Federal Court  Cour fédérale

Date: 20110419

Docket: T-716-06

Citation: 2011 FC 476

Toronto, Ontario, April 19, 2011

PRESENT: Madam Prothonotary Milczynski

BETWEEN:

PAUL SLANSKY

Applicant

and

THE ATTORNEY GENERAL OF CANADA, THE CANADIAN JUDICIAL COUNCIL, HER MAJESTY THE QUEEN

Respondents

REASONS FOR ORDER AND ORDER

[1] The Applicant in this proceeding filed a motion for an Order to require the application for judicial review proceed in the form of an action, or in the alternative, that the Respondent, Canadian Judicial Council ("CJC") deliver the complete record for the decision that is the subject of the review.

[2] At the hearing of this motion, submissions focused on the alternative relief, that the CJC be compelled to release the record as contemplated by Rule 317 of the *Federal Courts Rules*, and more specifically, the report of Professor Martin Friedland dated October 27, 2005 (the "Friedland Report"). This report was prepared for the CJC in respect of the complaint filed by the Applicant, Mr. Paul Slansky against Mr. Justice Robert M. Thompson of the Ontario Superior Court of Justice. For the reasons below, the motion is granted in part. That portion of the Friedland Report that contains facts in the record before the decision-maker ought to be produced. The facts are not protected by either solicitor-client or public interest privilege. Only the portions of the report that constitute legal advice is protected by solicitor client privilege and should be redacted from the copy produced and filed with the Court. Accordingly it is not necessary to address the matter of converting this application for judicial review into an action, or to rule on the disclosure of any other documents that may subsequently come into issue, as those documents were not put before the Court on this motion.

Background

[3] The underlying facts giving rise to this proceeding relate to the conduct of a murder trial and more specifically, the conduct of counsel for the defence, Mr. Slansky and the judge, Mr. Justice Thompson during the course of that trial. The facts of what transpired during the trial need not be set out for the purposes of this motion, except to say that both Mr. Slansky and Justice Thompson took such exception to the other that each filed a complaint alleging misconduct with the applicable governing bodies. Mr. Slansky filed his complaint first with the CJC, followed by Justice Thompson

who initially considered having contempt charges filed against Mr. Slansky, instead caused to be filed, a complaint against Mr. Slansky with the Law Society of Upper Canada.

[4] Each complaint was reviewed, and in the case of the complaint against Mr. Slansky, the Law Society determined that the matter should not be the subject of discipline or proceed to a hearing. The matter ended there, although the filing of the complaint had significant consequences for Mr. Slansky both personally and professionally.

[5] In the case of the complaint against Justice Thompson, the CJC conducted a review and investigation. By letter dated March 9, 2006, Mr. Slansky received a lengthy and very detailed response from Mr. Norman Sabourin, Executive Director and General Counsel for the CJC wherein Mr. Sabourin reviewed the allegations of misconduct and the steps taken by the CJC in its review and investigation, with the conclusion that:

> …while the conduct of the judge may at times have fallen short of the ideal, Chief Justice Scott has concluded, for the reasons outlined above, that his conduct does not constitute judicial misconduct. The judge clearly kept an open mind about the guilt of the accused, despite his personal opinion and ensured that both sides were able to advance their positions in a fair and thorough manner. With regard to the judge's obligation to remain courteous, Chief Justice Scott finds that the judge was, overall, remarkably restrained in his treatment of you, given your own behaviour.
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> …
>
> … Chief Justice Scott has come to the view that your complaint does not warrant further consideration as it does not establish judicial misconduct on the part of Mr. Justice Thompson. Accordingly, he has directed me to close the file with this reply.

[6] The Applicant was not satisfied with this resolution of his complaint and commenced the within application for judicial review, seeking a declaration that:

a. the CJC refused to exercise its jurisdiction and conducted a flawed, faint and anemic investigation;

b. the CJC erred in law in its interpretation of Justice Thompson's conduct;

c. 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

d. the complaint mechanism of the CJC, of having judges 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 ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[7] The Applicant also seeks an order quashing the decision of the CJC and returning the matter back to the CJC to conduct a further and new review of the complaint.

