Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

FINAL ORDER PO-1846-F

Appeal PA-990434-1

Ontario Hydro

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The *Electricity Act, 1998* implemented a restructuring of Ontario Hydro, effective April 1, 1999. At the same time, Ontario Hydro ceased to be an institution covered by the *Freedom of Information and Protection of Privacy Act* (the *Act*). Some, but not all, of the new corporate bodies created as part of the restructuring exercise were added by regulation to the list of institutions covered by the *Act*. Ontario Hydro Services Company (OHSC) was not one of the new organizations designated as an institution. However, by means of a Transfer Order made by the Lieutenant Governor in Council under the *Electricity Act, 1998*, OHSC assumed responsibility for certain requests made under the *Act* that were received by Ontario Hydro prior to April 1, 1999 and unresolved as of that date (see: Order PO-1730).

On February 23, 1999, the appellant submitted a request under the *Act* to Ontario Hydro for all records pertaining to Ontario Hydro's exemption from the *Act*.

Ontario Hydro initially responded that it continued to be covered by the *Act* and therefore no records existed in response to the request. The appellant appealed Ontario Hydro's interpretation of the request contending that the request included records relating to both Ontario Hydro and its successor companies. Appeal PA-990156-1 was opened which resulted in Order PO-1730. In Order PO-1730, Assistant Commissioner Tom Mitchinson found that records relating to the exclusion of Ontario Hydro's successor companies from the jurisdiction of the *Act* were reasonably related to the request. Consequently, the Assistant Commissioner ordered OHSC, on behalf of Ontario Hydro, to provide the appellant with a revised written decision respecting access to the records responsive to the request, as clarified, in accordance with sections 26 and 29 of the *Act*.

On behalf of Ontario Hydro, OHSC issued a decision in response to the appellant's original request. OHSC located three responsive records and granted full access to Record 3, a briefing note. OHSC denied access to Record 1 and part of Record 2 on the basis of section 19 (solicitor-client privilege) of the *Act*. The decision letter stated that the remaining part of Record 2 was not responsive to the request.

The appellant appealed the denial of access, and contends that additional records exist.

During mediation, the Mediator reviewed the portion of Record 2 that the institution considered not responsive to the request, and advised the appellant that she concurred with its position. As a result, the appellant agreed to eliminate the non-responsive portion of Record 2 from the scope of the appeal.

On May 1, 2000, OHSC's name was changed to Hydro One, Inc. For the purpose of this appeal, all references to actions taken by OHSC or Hydro One, Inc. shall be to Ontario Hydro.

I sent a Notice of Inquiry setting out the issues in the appeal to Ontario Hydro, initially.

The appellant submitted a similar request to the Ministry of Energy, Science and Technology (the Ministry). The Ministry issued a decision which the appellant also appealed and Appeal PA-990433-1 was opened. One record at issue in the current appeal (Record 1), is the same as Record 12 in Appeal PA-990433-1. For the sake of consistency, I

also sent Ontario Hydro a copy of the Notice of Inquiry for Appeal PA-990433-1 and provided it with an opportunity to address the issues arising in that appeal with respect to Record 12 (Record 1 in the current appeal).

I received Ontario Hydro's representations on the issues in this appeal, which included combined representations on Record 1 and Record 12 in Appeal PA-990433-1. I then sent the appellant the non-confidential portions of Ontario Hydro's representations along with a copy of the Notice of Inquiry that was sent to Ontario Hydro. The appellant did not submit representations in response.

RECORDS:

The records at issue are as follows:

Record 1: A letter from Legal Affairs, Ontario Hydro to Legal Affairs, Ministry of Energy Science and Technology; and

Record 2: A letter between Ontario Hydro and the Ministry. Only the last bullet point under Item 1 on page 2 of this document is at issue.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and Ontario Hydro indicates that further records do not exist, it is my responsibility to ensure that Ontario Hydro has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require Ontario Hydro to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, Ontario Hydro must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in Ontario Hydro's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant refers to Order PO-1730 in which Ontario Hydro was ordered to issue a decision addressing records relating to the exclusion of Ontario Hydro's successor companies from the jurisdiction of the *Act*. The appellant contends that with a matter of this significance, there must be more than three records in response to the request, including internally generated documents as well as those which were received as a result of consultation and/or communication with other government bodies.

