FILE NO. – 94/005

REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW OF [redacted] WITH RESPECT TO INFORMATION REQUESTED FROM CERTAIN CROWN CORPORATIONS

[redacted], applied under *The Freedom of Information and Protection of Privacy Act* (the "Act") for:

> "Record of payment to lawyers or law firms for 1990, 1991, 1992 and 1993. Please describe the nature of service."

This request was submitted to the following Crown Corporations:

Saskatchewan Transportation Company
Saskatchewan Water Corporation
Crown Investments Corporation of Saskatchewan
Saskatchewan Economic Development Corporation
Saskatchewan Government Insurance
SaskEnergy
SaskTel
Saskatchewan Power Corporation

[redacted] requests, in the main, were not well received. One or two corporations provided him with a list of lawyers or law firms and the amounts paid to them for the years 1991 and 1992. Some provided nothing at all, and all took the position that

information requested for the year 1993 would not be provided until after the financial statements of the various corporations had been reviewed by the Crown Corporations Committee of the Legislative Assembly of Saskatchewan.

A number of exemptions or exceptions in the Act were relied on, but in the final analysis it would appear that there are two substantial issues.

1. Whether a Crown corporation can lawfully refuse to produce information on its day to day activities prior to those activities being made the subject of an annual report and review by the Standing Committee on Crown Corporations of the Legislature of Saskatchewan.

2. Whether a Crown corporation can properly refuse to produce information relating to the nature of legal services it has received from solicitors whose services it has engaged.

All the corporations rely upon Section 22 of the Act, the relevant portion of which provides:

> "22 A head may refuse to give access to a record that:
>
> (a) contains information that is subject to solicitor–client privilege;
>
> (b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in

> relation to a matter involving the provision of advice or other services by the agent or legal counsel;"

Now it is obvious that the rendering of an account is a communication between a solicitor and his client, albeit one the client may not be anxious or even pleased to receive, but this does not ipso facto mean that it is a privileged communication. The communications which are privileged are described in *Descoteaux v. Mierzwinski* (1982) 1 S.C.R., 860 at p. 892 by Lamer, J. of the Supreme Court of Canada as follows:

> "In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advise kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality."

In an earlier decision, *Solosky v. Government of Canada* (1980) 1 S.C.R. 821 50 CCC (2d) 495 at 508 and 509, Dickson, J. said:

> "...privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege —
>
> (i) a communication between solicitor and client;
>
> (ii) which entails the seeking or giving of legal advice, and
>
> (iii) which is intended to be confidential by the parties."

and at pages 502 and 503 he said:

> " ...it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity or in which counsel gives advice, are protected."

It seems clear from the foregoing that there is no basis for a blanket claim to privilege for the accounts rendered by solicitors to these various corporations. Privilege would only extend to such information as might appear in such accounts to meet the criteria for the privilege.

Specifically, it was held in *Regina v. Box et al* 102 Sask. R. 230 that a statement of account from a solicitor to his client was not privileged.

If, however, such a statement of account should contain some information that meets the criteria for privilege, it could be severed under Section 8 of the Act.

Insofar as subsection 22(b) is concerned, it appears to be no more than a statement of a specific application of solicitor and client privilege to legal counsel for a government institution since it refers specifically to "a matter involving the provision of advice for other services by the agent or legal counsel."

By the time the account is rendered, the advice or other services provided by the solicitor have already been rendered, so it seems logical to conclude that the account, per se, was not prepared for the purpose of rendering such advice or services.