[8] For the purposes of this proceeding, the Applicant wrote to the CJC seeking the following:

i. a copy of any and all documents, memos, electronic or otherwise, with respect to the complaint, investigation, and decision at the Judicial Council with respect to the complaint; and

ii. a copy of the Respondent's entire file(s) with the Respondent touching upon the decision to close the file regarding the complaint

[9] On May 17, 2006, Mr. Sabourin replied, including copies of all material that were in the possession of the CJC in coming to its decision, with the exception of exchanges between the Chairperson of the Judicial Conduct Committee of the Council and his advisors in the matter,

namely Mr. Sabourin himself, the former counsel to the CJC, and Professor Martin Friedland. The objection to providing this material was stated that it was prepared confidentially to assist the Chairperson of the Judicial Conduct Committee in his consideration of the complaint and that it would be against the public interest to produce this material. Solicitor-client privilege was also asserted.

[10] In determining whether the Friedland Report should constitute part of the record for the purposes of Rule 317 and whether it can or should be produced, it is important to set out the basis upon which it was prepared for the CJC.

Canadian Judicial Council – Statutory Regime

[11] The CJC was established in 1971 pursuant to amendments to the *Judges Act.* It consists of all chief justices and associate chief justices of the superior courts of Canada and the chief judge and associate chief judge of all courts whose members are appointed by the federal government of Canada.

[12] The objects and mandate of the CJC are set out in s.60 of the *Judges Act:*

> s.60(1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts and in the Tax Court of Canada.
>
> s.60(2) In furtherance of its objects, the Council may,
>
> (a) establish conferences of chief justices, associate chief justices, chief judges and associate chief judges;
>
> (b) establish seminars for the continuing education of judges;

> (c) make the inquiries and the investigation of complaints or allegations described in section 63; and
>
> (d) make the inquiries described in section 69.

[13] Sections 63 and 64 of the *Judges Act* set out the framework for the Council's mandate to conduct investigations and inquiries:

> s. 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 or of the Tax Court of Canada should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).
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> s.63(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court or of the Tax Court of Canada.
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> s.63(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.
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> s.63(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
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> (a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is 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 is inquiring; and
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> (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.
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> s.64(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.

> s.64(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.

[14] Section 65 of the *Judges Act* sets out the only bases upon which that the CJC may recommend that a judge be removed from office:

> s.65(1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.
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> s.65(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 judge by reason of
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> (a) age or infirmity,
> (b) having been guilty of misconduct,
> (c) having failed in the due execution of that office, or
> (d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office,
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> The Council, it its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[15] Thus, when the CJC takes jurisdiction under the *Judges Act*, it may recommend that a judge be removed from office on the grounds that the CJC has found the judge to be incapacitated or disabled (as defined), or the Council may make no recommendation.

[16] The CJC has passed "Complaints Procedures" to assist the conduct of the investigation of complaints. Under these Procedures, the following initial outcomes are possible:

> a. the Chairperson of the Judicial Conduct Committee (the "Chair") can close the file where the matter is trivial, vexatious, made for an improper purpose, manifestly without substance or does not warrant further consideration;
>
> b. seek additional information from the complainant;

> c. seek the judge's comments and those of his or her chief justice;
>
> d. after obtaining comments from the judge or his or her chief justice, the Chair can:
> (i) close the file after concluding that the matter is without merit or does not warrant further consideration or where the judge acknowledges that his or her conduct was inappropriate and the Chair is of the view that no further inquiries need to be taken in relation to the complaint; or
>
> (ii)hold the file in abeyance pending pursuit of remedial measures pursuant to section 5.3; or
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> (iii)ask Counsel to make further inquires and prepare a report, if the Chair is of the view that such report would assist in considering the complaint; or
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> (iv)refer the file to a Panel.

