Federal Court  Cour fédérale

Date: 20111213

Docket: T-716-06

Citation: 2011 FC 1467

Ottawa, Ontario, December 13, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

PAUL SLANSKY

Applicant

and

ATTORNEY GENERAL OF CANADA,
HER MAJESTY THE QUEEN

Respondents

and

CANADIAN JUDICIAL COUNCIL

Intervener

REASONS FOR ORDER AND ORDER

[1] This is an appeal pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] of a decision of Prothonotary Milczynski dated April 19, 2011, whereby she ordered the Canadian Judicial Council ("CJC" or "Council") to produce portions of a report in which it alleges the existence of various privileges.

[2] The issues raised in this appeal are vitally important for the conduct of investigations by the CJC into complaints or allegations made in respect of a judge of a superior court. The gist of the debate is whether the report prepared by counsel appointed by the CJC to make further inquiries into the complaint should be kept confidential or ought to be produced (in whole or in part) to form part of the record for the purposes of Rule 317 of the *Rules*, in the context of an application for judicial review.

[3] For the reasons that follow, I am of the view that the Prothonotary's decision must be quashed. I find that she erred in finding that only the legal recommendation portion of the report prepared by Professor Friedland is protected by the solicitor-client privilege, and that the public interest privilege does not otherwise apply. Finally, I am also of the view that this application for judicial review does not warrant conversion into an action.

1. The Facts

[4] Paul Slansky is a barrister and solicitor in the Province of Ontario. He was called to the Bar in 1986, and has been a sole practitioner for most of his career. His practice has focused on criminal law, and he was involved in a number of murder cases.

[5] Mr. Slansky acted as defence counsel for the re-trial of an accused charged with first degree murder. At the end of his first trial in 1996, the accused was found guilty, but his conviction was overturned by the Court of Appeal and a new trial was ordered (*R v Baltrusaitis* (2002), 162 CCC (3d) 539, 58 OR (3d) 161 (ONCA)). It is in the context of the second trial, presided over by the Honourable Justice Thompson, that the incidents giving rise to the complaint to the CJC took place.

This second trial, which ended in an acquittal, was quite complex and lengthy: there were 40 days of pre-trial motions, a mistrial because the jury became tainted, and the trial proper which had to be moved from Walkerton to Owen Sound and which lasted 130 days.

[6] Early on in the re-trial, it became clear that both Mr. Slansky and Justice Thompson took exception to each other's conduct. They both filed a complaint before their respective regulatory bodies. In the case of Mr. Slansky, the Law Society of Upper Canada decided that the matter should not be the subject of discipline or proceed to a hearing, and the file was closed. The complaint filed against Justice Thompson warrants further discussion.

[7] On August 12, 2004, Mr. Slansky filed a complaint against Justice Thompson. In a 16 page letter, he alleged serious misconduct, including bias, improper motive, abuse of office and knowingly acting contrary to the law.

[8] Given the complexity of some of the legal and other issues involved in the complaint, the Chairperson of the Judicial Conduct Committee, Chief Justice Scott of Manitoba, retained Professor Martin L. Friedland, a law professor at the University of Toronto, to conduct further inquiries and prepare a report (the "Friedland Report" or "Report"). In his letter confirming his appointment, Mr. Norman Sabourin, Executive Director and General Counsel of the CJC, quoted the following excerpt from the Policy of the CJC with respect to counsel retained in judicial conduct matters:

> The role of Counsel in conducting further inquiries is, essentially, to gather further information. Persons familiar with the circumstances surrounding the complaint, including the judge who is the subject of the complaint, will be interviewed. Documentation may be collected and analyzed. It is not the role of Counsel conducting further inquiries to weigh the merits of a complaint or to make any

> recommendation as to the determination that a Chairperson or a Panel should make. Such Counsel acts on the instructions of the Chairperson or the Panel.
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> This role is sometimes referred to as that of a "fact-finder". This description is accurate if it is limited to the gathering or clarification of facts. It would not be accurate if it were intended to encompass adjudicative fact-finding in the sense of making determinations based on the relative credibility of witnesses or the persuasiveness of one fact over another. The role of Counsel conducting further inquiries is simply to attempt to clarify the allegations against the judge and gather evidence which, if established, would support or refute those allegations. The Counsel must obtain the judge's response to these allegations and evidence, and present all of this information to the Chairperson or Panel.
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> The role of Counsel undertaking further inquiries is to focus on the allegations made. However, if any additional, credible and serious allegations of inappropriate conduct or incapacity on the part of the judge come to the Counsel's attention, Counsel is not precluded from inquiry into those matters as well.

[9] In his affidavit filed as part of the motion record of CJC before the Prothonotary, Mr. Sabourin states that Counsel reviewed the minutes, transcripts and recordings of the proceedings, as well as Justice Thompson's numerous substantive and procedural rulings. Counsel also interviewed several individuals familiar with the criminal matter, including Mr. Slansky, Justice Thompson, three Crown counsel, the Regional Director of Crown Attorneys, seven members of court staff and Regional Senior Justice Bruce Durno.

[10] Upon concluding his inquiries, Professor Friedland reported on his findings and analysis. In his report, he reviewed the material evidence and made recommendations and provided advice to the Chairperson with respect to his adjudicative functions and with respect to the CJC's mandate regarding judicial conduct generally. Interestingly, the cover of the Report indicates that the document is confidential and subject to solicitor-client privilege. This would tend to confirm Mr.

Sabourin's statement in his affidavit (at para 27) that his expectations and those of the Chairperson are that Mr. Friedland's report would constitute legal advice.

[11] Upon review of the Report, the Chairperson determined that the complaint did not warrant further investigation as it did not establish misconduct on the part of Justice Thompson. On March 9, 2006, Mr. Sabourin wrote to Mr. Slansky on behalf of the Chairperson, providing lengthy and detailed reasons for dismissing his complaint.

[12] On April 18, 2006, Mr. Slansky applied for a judicial review of the CJC's decision. He sought a declaration that: i) the CJC refused to exercise its jurisdiction and conducted a flawed, faint, and anemic investigation; ii) the CJC erred in law in its interpretation of Justice Thompson's conduct; iii) the CJC exceeded its jurisdiction by passing erroneous and flawed judgment on the Applicant's conduct at trial, as defense counsel, as justification for the judge's sanctionable conduct; and that iv) the complaint mechanism of the CJC, of having judge judging judges' misconduct, is unconstitutional and of no force and effect and gives rise to a reasonable apprehension of institutional bias, and constitutes a breach of the Applicant's rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act (UK)*, 1982, c 11. He also sought an order quashing the decision of the CJC and returning the matter back to the CJC to re-conduct its investigation and review, in accordance with the direction of the Court.

[13] For the purposes of his proceeding, Mr. Slansky wrote to the CJC and sought the production of all documents with respect to the complaint investigation and the decision of the CJC with

respect to the complaint, as well as the CJC's entire file dealing with the decision to close the file regarding the complaint. The CJC provided the record, with the exception of certain documents, including the Friedland Report. The CJC opposed the production of that report on the basis that it was protected by both solicitor-client and public interest privileges.

[14] It is as a result of this response that Mr. Slansky brought a motion in which he sought an order to convert his judicial review application into an action or, alternatively, an order compelling the CJC to produce the Friedland Report in its entirety. On April 19, 2011, Madam Prothonotary Milczynski granted the motion in part, ordering the CJC to file a copy of the Friedland Report and to indicate on the copy those portions that should be redacted because they contain legal advice (*Slansky v Canada (Attorney General)*, 2011 FC 476 (available on CanLII) [*Slansky*]).

2. The Impugned Decision

[15] At the hearing, Mr. Slansky's submissions focused on the alternative argument, that is, whether the CJC should be compelled to release the Friedland Report as contemplated by Rule 317 of the *Rules*. As a result, the Prothonotary framed the issue as being "whether, as the CJC submits, the engagement of Professor Friedland gave rise to a solicitor-client relationship, and/or the information sought to be produced is protected by public-interest privilege" (*Slansky*, above at para 23). Having found that only the portions of the Report that constitute legal advice are protected by solicitor-client privilege and should be redacted, she decided that it was not necessary to address the issue of converting the application for judicial review into an action (*Slansky*, above at para 2).

