Federal Court of Appeal | Cour d'appel fédérale

Date: 20130909

Docket: A-497-11

Citation: 2013 FCA 199

CORAM: **EVANS J.A.**
STRATAS J.A.
MAINVILLE J.A.

BETWEEN:

PAUL SLANSKY

Appellant

and

ATTORNEY GENERAL OF CANADA,
HER MAJESTY THE QUEEN

Respondents

and

CANADIAN JUDICIAL COUNCIL

Intervener

Heard at Toronto, Ontario, on April 16, 2013.

Judgment delivered at Ottawa, Ontario, on September 9, 2013.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRING REASONS BY: MAINVILLE J.A.
DISSENTING REASONS BY: STRATAS J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. *INTRODUCTION*

[1] The Canadian Judicial Council (CJC) has a statutory responsibility to investigate complaints of misconduct made against federally appointed judges. This may result in a recommendation to the Minister of Justice that a judge has become unable to perform judicial duties by virtue of misconduct, and should be removed from office. The CJC's disciplinary function is delicate: it engages issues of judicial independence and accountability, and of confidentiality and transparency.

Consideration of these issues must be driven by the public interest in the administration of justice in both its broadest and more specific senses.

[2] This case raises an important issue about the CJC's investigative process. If a complainant applies for judicial review of a decision by the Chairperson of the Judicial Conduct Committee (Chairperson) to dismiss a complaint against a judge, must the CJC disclose a confidential report prepared by outside counsel to assist the Chairperson in considering the complaint?

[3] In August 2004, Paul Slansky, a Toronto criminal lawyer, complained to the CJC about the conduct of Justice Robert Thompson (Judge), an Ontario Superior Court Judge. He alleged that the Judge had been guilty of serious misconduct during a long and difficult first-degree murder trial before a jury, in which Mr Slansky was representing the accused.

[4] The Chairperson, Chief Justice Scott of Manitoba, dismissed the complaint and closed the file without referring it to an Inquiry Committee (hearing panel) of the CJC. In making this decision, the Chairperson relied on a report from counsel, Professor Martin Friedland, whom he had retained to make further inquiries into Mr Slansky's allegations.

[5] Mr Slansky brought an application for judicial review of the Chairperson's decision to dismiss his complaint and not to refer it to a hearing panel. Although Professor Friedland's report had been taken into account by the Chairperson in making this decision, the CJC refused to disclose it as part of the tribunal record requested by Mr Slansky pursuant to rule 317 of the *Federal Courts*

Rules, SOR/98-106 (Rules). The CJC said that the report constituted legal advice and was thus protected by solicitor-client privilege, and was also subject to public interest privilege.

[6] Mr Slansky brought a motion to compel disclosure of the report as part of the CJC's record. In the alternative, he argued that the Court should exercise its discretion under subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, to order the conversion of the application into an action, so that he would have the benefits of trial process, including discovery and *viva voce* evidence.

[7] Subject to the redaction of pages in the report that she considered to be legal advice, Prothonotary Milczynski granted the motion and rejected the CJC's privilege arguments. Having ordered disclosure of most of the report, she did not have to, and did not, determine the conversion issue. Her decision is reported at 2011 FC 476.

[8] The CJC brought a motion under rule 51 of the Rules to set aside the Prothonotary's decision. Justice de Montigny of the Federal Court allowed the motion and reversed the Prothonotary's decision. He found that Professor Friedland's report was subject to both legal advice and public interest privilege. He declined to sever parts of the report, but ordered the CJC to disclose the 6,000 pages of trial transcript examined by Professor Friedland, as well as other publicly available materials that he had considered in preparing his report. Justice de Montigny exercised his discretion not to convert the application into an action. His decision is reported at 2011 FC 1467.

[9] Mr Slansky appeals to this Court from that decision. For the reasons that follow, I have concluded that the Friedland Report is covered by legal advice privilege. In addition, I agree with my colleague Justice Mainville that the report is also subject to public interest privilege. I am not persuaded that Justice de Montigny committed any error in refusing Mr Slansky's request to convert the application into an action.

[10] Accordingly, I would dismiss the appeal, but vary the Federal Court's order by requiring the CJC to disclose pages 31-32 of the Report as part of its tribunal record because they are not relevant to Professor Friedland's investigation of Mr Slansky's complaint against the Judge.

B. FACTUAL BACKGROUND

[11] In a 16-page complaint to the CJC, dated August 12, 2004 (Appeal Book, pp. 39-54), Mr Galati, who was representing Mr Slansky, alleged serious misconduct by the Judge during the trial: discourteous, abusive and impatient behaviour towards Mr Slansky; bias, refusal to hear arguments and unduly interfering with Mr Slansky's cross-examination of witnesses; improper motives; abuse of office; and knowingly acting contrary to law.

[12] In turn, the Judge, through the Assistant Deputy Attorney General of Ontario, complained to the Law Society of Upper Canada about Mr Slansky's conduct at the trial. This complaint was dismissed without being referred to a hearing, on the ground that the conduct in question did not warrant discipline.

[13] The pre-trial motions and the murder trial before Justice Thompson lasted from September 2002 to July 2004, including 130 days for the trial itself, which was much longer than anyone anticipated. It involved dozens of motions and required the Judge to make numerous difficult procedural and evidentiary rulings. A complicating factor throughout was that it was a re-trial following the Ontario Court of Appeal's reversal of the accused's conviction at the first trial, a fact that the Judge had to keep from the jury. The fact that Mr Slansky was convinced of his client's innocence, while the Judge seems to have been equally convinced that the accused was guilty, only made the management of the trial more challenging.

[14] After receiving Mr Slansky's complaint against the Judge, the Chairperson engaged Professor Friedland of the University of Toronto's Faculty of Law to conduct further inquiries into it and to report back to him. Professor Friedland is a member of the Ontario Bar, a distinguished criminal law scholar, and the author of an influential report prepared for the CJC, *A Place Apart*: *Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).

[15] The scope of Professor Friedland's mandate was set out in a letter, dated May 3, 2005, in which Norman Sabourin, the Executive Director and General Counsel of the CJC, confirmed Professor Friedland's appointment: Appeal Book, pp. 56-58. The letter defined the scope of his role by quoting from the CJC's *Policy with Respect to Counsel Retained in Judicial Conduct Matters*, dated September 2002 (Policy).

> 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. [Emphasis added] 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. […]
>
> 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.
>
> 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.

[16] In an affidavit affirmed on February 9, 2007 (Appeal Book, pp. 293-94) for the purpose of Mr Slansky's motion before the Prothonotary, Mr Sabourin put something of a gloss on the terms of the CJC's Policy reproduced in Professor Friedland's letter of engagement. He indicated that counsel's role of "fact finder" was broader than might be inferred from reading the Policy.

[17] Thus, Mr Sabourin said that he was responsible for directing the scope of counsel's inquiries and "the nature of the advice they provide" (emphasis added). Further, he said, counsel is expected "to provide a lawyer's analysis and recommendations" (emphasis added) in respect of the allegations of the complaint. Mr Sabourin concluded that his expectation, as well as that of the Chairperson, was that counsel's report would 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. Indeed,

> this is why the *Complaints Procedures* provide that it must be a lawyer that conducts such inquiries; otherwise, this work could be ably conducted by an investigator without legal credentials. [Emphasis added]

[18] That Professor Friedland shared this understanding of his mandate is suggested by the fact that he stamped his report "CONFIDENTIAL and subject to SOLICITOR-CLIENT PRIVILEGE".

[19] In a 10-page letter, dated March 9, 2006, Mr Sabourin advised Mr Slansky of the bases of the Chairperson's decision that his complaint did not warrant further consideration: Appeal Book, pp. 311-20.

[20] According to Mr Sabourin, it was the Chairperson's opinion that when viewed in the context of this difficult trial, and taking into account Mr Slansky's own conduct, the Judge's management of the trial, while far from perfect, did not constitute judicial misconduct. The Chairperson had concluded that, although not all the Judge's rulings were necessarily correct, they did not evidence bias or a knowing disregard of the law.

[21] Mr Sabourin also described Professor Friedland's methodology in preparing his report (Appeal Book, p. 312), which included: the examination of 6,000 pages of trial transcript, minutes of the proceedings prepared by the court registrars during the trial, and 78 of the rulings made by the Judge before and during the trial; and interviews conducted by Professor Friedland with the Judge, Mr Slansky, named Crown counsel, the Regional Director of Crown Attorneys, and the Regional Senior Justice. Professor Friedland also listened to tapes of the parts of the trial that had become particularly intense.

[22] Mr Sabourin noted that the Chairperson had not adopted Mr Galati's suggestion that "the local bar" be interviewed, because the interviews conducted by Professor Friedland provided sufficient information to enable him to assess the complaint. Moreover, the Judge's predilections in matters of criminal justice, and sentencing in particular, were evident from interviews with the Judge and from some of his reported decisions.

[23] In his application for judicial review of the dismissal of the complaint, Mr Slansky alleged, among other things, that the CJC's investigation of the complaint was inadequate, the interpretation of the Judge's conduct was wrong in law, and the CJC had exceeded its jurisdiction by passing "erroneous and flawed judgment" on Mr Slansky's conduct at trial as an excuse for the Judge's misconduct.

C. LEGISLATIVE FRAMEWORK

[24] The *Judges Act*, R.S.C. 1985, c. J-1, is the primary legislation relevant to this appeal. Subsection 59(1) establishes the CJC, which is composed of the Chief Justice of Canada, who is the chair of the CJC, and the federally appointed chief justices, associate chief justices, and other specified senior judges, from across Canada.

[25] Subsection 60(1) defines the objects of the CJC. Subsection 60(2) set out the CJC's means of furthering these objects; paragraph (*c*) is directly relevant to this appeal.

60. (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.	60. (1) Le Conseil a pour mission d'améliorer le fonctionnement des juridictions supérieures, ainsi que la qualité de leurs services judiciaires, et de favoriser l'uniformité dans l'administration de la justice devant ces

tribunaux.

(2) In furtherance of its objects, the Council may	(2) Dans le cadre de sa mission, le Conseil a le pouvoir :
…	[…]
(*c*) make the inquiries and the investigation of complaints or allegations described in section 63; and	*c*) de procéder aux enquêtes visées à l'article 63;
…	[…]

[26] Section 62 authorizes the CJC to engage the services of others as it deems necessary for performing its functions, including the services of counsel to assist in the conduct of inquiries or investigations.

62. The Council may engage the services of such persons as it deems necessary for carrying out its objects and duties, and also the services of counsel to aid and assist the Council in the conduct of any inquiry or investigation described in section 63.	62. Le Conseil peut employer le personnel nécessaire à l'exécution de sa mission et engager des conseillers juridiques pour l'assister dans la tenue des enquêtes visées à l'article 63.

[27] Subsection 63(2) provides that the CJC may investigate any complaint or allegation made in respect of a federally appointed judge. Subsection 63(5) authorizes the CJC to prevent the publication of information arising from an investigation under this section, and subsection 63(6) permits an investigation to be held in public or private, unless the Minister of Justice requires it to be held in public.

63. (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.	63. (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.

(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.

[28] After the completion of an investigation, the CJC must report its conclusions to the Minister and may recommend that the judge be dismissed from office if it concludes that the judge is incapacitated or disabled from the due execution of the office of judge by, among other things, misconduct.