I received a lengthy submission from Mr. Scott Banda, a solicitor, on behalf of all of the above mentioned Crown corporations, arguing that in any event no disclosure of the information requested should be required before the financial reports of the Crown corporations have been reviewed by the Standing Committee of the Legislative Assembly on Crown Corporations. His submission to me is prefaced by the following general statement as to the nature of these various corporations:

> "It bears noting at the outset of these submissions that while the present application is concerned with the issue of legal fees, in fact a much larger issue is involved, and with respect, is the issue which ought to be addressed on this application. Specifically, the question is whether information as to a Crown corporation's day to day business activities ought to be subject to disclosure, in the factual context raised here. The Head's position is the same whether the information requested relates to legal fees, salaries, profits, losses, consultant's fees and/or reports, sundry expenses, etc.
>
> The Head's position is as follows: given the unique nature of Crown corporations, those corporations ought not be required to disclose day to day financial information, regarding a current fiscal year, until their annual report has been tabled, and subjected to proper legislative review.
>
> It will be noted that the Head is not saying that the Appellant can never have this information; it is simply asking the Appellant to hold off for a short period — "wait his turn". Indeed, the Heads have provided the information requested (except relating to the nature of the legal services) for all years requested where the corporations have had their annual reports tabled and reviewed.
>
> It is crucial in this application to bear in mind the unique nature of a Crown corporation. It is submitted that the Commissioner could likely, and would

likely, come to an opposite conclusion than the one urged by the Head in this case were an "ordinary" government department involved.

In a typical government department, the Legislature retains ultimate control. The department is established to administer a distinct government program, and legislation (usually) is drafted to dictate how this is done. The department, while having an annual budget (granted on a line by line basis), essentially operates in a straight line fashion: it administers the same services on January 1st as it does on December 31st, year after year. While there will be changes, this will be due to legislative intervention. There is no, or extremely little, independence from the government of the day, and no autonomous structure except rarely. In essence, a government department is an arm of the government, and acts as such.

Standing in stark contrast are the Crown corporations, which, except for being owned by the government, share none of the normal attributes of a typical government department. These are ordinary commercial enterprises, often very large, which have a typical management structure. They can sue and can be sued in their own name. The affairs of the corporation are governed by the Board of Directors. As with any corporation, there is a fiscal year, and a profit motive. The corporation must respond to the vagaries of the market, and where a service is unprofitable, they are likely to discontinue that service. Importantly, these Crown corporations often operate in "the real world", meaning they have competitors. While there is a public accountability, these corporations operate in a distant and arms-length manner from the government.

In short, Crown corporations have a unique identity, which is more akin to a private corporation than a government department. As such, the ordinary rationale which prevails relating to government departments — that there ought to be the widest disclosure of information — should yield to the rationale more applicable in the business world — that one's corporate affairs are, for the most part, private and confidential."

Then it turns to the question of accountability by Crown corporations in the following terms:

"The process of public accountability for Crown corporations begins with the tabling of the corporation's annual report in the Legislative Assembly. There

is a two-fold obligation in this regard. First, the specific obligation is found in section 34 of The Crown Corporations Act, 1993, c. C-50.101, which provides as follows:

> 34(1) Subject to subsection (2), every Crown corporation and every designated subsidiary Crown corporation in each fiscal year shall, within 90 days of the end of its preceding fiscal year, submit to the member of the Executive Council responsible for the Crown corporation or designated subsidiary Crown corporation, in accordance with The Tabling of Documents Act, 1991:
>
> (a) a report on its business for its preceding fiscal year; and
>
> (b) a financial statement showing its business for its preceding fiscal year in any form that may be required by the Treasury Board.
>
> (2) Notwithstanding The Tabling of Documents Act, 1991, CIC shall submit to the minister the report and financial statement required pursuant to subsection (1) on or before the April 30 following its fiscal year end.
>
> (3) The member of the Executive Council mentioned in subsection (1), in accordance with The Tabling of Documents Act, 1991, shall lay before the Legislative Assembly each report and statement received by him or her pursuant to subsection (1).

Second, The Tabling of Documents Act, 1991, S.S. 1991, c. T-1.1 provides a general obligation for such reports to be laid before the Assembly.

The next stage of accountability involves a committee known as the Standing Committee on Crown Corporations, a committee structure which is wholly unique to Saskatchewan in Commonwealth jurisdictions. The annual report of each Crown corporation ends up in the hands of this committee by way of a standard motion at the opening of each Assembly, which typically states as follows:

> That the annual reports and financial statements of the various Crown corporations and related agencies be referred as tabled to the Standing Committee on Crown corporations.