[17] Where the Chair of the Judicial Conduct Committee has asked Counsel to make further inquiries and prepare a report, the Executive Director of the CJC shall inform the judge that is the subject of the complaint, and his or her chief justice. Counsel shall also 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 (ss.7.1-7.2 of the Complaints Procedures). Following receipt and review of Counsel's report, the Chair may (i) close the file, (ii) hold the file in abeyance pending pursuit of remedial measure or (iii) refer the file to a Panel.

Status and Role of "Counsel"

[18] The CJC Complaints Procedures define "Counsel" as "a lawyer who is not an employee" of the CJC. The CJC has adopted a policy with respect to Counsel retained in judicial conduct matters, that sets out the role of Counsel in conducting the "further inquiries" contemplated by the Procedures. That policy states:

> "The role of Counsel in conducting further inquires 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 inquires 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 inquires 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."

[19] Professor Friedland was engaged as "Counsel" to conduct further inquiries in the matter of Mr. Slansky's complaint and that defined "fact-gathering" role was communicated him, together with the policy for "Counsel conducting further inquiries". The policy formed the basis of his engagement letter, along with the CJC's Complaints Procedures.

[20] In that respect, the terms of Professor Friedland's engagement and the description of the role and function of "Counsel making further inquiries" is critical for the disposition of this motion. The terms of the engagement letter indicate the relationship between CJC and "Counsel undertaking further inquiries" is not intended to create a solicitor-client relationship and the stated purpose of the engagement is not to provide legal advice. The role of Counsel is that of a skilled investigator and fact-gatherer, similar to the role of an investigator engaged to conduct interviews and make inquiries into complaints of human rights violations, or in the workplace where policies and protocols may exist to deal with complaints, to investigate sexual harassment or other allegations in a manner that is fair to all concerned.

[21] The CJC submits that in the course of this investigation by Counsel, issues of a personal nature may arise, including sensitivities and concerns on the part of persons being interviewed that must be taken into account. Persons interviewed may include court staff, fellow judges, supervisory judges, counsel who appear before the judge and/or work together. The CJC notes that in each of these cases, persons with knowledge about the complaint are often likely to feel vulnerable to the adverse opinions of the judge or of each other, or may feel that a proper working professional or supervisory relationship would be compromised if their views on the complaint were made known to their colleagues or to the public. The CJC asserts that if assurances of confidentiality are not given to persons being interviewed, it is probable that the investigation would not produce the same quality of information as can be obtained when such assurance is given, which would lead to more formal hearings in which evidence under oath is compelled.

[22] In addition, as the CJC submits, the role of "Counsel making further inquiries" is also important to allow the CJC to obtain the facts - reliable and candid information concerning a complaint, without going the route of an investigation by way of a Panel. Indeed, for the CJC, the role of Counsel arises and is important for the initial purposes of deciding whether a full inquiry or Panel is warranted at all, without having to resort to the formality of a proceeding in which evidence is obtained under oath. The CJC seeks to protect this summary route of investigation, wherein after investigation and reporting by Counsel, a complaint may be determined not to warrant further inquiry or, conversely, to require hearing by a Panel.

[23] These are understandable practical considerations given the constraints of the *Judges Act* as to how the CJC receives and investigates complaints, and how it has developed this "middle ground" between closing a file and referring a complaint to a Panel. The issue on this motion, however, is 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.

Solicitor-Client Privilege

[24] Whether or not the relationship between Professor Friedland and the CJC can be characterized as benefiting from solicitor-client privilege must be determined by reference to the fundamental principles underlying the privilege, which include the following essential features that indicate whether solicitor-client privilege is established.

