where required).

The directive does not apply to agencies of the Legislature nor those agencies that do not meet the four "tests" of an agency:

- majority provincial appointments;
- established by legislation or regulation;
- accountable to government; and
- responsibility to perform a public function or service.

The directive provides clarity on the differing responsibilities of all parties involved in the agency – government relationship. In general terms, the roles require the Minister to provide the strategic framework in which the agency carries out its statutory mandate. The directive clearly leaves the operations of the agency to the agency. Ontario has placed particular emphasis on recognizing that appointees to regulatory and adjudicative agencies make case decisions impartially and free of direction from government.

The Ontario Government has given considerable attention to the issue of accountability. Several new directives and policies were developed or revised to ensure effective management and accountability in the way in which public services are delivered. These directives include:

- Accountability Directive
- Transfer Payment Accountability Directive
- Agency Establishment and Accountability Directive
- Business Planning Directive
- Expenditure Management Directive
- Risk Assessment Policy
- Controllership Capacity Check
- Delegation of Authority (nearly completed)

- Staffing Operating Policies
- Alternative Service Delivery Framework

While the paper draws a distinction between accountability and answerability, the paper notes the necessity for Ministers to be accountable and responsive to problems when problems arise in an agency.

In Ontario, the Ontario Public Service Accountability Directive defines accountability as the obligation to answer for results. The minister has the accountability to the Legislature for the performance of the agency. The minister fulfils this accountability by approving the MOU and the business plan, receiving and tabling the annual report in the Legislature and by recommending or taking corrective action if required.

3. Ontario's Public Health Legislative Scheme

The responsibilities of local boards of health and the ministry are enunciated clearly within Ontario's comprehensive legislative scheme under the *Act.* The purposive provisions of the *Act*, set out within section 2, are clearly stated to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease, and the promotion and protection of the health of the people of Ontario. The mandate of public health authorities and the paramountcy of the principle of the protection of the public health run throughout the provisions of the *Act*.

The medical officer of health is an important statutory official under the *Act* who possesses significant authority under the legislation to act, among other things, to prevent the spread of disease, decrease the effects of health hazards and promote the health of Ontarians. (See, for example. sections 13, 22, 35 of the *Act*). The medical officer of health reports directly to the board of health on issues relating to public health concern and the employees of the board are subject to the direction of and are responsible to the medical officer of health under section 67 of the *Act*.)

Every medical officer of health must inspect or cause the inspection of the health unit served by him or her for the purpose of preventing, eliminating and decreasing the effects of health hazards in the health unit under section 10 of the *Act*. It is the duty of every medical officer of health to keep himself or herself informed in respective matters related to occupational and environmental health pursuant to section 12 of the *Act.*

Where a complaint is made to a board of health or a medical officer of health that a health hazard related to occupational or environmental health exists in the health unit, the medical officer of health must notify the ministry of the Government of Ontario having primary responsibility in the matter and in consultation with that ministry, must investigate the complaint under section 11 of the *Act*. Under section 19 of the *Act*, the medical officer of health has the power to cease or cause the seizure of a substance, thing, plant or animal other than man where the requirements of the provisions within section 19 are met.

Under section 13 of the *Act*, the medical officer of health may make a written order in respect of a health hazard, where the requirements of section 13(2) are met. Such an order, pursuant to section 13(4) of the *Act* may include, but is not limited to:

(a) requiring the vacating of premises;

(b) requiring the owner or occupier of premises to close the premises or a specific part of the premises;

(c) requiring the placarding of premises to give notice of an order requiring the closing of the premises;

(d) requiring the doing of work specified in the order in, on or about premises specified in the order;

(e) requiring the removal of anything that the order states is a health hazard from the premises or the environs of the premises specified in the order;

(f) requiring the cleaning or disinfecting, or both, of the premises or the thing specified in the order;

(g) requiring the destruction of the matter or thing specified in the order;

(h) prohibiting or regulating the manufacturing, processing, preparation, storage, handling, display, transportation, sale, offering for sale or distribution of any food or thing; and

(i) prohibiting or regulating the use of any premises or thing.

As noted above, every board of health is required under the *Act* to provide or ensure the provision of health programs and services in accordance with the requirements of the *Act*, the regulations and the guidelines. Failure by a board of health to comply with the *Act* or the regulations or failure by a board to provide or ensure the provision of the required health programs and services may cause the Minister or the Chief Medical Officer of Health, if authorized, to issue a written direction pursuant to section 83 of the *Act*. The Minister's or Chief Medical Officer of Health's direction may require a board to do anything that the Minister or Chief Medical Officer of Health considers necessary or advisable. If it is the Minister's or Chief Medical Officer of Health's opinion that a board of health has failed to comply with the direction, the Minister may issue a notice of failure to comply to the board.

Other provisions within the *Act* empower the Minister or Chief Medical Officer of Health, if authorized, to act anywhere in Ontario where situations of risk to health exist pursuant to provisions 86(1), (2). In addition, the Minister or the Chief Medical Officer of Health, if authorized, has the option to ensure that where a risk to health is involved, he or she may apply to the court for an order requiring the board to take appropriate action to decrease risk in accordance with section 86.1 of the *Act*.

It is important to note that the Minister may **authorize or direct** the Chief Medical Officer of Health in writing to exercise any right or power or perform any duty granted to or vested in the Minister under sections 82, 83, 84, 85, 86, 86.1 or 86.2. It is significant that an authorization or direction pursuant to section 86.3 of the *Act* is **not a delegation**. The Minister retains his or her authority to exercise any right or power or perform any duty within the provisions set out above,

even if the Minister authorizes the Chief Medical Officer of Health to exercise any right or power set out within those provisions.

To sum up, the roles of public health officials, their powers and the role of the Minister are clearly set out under the HPPA as is the mandate of the *Act*. Much of what is contained within the *Transparency* and *Crisis Management* sections does not apply to Ontario's public health legislative scheme.

We encourage Mr. d'Ombrain to contact us if he requires any further information or clarification.

Yours very truly,

SMITH LYONS LLP

K. Lynn Mahoney

KLM/scb