In the event the Legislative Assembly is not in session at the time of the annual report, section 35 of The Crown Corporations Act, 1993 requires the corporation to submit the report to the Clerk of the Legislative Assembly, who

> in turn must, as soon as possible, deliver a copy of the report to each member of the Standing Committee.
>
> Once in the hands of the Standing Committee, the report — and therefore the entire operations of the Crown for the last fiscal year — are subject to examination by the Committee. This is done through the attendance before the Committee of each Minister in charge of the particular Crown corporation under review, together with officials from each corporation. The activities of the corporation are then subjected to review by the M.L.A.'s who are members of the Committee. The members may also ask questions of the corporation as may be referred directly from the Legislative Assembly."

If this argument was well founded, it would mean that the Crown corporations would be virtually exempt from disclosing any information under the Act until after review by the Standing Committee. This, however, is obviously not the intention of the Legislature since the Act is specifically made applicable to any prescribed Crown corporation, and each and every of the Crown corporations in question has been prescribed by regulation of the Lieutenant–Governor in Council as Crown corporations to which the Act shall apply.

Furthermore, Section 23 of the Act specifically provides that the provisions of the Act shall override any restrictions in any other act or regulations to access by any person to a record or information, except as otherwise provided in subsection 23(3).

It is also suggested by Mr. Banda that in some manner the doctrine of parliamentary privilege can be relied upon to refuse access to the records in question. He submits:

> "The specific parliamentary privilege applicable in this case relates to the control of publication of debates and procedures in the House. As stated in "Parliament", 34 Hals. 4th at page 600:
>
> > It is within the power of either House of Parliament, should it deem it expedient, to prohibit publication of its proceedings."

This, it is submitted, includes proceedings of House committees and extends to prevent evidence given to a committee from being published before the committee has reported to the House.

Again, I observe that if this argument were to prevail, it would mean in effect that Crown corporations were virtually exempt from providing any access to any records whatever until after their reports to the Legislature had been reviewed by the Standing Committee of the Legislature on Crown Corporations.

It is my understanding that as soon as the annual reports are laid before the Legislative Assembly they become public documents, and accordingly I cannot accept the suggestion that publication of information in these reports before they are reviewed by the Standing Committee has any basis in fact as a breach of parliamentary privilege.

I have also been referred to the provisions of Section 18(1)(d)(e) and (f) of the Act:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

Depending on the nature and extent of the information or records to which access is desired, these sections might well operate to restrict the right of access to information, as for example, if a request were made for access to a monthly financial statement or something of that nature, but none of the corporations have established any basis of fact on which I could conclude that access to the records requested by the Applicant in this case would bring the matter within the foregoing provisions of Section 18.

Saskatchewan Power Corporation in a separate submission to me, also has argued that disclosure must be refused having regard to the provisions of Section 19(1)(c)(i) and (iii) in the following terms:

> "Additionally, Subsections 19(1)(c)(i) and (iii) prohibit the disclosure of information which would reasonably be expected to result in financial loss or a gain to a third party or interfere with its contractual or other negotiations. The billing information requested directly relates to the third party's income and therefore is relevant in its negotiations with others including: landlords, financial institutions and labour."

If SaskPower is serious about this contention, it should have given notice to each of the third parties as required by Section 34(1) of the Act. In fact, disclosure of the records in question will disclose nothing more than the fact that services were rendered by a particular lawyer or law firm to the corporation and the amount charged for such services. These amounts are gross amounts and provide little or no information as to the financial status of the law firm or anything else which could reasonably be expected to result in financial loss or gain or interfere with contractual or other negotiations, whether with landlords, financial institutions or employees. The onus is on the Head to prove that there is some reasonable basis for such a conclusion, and no such basis has been established by SaskPower.

Accordingly, it is my recommendation that the Applicant be given access to the records in question subject only to the severance of any portion thereof which might meet the criteria outlined above for solicitor and client privilege.

Dated at Regina, Saskatchewan this day of December, 1994.

Derril G. McLeod, Q.C.,
Commissioner of Information and
Privacy for Saskatchewan