Ontario Hydro responded to this issue as follows:

> The fact that the successor companies to Ontario Hydro would not be subject to the Act arose from the nature of the legislation that established these successor companies ie. Bill 35 Energy Competition Act, that envisioned commercial, competitive entities to succeed Ontario Hydro. This was not a decision that originated from Ontario Hydro.
>
> The legislation was reviewed by the Law Division of Ontario Hydro, which provided comments to the [Ministry], during the restructuring of Ontario Hydro.
>
> Discussion with senior legal staff in Law Division determined that any records relating to the exemption from the Act by the successor companies to Ontario Hydro, would have originated from that division and no other records would exist within the Institution.
>
> The appellant contends that an issue of this significance would generate more documents than the three identified.
>
> However, for Ontario Hydro this particular issue was one issue of many, considerably more significant issues that stemmed from the implementation of the Energy Competition Act. The documents identified represent the entire documentation on this particular issue, in the possession of Ontario Hydro.

In the Notice of Inquiry which I sent to the appellant I made the following request of him:

> ... if, after reviewing Ontario Hydro's submissions on the "Reasonableness of Search" issue, the appellant is satisfied with the response, he is requested to so advise in his submissions, in which case, this issue will be removed from the scope of the inquiry. ...
>
> **If the appellant is not satisfied with the responses provided by Ontario Hydro he is asked to ... provide detailed representations on why he believes more records should exist.** [emphasis in the original]

As I indicated above, the appellant did not submit representations. In my view, the response provided by Ontario Hydro relating to the location of possibly responsive records and its explanation for the small number of responsive records are both reasonable in the circumstances. The appellant has not provided a response to Ontario Hydro's explanation that either challenges the reasonableness of the explanation or that raises any doubt in this regard. As a result, I find that the appellant has not established a reasonable basis for concluding that additional records should exist. Accordingly, I conclude that Ontario Hydro's search for responsive records was reasonable and this part of the appeal is dismissed.

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is... In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
>
> (Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.). This case dealt with section 19 of the provincial *Freedom of Information and Protection of Privacy Act*, the equivalent provision to section 12 of the municipal *Act*.)

Thus, section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, Ontario Hydro must demonstrate that one or the other, or both, of these heads of privilege applies to the records at issue.

Ontario Hydro claims that both records are subject to solicitor-client communication privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... 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 attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...[*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice or legal assistance [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Ontario Hydro describes the two records and the basis for its claim as follows:

> Record 1 is a document prepared for Crown counsel for use in giving legal advice to the Ministry on the restructuring of the electricity industry and is protected under the 2nd Branch of section 19. The record is a letter from counsel for Ontario Hydro to counsel for the [Ministry] and is a confidential document prepared for the purposes of giving legal advice. The record is between legal advisors and is directly related to giving legal advice to the Ministry. The record also constitutes the legal advisor's working papers directly related to giving legal advice.
>
> Record 2 is one paragraph of a document prepared for Crown counsel for use in giving legal advice to the Ministry on the restructuring of the electricity industry and is protected under the 2nd branch of section 19. The record is contained in a letter from counsel at Ontario Hydro to counsel at the [Ministry] and is a confidential document prepared for the purposes of giving legal advice. Furthermore, the letter was marked confidential. The record is between legal advisors and is directly related to giving legal advice to the Ministry. The record also constitutes the legal advisor's working papers directly related to giving legal advice.

As noted by Ontario Hydro, both Records 1 and 2 consist of communications between legal counsel for Ontario Hydro, which was a Crown Corporation and the Ministry. In order to dispose of the issues relating to these records, I asked Ontario Hydro to respond to the following questions as they pertain to each record.