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.	65. (1) À l'issue de l'enquête, le Conseil présente au ministre un rapport sur ses conclusions et lui communique le dossier.
(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 :
…	[…]
(*b*) having been guilty of misconduct,	*b*) manquement à l'honneur et à la dignité;
…	[…]
the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.	

[29] The statutory provisions establishing the disciplinary powers and process of the CJC are in addition to the existing powers to remove a judge from office.

71. Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of	71. Les articles 63 à 70 n'ont pas pour effet de porter atteinte aux attributions de la Chambre des communes, du Sénat ou du gouverneur en conseil en matière

Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections.	de révocation des juges ou des autres titulaires de poste susceptibles de faire l'objet des enquêtes qui y sont prévues.

[30] The CJC's *Procedures for Dealing with Complaints Made to the Canadian Judicial Complaints about Federally Appointed Judges* (Ottawa: Canadian Judicial Council, approved 2002) (*Complaints Procedures*) puts some flesh on the skeletal statutory provisions about the process by which the CJC investigates complaints against judges. The *Complaints Procedures* were amended in 2010. However, since the 2002 version is the one relevant to this appeal, its terms are reproduced in these reasons.

[31] Section 3.2 of the *Complaints Procedures* describes the initial step after the CJC has received a complaint.

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 their court.	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.

[32] If the Chairperson does not summarily close the file on the ground that the complaint is, among other things, manifestly without basis or outside the jurisdiction of the CJC (paragraph 3.5(*a*)), the Chairperson may ask the complainant for more information or solicit comments from the judge against whom the complaint has been made (paragraphs 3.5(*b*) and (*c*)). Section 5.1 sets

out the options available to the Chairperson after considering the responses to these requests.

Paragraph 5.1(*c*) is directly relevant to this appeal.

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	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*) close the file where:	*a*) fermer le dossier dans l'un ou l'autre cas suivant :
(i) the Chairperson concludes that the complaint is without merit or does not warrant further consideration, or	(i) il conclut que la plainte est dénuée de fondement ou qu'elle ne nécessite pas un examen plus poussé,
(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	(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*) hold the file in abeyance pending pursuit of remedial measures pursuant to section 5.3; or	*b*) mettre le dossier en suspens en attendant l'application de mesures correctives conformément à l'article 5.3;
(*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	*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*) refer the file to a Panel.	*d*) déférer le dossier à un comité d'examen.

[33] Section 1 of the *Complaints Procedures* defines "Counsel" as follows.

"Counsel" means a lawyer who is not an employee of the Council;	« avocat » Un avocat qui n'est pas un employé du Conseil.

[34] Section 7 contains two provisions that apply when the Chairperson asks counsel to make further inquiries under paragraph 5.1(*c*).

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 5.1*c*), 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 report of Counsel.	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.

[35] If, after reviewing counsel's report, the Chairperson decides to close the file on any of the grounds set out in section 5.1, the Executive Director must provide the judge with a copy of the letter informing the complainant that the file is closed (section 8.2).

[36] The CJC's Policy contains further detail on the role of counsel when engaged by the Chairperson under paragraph 5.1(*c*) of the *Complaints Procedure* "to make further inquiries and prepare a report" to assist the Chairperson in considering a complaint. The provisions of that Policy relevant to this appeal are quoted in paragraph 15 of these reasons.

D. *DECISION OF THE PROTHONOTARY*

[37] Prothonotary Milczynski granted Mr Slansky's motion to compel disclosure of the Friedland Report pursuant to rule 318 of the Rules as part of the administrative record of the CJC's dismissal of his complaint, which he was challenging in an application for judicial review. She held

that the relationship between the CJC and Professor Friedland was not that of solicitor and client because its stated purpose was investigative or "fact-gathering", not the provision of legal advice.

[38] Consequently, she held that the report was not exempted from disclosure by legal advice privilege in so far as it was limited to its purpose, that is, fact gathering. However, she found that Professor Friedland had also gone on to provide legal analysis relevant to how the Chairperson should proceed with the complaint, including the allegation of bias. She ordered counsel representing the CJC on the motion to identify the portions of the report that constituted legal advice in order to assist the Court in determining how much should be redacted before disclosure.

[39] The Prothonotary also rejected the CJC's claim for public interest privilege, on the ground that the non-disclosure of the report would both damage public confidence in the integrity of the complaints process and impede Mr Slansky's right to have his application for judicial review conducted in a meaningful manner. She noted that there was no precedent for extending public interest privilege to the facts gathered in an investigation, and concluded that there was no evidence that disclosure would hamper the CJC's investigative process.

E. DECISION OF THE FEDERAL COURT JUDGE

[40] Justice de Montigny granted the CJC's motion under rule 51 to set aside the decision of the Prothonotary. On the claim for legal advice privilege, the Judge found that, in light of all the circumstances, a relationship of solicitor and client existed between Professor Friedland and the CJC. In this regard, it was a mistake to focus on a single document, such as the CJC's Policy or the letter of engagement. He concluded (at para. 52) that the task of sorting out the facts relevant to the

decision that the Chairperson had to make was "fundamentally a legal exercise", and that the factual components of the report could not be severed. However, he ordered the disclosure of publicly available materials consulted by Professor Friedland, including 6,000 pages of trial transcript.

[41] The Judge rejected the protection of judicial independence as the basis for public interest privilege. However, he found that the public interest in safeguarding the integrity of the CJC's informal investigative process warranted the non-disclosure of the report, especially since, in this case, Mr Sabourin's letter to Mr Slansky gave sufficient information about the bases of the Chairpersons's decision to inform him of the case he had to meet.

[42] Finally, he held that summary applications for judicial review are only converted into actions in exceptional circumstances, which did not exist here. Mr Sabourin had provided extensive information to Mr Slansky about the bases of the Chairperson's decision. Moreover, even if it were possible for Mr Slansky to identify all those interviewed by Professor Friedland, it was unclear whether they could provide relevant evidence if summoned as witnesses at a trial.

F. *ISSUES AND ANALYSIS*

[43] The principal issue to be considered in these reasons is whether the Friedland Report is covered by the legal advice branch of solicitor-client privilege. Before addressing this question, I shall deal briefly with three other issues.

(i) standard of review

[44] Counsel for Mr Slansky argued that the Judge made an error of law by failing to apply a deferential standard of review to the Prothonotary's decision on a question (the disclosure of the Friedland Report) that no one contended was vital to the final issue in the application for judicial review: see C*anada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.); *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 at para. 18.

[45] For this reason, and because it was not suggested that the Prothonotary had misapprehended the facts, Justice de Montigny held (at para. 32) that her decision could be reversed only on

> … a clear showing that it is wrong, in the sense that it rests upon a wrong principle or a misunderstanding of the law.

[46] Counsel submitted that although Justice de Montigny had correctly formulated the applicable legal test for reviewing decisions of prothonotaries, he had in fact simply substituted his opinion for that of the Prothonotary on questions that were not pure questions of law or principle. I do not accept this argument.

[47] Justice de Montigny disagreed with the Prothonotary's finding on the legal advice privilege issue that a solicitor-client relationship had not been established. He held that she had not considered all the circumstances relevant to this issue, including the nature of the task entrusted to Professor Friedland. Instead, she had focused too narrowly on the letter of engagement and the provisions of the CJC's Policy on the role of counsel. Justice de Montigny also held that it was an error of law to sever the factual portions of a privileged communication. In my view, these are questions of law or principle on which a Prothonotary is not entitled to deference.

[48] As for the issue of public interest privilege, I view the error of principle that warranted the Judge's intervention as the Prothonotary's apparent insistence that the CJC had to adduce evidence that those interviewed by Professor Friedland would have been less forthcoming if they had known that his report would be disclosed in the course of judicial proceedings. The Prothonotary also attached virtually no weight to the additional resources that would be required if the CJC were forced to resort regularly to formal hearings before a panel, because the efficacy of its informal investigative process had been undermined by an inability to maintain the confidentiality of counsel's report.

[49] In my view, the Judge did not err by failing to apply a deferential standard of review to the Prothonotary's decision.

(ii) waiver

[50] A suggestion arose during argument before this Court that the CJC had waived any privilege that it might have with respect to the Friedland Report. The suggestion was based on the following statement in the Prothonotary's reasons (at para. 31):

> 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.

Nonetheless, the Prothonotary concluded that any disclosure to the Law Society for the purpose of its investigation of the complaint against Mr Slansky did not constitute a waiver of privilege because the CJC and the Law Society had a common interest in the due disposition of complaints

against those engaged in the administration of justice. She did not mention the further copy allegedly forwarded to the Deputy Attorney General.

[51] In addition, Mr Slansky stated in a supplementary affidavit, sworn on June 8, 2009 (Appeal Book, p. 341) that during a regulatory meeting of the Law Society in connection with the complaint against him, a lawyer had told him that Professor Friedland had said that Mr Slansky's jury address in the murder trial was one of the best he had ever read. Because Professor Friedland had also said this to him during the interview, Mr Slansky inferred that the CJC must have made the report available to the Law Society for use in its disciplinary proceedings against Mr Slansky. However, this inference is not warranted because it is equally plausible that the lawyer had learned of this compliment during a conversation with Professor Friedland.

[52] These are the only indications in the record that the CJC might have disclosed the Friedland Report to the Law Society and to the Deputy Attorney General of Ontario. Mr Slansky appears not to have pursued the issue of waiver before Justice de Montigny, nor did counsel raise it in his memorandum of fact and law in the appeal to this Court. When it arose at the hearing in this Court as a result of questions from the Bench, counsel for the CJC consulted Mr Sabourin, and reported that Mr Sabourin had told him that he had no knowledge of any disclosure of the report. Counsel for Mr Slansky did not comment.

[53] In my view, there is insufficient evidence in the record to establish that the CJC had waived its privilege by providing copies of the report to either the Law Society or the Deputy Attorney General of Ontario.

(iii) conversion

[54] The conversion of the application into an action only arises as an issue in this case if the Friedland Report is privileged. Since the Prothonotary found that it was not, she did not have to decide this question.

[55] Having held the report to be privileged, Justice de Montigny was required to consider Mr Slansky's request to convert his application for judicial review into an action under section 18.4 of the *Federal Courts Act*. Because his refusal to convert was discretionary in nature, it will only be set aside on appeal if it was either unreasonable in light of the facts or wrong in law.

[56] In his careful consideration of this issue (at paras. 86-94), Justice de Montigny correctly stated that a court should grant a request for a conversion "only in exceptional circumstances" (at para. 87). He inferred this from the text of subsection 18.4(1) which provides that applications "shall be heard and determined without delay and in a summary way". The Federal Court's discretion to convert an application into an action under subsection 18.4(2) is very much an exception to the general rule in subsection (1), as affirmed by the case law cited by Justice de Montigny (at paras. 88-89).

[57] He noted (at para. 90) that the only basis on which Mr Slansky relied to support the request for a conversion was that the facts relevant to his challenge to the CJC's dismissal of his complaint could not be established by affidavit evidence, which could not make good the "various evidentiary gaps, inconsistencies, and factual issues". However, Justice de Montigny held that any "gaps" were adequately filled by the detailed explanation of the Chairperson's decision that Mr Sabourin had

provided to Mr Slansky. Moreover, he said, if gaps existed, it was by no means clear that they could be filled by *viva voce* evidence, especially since Mr Slansky would not have access to the privileged report.