[16] First, the Prothonotary declared that the essential elements in determining whether the Friedland Report ought to be produced lie in the terms of Professor Friedland's engagement and in the description of the role and function of counsel retained by the CJC in the conduct of inquiries under paragraph 5.1(c) of the Council's *Complaints Procedures*. She noted that the terms of the engagement letter indicate the relationship between the CJC and Counsel is not intended to create a solicitor-client relationship and that the stated purpose of the engagement is not to provide legal advice. Accordingly, she found that Mr. Friedland was retained as a "skilled investigator" and a fact-gatherer.

[17] She acknowledged the CJC's concerns that if assurances of confidentiality are not given to persons being interviewed, they may feel vulnerable or wary that a proper working professional or supervisory relationship would be compromised, and may not be as candid as they would if confidentiality is the rule. This, in turn, could prompt the CJC to take the route of a formal investigation by way of a panel, where evidence under oath is compelled, to ensure that the information obtained is fulsome and reliable. While these are understandable practical considerations, given the constraints of the *Judges Act*, RSC 1985, c J-1, as to how the CJC receives and investigates complaints, they are not determinative of the issue on the motion, which is whether the engagement of Professor Friedland gave rise to a solicitor-client relationship and/or whether the information sought to be produced is protected by public interest privilege. Sections 63 through 65 of the *Judges Act* have been reproduced in the Annex, for ease of reference.

[18] The Prothonotary then turned to the solicitor-client privilege. After having reviewed the essential features of that privilege, she considered the CJC's argument that in addition to fact-

gathering, Professor Friedland was instructed to provide a lawyer's analysis and recommendations, and that it was indeed the expectation of CJC that the report would be confidential and would constitute legal advice. Having examined the Report carefully, the Prothonotary found that Professor Friedland provided more than facts and offered some legal analysis and advice. This did not constitute unsolicited legal advice, however, since Mr. Sabourin made it clear in his affidavit that persons engaged as counsel are instructed "to provide a lawyer's analysis and recommendations in respect of those allegations" of misconduct for consideration by the Chairperson of the Judicial Conduct Committee.

[19] While the Prothonotary was prepared to accept that the legal recommendation portion of the Report does attract the solicitor-client privilege, it did not entail, in her view, that the entirety of the Report ought to benefit from the same privilege. Prothonotary Milczynski stated the following about that crucial distinction:

> [30] However, that part of the Friedland Report attracts solicitor-client privilege does not mean that the entirety of the report should be withheld on the grounds of privilege. As noted in *Blank v Canada (Minister of Justice)* (2007), 280 DLR (4th) 540 (FCA), it is possible to sever the "fact-gathering" investigative work product prepared by "Counsel" where Professor Friedland sets out the facts of what happened at the trial and his interviews with individuals with knowledge for the purposes of clarifying the allegations. These facts are separate and distinct from the advice given on legal issues that is privileged. In this regard, at the hearing of the motion the matter of possible redaction was discussed (to the extent solicitor-client privilege was not found to have been waived). The report could have those portions redacted, a suggestion that was, however, rejected by the CJC. Nonetheless, this manner of proceeding is appropriate in the circumstances. The facts gathered by Professor Friedland in his role as "Counsel" regarding the trial and for clarification of the allegations cannot be withheld simply because another part of the report deals with legal issues and advice about them. It is appropriate instead to redact the legal advice in the report, and by

> way of example, such redaction would include the portion of the report from the middle of page 23 to the end of page 30.
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> *Slansky*, above at para 30.

[20] The Prothonotary then dealt with Mr. Slansky's argument that to the extent that all or part of the Friedland Report was protected by solicitor-client privilege, the CJC must be deemed to have waived this privilege due to third party disclosure. She observed that the CJC had provided a copy of the Report to the Law Society of Upper Canada to be included in its investigation of the complaint filed by Justice Thompson against Mr. Slansky. She also noted that a further copy was sent to the Deputy Attorney General at the request of Justice Thompson for this purpose. In her view, though, the CJC and the LSUC have a similar mandate and a common goal in investigating complaints of misconduct, particularly in a case where complaints were filed against both judge and counsel in the same proceeding. For that reason, she was of the view that Mr. Slansky's argument was untenable due to the common interest of these regulatory bodies in the proper disposition of the complaints.

[21] The Prothonotary then considered the CJC's argument that what is not protected by solicitor-client privilege otherwise benefits from a public interest privilege. The public interest identified by the CJC in support of its argument is the concern that, without assurances of confidentiality, it could be difficult to obtain complete, reliable and candid information about a judge against whom a complaint has been filed. She also took into consideration CJC's assertion that judicial independence could be compromised if a judge's state of mind during the deliberative or decision-making process were to be made public. However, she was not convinced by those arguments, and observed that no evidence was put forward that people who were interviewed for the

Friedland Report would not have been as forthcoming had they known that their information might become public. She also stressed that the CJC can always resort to a formal inquiry with the attendant power to compel witnesses under oath, if it feels that an informal investigation did not produce reliable and comprehensive evidence.

[22] The following paragraph captures the essence of the Prothonotary's reasoning on this issue:

> [38] I am satisfied that there is a public interest in knowing how the CJC deals with complaints against judges to ensure the public has confidence in the integrity of the process, and to also ensure that the application for judicial review can be conducted in a meaningful way. I cannot conclude that disclosure of the facts would so impair this or future investigations of complaints against members of the judiciary. The fact that a complaint had been made was not in and of itself secret, and it would be no secret necessarily as to who would be sought out by Counsel for information. In any event, to the extent there is such concern, counsel for the Applicant made a suggestion at the hearing of the motion that names might be redacted or to the extent it was applicable, Rule 151 of the *Federal Courts Rules* might be engaged on a further motion to seal any particularly sensitive information. This suggestion was also rejected by the CJC at the hearing, but remains an option that may be pursued on further motion if necessary, at a later date.
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> *Slansky*, above at para 38.

[23] For all the foregoing reasons, the Prothonotary ordered the CJC to file a copy of the Friedland Report, indicating on the copy those portions that are to be redacted in accordance with her reasons. Once finalized by the Court, the redacted Report was then to be produced and to form part of the record for the purposes of Rule 317 of the *Rules*.

3. The Statutory Regime

[24] The CJC is a statutory body created by s. 59 of the *Judges Act*. It consists of the Chief Justice of Canada and all chief justices and associate chief justices of the superior courts of Canada. The CJC is mandated to make inquiries into and investigate complaints made in respect of federally appointed judges (s. 60(2)(c)).

[25] There are two methods by which complaints are considered by the CJC. Under subsection 63(1) of the *Judges Act*, the Minister of Justice of Canada or the Attorney General of a province may request the Council to commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d). Under subsection 63(2), "the Council may investigate any complaint or allegation made in respect of a judge of a superior court".

[26] In conducting an inquiry or investigation, the CJC is deemed to be a superior court and has the power to summons witnesses to give evidence under oath (s. 63(4)). The CJC may prohibit the publication of any information or documents arising out of an inquiry or investigation where it deems such disclosure is not in the public interest (s. 64(5)). The CJC may also hold an inquiry or investigation in private, unless the Minister requires that it be held in public (s. 64(6)). Upon completing an inquiry or investigation, the CJC may recommend that a judge be removed from office on the basis that he or she has become incapacitated or disabled from the due execution of office, or in the alternative, the CJC may make no recommendation (s. 65).