1. Is the provincial Crown one and indivisible such that solicitor-client communications can exist between different ministries/agencies? (see: Orders P-270, P-902 and P-965 on the "indivisibility of government")

2. If so, does this principle include Crown Corporations such as (the former) Ontario Hydro?

3. Who is the author/recipient of the record?

4. When was the record given to the Ministry?

5. For what purpose?

6. At the time the record was created and/or given to the Ministry, what was the relationship between Ontario Hydro and the Ministry? In particular,

   i) was Ontario Hydro an agent of the Ministry?

   ii) what powers did the Ministry have to compel Ontario Hydro to produce documents to it?

   iii) in law, was there a formally structured relationship between the Ministry and the former Ontario Hydro? Was this relationship governed by statute or contract?

7. At the time the record was created and/or given to the Ministry, was Ontario Hydro's solicitor acting on behalf of Ontario Hydro and/or the Ministry in providing the record?

8. Please describe what solicitor-client relationships existed at the time the record was created and/or provided to the Ministry, as regards the issues dealt with in the record.

9. Is there a joint or common interest between Ontario Hydro and the Ministry? If so, what is the nature of the interest? (see: Orders P-538, M-739 and P-1342 on the issue of "joint interest")

Ontario Hydro provides brief responses to these questions in its representations.

With respect to the first two questions, Ontario Hydro states:

> The provincial Crown is one and indivisible and solicitor client communications can exist between different ministries and institutions. The procedural scheme established by the [*Act*] contemplates that the government will speak with one voice with respect to requests for access to government records. The legislation contains various provisions which

> contemplate that the institution which receives the request may canvass other government institutions, if necessary.
>
> The principle of indivisibility does include Ontario Hydro because both Ontario Hydro and the Ministry were "institutions" for the purposes of the [*Act*]. For example, the Ministry could canvass Ontario Hydro with respect to a particular request.

In describing the relationship between Ontario Hydro and the Ministry (questions 6, 7 and 8), Ontario Hydro states:

> At the time the record was created and given to the Ministry, Ontario Hydro was a statutory corporation without share capital established pursuant to the *Power Corporation Act* [the *PCA*] and the *PCA* was administered by the Ministry. The Deputy Minister of Energy was a non-voting member of the board of directors. Ontario Hydro was a Schedule II Agency of the Ontario Government as classified by the Management Board of Cabinet. Agencies are created by the Legislature of Ontario to act either for the Legislature directly or a ministry of the Crown. Schedule II Agencies are established to carry out an aspect of public policy which may have a commercial orientation.

Ontario Hydro indicates that it was not an agent of the Ministry but was, rather, an agent of the Crown under common law. Ontario Hydro notes that pursuant to section 9(2) of the *PCA*, it was required to provide information to the Minister of Energy from time to time. Ontario Hydro refers to a number of sections of the *PCA* which pertain to the Minister's powers relating to it:

> These include s. 10 of the *PCA* where the Minister may issue policy directives that have been approved by the Lieutenant Governor in Council on matters relating to Ontario Hydro's exercise of its powers and duties under the *PCA*. Ontario Hydro was required to file with the Minister an annual report on the affairs of the company and the Minister was required to submit such a report to the Lieutenant Governor in Council pursuant to section 9 of the *PCA*. As stated above, the Deputy Minister of Energy was a non-voting member of the Ontario Hydro board of directors. Under section 11 of the *PCA*, Ontario Hydro and the Minister of energy had entered into a memorandum of understanding with respect to certain matters including reporting requirements.
>
> Ontario Hydro submits that there exists a solicitor-client relationship between it and its counsel and the Ministry and its counsel, and that in creating and providing the records at issue to the Ministry, its solicitor was acting on behalf of Ontario Hydro.

Finally, Ontario Hydro submits that there is no joint or common interest between it and the Ministry.