[58] Justice de Montigny concluded (at para. 93) that the key question was whether affidavit evidence would be inadequate for the fair disposition of the allegations made in the application for judicial review, and not whether trial evidence might be superior. Applying this test, he was not persuaded that the circumstances of this case justified converting the application into an action.

[59] This is the only issue on which counsel for the Attorney General took a position. Like the CJC, he supported Justice de Montigny's decision that conversion was not appropriate.

[60] In my view, Justice de Montigny's analysis contains no error warranting this Court's interference with his exercise of discretion. In substance, much of counsel's argument in this Court was designed to show that trial evidence was likely to be better than the affidavits. But that is not the test.

[61] Counsel for Mr Slansky relied heavily on *Payne v. Ontario Human Rights Commission* (2000), 192 D.L.R. (4th) 315 (Ont. C.A.). However, in my view, this case is not of much assistance to Mr Slansky since it concerned a different issue, to which a different test applied: whether the applicant was entitled to serve a Notice of Examination on the Commission's registrar under Rule 39.03 of the *Ontario Rules of Civil Procedure* in order to obtain all the documents in the Commission's possession relevant to the case.

[62] In any event, if the Friedland Report is privileged – and the issue of conversion only arises if it is – it could not be discovered in a trial. Further, Mr Slansky has been informed of the publicly available documents on which Professor Friedland relied and has been given a full explanation of the bases of the Chairperson's decision.

[63] In these circumstances, I would not interfere with Justice de Montigny's exercise of discretion to refuse to convert the application into an action.

ISSUE 1: Is the Friedland Report subject to solicitor-client privilege?

(i) *introduction*

[64] In considering the CJC's claim for solicitor-client privilege for the Friedland Report, I have kept in mind the following four features of the privilege and of legal advice privilege in particular.

[65] First, solicitor-client privilege has two branches: litigation and legal advice privilege. The only branch claimed for the Friedland Report is legal advice privilege. This attaches to communications between solicitor and client for the purpose of obtaining or giving legal advice. It is the privilege of the client, not the lawyer.

[66] The rationale for legal advice privilege is that individuals who require the assistance of a lawyer must be able to disclose fully and frankly to the lawyer all the information that the lawyer requires in order to provide sound advice in a legal context: see, for example, *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 at para. 9 (*Blood Tribe*).

[67] Without this guarantee of confidentiality, individuals may be unwilling to reveal all to their lawyer and, as a result, their ability to successfully assert their legal rights, or to discharge their legal duties, may be prejudiced, and the integrity of the administration of justice undermined: *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 at para. 2. Thus, the rule of law is the ultimate justification of the privilege: *Three Rivers District Council v. Governor and Company of the Bank of England*, 2004 U.K.H.L. 48 (Eng. H.L.) at para. 34.

[68] Second, the privilege extends not only to communications from client to lawyer, but also from lawyer to client, including a lawyer's advice on legal issues on which she or he had been consulted by a public official or body in connection with the discharge of statutory responsibilities. Thus, for example, in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (*Pritchard*), privilege was successfully claimed for a legal opinion provided by in-house counsel, on which the Commission had relied in deciding not to exercise its statutory power to refer a complaint of discrimination to adjudication.

[69] It follows from the rationale for legal advice privilege that it does not protect the confidentiality of communications by third parties to a lawyer, at least when the third party was not acting on behalf of the client: *General Accident Assurance Co. v. Chrusz* (1999) 180 D.L.R. (4th) 241 (Ont. C.A.) at paras 120-22 (*per* Doherty J.A.) (*Chrusz*); *College of Physicians and Surgeons of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, 9 B.C.L.R (4th) 1 at paras. 45-58 (*College of Physicians and Surgeons of B.C.*).

[70] Hence, any discussion in the report of statements made in confidence to Professor Friedland by those he interviewed is not covered by legal advice privilege. Whether public interest privilege applies is, however, another matter.

[71] Third, when legal advice privilege for a communication has been established on the facts of a given case, and none of the limited exceptions apply (on which, see Adam M. Dodek, "Reconceiving Solicitor-Client Privilege" (2009), 35 Queen's L.J. 493 at 514-16), the privilege is "as close to absolute as possible" and, once established, "does not involve a balancing of interests on a case-by-case basis": *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 at para. 35. In this latter respect, legal privilege differs from public interest privilege. I would also add that, if a communication is found to be privileged, it is not for the Court to opine on the wisdom of the decision to make the claim.

[72] The search for truth in litigation should not be taken to be the one "true" principle, to which claims for the confidentiality of a communication on the basis of solicitor-client privilege are subsidiary and "a necessary evil to be tolerated only in the clearest of situations": *Chrusz* at para. 67. Rule 317 and 318 are not a statutory abrogation of solicitor-client privilege: *Pritchard* at paras. 32-36.

[73] Fourth, legal privilege is based on the class to which the communication belongs, not on the content of that communication. Thus, once it is established that a communication falls within the definition of the scope of the privilege, the court does not consider the content of the document in

question in order to determine whether its disclosure is likely to prejudice the free flow of information that legal privilege is designed to protect.

(ii) *the elements of legal advice privilege*

[74] The four elements of the test for determining whether a communication qualifies for legal advice privilege are well established: (1) it must have been between a client and solicitor; (2) it must be one in which legal advice is sought or offered; (3) it must have been intended to be confidential; and (4) it must not have had the purpose of furthering unlawful conduct: see *R. v. Solosky*, [1980] 1 S.C.R. 821 at 835; *Pritchard* at para. 15.

[75] Counsel for Mr Slansky did not dispute that the report was intended to be confidential. Professor Friedland stamped it as such. As already noted, I am not persuaded that the CJC subsequently waived its confidentiality. The fourth element of the *Solosky* test is not relevant to this appeal.

[76] The central question in this case is whether the Chairperson engaged Professor Friedland in his capacity as a lawyer to provide legal advice to assist him in deciding whether to dismiss the complaint or refer it to a hearing.

[77] Legal advice has been held to include not only telling clients the law, but also giving advice "as to what should prudently and sensibly be done in the relevant legal context": *Balabel v. Air India*, [1988] Ch. 317 (Eng. C.A.) at 330, quoted with approval in *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA, 317 D.L.R. (4th) 634 at para. 126.

[78] Further, as Steel J.A. observed in *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11, 196 D.L.R. (4th) 716 at para. 22 (*Gower*), this question is "closely related to whether the solicitor was acting in a professional legal capacity as a solicitor."

[79] In *Blood Tribe*, Justice Binnie somewhat broadened the scope of legal advice privilege by stating (at para. 10) that solicitor-client privilege is

> … applicable to all interactions between a client and his or her lawyer <u>when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer</u> rather than as a business counsellor or in some other non-legal capacity: … [emphasis added]

Thus, a solicitor-client relationship is established for privilege purposes if the lawyer has been asked either to give legal advice or otherwise to act as a lawyer, that is, to perform services related to a legal issue pertaining to the client for which the professional skills and knowledge of a lawyer are required.

(iii) *lawyers and investigations*: *the jurisprudence*

[80] *Gower* is the leading authority on legal advice privilege respecting a report by a lawyer who has been instructed by a client to investigate a complaint of improper conduct. The issue in *Gower* was whether the plaintiff in a wrongful dismissal action was entitled to the production of a report written by a lawyer at the request of the defendant, the plaintiff's employer.

[81] The lawyer had been retained to conduct an investigation into a complaint against the plaintiff of sexual harassment "as counsel on behalf of the employer for the purpose of providing a fact finding report and giving legal advice based on the report" (para. 4). The Court held (at para.

12) that the entire report, including the section on findings of fact, was subject to legal advice privilege, on the ground that "the entire report forms an investigative report leading to legal advice".

[82] As to what constitutes "legal advice" for the purpose of the privilege, the Court stated (at para. 19):

> ... legal advice is not confined to merely telling the client the state of the law. It includes advice as to what should be done in the relevant legal context. It must, as a necessity, include ascertaining or investigating the facts upon which the advice will be rendered. Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services.

[83] The Court held (at para. 37) that if the lawyer had been asked only to investigate and to find the facts, that would not have constituted the giving of legal advice, and the report would not have been privileged. However, the Court was satisfied (at para. 38) that the lawyer was also asked to provide recommendations and to advise on their legal implications. Since the fact finding was inextricably linked to the provision of that legal service, the portion of the report dealing with the lawyer's findings of fact was also covered by the privilege.

[84] *College of Physicians and Surgeons of B.C.* arose from a complaint of misconduct by a physician. One issue was whether experts' reports obtained by the College's in-house lawyer in the course of her investigation of the complaint were covered by legal advice privilege.

[85] Adopting the approach in *Gower*, the Court in *College of Physicians and Surgeons of B.C.* stated that legal advice privilege may attach to a communication by a lawyer to a committee of the regulatory body made in the context of providing legal advice on the performance of its statutory

duty to decide whether a complaint should be subject to further inquiry. The Court found (at para. 42) that the lawyer's instructions were

> … to obtain the facts necessary to render legal advice to the [College's Sexual Conduct Committee] concerning its legal obligations arising out of the complaint. As such, she was engaged in giving legal advice to her client.

However, on the basis of *Chrusz*, the Court held that the experts' reports were not covered by solicitor-client privilege because they were communications to the lawyer by third parties who were not acting on behalf of the College, the lawyer's client.

[86] In an earlier case, *Wilson v. Favelle* (1994), 26 C.P.C. (3d) 273 BCSC *(Wilson*), the Master emphasized the importance of the scope of the role assigned to a lawyer in determining whether legal advice privilege applies. An outside lawyer had been retained by the British Columbia Ministry of Health to investigate a complaint of misconduct by the plaintiff, an employee of the Ministry. The plaintiff sought production of the lawyer's report, which the Province opposed on the ground that it was subject to solicitor-client privilege.

[87] The contract between the lawyer and the Ministry stated that the lawyer was to investigate the allegations by interviewing the complainant. The lawyer was then to prepare a report for the Deputy Minister documenting the facts, and advise on any breaches of the standards of conduct applicable to public service employees and on any damage to either the Ministry's ability to perform its functions or the reputation of the Crown or its employees. The terms of the contract were subsequently characterized in an affidavit as including the provision of legal advice to the Deputy Minister.

[88] The Master granted the motion for production on the ground that the terms of the lawyer's contract did not establish a solicitor-client relationship. He gave no weight to the affidavit's after-the-fact re-characterization of the instructions.

[89] Unlike the situation in *Gower* and *College of Physicians and Surgeons of B.C.*, Professor Friedland's letter of engagement did not expressly include the provision of legal advice to the Chairperson. Indeed, he was specifically instructed not to advise the Chairperson on the decision he should make regarding the complaint. However, *Blood Tribe* has somewhat modified the law as formulated in these cases in that a lawyer and client relationship will be established if the lawyer had been engaged to provide services in a legal context for which a lawyer's skills and knowledge are necessary, even if the services might not be regarded as the provision of legal advice in the ordinary sense, because, for example, the lawyer neither informs the client about their legal rights or duties, nor expressly advises on action to be taken by the client given the client's legal position.