[25] Solicitor-client privilege attaches to communications between a lawyer and his or her client where: (i) the client seeks legal advice from a lawyer; (ii) where the lawyer provides this legal advice in his or her professional capacity; (iii) where the communication between the lawyer and the client relates to legal advice; and (iv) where the communication between the lawyer and client is made in confidence. In order to qualify for solicitor-client privilege, the communication must thus be in relation to legal advice sought from a legal advisor in his or her capacity as a legal advisor. (*Solosky v. The Queen (1979)* [1980] 1. S.C.R. 821; *The Law of Privilege in Canada*, Hubbard, Magotiaux, Duncan; Canada Law Book, November, 2010).

[26] It is the CJC's evidence on this motion that in addition to "fact-gathering", Professor Friedland was instructed to "provide a lawyer's analysis and recommendations" in respect of the allegations. The CJC states that it was its expectation that the report prepared by Counsel was confidential and that it constitutes legal advice. These expectations are set out in the affidavit of the Norman Sabourin, the CJC's Executive Director and General counsel, but are not expressly reflected in either Professor Friedland's engagement letter, or in Professor Friedland's own comments in his report regarding his mandate.

[27] Professor Friedland notes that he is to act as a "fact-finder", and that his role is to clarify the allegations and gather evidence. He expressly acknowledges that it is not his role to weigh the merits of the complaint or make any recommendation as to the determination that a Chairperson or a Panel would make.

[28] In his report, Professor Friedland describes what he did. He conducted numerous interviews; he listened to tapes and reviewed transcripts from parts of the trial and the minutes of the proceedings prepared by the registrars of the courts. Professor Friedland goes into great detail describing what happened at the trial. He also identifies a number of issues for the CJC and frames the questions to be determined by the CJC in its determination of how to proceed with Mr. Slansky's complaint. In that assessment, he does appear to provide more than the facts, and indeed offers some legal analysis and advice. For example, Professor Friedland identifies as an issue for the CJC to determine, whether the judge maintained an appearance of impartiality. He also reviews Justice Thompson's legal decisions made during the course of the trial, in particular evidentiary rulings made during the trial. On both of these matters, Professor Friedland offers his professional opinion about them.

[29] This analysis and advice goes beyond the mandate for Counsel as stated in the CJC's Complaints Procedures and the Policy for "Counsel conducting further inquiries", but I cannot conclude that they were gratuitous comments or constitute unsolicited legal advice. Mr. Sabourin made clear in his affidavit that persons engaged as Counsel are instructed to provide a lawyer's analysis and recommendations in respect of the allegations of judicial misconduct, for consideration by the Chairperson of the Judicial Conduct Committee.

[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 (4^{th}) 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.

No Waiver – Common Interest Privilege Applies

[31] Professor Friedland's report was provided to the CJC on or about October 27, 2005. The Court was advised at the hearing of the motion that the CJC subsequently provided a copy of the Friedland Report to the Law Society of Upper Canada to be included in its investigation of the complaint filed by Justice Thompson against Mr. Slansky, and that a further copy was sent to the Deputy Attorney General at the request of Justice Thompson for this purpose. The Applicant submits that to the extent all or part of the Friedland Report was protected by solicitor-client privilege, it was waived by the CJC by this disclosure to third parties.

[32] As noted in *The Law of Privilege in Canada* (at p.11-54.1), for common interest to exist, the parties must share a common goal, seek a common outcome or have a selfsame interest. Here, there is an affinity between the CJC and the Law Society of Upper Canada in investigating complaints of misconduct, particularly in those cases where complaints are filed against both judge and counsel in the same proceeding. The legal advice and opinions that may be shared between them are to ensure a complete investigation into the allegations of judicial and/or professional misconduct and to ensure, from the perspective of the public, that justice was done in the proceeding that has attracted scrutiny. Such exchange in such circumstances is to be encouraged and it was done in this case. I am satisfied that as between the CJC and Law Society, they have a common interest in the matter of the proper disposition of the complaints of misconduct made by each of Mr. Slansky and Justice Thompson.

Public Interest Privilege

[33] What is not protected by solicitor-client privilege, the CJC claims public interest privilege to prevent production and disclosure in the record. Public interest privilege protects information that should not be disclosed on the grounds that its disclosure would be contrary to the "public interest". To determine whether information should be so protected, requires a balancing of interests, often competing "public interests" – one to disclose the information, and the other to preserve its confidentiality. These determinations can only be made on a "case-by-case" basis.