In Order P-965, former Assistant Commissioner Irwin Glasberg commented on the principle of "indivisibility of government":

> ... In practical terms, this means that where a ministry has assumed the responsibility of processing an access request, it is that ministry which should speak for and represent the interests of the provincial government as a whole.
>
> I consider this approach to be the correct one for several reasons. First, there is a long line of judicial authority which endorses the proposition that the Crown is one and indivisible [see, for example, *Re Caisse de Depot et Placement du Quebec and Ontario Securities Commission* 42 O.R. (2d), 561 (Ont. Div. Ct) and *Alberta v. Canada (Canadian Transportation Commission* (1977) 75 D.L.R. (3d) 257 (S.C.C.)] Second, the scheme of the *Act* as set out in sections 25 and 27 of the statute contemplates that there will be a lead ministry which will be responsible for dealing with a request. In this respect, the *Act* provides specific mechanisms to ensure that the collective position of the provincial government is advanced. Third, I have not found any wording in either section 50(3) or 52(13) of the *Act* which would lead me to believe that the Commissioner must notify one emanation of the Crown where another is already participating in an appeal.

The issue of the indivisibility of government has only arisen in appeals of this office in the context of notification of affected parties under the *Act* (Orders P-270, P-395 and P-965, for example). In the current appeal, the question is whether this principle can also apply to solicitor-client communications between the Ministry and Ontario Hydro which was a Crown Corporation at the time the communications were made.

In my view, the mere fact that both Ontario Hydro and the Ministry are "institutions" under the *Act* is not determinative of this issue. The jurisdiction of the *Act* covers a wide variety of institutions, including ministries, agencies, commissions, tribunals and other Crown corporations with widely diverse functions, mandates and arguably, interests. To maintain that a solicitor-client relationship can be established between institutions simply because they fall within the purview of the *Act* is a stretch of the principle of indivisibility of government far beyond what a reasonable interpretation would allow.

In approaching this issue, I find that a decision of the Saskatchewan Court of Queen's Bench in *Regina (City) Police Service v. McKay*, [1999] S.J. No. 906 (Q.B.), regarding Crown disclosure of records held by the Chief of Police, is instructive. The Court states at paragraph 17:

> These cases suggest that the proper analysis to determine whether a department is part of the Crown for the purpose of disclosure, focuses on the nature of the body and the nature of the records generated by that body. Where the analysis shows a close relationship between the body and the Attorney General, the body will be considered part of the Crown. Otherwise, the body is independent and its records attract third party status.

The questions I asked of Ontario Hydro are directed at discerning the relationship between it and the Ministry. In responding, Ontario Hydro does not appear to base its position that there exists a solicitor-client relationship as between itself and the Ministry *per se*, but on the fact that it is an agent of the Crown, thus bringing it within the principles of "indivisibility of government".

At the time the records were created, sections 1, 2 and 3 of the *Crown Agency Act* (the *CAA*) stated:

> 1. In this Act, "Crown agency" means a board, commission, railway, public utility, university, manufactory, company or agency, owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or the Lieutenant Governor in Council.
>
> 2. A Crown agency is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.
>
> 3. This Act does not affect Ontario Hydro.

Ontario Hydro does not refer to the *CAA* but rather, states that it is an agent of the Crown at common law. Ontario Hydro does not explain why or on what basis in law it takes this position. In *Dableh v. Ontario Hydro* (1990), 33 C.P.R. (3d) 544 (Fed. T.D.), reversed on other grounds [1996] 3 F.C. 751 (C.A.), the court appears to take a different view of Ontario Hydro's status. The court stated (at pp. 549-550):

> ... However, the basic question remains: is this alleged Crown corporation an agent of the Crown?
>
> Paragraph 5(1)(a) of the Ontario Proceedings Against the Crown Act ... stipulates that the Crown is subject to all liabilities in respect of a tort committed by any of its servants or agents ...
>
> Section 2 of the [*PCA*] states that "Ontario Hydro is continued as a body corporate and shall be composed of those persons who from time to time comprise its Board". The Proceedings Against the Crown Act, s. 1(b) defines the Crown to mean only "Her Majesty the Queen in right of Ontario". Section 3 of the Ontario Crown Agency Act ... explicitly excludes Ontario Hydro from the Act: "This Act does not affect Ontario Hydro".
>
> Thus, these statutory provisions clearly indicate that Ontario Hydro is neither the Crown within the definition found in the Proceedings Against the Crown Act, nor a Crown agent under the Crown Agency Act. As the [*PCA*] defines Ontario Hydro as a corporation, it is a suable entity. For the above reasons, Ontario Hydro may not claim the benefit of Crown immunity, for it is not a Crown agent.