[27] The CJC has passed the "*Complaints Procedures*", which govern the investigation of complaints. The relevant portion of these procedures can be found in the Annex to these reasons. Upon receipt of a complaint, and following review of the judge's comments and those of his or her chief justice, the Chairperson may "ask Counsel to make further inquiries and prepare a report, if the Chairperson is of the view that such a report would assist in considering the complaint" (s. 5.1(c)). Upon review of Counsel's report, the Chairperson may dismiss the complaint, hold the file in abeyance pending pursuit of remedial measures, or refer the complaint to a formal panel (s. 8.1). The use of Counsel represents a summary process for screening complaints which is an alternative to referring them directly to a formal panel for consideration. As noted in *Cosgrove v Canadian Judicial Council*, 2007 FCA 103 at para 77, [2007] 4 FCR 714, this screening process "permits the early resolution of a complaint by remedial measures, without the establishment of an Inquiry Committee".

4. The Issues

[28] This appeal raises the following issues:

a) What is the applicable standard of review?

b) Did the Prothonotary err in law in ruling that the Report in its entirety is not protected by solicitor-client privilege?

c) Did the Prothonotary err in law in her ruling that the Report is not protected by public interest privilege?

d) In the event that the Prothonotary's Order is set aside and the Friedland Report is not ordered to be produced, should the application for judicial review be converted into an action pursuant to s. 18.4(2) of the *Federal Courts Act*, RSC 1985, c F-7?

[29] It is important to take notice that the Respondent Attorney General of Canada took part in this appeal only to oppose the Applicant's motion to convert his application into an action. Counsel for the Attorney General did not take any position with respect to the first three questions and essentially relied on her submissions before the Prothonotary with respect to the fourth one.

5. Analysis

a) The standard of review

[30] It is settled law that a judge of this Court must show deference to a prothonotary's decision, much like courts of appeal do when called upon to assess trial judges' discretionary decisions. Such deference must be shown, and the decision of the prothonotary ought not be disturbed on appeal, unless: "(a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts" (*Merck & Co v Apotex Inc*, 2003 FCA 488 at para 19, [2004] 2 FCR 459 [*Apotex*]. (See also, *R v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 (FCA) at para 95 (available on CanLII)).

[31] In the case at bar, the questions raised in the Intervener's motion are clearly not vital to the outcome of the judicial review. The Prothonotary made an interlocutory Order for the production of a redacted copy of the Friedland Report. This Order does not in any way dispose of the ultimate question to be decided on the application for judicial review, which is whether the CJC (through Chief Justice Scott) made a reviewable error in dismissing the complaint of Mr. Slansky. As the Federal Court of Appeal pointed out in *Apotex*, above at para 22, this first prong of the test must be

applied stringently if we are to give effect to the intention of Parliament in creating the office of prothonotary. Far from being a mere "rest stop along the procedural route to a motions judge", as the Court of Appeal stated in *Apotex*, above, the prothonotaries are there to promote the efficient performance of the work of the Court. The Order of Prothonotary Milczynski was clearly meant to advance the proceedings and not to pre-empt the final decision to be made. To that extent, it is entitled to deference.

[32] Neither party suggested that the decision of the Prothonotary was premised on a misapprehension of the facts. Therefore, the only basis upon which the Prothonotary's Order ought to be disturbed is a clear showing that it is wrong, in the sense that it rests upon a wrong principle or a misunderstanding of the law.

b) The solicitor-client privilege

[33] There is no debate between the parties as to the nature and extent of the solicitor-client privilege. It finds its roots in the 16th century, and was then predicated on the oath of honour of the solicitor that compelled him to keep his client's secrets (see, Alan W. Bryant, Sidney N. Lederman & Mickelle K. Fuesrt, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed (Canada: LexisNexis Canada Inc, 2009) at para 14.42 [Sopinka, Lederman and Fuerst, *The Law of Evidence in Canada*]).

[34] By the 18th century, the rationale for the privilege had evolved, and became the ascertainment of truth. It is now well established that the solicitor-client privilege is essential to the proper functioning of our legal system. The complexity of the law requires professional expertise,

and legal advice is only as good as the factual information upon which it is based. As Justice Cory put it in *Smith v Jones*, [1999] 1 SCR 455 at para 46 (available on CanLII):

> Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system. It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step. [Emphasis added]
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> See also, to the same effect: *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 9, [2008] 2 SCR 574 [*Blood Tribe*].

[35] Solicitor-client privilege was first conceived as a rule of evidence and was considered to be a mere testimonial privilege which could only be asserted at trial. Recent decisions, however, have departed from this position and acknowledge that it must now be regarded as a rule of substance whose role goes much beyond shielding protected materials from being tendered in evidence in judicial proceedings. It extends to cover any consultation for legal advice and is no longer restricted to communications exchanged in the course of litigation. As Justice Binnie stated, in *Blood Tribe*, above at para 10, on behalf of a unanimous Court:

> 10. (…) While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some

> other non-legal capacity: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 885-87; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18, at paras. 40-47; *McClure*, at paras. 23-27; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SDD 39, at para. 26; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8. A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes: *Descôteaux*, at p. 881; *R. v. Campbell*, [1999] 1 S.C.R. 565. The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance" (*McClure*, at para. 35).

[36] Considering the high public interest in protecting the communications between a solicitor and his or her client, it is not surprising that the privilege has been found to be almost absolute. Indeed, courts have been loath to interfere with this privilege, and have done so only in the most exceptional circumstances. Such will be the case where the communications between a party and his or her legal adviser are criminal in nature or are made with a view to obtaining legal advice to facilitate the commission of a crime, or where adherence to the rule would have the effect of preventing the accused from making full answer and defence (See, for example: *R v Campbell*, [1999] 1 SCR 565 at paras 55, 65 (available on CanLII) [*Campbell*]).

[37] To give effect to the importance of solicitor-client privilege in the administration of justice, the Supreme Court of Canada in *Solosky v The Queen*, [1980] 1 SCR 821 at p 835 (available on

CanLII) [*Solosky*], endorsed the following broad definition for solicitor-client privilege found in *Wigmore on Evidence* (McNaughton rev. 1961, para 2292):

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

[38] Where solicitor-client privilege is found, it encompasses a broad range of communications between lawyer and client:

> The privilege, once established, is considerably broad and all-encompassing. In Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.
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> *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 16, [2004] 1 SCR 809 [*Pritchard*].

[39] Such a broad protection is in keeping with the class nature of solicitor-client privilege, as described by the Supreme Court in *R v National Post*, 2010 SCC 10 at para 42, [2010] 1 SCR 477:

> In a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship. Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. […] Anything less than this blanket confidentiality, the cases hold, would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the administration of justice. […]

[40] Quite understandably, counsel for the CJC put a lot of emphasis on the breadth of the protection afforded by the privilege, and stressed that it encompasses a wide range of

communications between a solicitor and his or her client. As a result, it is argued that the Prothonotary was in error when she found that the factual part of the Friedland Report does not attract solicitor-client privilege and can be severed from its legal findings and opinions.

[41] Before we reach that point, however, the solicitor-client relationship must be established. The mere fact that a communication takes place between a lawyer and another person, or that "solicitor-client" is stamped on a document, does not necessarily mean that a genuine solicitor-client relationship arose. In particular, this will be the case in the corporate or government context, where "in-house" counsel may have multiple responsibilities and may be called upon to provide advice that is foreign to their legal training or expertise. Each situation must therefore be assessed on a case-by-case basis to determine if the circumstances warrant the existence of the privilege. The test is functional in nature: whether or not solicitor-client privilege attaches to a particular situation will depend on "the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered" (*Campbell*, above at para 50; *Pritchard*, above at para 20).

[42] In other words, the party seeking to assert the privilege has the burden of proving: 1) a communication between solicitor and client; 2) which entails the seeking and giving of legal advice; and 3) which is intended to be confidential by the parties. (See, *Solosky*, above at p 837; *Pritchard*, above at para 15). I will now turn to these requirements, as they apply to the case at bar.

[43] In a nutshell, counsel for Mr. Slansky made the following submissions. First, it is contended that the CJC had no legal obligation to retain legal counsel in disposing of the complaints; while it may have been preferable to have somebody with legal training, it did not have to be a member of

the Bar. The person retained to investigate could have been a retired judge, or a university professor who is not a member of any law society. The CJC could not suppress the factual content of the record simply by hiring a lawyer to compile the facts as an investigator. Second, and closely related to this first argument, it is submitted that Professor Friedland was hired to investigate and gather the facts, similar to a police officer investigating a criminal allegation. The fact that Professor Friedland strayed beyond this role and offered legal advice does not detract from his mandate and cannot cloak his report with solicitor-client privilege.