[90] Whether Professor Friedland was retained to give legal advice or otherwise to act as a lawyer depends on the answers to two questions. First, what was the scope of the mandate given to him by the CJC? Second, is that mandate properly characterized as "providing legal advice or otherwise acting as a lawyer"?

(iv) *Professor Friedland's mandate*

[91] Counsel for Mr Slansky says that the terms of the CJC's Policy form the basis of Professor Friedland's letter of engagement. They establish that, as counsel, his role was limited to

investigating the complaint by gathering facts and clarifying the allegations, so as to assist the Chairperson in deciding how to proceed with the complaint.

[92] Further, he argues, it is clear from *Gower*, *College of Physicians and Surgeons of B.C,* and *Wilson* that the reports of lawyers who are instructed to investigate the facts of a complaint are not subject to legal advice privilege, unless their mandate also includes the provision of legal advice.

[93] Counsel submits that Professor Friedland's role was not to provide legal advice or other legal services, but rather was analogous to that of human rights investigators who investigate complaints of discrimination and report to the Commission on whether an adjudicative hearing is warranted. He says that these investigators have not generally been lawyers, and their reports are normally disclosed as a matter of fairness to complainants.

[94] There might be much to be said for this view if the nature of Professor Friedland's mandate was to be determined only by reference to the CJC's Policy incorporated into the letter of engagement, without any consideration of context. However, while the retainer is important evidence of whether a solicitor-client relationship has been established, the terms of the retainer are not necessarily conclusive (*Gower* at para. 40), and must be construed in light of all the relevant circumstances.

[95] The description of Professor Friedland's mandate in the letter of engagement was based on the CJC's Policy respecting the role of counsel. The parts of the Policy quoted in the letter state that the role of counsel in conducting further inquiries into a complaint is to "gather further

information", "attempt to clarify the allegations" and "gather evidence which, if established, would support or refute those allegations". In addition, the Policy provides that "documentation may be collected and analyzed" (emphasis added) by counsel.

[96] The Policy provides no further positive explanation of what "fact gathering" entails, but it does say what it does not include. First, while sometimes described as a fact finder, counsel is not an adjudicative fact finder who must make factual determinations based on a weighing of the evidence. Second, it is not counsel's role to recommend the decision that the Chairperson should make on the complaint. The Policy does not mention the provision of legal analysis or advice, although, depending on the nature of the particular complaint, this could be implicit in counsel's mandate, including the instruction to provide an analysis of documentation.

[97] Professor Friedland's letter of engagement did not expressly relate the terms of the Policy to the nature of the inquiries he was to make in respect of Mr Slansky's complaint. However, in my view this can be inferred from the complaint itself, which included allegations that the Judge's conduct of the trial included highly improper, non-judicial behaviour, bias, and procedural and evidentiary rulings that the Judge knew to be wrong.

[98] Inquiring into these allegations in order to assist the Chairperson in making a decision on whether to refer the complaint to a hearing panel called for an analysis of documents and tapes that required the skills and knowledge of a lawyer. And not just any lawyer, but one like Professor Friedland who had an extensive knowledge of criminal law and criminal trial process.

[99] Thus, Professor Friedland examined 6,000 pages of trial transcript, and listened to tape recordings of parts of the trial, in order to clarify the allegation of misconduct by the Judge in the manner in which he managed a difficult trial. Sifting through this material to understand the dynamics of the trial, identifying exchanges involving the Judge that might constitute judicial misconduct and not just give rise to an appeal, and providing an analysis of these findings, all called for a lawyer's knowledge and skills. Similarly, Professor Friedland's analysis of the Judge's rulings in this case, as well as of his other reported decisions, for indications of bias, bad faith, or improper motives, was also uniquely within a lawyer's competence.

[100] These activities are certainly included in the analysis of documentation that the CJC's Policy states is part of the role of counsel. The documents that had to be analyzed to enable Professor Friedland to conduct further inquiries into Mr Slansky's allegations clearly called for a lawyer's expertise.

[101] The context in which Professor Friedland was retained under paragraph 5.1(*c*) of the *Complaints Procedures* as counsel to conduct further inquiries into the complaint of judicial misconduct was to assist the Chairperson in making a decision as to whether to refer the complaint to a hearing panel. This is an essential aspect of the legal context in which he provided his services.

[102] In order for Professor Friedland in this case to provide the assistance contemplated by paragraph 5.1(*c*), he also had to be sensitive to the line between judicial errors that are appropriately remedied by an appeal and misconduct that might warrant removal from the Bench. This is always an especially delicate matter when the CJC is investigating a complaint, like Mr Slansky's, that

relates to a judge's legal rulings and conduct of a trial, issues that are at the heart of judicial independence and for which an appeal is normally the appropriate recourse.

[103] In my view, a lawyer's knowledge was required to make that distinction in this case. Professor Friedland's special legal expertise, as both a criminal lawyer and the author of a study of judicial discipline and judicial independence, made him particularly qualified for this role.

[104] There are undoubtedly similarities between the role of non-lawyer human rights investigators and that of counsel appointed under paragraph 5.1(*c*). In my view, however, these are outweighed in the present case by the differences. Human rights investigations are typically heavy on fact and light on law, and can be capably undertaken by suitably trained persons, whether or not they are lawyers. In contrast, the investigation of Mr Slansky's allegations inherently required factual and legal analysis peculiarly within a lawyer's expertise.

[105] Thus, despite the engagement letter's description of counsel's role as that of a gatherer and finder of the facts, it can be inferred from the nature of the allegations into which the letter stated that Professor Friedland was to conduct his inquiries that his role involved legal and factual analyses that required the skills and knowledge of a lawyer. Accordingly, when engaged to assist the Chairperson in deciding how to proceed with the complaint, Professor Friedland was engaged in his capacity as a lawyer. As a result, his report to the Chairperson is subject to solicitor-client privilege as legal advice.

[106] Indeed, it is frankly inconceivable that, when read in the context of Mr Slansky's complaint, the letter of engagement mandates Professor Friedland simply to gather the facts by assembling the raw data (the trial transcript and the Judge's rulings in this case, as well as other of his criminal law decisions), and to leave their analysis to the Chairperson. Indeed, the Policy specifically includes the analysis of documentation in the role of counsel, which in this case called for a legal analysis. The raw documentary data collected by Professor Friedland that is already in the public domain is not privileged. Justice de Montigny ordered its disclosure to Mr Slansky.

[107] The view I have taken of Professor Friedland's "fact finding" role in this case is reinforced by the affidavit of Mr Sabourin, where he states that, in engaging counsel, he and the Chairperson expect a lawyer's analysis and recommendations in respect of the allegations. In addition, the fact that the CJC's *Complaints Procedures* stipulates that counsel must be a lawyer suggests that their task calls for a lawyer's skills. I do not accept that this is a cynical attempt by the CJC to ensure that it can keep all investigative reports secret.

[108] Nonetheless, in the interests of transparency, and to avoid future misunderstandings, the description of the role of counsel contained in the CJC's *Complaints Procedures* should be modified to reflect more clearly the scope of the tasks that they are expected to undertake. The terms of letters of engagement should also provide more specific instructions regarding the particular complaint that counsel was engaged to investigate.

[109] In summary, when Professor Friedland was engaged to conduct further inquiries into Mr Slansky's allegations, and to submit a report on them to assist the Chairperson to discharge his legal

duty to decide on how to proceed with the complaint, he was engaged in his professional capacity as a lawyer. In view of the complexity and nature of the complaint, any analysis of the data that would assist the Chairperson required the skills and knowledge of a lawyer. Hence, when the letter of engagement is read in the context of this complaint, it is my view that Professor Friedland was engaged to provide legal advice or otherwise to act as a lawyer. The report of his inquiries is therefore subject to legal advice privilege.

ISSUE 2: Are the factual components of the report severable?

[110] Having concluded that Professor Friedland was engaged by the Chairperson to provide legal advice, or otherwise to act in his capacity as a lawyer, and that the confidential report of his further inquiries is therefore privileged as legal advice, I can deal quite briefly with the argument that the factual parts of the report should be severed and disclosed.

[111] In my view, the short answer to this argument is that, while holding that the factual analysis in the report could not be severed, Justice de Montigny nonetheless ordered the disclosure of the publicly available documentary materials that Professor Friedland had consulted in the preparation of his report. These documents contained the "facts". However, the legal and factual analysis of this material, which Professor Friedland undertook to assist the Chairperson with his decision, is the core of the communication covered in this case by legal advice privilege.

[112] As the Court observed in *Gower*, it is not permissible to sever findings of fact made in an investigative report covered by solicitor-client privilege when they form the basis of, and are inextricably linked to, the legal advice provided.

[113] Without necessarily adopting every aspect of Justice de Montigny's analysis of severance, subject to the two relatively minor reservations described below I agree that the disclosure of documents that he ordered substantively satisfied any possible duty to sever. To go further would erode the confidentiality on which the lawyer-client relationship fundamentally rests.

[114] First, I have already indicated at paragraphs 69 and 70 of these reasons that statements made by those interviewed by Professor Friedland in the course of his inquiries are not subject to legal advice privilege because they were not made on behalf of the client, the CJC. Accordingly, any account of those interviews in the report cannot be withheld from disclosure on the basis of solicitor-client privilege.

[115] My second reservation concerns pages 31-32 of the report. These deal with a general policy issue that Professor Friedland recommends that the CJC should take on as one of its initiatives, namely, the handling of mega trials.

[116] While this recommendation arises from Professor Friedland's inquiries into this complaint, it does not form the basis of his analysis of Mr Slansky's allegations. In my view, it is essentially policy advice and is insufficiently connected to Professor Friedland's mandate to fall within the scope of the privilege. However, it will be for the Judge who hears the application for judicial review to decide what relevance, if any, these pages have to the issues raised in the application.

"John M.Evans"

J.A.

MAINVILLE J.A. (Concurring reasons)

[117] I have read the reasons of my colleagues Evans J.A., and I adopt his description of the factual background, of the applicable legislative framework and of the decisions of the Federal Court. For the reasons given by him, which I also adopt, I agree (a) that Justice de Montigny did not err with respect to the standard of review; (b) that there is insufficient evidence in the record to establish that the Canadian Judicial Council (also referred to in these reasons as the "Council") waived its privilege; and (c) that we should not interfere with Justice de Montigny's exercise of discretion to refuse to convert the application into an action.

[118] On the substantive issue of legal advice privilege, I also agree with my colleague Evans J.A. that the analysis and advice contained in the confidential report prepared and submitted to the Canadian Judicial Council by Professor Martin Friedland (the "Friedland Report" or "report") is subject to such privilege.

[119] I also agree with my colleague Evans J.A. that the disclosure of the publicly available documentary materials that Professor Friedland had consulted contain most of the facts which were the subject of his report. However the report also contains other facts, including brief summaries of interviews carried out by Professor Friedland with the trial judge and various third parties. I agree that legal advice privilege does not normally protect the confidentiality of communications by third parties, at least when the third party was not acting on behalf of the client. I however neither find it useful nor necessary to determine whether these communications are severable from the remainder of the report since they are, in any event, subject to a public interest privilege.