[34] The public interest identified by the CJC on this motion concerns the functioning of the CJC's complaints process and the initial determination it must make regarding whether or not a

complaint should proceed to inquiry. The CJC has developed its process of investigation relying upon Counsel to gather facts and to clarify allegations, and submits that without assurances of confidentiality, it could be difficult to speak to witnesses and obtain complete, reliable and candid information about a judge against whom a complaint as been filed. These persons might feel vulnerable or concerned about working relationships which would prevent them from speaking freely if they knew their comments could find their way into the public record, notwithstanding the fact that in the event of a hearing, these individuals could be called to give their testimony under oath. The CJC expresses its concern for the judge who is the subject of the complaint, who may be interviewed by Counsel regarding his or her health or other personal information. In a single sentence, the CJC also notes 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.

[35] The Applicant notes that this case raises concerns about how the CJC deals with complaints against fellow judges. The public must in this regard, have confidence in the integrity of this process, and confidence generally in the judicial process and administration of justice. When we speak of judicial independence, it is the public interest in judicial independence that is paramount. It is in the public interest to ensure that decisions are made independently, free from political interference and with impartiality and fairness. To the extent the decision of the CJC to close the file on Mr. Slansky's complaint is subject to judicial review, there may be an additional concern by the public as to how the reviewing Court can fulfill its role on the application for judicial review without the facts on which the CJC made its decision being in the record, particularly the facts that are contained in the Friedland Report, which the CJC has stated was key to its decision. It is in the public interest to ensure that a meaningful and effective judicial review can be conducted.

[36] The CJC did not point to any case where the facts gathered in an investigation were found to be protected by public interest privilege, absent risk to the safety of an informant, or serious risk to the investigation itself (usually the case in criminal or administrative investigations). In the matter at hand, whether the CJC's process would be hampered in future is the subject of speculation. There is no evidence that people who were interviewed for the Friedland Report would not have been as forthcoming, had they knowledge that their information might become public, and there is nothing in the Friedland Report or motion material that would warrant such inference being made. There is also the added consideration that under the *Judges Act* and the CJC's Complaints Procedures, the CJC has the ability to conduct an inquiry and investigation into a complaint, with power to compel witnesses under oath – the CJC will thus always have the ability to gather facts and obtain reliable evidence, even if its preferred approach at the initial stage of a complaint, is to conduct the more informal investigation through Counsel.

[37] The issue is thus whether there is a public interest in the disclosure of the facts gathered in Professor Friedland's investigation and whether another public interest would be compromised or damaged by the disclosure.

[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.

[39] Accordingly, I find that no public interest privilege attaches to those parts of the Friedland Report that are not legal advice and protected by solicitor-client privilege, and that those parts of the report should be produced. In that respect, as part of the order below, counsel for the CJC shall review the Friedland Report and highlight for the Court, those portions that the CJC submits constitute legal advice. A final redacted version of the Friedland Report shall then be produced to form part of the record for the purposes of Rule 317 of the Federal Courts Rules.

ORDER

1. The CJC shall, within twenty days of the date of this Order, file a copy of the Friedland Report, indicating on the copy, those portions that are to be redacted, consistent with these reasons.
2. Upon the Court finalizing the redacted version of the Friedland Report, the redacted Friedland Report shall be produced and form part of the record for the purposes of Rule 317 of the Federal Courts Rules.
3. To the extent the parties do not agree on the costs of this motion, written submissions no longer than three pages in length may be filed within twenty days of the date of this Order.

"Martha Milczynski"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-716-06
STYLE OF CAUSE:	PAUL SLANSKY v. THE ATTORNEY GENERAL OF CANADA, THE CANADIAN JUDICIAL COUNCIL, HER MAJESTY THE QUEEN
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