[44] It is true that when one looks at the engagement letter of Professor Friedland and at the policy with respect to counsel retained in judicial conduct matters as quoted in that letter, the role of counsel appears to be essentially that of a "fact-finder". Not only is there no mention of any advisory role, but nowhere is it mentioned that counsel is to provide legal advice or to perform any analysis of a legal nature. To the contrary, his role in conducting further inquiries pursuant to 5.1(c) of the *Complaints Procedures* is described as "simply to attempt to clarify the allegations against the judge and gather evidence which, if established, would support or refute those allegations". On that basis alone, there is no doubt that the solicitor-client privilege would not attach to the relationship between counsel and the CJC.

[45] Counsel for the CJC emphasized that this language is aimed at preventing the usurpation by counsel of the Chairperson's determination of the matter. Relying on the administrative law principle of *delegatus non potest delegare*, it is said that the integrity of the decision-making process has to be preserved, and that the policy is meant to reflect and to stress that the final determination is

made by the Chairperson on behalf of CJC, and not by counsel appointed to inquire into the complaint.

[46] While this is undoubtedly an interesting explanation, it is not entirely compelling. Counsel could be tasked with the responsibility to inquire into the facts and to provide a legal analysis and even recommendations without straying into forbidden territory. There would be no harm in stating that the role of the Chairperson is to determine, on the basis of all the relevant evidence and with the benefit of legal advice, whether there is a basis to refer the file to a panel. If this is indeed what counsel is retained to do, transparency would require that it be stated explicitly. As long as Counsel is not merely an extension of the Chairperson and that his report is not meant to be blindly rubber stamped, there is nothing wrong with the Chairperson seeking and obtaining legal advice in fulfilling his or her task.

[47] That being said, I do not think that this flaw is fatal to the position advanced by the CJC. It must be remembered that in order to determine whether the solicitor-client privilege attaches to a particular situation, one must not focus on any particular document, be it the retaining letter, but rather to the circumstances as a whole. From that perspective, the position of the CJC is more convincing. The intention of the parties cannot be inferred exclusively from the engagement letter; when one looks at the nature of the relationship between the CJC and Professor Friedland, as well as the circumstances in which the report was sought and rendered, the conclusion that a solicitor-client relationship was established is inescapable.

[48] First of all, it is the uncontradicted evidence of the CJC that its expectation in asking Professor Friedland to conduct "further inquiries" under paragraph 5.1(c) of the *Complaints Procedures* was that he would provide legal advice. The Executive Director and General Counsel of the CJC, Mr. Norman Sabourin, who approached Mr. Friedland in the first place and wrote the engagement letter, states the following in his affidavit:

> 26. Counsel are instructed to gather information about the allegations surrounding the complaint and to provide a lawyer's analysis and recommendations in respect of those allegations, for consideration by the Chairperson of the Judicial Conduct Committee. […]
>
> 27. My expectations, and those of the Chairperson, in relation to mandate given to Counsel in conducting further inquiries, is that Counsel's report will constitute legal advice because we retain legal counsel and seek a solicitor's investigation of the facts and a solicitor's analysis and recommendations concerning those facts in the context of the legal mandate and obligations of the Council when considering a complaint. […]
>
> Applicant's Motion Record, at p 211.

[49] It appears that Professor Friedland was also of the view that he was hired as a lawyer and to provide legal advice in the broad sense of the term. This can be gathered from the fact that the first page of his report is stamped with the notation "This document is CONFIDENTIAL and subject to SOLICITOR-CLIENT PRIVILEGE". This is further borne out by the fact that his report his replete with legal analysis and advice, to which I shall deal with shortly. It would appear, therefore, that both parties were of the view that the advice sought and provided was confidential and not to be disclosed.

[50] As previously mentioned, counsel for Mr. Slansky submitted that it was not essential for an investigator to have legal expertise, since the task envisaged was simply to collect and report on the facts. Counsel conceded that it was helpful to have training in the law, but added that one does not have to be a member of the Bar to fulfill that requirement.

[51] In my view, the prescription in the *Complaints Procedures* that further inquiries must be performed by outside counsel who is a lawyer, makes perfect sense, in light of the task at hand. The crucial role of the CJC and its Judicial Conduct Committee is to determine whether the conduct of a judge which is the subject of a complaint amounts to misconduct. This role would also include warranting a recommendation to the Minister that a judge be removed from office pursuant to ss. 65(2) of the *Judges Act*, or whether it pertains to errors of law that are better left to the judicial process through an appeal.

[52] I agree with counsel for the CJC that for an investigator to be able to "attempt to clarify the allegations against the judge and gather evidence which, if established, would support or refute those allegations", to quote from the Complaint Policy, he or she must know the legal elements of the specific allegations and of the notions of "judicial misconduct" and "incapacity" more broadly. In the case at bar, for example, Mr. Slansky alleged in his 16-page letter, bias, abuse of office, improper motive and knowingly acting contrary to the law. For the investigator to determine whether there is evidence that would support these allegations, he or she must be able to determine the materiality of the evidence. This is fundamentally a legal exercise, as it requires an assessment of whether there is a probative connection between the facts to be proved and the facts in issue as determined by the substantive law. Relevance and materiality are determined by the trier of law in a

court proceeding, whereas the weight to be given to that evidence is for the trier of fact (Bryant, Lederman and Fuesrt, *The Law of Evidence in Canada*, pp 56-58, ss 2.49-2.50). Once again, it was essential for the investigator to be well versed in the principles of substantive law and evidence, to be in a position to assess whether the examples provided by Mr. Slansky in support of his complaint, amount to mere errors of law that are better left to an appeal court or whether they do raise, when considered in isolation or as a whole, the sort of concerns put forward by Mr. Slansky.

[53] Moreover, the investigator must always be mindful to safeguard the procedural fairness of the process. The *Complaints Procedures* itself requires counsel to ensure the judge's right to procedural fairness. Counsel is explicitly directed to determine whether he or she has provided the judge with sufficient information about the allegations and the material evidence so as "to permit the judge to make a full response". As the Supreme Court stated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (available on CanLII), the duty of procedural fairness is flexible and variable and depends on an appreciation of the content of the particular statute and the rights affected. Several factors are relevant to determining the content of the duty of fairness, and a lawyer is most certainly better equipped than anyone else to perform that analysis. The fact that a university professor or a retired judge could be qualified to investigate does not detract from the argument. At most, it may be that the requirement in the *Complaints Procedures* that an investigator be a lawyer is slightly under-inclusive. Whatever the reason for this policy choice, it nevertheless attests to the importance of legal training and expertise in the choice of an investigator.

[54] In light of the foregoing, therefore, I agree with CJC that counsel could only gather and examine relevant facts and present his or her findings and analysis through a legal framework or analysis. There is no doubt in my mind that Professor Friedland was retained by the CJC in his professional capacity as a lawyer, with the intention of providing assistance through his legal knowledge and analysis.

[55] A careful reading of Professor Friedland's Report bears this out. He provides his legal analysis with respect to the allegations of bias and gross misapplication of the law in the latter pages of his Report. In addition to this, he has sifted through the minutes and the transcripts of the proceedings, as well as the interviews of a number of key witnesses to offer what he considered as the key events of the trial and his understanding of the various interactions between the participants. The fact that counsel does not culminate his legal analysis with a final determination of a particular issue does not remove the communication from solicitor-client privilege.

[56] Indeed, the Prothonotary recognized as much in her decision. She accepted that Professor Friedland offered some legal analysis and advice. Even if she was of the view that this advice and analysis went beyond his mandate because she focused on the role of counsel conducting further inquiries as stated in the *Complaints Procedures* and in the Policy, she acknowledged that they were not gratuitous comments or unsolicited legal advice. For that reason, she found that at least part of the Friedland Report attracts solicitor-client privilege and that it was appropriate to redact the legal advice in the Report, including specifically the middle of page 23 to the end of page 30.