[120] My colleague Evans J.A. suggests at paragraph 108 of his reasons that the Canadian Judicial Council should give greater thought to the role and mandate of outside counsel. I concur. I note in particular that pursuant to general principles of administrative fairness and natural justice which are reflected in section 64 of the *Judges Act*, R.S.C. 1985, c. J-1 and section 7.2 of the Council's *Complaints Procedures*, the Council has a legal duty to provide to a judge who is the subject of investigation sufficient information about the allegations and the material evidence to permit the judge to make a full response. Thus, a judge under investigation is entitled to such information, and this right cannot be thwarted through solicitor-client privilege claims over the fact findings of outside counsel.

[121] That being said, there may be appropriate circumstances where information included in a report from outside counsel, including communications from third parties, become subject to a public interest privilege. I address in my reasons the public interest privilege which applies in this case.

Background

[122] One of the responsibilities of the Canadian Judicial Council is to maintain public confidence in the federal judiciary. For this purpose, and pursuant to the statutory mandate vested in it by Parliament under the *Judges Act*, the Canadian Judicial Council is empowered to carry out investigations and inquiries into the conduct of a superior court judge.

[123] In the course of such inquiries and investigations, questions may arise as to the disclosure of certain information, such as the disclosure of statements given to the Canadian Judicial Council

under an undertaking of confidentiality. In such circumstances, the Council must determine whether maintaining public confidence in the judiciary is better served by disclosing or withholding the information.

[124] It is the prerogative and responsibility of the Canadian Judicial Council to decide in which circumstances and to what extent it is in the public interest not to disclose information obtained in the course of an investigation into the conduct of a judge. This public interest privilege flows in part from the constitutional principle of judicial independence. A large degree of deference is owed to the Council on this matter. However, in the context of a judicial proceeding where the issue may arise, it is the role of the court to balance the harm to judicial independence and the Council's processes that may result from a disclosure against the prejudice to the administration of justice that may result from non-disclosure.

[125] In this case, the Canadian Judicial Council decided to disclose a considerable amount of information with respect to its investigation into the conduct of the Honourable Justice Thompson of the Superior Court of Justice of Ontario (the "trial judge") during a long and difficult murder trial held before a jury in Owen Sound from October 2003 to May 2004 (the "trial"). This investigation was carried out in response to a complaint by one of the counsel acting at that trial, the appellant Paul Slansky. The Council explained in writing to Mr. Slansky the process it followed to investigate his complaint. In a letter, the Council set out a detailed review of all the salient and relevant facts, explained its review of the conduct of the trial judge during the trial, and provided clear, cogent and detailed reasons supporting its conclusion that his complaint did not warrant further consideration.

[126] The Council did not however disclose to Mr. Slansky the confidential report prepared and submitted to it by Professor Martin Friedland, a lawyer and law professor it had engaged to assist it with its investigation. The Council claims solicitor-client privilege over the report, since Professor Friedland was hired as a legal counsel. This claim has been dealt with by Evans J.A. in concurring reasons. The Council also claims a public interest privilege over the report. I will address this claim in these reasons.

[127] The Council raised the following reasons to refuse disclosure of the Friedland Report to Mr. Slansky on the ground of public interest privilege: (a) the need to protect judicial independence; (b) that individuals who had conveyed information to Professor Friedland had done so on the basis of an undertaking of confidentiality; (c) that the integrity and effectiveness of the Council's summary complaints process requires it to have the ability to obtain full and frank disclosures from affected judges and third parties with the knowledge that their statements would not be disclosed to the public; and (d) that the privacy interests of the affected judge must be protected.

[128] Justice de Montigny of the Federal Court found that the Council could raise a public interest privilege in this case, principally on the ground of the integrity and effectiveness of the Council's complaints process. He also found that, in the circumstances of this case, the public interest privilege outweighed any argument for disclosure. He noted that the information and documents already provided to Mr. Slansky by the Council were fulsome and complete, and clearly sufficient to properly undertake a judicial review of the decision of the Council not to pursue further his complaint.

[129] For the reasons set out below, I find that the report of Professor Friedland is subject to public interest privilege on the grounds raised by the Canadian Judicial Council.

Judicial independence and public interest privilege

[130] When the disclosure of information would be contrary to public interest, the common law may recognize a public interest privilege of non-disclosure: Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*, Canada Law Book, Toronto, loose-leaf ed. at sections 3.10 and 3.50. Several statutory provisions also provide for protection against disclosure on the ground of a specified public interest, notably sections 37, 38 and 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. The public interest privilege of non-disclosure is usually raised by the Executive branch of government, but it also extends to the legislative branch under the concept of Parliamentary privilege. In appropriate circumstances, the judicial branch may also raise public interest privilege.

[131] Through the combined effect of subsections 61(2), 63(5) and 63(6) of the *Judges Act*, Parliament has recognized that it may not be in the public interest to disclose certain information gathered within the context of an inquiry or an investigation into the conduct of a superior court judge. The relevant public interest here is judicial independence – a constitutional principle – and the integrity of the Canadian Judicial Council's process for enabling it to discharge its mandate effectively.

[132] Canadian constitutional history and Canadian constitutional law establish the deep roots, vitality and vibrancy of the principle of judicial independence in Canada. This principle requires that the courts be completely separate in authority and function from all other participants in the

justice system. At a minimum, this means that no outsider – be it government, a pressure group, an individual or even another judge – should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision: *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at pp. 69-70 and 73 ("*Beauregard*"). Moreover, judicial independence also means that security of tenure and financial security must be assured for a judge, and the institutional independence of the court to which the judge belongs must be preserved: *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 687 ("*Valente*").

[133] The concept of judicial independence has both individual and institutional aspects: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at paras. 121 to 130 ("*Reference re Remuneration*"). For the purposes of this appeal, it is sufficient to note that judicial independence requires that a judge be free from outside interference in conducting and deciding cases, and that, while acting in a judicial capacity, a judge should not fear that he or she may have to answer for the ideas expressed or the words used in open court or in a judgment: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 at paras. 56-57 ("*Moreau-Bérubé*").

[134] The principle of judicial independence has resulted in concomitant immunities, most notably (a) the immunity of a judge from suit and prosecution, and (b) the immunity of a judge from testifying about or otherwise justifying the reasons for a particular decision beyond those given in open court: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at p. 830 ("*MacKeigan*").

[135] The immunity of a judge from suit and prosecution has long been recognized as necessary to maintain public confidence in the judicial system: *Garnet v. Ferrand (1887)*, 6 B. & C. 611, at pp. 625-626, quoted approvingly in *Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716 ("*Morier*") at p. 737. The immunity serves to ensure that the judge is free in thought and independent in judgment: *Morier* at pp. 737 to 745. As noted by Lord Denning in *Sirros v. Moore*, [1975] 1 Q.B. 118, quoted approvingly in *Morier* at p. 739 and in *R. v. Lippé*, [1991] 2 S.C.R. 114 at pp. 155-156:

> If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable to damages?"

[136] The additional immunity from accounting for or justifying judicial decisions beyond those reasons provided in open court also serves to ensure the independence of judges and to instil public confidence in the judicial process: *MacKeigan* at pp. 828 to 830. As noted by McLachlin J. (as she then was), at p. 831 of that decision, "[t]o entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence."

[137] It is important to bear in mind that these immunities are there not for the benefit of individual judges; rather they exist for the benefit of the community as a whole. Indeed, an independent judiciary free from improper influence is an essential component of a free and democratic society.

[138] Unfortunately, it may happen that a judge's conduct amounts to an abuse of judicial independence. Such abuse is extremely serious since it threatens the integrity of the judiciary as a whole. If actions or expressions of a judge raise concern about the integrity of the judicial function, the process that is put in place to investigate the conduct of the judge is, in effect, an investigation into allegations of abuse of judicial independence: *Moreau-Bérubé* at para. 58. An effective mechanism for holding judges to account for misconduct is thus essential to maintaining public confidence in the judiciary and hence, ultimately, judicial independence.

[139] Through Part II of the *Judges Act*, Parliament has entrusted the Canadian Judicial Council with the responsibility of conducting investigations and inquiries into the conduct of superior court judges. Parliament has granted the Council a large degree of discretion to carry out this public interest task. Indeed, the Council has been vested with all the powers of a superior court in investigating complaints and conducting inquiries (subsection 63(4)). It has the authority to make by-laws respecting the conduct of its inquiries and investigations (paragraph 61(3)*(c)*). It has been given large discretionary authority to direct the manner in which it carries out its own work, which includes how it chooses to handle complaints (subsection 61(2)). It may engage the services of counsel to aid and assist it in its inquiries and investigations (section 62). It may prohibit the publication of information or documents arising out of an inquiry or investigation (subsection 63(5)). It may also call for an inquiry or investigation to be held in private (subsection 63(6)).

[140] Pursuant to these statutory powers, the Council has adopted *Complaints Procedures* (approved by the Council on September 27, 2002 and revised effective October 14, 2010). These procedures provide for a gradation of steps in the analysis of complaints against superior court

judges, going from a refusal to open a file when the complaint is irrational or an obvious abuse of process, to a full public inquiry carried out by an Inquiry Committee constituted under subsection 63(3) of the *Judges Act*, with intermediary steps in between.

[141] Many provinces have enacted similar legislation entrusting judges with the responsibility to oversee the conduct of provincial court judges, for example in Ontario the *Courts of Justice Act*, R.S.O. 1990, c. C-43 at sections 49 to 51.12. Indeed, judicial independence requires that such investigations and inquiries into the conduct of judges be dealt with primarily by other judges: *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3 at paras. 39 and 57; *Moreau-Bérubé* at para. 47.

[142] A judicial council investigating allegations of judicial misconduct has a unique mandate to consider the allegations in light of the constitutional principle of judicial independence. This unique mandate was explained in *Therrien (Re)*, above at paras. 147-148, and restated as follows in *Moreau-Bérubé* at para. 51:

> ... Gonthier J. noted in *Therrien*, *supra*, at para. 147 [...], that "before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office". In making such a determination, issues surrounding bias, apprehension of bias, and public perceptions of bias all require close consideration, all with simultaneous attention to the principle of judicial independence. This, according to Gonthier J., creates "a very special role, perhaps a unique one, in terms of both the disciplinary process and the principles of judicial independence that our Constitution protects" (para. 148).
> [Emphasis added]

[143] When undertaking an examination of the conduct of a judge, the Canadian Judicial Council must ensure that the examination respects the underlying purpose of the constitutional principle of

judicial independence. Throughout its investigation, it must act in a manner that does not materially impair the independence and impartiality of the judiciary more than is necessarily inherent in the discharge of its statutory responsibility of preserving the integrity of the judiciary: As noted by La Forest J. in *MacKeigan* at p. 813:

> To conclude, bodies which are set up or which in the course of their duties are required to undertake an examination of the conduct of a superior court judge in the exercise of judicial functions must be so constructed as to respect the letter and the underlying purpose of the judicature provisions of the Constitution. Nor can investigatory bodies act in a manner that might materially impair the protection accorded by s. 99 or the independence and impartiality of the judiciary.

[144] It may be necessary, in appropriate circumstances, to refuse to disclose information gathered in the course of an examination into a judge's conduct, particularly when such disclosure risks impairing the independence and impartiality of the judiciary. The *Judges Act* recognizes this.