In *The System of Government in Ontario* (George C. Bell and Andrew D. Pascoe, c. 1988, Wall & Thompson, Inc.), the authors describe "Schedule II agencies" as:

> ... self-supporting, fully operational Crown corporations, such as Ontario Hydro and the Ontario Lottery Corporation, which operate at arm's length from the government.

Section 4 of the *PCA* provides that the business and affairs of Ontario Hydro are under the direction and control of its board of directors.

In my view, based on the above, there is an established basis for concluding, contrary to Ontario Hydro's position, that it is not an agent of the Crown either at common law or by statute. Moreover, as noted by Bell and Pascoe, Ontario Hydro was established to operate at arm's length from the government.

Section 53 of the *Act* places the onus on institutions to satisfy the requirements of the exemptions on which they rely. In my view, a bald statement by Ontario Hydro that it is an agent of the Crown, particularly in light of case law that recognizes that, not only is it excluded from the *CAA*, but that it does not appear to be an agent of the Crown at common law (*Dableh*) is not sufficient to meet this onus. On this basis, I find that Ontario Hydro is not an agent of the Crown.

Although the Ministry sought Ontario Hydro's views (through its counsel) on the issue of inclusion under Freedom of Information legislation, there is nothing in either the representations or the records themselves that would suggest that they share the same interests in the matter. Indeed, it is possible that their perspectives and interests in this issue are quite different. In my view, as an "arm's length" corporation, Ontario Hydro is nothing more than an interested party, from the government's perspective, in determining whether to include its successor companies under the *Act*. In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice generally, and having legal representation in the context of litigation, not the interests of other interested parties. Accordingly, I find that Ontario Hydro has not established that it or its legal advisors had a solicitor-client relationship with the Ministry such that its communications are protected under section 19 of the *Act*.

Waiver

Even if solicitor-client communication privilege could apply to the records prior to being communicated to the Ministry, that privilege was lost through waiver when subsequently provided to the Ministry. Waiver of common law solicitor-client privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [(*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C. S.C.); Order P-1342].

In Order M-260, former Adjudicator Anita Fineberg considered the issue of waiver of solicitor-client privilege:

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.
>
> In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:
>
> > Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.

> Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
>
> . . . . .

In *S. & K. Processors Ltd.* ... McLachlin J. noted:

> However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), as set out in *The Law of Evidence in Canada* (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be inferred from the actions of the client's solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client's privilege. [J. Sopinka et. al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 (S.C.C.); *Derby & Co. Ltd. v. Weldon (No. 8),* [1991] 1 W.L.R. 73 at 87 (C.A.)].

In my view, by providing the records to the Ministry, counsel, on behalf of Ontario Hydro, waived any privilege which may have attached to the records. The fact that at least one of the records was marked as being confidential does not negate this finding.

This conclusion is consistent with the finding of Adjudicator Holly Big Canoe in Order P-1342. In that case, the Adjudicator found that disclosure of otherwise privileged material by a Crown Prosecutor to the Law Society of Upper Canada constituted waiver. This decision was upheld by the Divisional Court in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495.

Section 19 cannot apply to the records because the Ministry is not the client with respect to the communication. Even if privilege did attach to the records, it was waived, and thus section 19 cannot apply. Therefore, the records must be disclosed.

ORDER:

1. The appellant's appeal of the reasonableness of Ontario Hydro's search for responsive records is dismissed.

2. I order Hydro One, Inc. on behalf of Ontario Hydro, to provide the appellant with the records at issue by sending him a copy of Record 1 and the responsive portion of Record 2 no later than January 17, 2001.

3. In order to verify compliance with Provision 2, I reserve the right to require Hydro One, Inc. to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: December 21, 2000
Laurel Cropley
Adjudicator