[57] This is in keeping with the case law, according to which solicitor-client privilege will attach where legal advice of any kind is sought from a professional legal adviser in such a capacity. In *College of Physicians of British Columbia v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, 9 BCLR (4th) 1 [*College of Physicians*], the Court found that a lawyer instructed by the Sexual Review Conduct Committee to determine if there was enough information on the basis of all the evidence, to warrant the issuance of disciplinary charges, was acting as a lawyer when investigating the complaint. The Court wrote:

> [42] In my opinion, the Commissioner and the chambers judge erred in finding that the College's lawyer was not acting in her capacity as a lawyer when she investigated the Applicant's complaint. She was acting on her client's instructions to obtain the facts necessary to render legal advice to the SMRC concerning its legal obligations arising out of the complaint. As such, she was engaged in giving legal advice to her client.
>
> *College of Physicians*, above at para 42.

[58] This is precisely the situation in the case at hand. When one looks at the nature of the relationship between the CJC and Professor Friedland, the subject matter of his Report and the circumstances in which it was sought and rendered, the inescapable conclusion is that his advice clearly attracts the solicitor-client privilege.

[59] What remains to be decided, therefore, is whether the privilege attaches to the whole Report or only, as found by the Prothonotary, to what she considers the legal portion of it. With all due respect, this is where I part company with her decision.

[60] The Prothonotary concluded at paragraph 30 of her decision that "it is possible to sever the "fact-gathering" investigative work product" prepared by counsel from the privileged legal advice

contained in the Report (*Slansky*, above). She based her conclusion on the assumption that the "facts are separate and distinct from the advice given on legal issues that is privileged" (*Slansky*, above at para 30). Such an assumption is not only unwarranted and without any foundation in the jurisprudence, but it is completely at odds with the "as close to absolute as possible" protection to be afforded to the solicitor-client privilege. This is to say nothing of the practical difficulties one would encounter, in many instances, if an opinion had to be parsed to distinguish between its factual and legal components.

[61] One must start from the premise that once the solicitor-client privilege is established, the extent of its coverage is extremely broad and encompasses the factual information upon which the legal analysis is based. As stated by the Supreme Court in *Pritchard*, above at para 16:

> Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing...

[62] One of the consequences deriving from this principle is that express statutory authority will be required to abrogate or curtail the privilege. Solicitor-client privilege cannot be abrogated by inference. In *Blood Tribe*, above, the Supreme Court squarely addressed this issue:

> 11. To give effect to this fundamental policy of the law, our Court has held that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents...

[63] In *Pritchard*, above, the Supreme Court considered a statutory provision equivalent to Rule 317 of the *Rules*, requiring production of the record of proceedings by an administrative tribunal in

the context of a judicial review application. The Court found that a "record of proceeding" does not include solicitor-client privileged information, as there is no express statutory intention to abrogate the privilege. This analysis applies squarely to the case at hand, as Rule 317 contains no express statutory authority to abrogate the solicitor-client privilege.

[64] There is simply no authority for the proposition that facts can be severed from a communication that is protected as a result of the solicitor-client privilege. The decision of the Supreme Court in *Pritchard*, above, is quite significant in that regard. Having refused the appellant's request for production of a legal opinion as part of the record of the proceedings on the basis that the legal opinion was protected by solicitor-client privilege, the Court refrained from ordering that the factual parts of the opinion be severed from the legal analysis and disclosed as part of the record of the proceedings. Rather, the Court implicitly ruled that the privilege extended to the entire legal opinion including the factual material. While courts have sometimes accepted to sever public documents attached as exhibits from the legal advice that is covered by the solicitor-client privilege (see, for example: *Murchison v Export Development Canada*, 2009 FC 77 at para 45, 354 FTR 18) there is no precedent for what the Prothonotary has ordered in the present case.

[65] There are good principles and practical reasons for such an approach. Due to the importance of the privilege for the administration and quality of justice in this country, every attempt to restrict or curtail it must be resisted. What may appear as insignificant information of a factual nature may sometimes reveal the nature or the content of the legal advice sought. As Bryant, Lederman and Fuerst state in their treatise, "[T]he distinction between "fact" and "communication"

is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated" (at p 734, s. 14.53).

[66] Moreover, facts are often intimately linked to legal analysis, to such an extent that it would be virtually impossible to disentangle them. The decision of the Court of Appeal of Manitoba in *Gower v Tolko Manitoba Inc*, 2001 MBCA 11, 153 Man R (2d) 20, provides a telling example of that principle. In that case, a lawyer had been hired by an employer to investigate a complaint of sexual harassment against one of his employees. The Court found that the investigation was inextricably linked to the provision of legal advice. It is interesting to note that the retainer letter in that case explicitly tasked the investigator with the mandate to provide a fact-finding report and to give legal advice. The Court nevertheless stated that the retainer letter would not be determinative if there was evidence that pointed to the opposite conclusion. This is consistent with the functional approach espoused by the courts in determining whether the solicitor-client privilege applies.

[67] The decision of the Ontario Superior Court of Justice in *R v Ahmad*, [2008] OJ No 5915, 77 WCB (2d) 804 [*Ahmad*], offers another helpful analogy. In that case, seven of the ten accused charged with a variety of terrorism offences applied for an order to disclose the package of material that was forwarded by Crown counsel to the Deputy Attorney General for his consideration in determining whether to exercise his discretion to consent to the preferral of the direct indictment. The Court concluded that the package of material constituted a communication made in confidence with a professional legal adviser for the purpose of giving and receiving legal advice, which was consequently protected by the solicitor-client privilege. One of the accused nevertheless argued that the judge should review the recommendation package to separate out the factual assertions and

comments from the kernels of pure legal advice. Commenting that such a submission reflects a "fundamental misunderstanding of the breadth of the coverage provided by solicitor-client privilege", Justice Dawson (at para 84) stated:

> Obviously a discussion of the facts and what is to be taken from them will almost always be integrally bound into the giving and receiving of legal advice. Inferences to be drawn from facts, what facts the evidence establishes alone and in combination with the other evidence, and the interrelationship between the facts and the law and the policy of the law are all likely to be closely related to the legal advice requested and given...
>
> *Ahmad*, above at para 84.

[68] The only case relied upon by the Prothonotary as authority for ordering the severance and disclosure of factual material in the Friedland Report is the decision of the Federal Court of Appeal in *Blank v Canada (Minister of Justice)*, 2007 FCA 87, 280 DLR (4th) 540 [*Blank*]. A careful reading of that decision convinces me that it does not stand for the proposition that factual material in a privileged document may be severed.

[69] At issue in that case was the scope of a statutory duty to sever non-privileged communications under the federal *Access to Information Act*, RSC 1985, c A-1. The Act provides a right of access to information in records under the control of a government institution. Where the government institution claims solicitor-client privilege over requested records, the Act, unlike Rule 317, expressly provides for the severance of any non-privileged information or material from those records (*Access to Information Act*, s. 23, 25).

[70] First of all, it is obvious that the decision of the Court of Appeal pertains to an entirely different statutory context. Significantly, the CJC is exempt from the Act, since it does not come within the definition of a government institution (*Access to Information Act*, s. 3, 4 and Schedule 1).

[71] More fundamentally, however, the Court found that a statutory duty to sever must be interpreted restrictively, and cannot be used to sever factual material which is part of a privileged communication. The Court stated:

> Second, it is well established that section 25 applies to records falling within section 23 […] However, section 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.
>
> *Blank*, above at para 13.