[145] Significantly, the Canadian Judicial Council is not subject to the *Access to Information Act*, R.S.C. 1985, c. A-1. Moreover, pursuant to subsection 63(6) of the *Judges Act*, an inquiry or investigation carried out by the Council may be held in public "or in private", unless the Minister of Justice of Canada requires that it be held in public. Pursuant to subsection 63(5) of the *Judges Act*, the Canadian Judicial Council may prohibit the publication of any information or documents placed before it in connexion with, or arising out of, such an inquiry or investigation "when it is of the opinion that the publication is not in the public interest." Pursuant to subsection 61(2) of the *Judges Act* "the work of the Council shall be carried out in such manner as the Council may direct."

[146] All these provisions serve to protect judicial independence, while giving the Council the tools required for ensuring public confidence in the judiciary through effective and appropriately

transparent inquiry and investigation processes. Though the *Judges Act* does not specifically refer to a public interest privilege or to solicitor-client privilege within the context of an investigation carried out by the Council, these privileges flow from the common law, and at least in the case of the public interest privilege, from the constitution itself which recognizes judicial independence as a fundamental concept.

[147] The apt comments below by Arbour J. in *Moreau-Bérubé* at para. 46, made in relation to provincial disciplinary bodies must also be understood as applying to the task of the Canadian Judicial Council when it carries out an investigation or inquiry into the conduct of a superior court judge:

> Despite provincial variations in their composition, discipline bodies that receive complaints about judges all serve the same important function. In *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, Gonthier J. described, at para. 58, the committee of inquiry in Quebec as "responsible for preserving the integrity of the whole of the judiciary" (also see *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267). The integrity of the judiciary comprises two branches which may at times be in conflict with each other. It relates, first and foremost, to the institutional protection of the judiciary as a whole, and public perceptions of it, through the disciplinary process that allows the Council to investigate, reprimand, and potentially recommend the removal of judges where their conduct may threaten judicial integrity (*Therrien, supra*, at paras. 108-12 and 146-50). Yet, it also relates to constitutional guarantees of judicial independence, which includes security of tenure and the freedom to speak and deliver judgment free from external pressures and influences of any kind (see *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente, supra*.
> [Emphasis added.]

[148] This is a task for which the Canadian Judicial Council is particularly well suited, since it consists of the Chief Justice of Canada, and the Chief Justices and senior judges of all Canadian superior courts. In light of its statutory mandate, which is closely related to the preservation of both judicial independence and judicial integrity, it is the responsibility of the Canadian Judicial Council

to determine in which circumstances and to what extent it is in the public interest not to disclose information arising out of an investigation or inquiry concerning a judge.

[149] A large degree of deference is owed to the Canadian Judicial Council on these matters: *Moreau-Bérubé* at paras. 51 to 53; *Taylor v. Canada (Attorney General)*, 2003 FCA 55, [2003] 3 F.C. 3 at paras. 46 to 55.

[150] Canada is not unique in this regard. As an example, in the United Kingdom, subsection 40(4) of *The Judicial Discipline (Prescribed Procedures) Regulation 2006*, S.I. 2006/676 allows for the public disclosure of information about disciplinary action where the Lord Chancellor and the Lord Chief Justice agree that the maintenance of public confidence in the judiciary requires that such information be disclosed. At the federal level in the USA, under the *Judicial Conduct and Disability Act of 1980*, U.S.C. 28 s. 360, all papers, documents, and records of proceedings related to investigations conducted under the act are confidential, and are not to be disclosed in any proceeding unless (i) the judicial council, at its discretion, chooses to release the report of a special committee to the complainant and the judge, (ii) unless the material is necessary for an impeachment proceeding or trial of a judge, or (iii) unless written authorization is provided by the judge subject to the complaint.

[151] The Supreme Court of Canada has referred to international instruments to flesh out the content of the principle of judicial independence: *Beauregard* at pp. 74-75; *R. v. Lippé*, above, at p. 153. With this in mind, I note that the United Nations General Assembly has endorsed the *Basic Principles on the Independence of the Judiciary*: UN General Assembly resolutions 40/32 of 29

November 1985 and 40/146 of 13 December 1985. Those basic principles were specifically referred to approvingly by Lamer C.J. in *Reference re Remuneration* at para. 194. As a fundamental component of judicial independence, these principles call for the confidentiality of the disciplinary process, at least at the initial stage:

> 17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at the initial stage shall be kept confidential, unless otherwise requested by the judge. [Emphasis added].

[152] As this basic principle emphasizes, confidentiality is particularly important at the investigation stage of a complaint made against a judge. This is so for many reasons: (a) disclosure of information surrounding unsubstantiated complaints could risk undermining a judge's authority in carrying out his or her judicial functions: *Guardian News & Media Limited v. Information Commissioner;* [2009] Information Tribunal, EA/2008/0084; (b) the effectiveness of the investigation process itself may be affected, since without the capability to ensure some form of confidentiality, the ability to obtain full and frank disclosures at the investigation stage may be compromised, thus affecting in the long term the public's confidence in the process; moreover, without an effective screening process, more complaints would end up before a hearing panel leading to additional delays and expenditures without any obvious additional benefit; (c) the judge who is the subject of an investigation may have legitimate privacy concerns over the information; and (d) most compelling, in my view, is the overriding need to protect judicial independence.

[153] The independence of the judiciary ultimately rests on the public's confidence in its integrity. This may certainly be enhanced by appropriate transparency in the Canadian Judicial Council's processing of complaints. Circumstances however vary from case to case, and ultimately, it is the

responsibility and prerogative of the Council to determine what approach to disclosure of information best serves the public interest in any given case, while preserving judicial independence.

[154] However, the Canadian Judicial Council's view that judicial independence and the integrity of its process will be better served by not disclosing certain information is not the only consideration when a decision of the Council respecting a complaint against a judge is subject to judicial review or to some other form of judicial proceeding. There is also a public interest in the due administration of justice that may be harmed if a party is deprived of access to material relevant to the litigation. The Canadian Judicial Council, within its treatment of a complaint under the *Judges Act*, is entitled to deference on its determination of whether certain information should be withheld. On the other hand, the court dealing with litigation in which such information may be pertinent has to balance the harm to judicial independence and to the integrity of the Council's process against the prejudice to the administration of justice as a result of non-disclosure.

[155] I will now summarize my findings. Pursuant to the *Judges Act*, the Canadian Judicial Council is the judicial body which must consider and evaluate complaints made against superior court judges. It thus plays an important and crucial role in preserving public confidence in the judiciary and in protecting judicial independence. In determining the extent to which disclosure should not be made of certain information obtained in the course of an investigation or inquiry into the conduct of a judge, the Council must balance various important factors, including (but not limited to) the value of transparency, the constitutional principle of judicial independence, and the integrity of its processes. The Council is particularly well suited to carry out this function, and its

decision to raise the public interest privilege in the course of an investigation deserves a large degree of respect and deference. However, in the context of a judicial proceeding where the issue may arise, it is the role of the court to balance the harm to judicial independence and the Council's processes that may result from a disclosure against the prejudice to the administration of justice that may result from non-disclosure.

Application to the circumstances of this case

[156] In this case, the Canadian Judicial Council acted with great transparency. It provided to the complainant, Mr. Slansky, a 10 page letter dated March 9, 2006 setting out detailed reasons why his complaint against the trial judge did not warrant further consideration: Appeal Book ("AB") at pp. 83 to 92. This letter fully sets out the process followed by the Council in reviewing the complaint, as well as the conclusions reached from its investigation resulting from that complaint. It explains that the Council retained Professor Friedland as counsel, the process followed by Professor Friedland, including his review of the minutes of the trial, of an additional 6,000 pages of trial transcripts, and of 78 of the rulings that the trial judge rendered before and during the trial. It moreover sets out in detail Chief Justice Scott's review of the salient and relevant facts, including his review of the conduct of the trial judge during the trial. Finally, the letter provides clear, cogent and detailed reasons supporting the conclusion that the complaint did not warrant further consideration.

[157] In addition, it has been clear since the beginning of the judicial review proceedings that the Canadian Judicial Council would be providing Mr. Slansky with other material in its possession regarding his complaint: see letter dated May 17, 2006 from the Council reproduced at AB pp. 120-

121. This includes the 6,000 pages of trial transcripts reviewed by Professor Friedland, the minutes of the trial, and the trial judge's 78 rulings.

[158] Justice de Montigny closely reviewed the Friedland report to determine if its disclosure would be required for a fair and proper determination of the judicial review proceedings. He found that the information already provided to Mr. Slansky was "clearly sufficient to judicially review the decision made by the [Canadian Judicial Council], and contrary to what Mr. Slansky claims, he is not left in the dark but is quite aware of the onus he has to meet before the Federal Court, in order to be successful" (at para. 84 of his reasons). I agree with this assessment.

[159] Like Justice de Montigny, I find that the Canadian Judicial Council's decision that the Friedland Report should not be disclosed on the ground of public interest privilege is reasonable in the circumstances of this case. Any resulting damage to the public interest in the due administration of justice is non-existent or minimal at best. On the other hand, the disclosure of the report would negate, without justification, the undertakings of confidentiality provided by the Council to the third parties who participated in the process, undertakings which were made at the behest of Mr. Slansky himself.

[160] First, the thrust of Mr. Slansky's complaint against the trial judge was that the judge's management of the trial was improper, and that the decisions he rendered before and during the trial were unfair to the defendant. As I have already noted, judicial independence requires that a judge be immune from having to account for and justify his or her decisions beyond the reasons given in open court. From a practical point of view, this immunity should not be raised in order to impede an

investigation by the Canadian Judicial Council. However, this does not mean that the immunity becomes meaningless when the Council carries out an investigation or an inquiry. Rather, the Canadian Judicial Council must carefully assess whether disclosing information provided by the judge in order to explain these rulings would infringe upon judicial independence.

[161] Though the trial judge may well have provided justifications to the Council concerning his conduct of the trial or his decisions, this does not mean that these justifications must be disclosed to Mr. Slansky or to the Federal Court. To put it simply, the trial judge does not report to Mr. Slansky or to the Federal Court. Under the principle of judicial independence, he need not (and should not) justify his conduct of the trial, or any of his judicial decisions, to either the appellant or the Federal Court. The trial judge may well wish to explain to the Council his management of the trial and the reasons for his trial decisions, but that does not entail that he must do so publicly. As noted by the Executive Director of the Canadian Judicial Council at para. 24 of his affidavit dated February 9, 2007 (AB at p. 66): "The maintenance of this confidentiality also enables Counsel to obtain information from a judge (who is the subject of a complaint) that might be important in explaining the judge's conduct but that might not be volunteered if it were to be made public. Indeed, judicial independence may be threatened if Council cannot give assurances of confidentiality about information provided by a judge regarding a judge's state of mind during the deliberative or decision-making process." I agree.

[162] Second, in his complaint to the Council, Mr. Slansky recognized himself that in the "early stages of any investigation, assurances of confidentiality may be necessary to obtain information"; he, in fact, insisted that confidentiality undertakings be extended to witnesses in the course of the

Council's investigation: AB at p. 53. As noted in the Council's letter dated March 9, 2006, the trial judge also agreed that assurances of confidentiality should be extended to third parties involved in the investigation: AB at p. 84. Professor Friedland's interviews were thus carried out on the basis of confidentiality undertakings requested or agreed to by both Mr. Slansky and the trial judge. It would be unacceptable on the part of the Council to now breach the trust of those to whom it extended these undertakings without a valid, important and cogent reason to do so. No such explanation has been provided in these proceedings as to why these confidentiality undertakings, made in part at the behest of Mr. Slansky, should now be set aside and ignored.