[72] Commenting further on a previous decision of the Court involving the same parties, where Justice Sharlow had indicated that "generally innocuous opening words and closing words of the communication", as well as other general identifying information could sometimes be severed, Justice Evans, writing on behalf of the Court, made the following clarification:

> 21. Third, Sharlow J.A. included in her list of "general identifying information" (at para. 23) , "the generally innocuous opening words and closing words of the communication". It is not clear to me to what this refers. The adjective "innocuous" could be interpreted as requiring an examination of the body of a privileged communication to determine if disclosure of particular sentences would be harmful.
>
> 22. In my view, however, a reading of Sharlow J.A.'s discussion as a whole (including her statement in para. 20 that policy advice by a lawyer in a letter also giving legal advice may not be within solicitor-client privilege) indicates that, in her view, the proper test is whether the information is part of the privileged communication. If

> it is, then section 25 does not require that it be severed from the balance of the privileged communication.
>
> *Blank*, above at paras 21, 22.

[73] That decision, therefore, cannot be relied upon to order the severance of the facts which are part of a privileged communication. On the contrary, it is entirely consistent with the jurisprudence of the Supreme Court referred to earlier in these reasons, to the effect that the solicitor-client privilege must be interpreted broadly and should be tempered with only in the most exceptional circumstances.

[74] For all of the foregoing reasons, I am therefore of the view that the entire Report of Professor Friedland is protected by the solicitor-client privilege, and that the Prothonotary erred in concluding that the factual material can be severed from the legal advice.

[75] That being said, I find that the 6,000 pages of transcript ordered by Professor Friedland in order to write his report should be produced by the CJC, as well as all other material that had already been produced and that was considered by Professor Friedland. Although that material was not appended to his report, Professor Friedland indicated that it is available (both in hard copy and electronically) and that he would be happy to send it to the CJC if it is required. This material is clearly public and not covered by the solicitor-client privilege, and should be part of the record. I appreciate that Mr. Slansky could file the transcript himself, as part of his record, as suggested by counsel for the CJC. However, the production of the full transcript would not indicate the portions upon which Professor Friedland relied to draft his report. Moreover, there would be no point in putting Mr. Slansky to the expense of seeking a transcript that has already been prepared.

c) The public interest privilege

[76] Having found that the solicitor-client privilege does attach to the entire Friedland Report, there would be no need to address CJC's alternative argument that the Prothonotary also erred in ruling that the Report is also protected by the public interest privilege. I will, nevertheless, venture the following remarks, if only because this argument was argued before me both by counsel for the CJC and for Mr. Slansky.

[77] There is no dispute that public interest privilege attaches to communications which disclosure would be contrary to the public interest. This, in turn, implies a balancing of countervailing public interests in maintaining confidentiality and obtaining disclosure. In the case at bar, the CJC invoked the necessity to safeguard three public interests: a) ensuring the integrity of the CJC's summary process by obtaining full and frank disclosure in the course of investigating a complaint; b) protecting the privacy interests of the judge; and c) protecting judicial independence.

[78] I agree with the Prothonotary that it is far from obvious how judicial independence could be compromised by the disclosure of Professor Friedland's Report. At the hearing before this Court, counsel for CJC was not much more explicit in this respect. While judicial independence obviously deserves to be insulated from any encroachment, I fail to see how a report commissioned by the CJC to inquire into a complaint could interfere with a judge's independence; it is clearly not the case, at the very least, of the Friedland Report.

[79] As for the concerns related to the privacy interests of the judge who is the subject of the complaint, they are certainly valid and deserve to be taken into consideration. To the extent that such preoccupations are relevant, however, they can easily be taken care of by resorting to a motion for a confidentiality order pursuant to Rule 151 of the *Rules*. Indeed, counsel for Mr. Slansky has explicitly stated that his client was prepared to accept the need for such an order to protect the anonymity of witnesses and sensitive information with respect to Justice Thompson's health or other sensitive information.

[80] More compelling is the argument that it is important to safeguard the integrity of the summary process, in order to avoid the need for a full-blown formal proceeding. There is no doubt that it is in the interest of all parties, and of the administration of justice, that scarce judicial resources should be spent on those complaints that raise serious concerns. When in doubt, it is clearly desirable that there be an informal procedure whereby the CJC can determine whether a full inquiry is warranted. In the absence of such a mechanism, every complaint that is not clearly "trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration" pursuant to s. 3.5 of the *Complaints Procedures* would have to be considered by a panel of three or five judges (two or three of which would include chief justices or associate chief justices). This would plainly be a waste of critical judicial resources.

[81] For the informal procedure to be effective, though, full and frank disclosure must be ensured. While there may not be any evidence that people who were interviewed by Professor Friedland for the purpose of his Report would not have been as forthcoming had they known that their information might become public, I do not think such an inference is purely speculative or

unreasonable. In his letter of complaint, Mr. Slansky himself acknowledged that members of the Bar would be reluctant to come forward without assurances of confidentiality. Similarly, Professor Friedland highlighted in his Report the sensitive nature of interviewing members of the local Bar and their likely reluctance to be forthright when speaking with him. This is easily understandable, especially in a small community where a judge against whom a complaint may be made will often be the only resident Superior Court judge.

[82] Parliament itself has recognized the vital role of confidentiality in the CJC's investigations and inquiries. Subsections 63(5) and (6) of the *Judges Act* provide that the CJC may hold an inquiry or investigation in private and may prohibit the publication of material arising out of an inquiry or investigation when it is of the opinion that the publication is not in the public interest. I agree with counsel for the CJC that this is a clear recognition that the integrity of the investigation process can be undermined where confidentiality is not maintained.

[83] At the end of the day, the critical determination as to whether information should be protected or disclosed hinges on a balancing act. Does the public interest in transparency and maintaining confidence in the integrity of the judicial process outweigh public interest for confidentiality and the best allocation of scarce judicial resources?

[84] In answering this question, one must not lose sight of the information provided to Mr. Slansky by the Executive Director of the CJC in notifying him that his complaint was dismissed. Far from being a mere formal letter the conclusion reached is communicated without any further explanation. Mr. Sabourin's ten page letter is quite elaborate and outlines in detail the process

followed, the principles applied, the gist of Professor Friedland's Report and the reasons of Chief Justice Scott for closing the file. This is clearly sufficient to judicially review the decision made by the CJC, and contrary to what Mr. Slansky claims, he is not left in the dark but is quite aware of the case he has to meet before the Federal Court, in order to be successful.

[85] For all of the foregoing reasons, I am therefore of the view that the Prothonotary erred in law by ruling that the Report did not attract public interest privilege.

d) Should the application for judicial review be converted into an action?

[86] As previously mentioned, the main objective of the Applicant in bringing his motion before the Prothonotary was to require that his application for judicial review be converted into an action, pursuant to ss. 18.4(2) of the *Federal Courts Act*. However, the Prothonotary did not deal with this aspect of the motion as the focus quickly shifted to the alternate remedy sought by Mr. Slansky - that of compelling the CJC to deliver the complete record for its decision, including the Friedland Report.

[87] It is well established that Parliament intended judicial review proceedings to be determined by means of applications in order to ensure the speedy resolution of the issues raised by an applicant. It is only in exceptional circumstances that the Court will convert an application into an action.

[88] The *locus classicus* on that issue is found in the following statement of Justice Décary, writing for a unanimous Court of Appeal in *Macinnis v Canada (Attorney General)*, [1994] 2 FC 464 at pp 470-471 (available on CanLII) [*Macinnis*]:

> It is, in general, only where facts of whatever nature cannot be satisfactorily established or weighed through affidavit evidence that consideration should be given to using subsection 18.4(2) of the Act. One should not lose sight of the clear intention of Parliament to have applications for judicial review determined whenever possible with as much speed and as little encumbrances and delays of the kind associated with trials as are possible. The "clearest of circumstances", to use the words of Muldoon J., where that subsection may be used, is where there is a need for viva voce evidence, either to assess demeanour and credibility of witnesses or to allow the Court to have a full grasp of the whole of the evidence wherever it feels the case cries out for the full panoply of a trial…

[89] Over time, the Court of Appeal and this Court have somewhat expanded the grounds upon which conversion might be ordered. The Court of Appeal summarized the case law on this issue in *Association des crabiers acadiens Inc v Canada (Attorney General)*, 2009 FCA 357 at para 39, 402 NR 123:

> Therefore, conversion is possible (a) when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought (*Haig v. Canada*, [1992] 3 F.C. 611 (F.C.A.)), (b) when the facts allowing the Court to made a decision cannot be satisfactorily established through mere affidavit evidence (Macinnis v. Canada, [1994] 2 F.C. 464 (F.C.A.)), (c) when it is desirable to facilitate access to justice and avoid unnecessary cost and delay (*Drapeau v. Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 (F.C.A.)) and (d) when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (*Hinton v. Canada*, [2009] 1 F.C.R. 476).

[90] In the case at bar, the only basis put forward by the Applicant in support of his claim that his application should proceed as an action, is the bald assertion that the facts cannot be established or weighed by affidavit evidence, and that there are "various evidentiary gaps, inconsistencies, and factual issues which cannot be weighed by way of affidavit evidence" (Memorandum of the Applicant, para 30). I agree with the Attorney General that this is clearly insufficient, in the absence of any explanation as to why the affidavit evidence is lacking and is inadequate to properly assess the application for judicial review.

[91] The Applicant relies on *Chen v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1573, [2005] 3 FCR 82, where a judicial review application was converted into an action. This case is easily distinguishable, though, as there was clearly information relevant to the determination of the issues raised by the application that was only available through the procedural step of examination for discovery, a process which is only available in an action. Moreover, there were parallel actions proceeding on similar grounds which would have resulted in a multiplicity of proceedings if the applications continued at the same time. In the present case, there is only one proceeding and the only information that is unavailable relates to exchanges between the Chairperson of the CJC and his legal advisors.

[92] I have previously determined that there are no relevant evidentiary gaps created by the failure of the CJC to disclose these documents. The letter from the Executive Director and General Counsel to Mr. Slansky explaining why Chief Justice Scott has come to the view that his complaint does not warrant further consideration, provides all the relevant information necessary to proceed with the application for judicial review. Even if there were some gaps, however, they could not be

remedied by *viva voce* evidence or by any other procedures available in an action. The solicitor-client privilege will apply in an action as much as in an application for judicial review, and will protect the Friedland Report from disclosure.

[93] Counsel for Mr. Slansky submitted that witnesses could be called to the Bar and compelled to testify as to what they told Professor Friedland in the context of his investigation. First of all, the names of the people that have been interviewed by Professor Friedland have not been disclosed, since privilege has been claimed over them. Second, it is pure speculation that these witnesses (to the extent that Mr. Slansky or his counsel could guess who they are) would be able to provide relevant and useful evidence for the purpose of his argument. This is clearly an insufficient rationale to convert an application into an action. As the Federal Court of Appeal held in *Macinnis*, above at pp 471, 472, "[…] speculation that hidden evidence will come to light is not a basis for ordering a trial". It is only if there are "good grounds" for believing that relevant evidence would come to light through a trial, that a judge might be justified in ordering a judicial review be converted into an action. At the end of the day, "…the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior" (at p. 472). Counsel for the Applicant has not provided me with anything of substance that such would be the case at hand.

[94] There being no other basis urged upon the Court to convert this application into an action, I find that the Applicant has not established that this case meets the "clearest of circumstances" criteria.

[95] The appeal is therefore granted. Costs shall be in the cause.

ORDER

THIS COURT ORDERS that the appeal is granted. Costs shall be in the cause.

"Yves de Montigny"
Judge

Annex

Judges Act, RSC 1985, c J-1	Loi sur les juges LRC. 1985, ch J-1)
Inquiries concerning Judges Inquiries	Enquêtes sur les juges Enquêtes obligatoires
63. (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(*a*) to (*d*).	**63**. (1) Le Conseil mène les enquêtes que lui confie le ministre ou le procureur général d'une province sur les cas de révocation au sein d'une juridiction supérieure pour tout motif énoncé aux alinéas 65(2)a) à d).
Investigations	Enquêtes facultatives
(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.	(2) Le Conseil peut en outre enquêter sur toute plainte ou accusation relative à un juge d'une juridiction supérieure.
Inquiry Committee	Constitution d’un comité d’enquête
(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.	(3) Le Conseil peut constituer un comité d’enquête formé d’un ou plusieurs de ses membres, auxquels le ministre peut adjoindre des avocats ayant été membres du barreau d’une province pendant au moins dix ans.
Powers of Council or Inquiry Committee	Pouvoirs d’enquête
(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have	(4) Le Conseil ou le comité formé pour l’enquête est réputé constituer une juridiction supérieure; il a le pouvoir de :
(*a*) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is	a) citer devant lui des témoins, les obliger à déposer verbalement ou par écrit sous la foi du serment — ou de l’affirmation solennelle dans les cas où elle est autorisée en matière civile

entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

— et à produire les documents et éléments de preuve qu'il estime nécessaires à une enquête approfondie;

(*b*) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

b) contraindre les témoins à comparaître et à déposer, étant investi à cet égard des pouvoirs d'une juridiction supérieure de la province où l'enquête se déroule.

Prohibition of information relating to inquiry, etc.

Protection des renseignements

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

(5) S'il estime qu'elle ne sert pas l'intérêt public, le Conseil peut interdire la publication de tous renseignements ou documents produits devant lui au cours de l'enquête ou découlant de celle-ci.

Inquiries may be public or private

Publicité de l'enquête

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

(6) Sauf ordre contraire du ministre, les enquêtes peuvent se tenir à huis clos.

Notice of hearing

Avis de l'audition

64. A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.

64. Le juge en cause doit être informé, suffisamment à l'avance, de l'objet de l'enquête, ainsi que des date, heure et lieu de l'audition, et avoir la possibilité de se faire entendre, de contre-interroger les témoins et de présenter tous éléments de preuve utiles à sa décharge, personnellement ou par procureur.

Report and Recommendations
Report of Council

Rapports et recommandations
Rapport du Conseil

65. (1) After an inquiry or investigation under section 63 has been completed, the Council

65. (1) À l'issue de l'enquête, le Conseil présente au ministre un rapport sur ses

shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

conclusions et lui communique le dossier.

Recommendation to Minister

Recommandation au ministre

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

(2) Le Conseil peut, dans son rapport, recommander la révocation s'il est d'avis que le juge en cause est inapte à remplir utilement ses fonctions pour l'un ou l'autre des motifs suivants :

(*a*) age or infirmity,

a) âge ou invalidité;

(*b*) having been guilty of misconduct,

b) manquement à l'honneur et à la dignité;

(*c*) having failed in the due execution of that office, or

c) manquement aux devoirs de sa charge;

(*d*) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,

d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges

"Complaints Procedures"

Approved by the Canadian Judicial Council September 27, 2002

Effective January 1, 2003

…

3. Review by the Chairperson/ Vice-Chairpersons of the Judicial Conduct Committee

3.1 Neither the Chairperson of the Council nor any member of the Council who is a judge of the Federal Court of Canada, shall participate in the Council's consideration of any complaint, unless the Chairperson of the Council considers that the public interest and the due administration of justice require it.

3.2 The Executive Director shall refer a file to either the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee in accordance with the directions of the Chairperson of the Committee. The Chairperson or a Vice-Chairperson shall not deal with a file involving a judge of his or her court.

3.3 Throughout the remainder of these procedures "Chairperson" refers to either the Chairperson or one of the Vice-Chairpersons of the Judicial Conduct Committee established by the Council.

3.4 After a file has been opened, and upon receipt of a letter from the complainant asking for the withdrawal of his or her complaint, the Chairperson may:

Procédures relatives à l'examen des plaintes déposées au Conseil canadien de la magistrature au sujet de juges de nomination fédérale

« Procédures relatives aux plaintes »

Approuvées par le Conseil canadien de la magistrature le 27 septembre 2002

en vigueur le 1er janvier 2003

…

3. Examen de la plainte par le président ou par un vice-président du comité sur la conduite des juges

3.1 À moins que le président du Conseil ne considère que l'intérêt public et la bonne administration de la justice l'exigent, ni lui ni aucun membre du Conseil qui est juge à la Cour fédérale du Canada ne peuvent participer à l'examen d'une plainte.