[163] Third, as authorized by Parliament under paragraph 61(3)*(c)* of the *Judges Act*, the Canadian Judicial Council has established an investigations process that seeks to obtain candid views from persons with knowledge about the matters at issue in a complaint, as well as a candid assessment from the outside counsel appointed to assist it under section 62 of the *Judges Act*. The respective positions of a judge and of a complainant in such a candid investigation process are substantially different.

[164] Confidentiality is somewhat limited vis-à-vis a judge who is the subject of the inquiry and who is directly affected by its outcome. The judge is entitled to notice of the subject-matter of the investigation, and he must be provided sufficient information about the material evidence gathered: *Judges Act*, s. 64 and *Complaints Procedures* of the Council at section 7.2. In investigating a complaint against a judge, the Council is in effect determining whether the judge's conduct could amount to an abuse that merits a further inquiry to determine whether the judge should be removed from office. Since the rights of the judge may be directly and substantially affected by the ultimate

outcome, the Council owes the judge a high duty of procedural fairness throughout the process so as to afford the judge an effective opportunity to respond.

[165] However, since the complainant's only legal right is to make a complaint, the content of any duty of fairness that the Council may owe to the complainant in dismissing the complaint is at the low end of the spectrum: *Taylor v. Canada (Attorney General)*, 2001 FCT 1247, [2002] 3 F.C. 91 at paras. 50 to 52; *Hon. Lori Douglas v. Canada (Attorney General)*, 2013 FC 451 at paras. 20 to 22; see by analogy *Jacko v. Ontario (Chief Coroner) 2008*, 247 O.A.C. 318, 306 D.L.R. (4th) 126 at para. 18. The limited duty of disclosure owed under the Council's *Complaints Procedures* is simply to inform the complainant of the disposition of the complaint. This was amply discharged in this case. The Council owes no further duty of disclosure to Mr. Slansky.

[166] Fourth, the privacy concerns of the judge who is the subject of the investigation must be taken into account. As noted by the Executive Director of the Canadian Judicial Council in his affidavit, at para. 24 (AB p. 66): "The Council is also mindful of the privacy interests of the judge against which the complaint is brought. Even when a decision of the Council results in the complete exoneration of a judge, the report of Counsel in the matter might include information that the judge would rightly consider personal and confidential. This information may relate to medical conditions, family situations, or a judge's state of mind during the deliberative process."

[167] Since, in this case, the Canadian Judicial Council justifiably raised a public interest privilege over the Friedland Report, and since the disclosure of this report is not necessary in order for Mr.

Slansky to pursue his judicial review application, Justice de Montigny did not commit an error in concluding that the motion seeking its disclosure should have been dismissed by the prothonotary.

[168] I would dispose of this appeal in the manner proposed by my colleague Evans J.A.

"Robert M. Mainville"

J.A.

STRATAS J.A. (**Dissenting reasons**)

A. Introduction

[169] Mr. Slansky, a defence lawyer, complained to the Canadian Judicial Council about Justice Thompson's conduct in the open courtroom during a criminal trial.

[170] When it looked into the complaint, the Council did not do its own investigation of the facts. Instead, it retained Professor Friedland to gather information about what had happened.

[171] Professor Friedland reviewed the minutes, transcripts and tapes of the trial. He also interviewed Mr. Slansky, Justice Thompson, three Crown counsel involved in the case, the Regional Director of Crown Attorneys, seven members of court staff, and Regional Senior Justice Bruce Durno.

[172] In the letter retaining Professor Friedland, the Council told him not to make any recommendations concerning how the Council should deal with the complaint. The letter went further: Professor Friedland was not to assess the facts or determine the credibility of witnesses. Those were Council's tasks.

[173] Professor Friedland delivered his report to the Council, setting out the information gathered. Contrary to the retainer letter, the Friedland Report contained limited legal analysis and recommendations. But that is of no consequence, as Mr. Slansky does not ask to see these portions of the Report.

[174] After reviewing the information in the Friedland Report, the Council summarily dismissed Mr. Slansky's complaint.

[175] As is his right, Mr. Slansky has applied to the Federal Court for judicial review of the Council's decision, raising, among other things, the unreasonableness of the decision. He says the decision cannot be supported by the facts placed before the Council. He adds that the investigation of the available facts was inadequate.

[176] The Friedland Report describes the investigation and communicates most of the facts relied upon by the Canadian Judicial Council. In its decision, the Council often refers to the Friedland Report or the facts in it. Many of the facts relate to what happened in open court and how the judge, a public official, behaved.

[177] Within the judicial review, Mr. Slansky has moved for an order requiring that the Friedland Report be placed before the Federal Court. Without it, he says, the Federal Court cannot determine whether the Council had sufficient factual support for its decision or whether the investigation of the available facts was inadequate.

[178] For the purpose of determining Mr. Slansky's motion, the Prothonotary, a Federal Court judge, and the three of us have accessed the Friedland Report under seal. As the Prothonotary recorded at paragraph 31 of her reasons, complete copies of the Report have also found their way to Mr. Slansky's professional regulatory body (the Law Society of Upper Canada) and one of Mr. Slansky's clients (the Attorney General of Ontario).

[179] Given the centrality of the Friedland Report to the issues in Mr. Slansky's judicial review, the public nature of much of what the Report describes, and the fact that many others have seen the Report, one would think that the Court sitting in review of the Council's decision would also be able to see it.

[180] But one would be wrong. The Council says the reviewing court cannot see the Friedland Report it considered and relied upon. The Council says solicitor-client privilege and public interest privilege apply.

[181] I disagree. The prerequisites for the privileges are not present here. Beyond that, a contrary finding in these circumstances would extend these privileges beyond the purposes they serve. It would be secrecy for secrecy's sake, hobbling the reviewing court in its task of supervising the Council and vetting its decision to determine if it was acceptable and defensible on the facts and the law.

[182] Therefore, I would allow Mr. Slansky's appeal and grant his motion in large part. As we shall see, I would attach terms to the Court's order. My colleagues would dismiss Mr. Slansky's appeal. Regrettably, I dissent.

[183] The Council has asserted two bases for privilege: solicitor-client privilege and public interest privilege. I shall examine these in turn.

B. Solicitor-client privilege

[184] The Canadian Judicial Council submits that the Friedland Report must not form part of the tribunal record on judicial review because of solicitor-client privilege.

[185] For the reasons below, I reject the Canadian Judicial Council's submission. The Friedland Report is not covered by solicitor-client privilege. Many of the prerequisites for the privilege are not met – a matter well-illustrated by the fact that the application of the privilege here would take it beyond the purposes the privilege is meant to serve. Even if the prerequisites were met, in two ways privilege has been waived.

(1) General principles

[186] Solicitor-client privilege protects communications between a solicitor and client, intended to be confidential and related to the seeking and giving of legal advice: *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at page 837. "Legal advice of any kind" is very much the gist of the privilege: see *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at page 872 and *R. v. Campbell*, [1999] 1 S.C.R. 565 at paragraph 49, quoting with approval the description of solicitor-client privilege in *Wigmore on Evidence***,** vol. 8 (McNaughton rev. 1961), at paragraph 2292.

[187] Legal advice includes "opinion or analysis": *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner*), 2002 BCCA 665, 2 W.W.R. 279 at paragraph 31. It also includes advice as to what should prudently and sensibly be done in the relevant legal context.

[188] To assess whether legal advice, legal opinion or legal analysis of any kind is present in the relationship between Professor Friedland and the Canadian Judicial Council, we are to assess the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered: *Campbell*, *supra* at paragraph 50.

[189] The privilege enables individuals to obtain effective legal assistance, recognizing that such assistance requires that clients be able to discuss matters with their lawyers without fear of consequences. The Supreme Court often uses this purpose to help define the boundaries of solicitor-client privilege: see, *e.g.*, *Descôteaux et al.*, *supra*, at pages 876-877 and *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331 at paragraphs 25-34. As we shall see, this is a useful approach in this case.

(2) The role of retainer letters in the assessment of a privilege claim

[190] The Federal Court judge in this case found (at paragraph 47) 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." I disagree.

[191] In assessing a claim of privilege, where there is a retainer letter, it must predominate: *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11, 196 D.L.R. (4th) 716 at paragraph 40. The retainer letter, if one exists, defines, with binding contractual force, the nature of the relationship, the purpose of the lawyer's retainer, whether any advice is to be given, and the nature of that advice. A retainer letter also often discloses the circumstances which have prompted the retainer, including the reasons for it.

[192] The retainer letter is the best evidence of these matters, the matters that *Campbell* says must be examined. The retainer letter is written and agreed upon at the outset of the relationship, before any controversy over solicitor-client privilege. An affidavit is written and filed after controversy has arisen.

[193] Accordingly, in the usual case, an affidavit that seeks to add a gloss upon, modify, or supplant matters addressed in the retainer letter must be approached with caution, perhaps even with suspicion.

[194] Indeed, it may not even be admissible. The contractual nature of the retainer letter must be kept front of mind. Absent ambiguity, normally we do not admit affidavits tendered for the purpose of adding a gloss upon, modifying, or supplanting the matters explicitly addressed in a contract: *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at pages 341-342.

[195] In some solicitor-client relationships, there might be more to the story than the retainer letter. There could be contemporaneous shared oral understandings that are the equivalent of collateral contracts or later shared understandings that affect matters in the retainer letter.

[196] But not in this case. Before us is a retainer letter signed by Mr. Sabourin, in-house counsel for the Council, the client in the solicitor-client relationship. If there were any contemporaneous oral understandings or later communications supplementing or amending the retainer letter, one would expect that Mr. Sabourin would tell us about them.

[197] He has not. Accordingly, we must proceed on the basis that there were none. In this case, the agreed-upon, contractual words of the retainer letter stand alone.

(3) The retainer letter

[198] By retainer letter dated May 3, 2005, Mr. Sabourin retained Professor Friedland. Professor Friedland accepted the retainer.

[199] The letter carefully defines Professor Friedland's task. It does so by quoting a policy setting out the role he was to play. My colleague has reproduced the relevant portion of the letter at paragraph 15 of his reasons.

[200] Overall, the retainer letter shows that Professor Friedland was nothing more than an information gatherer who, if necessary, could clarify any ambiguities in the complaint.

[201] Specifically, the retainer letter tells us that Professor Friedland's "role…is, essentially, to gather further information" and "simply to attempt to clarify the allegations against the judge and gather evidence which, if established, would support or refute [the] allegations."

[202] In his information gathering, Professor Friedland was to focus on "the allegations made." Should he uncover further allegations of inappropriate conduct or incapacity on the part of the judge, he was instructed to look into those allegations as well.

[203] Professor Friedland was not instructed to provide any legal advice, opinion or analysis. Specifically, he was instructed "not…to weigh the merits of a complaint or to make any recommendation as to the determination that a Chairperson or a Panel should make." Rather, he was to interview "[p]ersons familiar with the circumstances surrounding the complaint, including the judge," "obtain the judge's response to these allegations and evidence," and "to gather further information."

[204] Having collected this information, Professor Friedland was instructed to "present all of [it] to the Chairperson or Panel." He could not engage in "[a]djudicative fact-finding in the sense of making determinations based on the relative credibility of witnesses or the persuasiveness of one fact over another."