3.2 Le directeur exécutif transmet un dossier au président ou à un vice-président du comité sur la conduite des juges conformément aux directives du président du comité. Ni le président non plus que les vice-présidents ne doivent examiner un dossier mettant en cause un juge qui est membre de la même cour qu'eux.

3.3 Pour l'application des dispositions qui suivent, le terme « président » désigne le président ou l'un des vice-présidents du comité sur la conduite des juges constitué par le Conseil.

3.4 Si, après l'ouverture d'un dossier, le président reçoit une lettre dans laquelle le plaignant demande le retrait de sa plainte, il peut:

(*a*) close the file and categorize it as "withdrawn"; or

a) soit fermer le dossier et le classer dans la catégorie des plaintes « retirées »;

(*b*) proceed with consideration of the complaint on the basis that the public interest and the due administration of justice require it.

b) soit décider de poursuivre l'examen de la plainte, considérant que l'intérêt public et la bonne administration de la justice l'exigent.

3.5 The Chairperson shall review the file and may

3.5 Le président examine le dossier et peut, selon le cas:

(*a*) close the file if he or she is of the view that the complaint is

a) fermer le dossier s'il estime:

(i) trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration, or

(i) que la plainte est frivole ou vexatoire, qu'elle est formulée dans un but injustifié, qu'elle est manifestement dénuée de fondement ou qu'elle ne nécessite pas un examen plus poussé,

(ii) outside of the jurisdiction of the Council because it does not involve conduct; or

(ii) que la plainte n'est pas du ressort du Conseil, parce qu'elle ne met pas en cause la conduite d'un juge;

(*b*) seek additional information from the complainant; or

b) demander des renseignements supplémentaires au plaignant;

(*c*) seek the judge's comments and those of his or her chief justice.

c) demander des commentaires au juge et à son juge en chef.

3.6 When the Chairperson has closed a file under this section, the Executive Director shall provide to the judge and to his or her chief justice a copy of the complaint and of the letter advising the complainant that the file has been closed.

3.6 Lorsque le président a fermé un dossier aux termes du présent article, le directeur exécutif remet au juge et à son juge en chef une copie de la plainte de même qu'une copie de la lettre informant le plaignant de la fermeture du dossier.

4 Request for Comments from Judge/Chief Justice

4. Demande de commentaires au juge ou à son juge en chef

4.1 Where the Chairperson has decided to seek comments from the judge, the Executive Director shall write to the judge and his or her chief justice requesting comments.

4.1 Lorsque le président a décidé de demander des commentaires au juge, le directeur exécutif écrit au juge et à son juge en chef leur demandant de formuler des commentaires.

5. Consideration of Response of the Judge

5.1 The Chairperson shall review the response from the judge and the judge's chief justice, as well as any other relevant material received in response to the complaint, and may

(*a*) close the file where:

(i) the Chairperson concludes that the complaint is without merit or does not warrant further consideration, or

(ii) the judge acknowledges that his or her conduct was inappropriate and the Chairperson is of the view that no further measures need to be taken in relation to the complaint; or

(*b*) hold the file in abeyance pending pursuit of remedial measures pursuant to section 5.3; or

(*c*) ask Counsel to make further inquiries and prepare a report, if the Chairperson is of the view that such a report would assist in considering the complaint; or

(*d*) refer the file to a Panel.

5.2 When closing the file pursuant to subparagraph 5.1(a)(ii), the Chairperson may, in writing, provide the judge with an assessment of his or her conduct and express any concerns he or she may have about it.

5.3 In consultation with the judge's chief justice and with the consent of the judge, the Chairperson may

(*a*) recommend that any problems identified as a result of the complaint be addressed by way of counselling or other remedial measures, and

5. Examen de la réponse du juge

5.1 Le président examine la réponse du juge et du juge en chef, de même que tout autre document pertinent reçu en réponse à la plainte. Il peut prendre l'une ou l'autre des décisions suivantes:

a) fermer le dossier dans l'un ou l'autre cas suivant :

(i) il conclut que la plainte est dénuée de fondement ou qu'elle ne nécessite pas un examen plus poussé,

(ii) le juge reconnaît que sa conduite était déplacée et le président est d'avis qu'il n'est pas nécessaire de prendre d'autres mesures en ce qui concerne la plainte;

b) mettre le dossier en suspens en attendant l'application de mesures correctives conformément à l'article 5.3;

c) demander à un avocat de mener une enquête supplémentaire et de rédiger un rapport, si le président est d'avis qu'un tel rapport faciliterait l'examen de la plainte;

d) déférer le dossier à un comité d'examen.

5.2 Lorsqu'il ferme le dossier conformément au sous-alinéa 5.1a)(ii), le président peut écrire au juge pour lui faire part de l'évaluation de sa conduite et lui exprimer ses préoccupations à l'égard de celle-ci.

5.3 En collaboration avec le juge en chef du juge et avec le consentement du juge, le président peut:

a) recommander que les problèmes relevés par suite de la plainte soient traités en ayant recours à des services de consultation ou à d'autres mesures correctives;

(*b*) close the file if satisfied that the matter has been appropriately addressed.

b) fermer le dossier s'il est satisfait que les problèmes relevés ont été traités de façon appropriée.

5.4 When the Chairperson closes a file, the Executive Director shall provide to the judge and to his or her chief justice a copy of the letter informing the complainant that the file has been closed.

5.4 Lorsque le président ferme un dossier, le directeur exécutif remet au juge et à son juge en chef une copie de la lettre informant le plaignant de la fermeture du dossier.

6. Complaints involving a Council Member

6. Plaintes mettant en cause un membre du Conseil

6.1 When the Chairperson proposes to close a file that involves a member of the Council, he or she shall refer the complaint and the proposed reply to Counsel who shall provide his or her views on the proposed disposition of the complaint.

6.1 Lorsque le président propose de fermer un dossier mettant en cause un membre du Conseil, il soumet la plainte et la réponse proposée à un avocat, qui donne son avis sur la décision qui est proposée relativement à la plainte.

7. Further Inquiries by Counsel

7. Enquête supplémentaire menée par un avocat

7.1 If the Chairperson asks Counsel to make further inquiries under paragraph 5.1(c), the Executive Director shall so inform the judge and his or her chief justice.

7.1 Si le président demande à un avocat de mener une enquête supplémentaire en vertu de l'alinéa 5.1c), le directeur exécutif en informe le juge et son juge en chef.

7.2 Counsel shall provide to the judge sufficient information about the allegations and the material evidence to permit the judge to make a full response and any such response shall be included in the Counsel's report.

7.2 L'avocat fournit au juge suffisamment de renseignements sur les allégations formulées et les éléments de preuve qui s'y rapportent pour lui permettre de présenter une réponse complète à leur égard; toute réponse du juge est incorporée au rapport de l'avocat.

8. Consideration of Counsel's Report

8. Examen du rapport de l'avocat

8.1 The Chairperson shall review the Counsel's report and may

8.1 Le président examine le rapport de l'avocat et peut prendre l'une ou l'autre des décisions suivantes :

(*a*) close the file on any grounds specified in paragraph 5.1(a); or

a) fermer le dossier pour l'un des motifs précisés à l'alinéa 5.1a);

(*b*) hold the file in abeyance pending pursuit of remedial measures under section 5.3; or

b) mettre le dossier en suspens en attendant l'application de mesures correctives conformément à l'article 5.3;

(*c*) refer the file to a Panel.

c) déférer le dossier à un sous-comité.

8.2 When the Chairperson closes a file, the Executive Director shall provide to the judge and his or her chief justice a copy of the letter informing the complainant that the file has been closed.

8.2 Lorsque le président ferme un dossier, le directeur exécutif remet au juge et à son juge en chef une copie de la lettre informant le plaignant de la fermeture du dossier.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-716-06
STYLE OF CAUSE:	PAUL SLANSKY v ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	October 17, 2011
REASONS FOR ORDER AND ORDER:	de MONTIGNY J.
DATED:	December 13, 2011

APPEARANCES:

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Kathryn Hucal	FOR THE RESPONDENTS
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