[205] As part of his information gathering task, the retainer letter mentions that "[d]ocumentation may be collected and analyzed" by Professor Friedland. In paragraph 15, my colleague, Justice Evans, emphasizes the word "analyzed" and suggests that Professor Friedland was performing legal analysis. That is a leap too far. It would run counter to the retainer letter's explicit instruction that Professor Friedland was "not…to weigh the merits of a complaint" or make any "recommendation as to the determination a Chairperson or a Panel should make." As mentioned, Professor Friedland could not even engage in adjudicative fact-finding, as opposed to information gathering.

[206] Viewed in light of the tasks the retainer letter assigns to Professor Friedland and, more importantly, the restrictions on what he could do, the word "analyzed" can only mean identifying, gathering, and summarizing bits of information from the documents and interviews.

(4) Mr. Sabourin's affidavit

[207] Before us is an affidavit of Mr. Sabourin, in-house counsel for the Council. He swore it after the controversies giving rise to this matter arose.

[208] Nowhere in the affidavit does he disavow any of the text in the retainer letter. Nowhere in it is there a suggestion that any of the words in the letter should be altered or interpreted in a particular way. Nowhere in it is there a hint of any discussion with Professor Friedland that might alter or qualify those words. In short, Mr. Sabourin, acting under oath, did not displace the words of the retainer letter. Neither should we.

[209] Mr. Sabourin deposes that Professor Friedland was "appointed and requested to make further inquiries" (affidavit, paragraph 16). In the context of the words of the retainer letter, this can only be understood as inquiries to gather information.

[210] Mr. Sabourin deposes that Professor Friedland presented "findings and analysis" and "recommendations and advice" in the Friedland Report (affidavit, paragraph 19). The Report has been confidentially filed before us and is under seal. I agree that small, severable parts of the Friedland Report contain analyses, recommendations, and advice. So, in a technical sense, Mr. Sabourin's statement that the Friedland Report contains such things is accurate. But none of these things were solicited in the retainer letter.

[211] Can a lawyer take a purely informational document and suddenly make it wholly secret by unilaterally inserting analyses, recommendations and advice that formed no part of the retainer? I think not. And there is no authority to support such a proposition.

[212] In any event, Mr. Slansky does not seek any of the gratuitous legal observations made by Professor Friedland. When those are severed from the Report – and, as we shall see and as the Prothonotary found, they are easily severed – all that is left is a dry recitation of information gathered without any analysis, recommendations or advice, exactly what Professor Friedland was retained to do.

[213] On the nature of Professor Friedland's retainer, Mr. Sabourin offers the following (affidavit, paragraph 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. In the case of the instant report, Professor Friedland did provide analysis and recommendations to the Chairperson on how to address the complaint.

[214] At best, the first sentence is nothing more than evidence of a general practice – it may be taken to be what Mr. Sabourin normally instructs counsel to do. But nowhere does Mr. Sabourin say this general practice was followed here. Nowhere does he say Professor Friedland was so instructed. Nor can he: in the retainer letter, he instructed Professor Friedland "not…to weigh the merits of a complaint" or make any "recommendation as to the determination a Chairperson or a Panel should make."

[215] The second sentence in the above passage says nothing more than Professor Friedland went beyond his instructions and gratuitously offered some analysis and recommendations. As I have said, this is of no consequence.

[216] Mr. Sabourin further deposes (affidavit, at paragraph 27):

> My expectations, and those of the Chairperson, in relation to mandate [sic] 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. Indeed, this is why the *Complaints Procedures* provide that it must be a lawyer that conducts such inquiries; otherwise this work could be ably conducted by an investigator without legal credentials.

[217] Again, these expectations might be the usual expectations. But, tellingly, Mr. Sabourin stops short of saying that these were the expectations when Professor Friedland was retained. We must take care not to extend these words to go where Mr. Sabourin was unwilling to go – to suggest that the retainer letter does not mean what it says.

[218] Mr Sabourin suggests that lawyers are retained in Canadian Judicial Council proceedings "to give a solicitor's analysis and recommendations concerning…facts." That may have been the usual expectation. But, again, the retainer letter here specifically forbade Professor Friedland from weighing the information gathered and offering recommendations and assessments. He was asked to gather information, nothing more.

[219] More arises from the above passage. It is best discussed in the following section of these reasons, in the context of some broader legal principles.

(5) Legal advice is the gist of the privilege

[220] In paragraph 27 of Mr. Sabourin's affidavit, quoted just above, we are told that the *Complaints Procedures* require a lawyer to be retained because the lawyer is investigating matters within the Council's legal mandate, one incumbent with legal obligations. Before us, the Council urged that this triggered solicitor-client privilege over the Friedland Report.

[221] In essence, the Council's submission is that if a person, working within a legal mandate and subject to legal obligations, chooses to hire a lawyer rather than an ordinary investigator to conduct a factual inquiry, privilege arises.

[222] I reject this. The mere fact that a lawyer is involved does not make a report generated by the lawyer privileged: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 at paragraphs 19-20; *Campbell*, *supra* at paragraph 50 ("not everything done by a…lawyer…attracts solicitor client privilege").

[223] Instead, the documents or information said to be privileged must themselves be for the dominant purpose of giving or receiving legal advice or closely and directly related to the seeking, formulating or giving of legal advice: *Pritchard*, *supra*, at paragraph 15; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 at paragraph 36; *Campbell*, *supra*, at paragraph 49; *Descôteaux et al.*, *supra*, at page 872-873; *Solosky*, *supra*, at page 835; *Thompson v. Canada (Minister of National Revenue)*, 2013 FCA 197 at paragraph 40.

[224] By virtue of their special training and experience, lawyers are often retained to do things other than provide legal advice. For example, lawyers can be retained to sit on a corporate board or give input on the design of a new courthouse but their activities are not privileged. Lawyers can be retained to handle trust monies and account for them – indeed, bar admission materials offer much instruction on this – but this, by itself, does not make these activities privileged, nor is the factual information about the payment or non-payment of fees necessarily privileged: *Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.); *R. v. Joubert* (1992), 69 C.C.C. (3d) 553 (B.C.C.A.); *R. v. Cunningham*, *supra* at paragraphs 25-34. A distinction should be drawn between a privileged communication related to advice and "evidence of an act or transaction": *Thompson*, *supra* at paragraph 46.

[225] Similarly, through years of experience, some lawyers become adept at gathering and handling information – some, in fact, have spent much of their lives interviewing potential witnesses – and, thus, are retained for that limited purpose. But I am unaware of any authority suggesting that such activities, without more, trigger solicitor-client privilege.

[226] In the context of investigations, a line exists between a lawyer retained only to gather information and a lawyer who is retained to gather information as part of the larger exercise of providing legal advice. Reports concerning the former – such as the Friedland Report – are not privileged. The information supplied has nothing to do with providing legal advice.

[227] On this, the British Columbia Court of Appeal has drawn a bright line:

> Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her.

(*College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, *supra* at paragraph 32.)

[228] The Manitoba Court of Appeal has also articulated this line. In *Gower*, *supra*, it confirmed that a lawyer retained to gather facts, nothing more, is just an investigator and so the privilege does not apply (at paragraph 37):

> In the situation at hand, it is clear from the evidence that [the lawyer] was asked to investigate and perform a fact-finding function. If that is all she was asked to do then, regardless of the fact that she is a lawyer, she would not have been providing legal advice and would have been acting as an investigator, not as a lawyer. Consequently, legal advice privilege would not have been available.

[229] However, if, as in *Gower*, the lawyer is fact-finding as part of the exercise of providing legal advice or if the fact-finding is "connected to the provision of…legal services" (at paragraph 19), the privilege can apply:

> However, there is strong evidence that [the lawyer] was asked to do more. The investigation to determine the veracity of the allegations made against the plaintiff was only one part of her tasks. It is clear that the client requested Janzen make recommendations based on the facts that she gathered and provided advice with respect to the legal implications of those recommendations. Thus, the fact gathering was inextricably linked to the second part of the tasks, the provision of legal advice.

(*Gower*, *supra* at paragraph 38.)

[230] In the course of its reasons, the Manitoba Court of Appeal in *Gower* cited with approval the authority of *Wilson v. Favelle*, 1994 CanLII 1152, 26 C.P.C. (3d) 273 (B.C.S.C.). *Wilson* indeed is an authority consistent with *Gower* and somewhat close to the facts of this case.

[231] In *Wilson*, a government retained a lawyer to conduct an investigation into a complaint of misconduct against an employee and produce a report. The purpose of the report was to document the facts relating to the allegations and to provide advice regarding any violations of non-legal standards of conduct for public service employees. The Court found that the lawyer was hired as a mere investigator. Of interest is the Court's focus upon the contractual language in the lawyer's retainer and not the affidavit filed by the government once the matter had become litigious.

[232] I accept that, in assessing on what side of the line a case falls, "advice" must be broadly construed. It includes "advice as to what should prudently and sensibly be done in the relevant legal context," in other words, practical advice mindful of the legalities or advice on a course of action informed by the legalities: *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112, 317 D.L.R. (4th) 634 at paragraph 26, quoting with approval *Balabel v. Air India*, [1988] Ch. 317 at page 330 (Eng. C.A.); *Gower*, *supra* at paragraph 19.

[233] But Professor Friedland was asked to gather information, not to give any sort of advice. Indeed, the retainer letter expressly forbade him from doing any such thing.

[234] The Council infers from the legal complexity of the allegations in Mr. Slansky's complaint – allegations which included bias, misconduct, and knowingly acting contrary to law – that Professor Friedland was required to provide legal advice, opinion, or analysis.

[235] I disagree. The retainer letter shows that the Council decomposed the overall task into factual and legal parts. It assigned to Professor Friedland a subset of the factual part – information gathering – leaving for itself the task of reviewing the facts gathered, applying the relevant law, and reaching a conclusion on the merits of Mr. Slansky's complaint.

[236] At its highest, Professor Friedland's task required him to assess what was material and what was not. This resembles the task of insurance adjusters or other skilled investigators who must assess materiality to some extent when gathering evidence relevant to an accident that might constitute a tort actionable in law. Yet, their investigation reports are not privileged: *General Accident Assurance Company v. Chrusz* (1999), 45 O.R.(3d) 321 (C.A.).

[237] In this case, information gathering cannot be said to be the exclusive preserve of a lawyer. Indeed, non-lawyers could have done Professor Friedland's job. There are many who can appreciate what information is relevant to the conduct of a judge in a courtroom.

[238] True, a lawyer might do it better, and Professor Friedland almost certainly can do it better than many lawyers. But that does not transform the nature of the task and the skills brought to bear on it from information gathering to the giving of legal advice or practical advice related to the legalities.

[239] This is sufficient to dismiss the Council's claim of solicitor-client privilege over the Friedland Report. However, I wish to address another submission of the Council, one that my colleague, Justice Evans, has accepted.

(6) The *Blood Tribe* case did not extend the scope of solicitor-client privilege

[240] As explained above, a necessary condition of solicitor-client privilege is the seeking and giving of legal advice or practical advice related to the legalities. However, before us, the Council sought to extend the scope of solicitor-client privilege far beyond the decided cases. It sought to shift the analytical focus from whether legal advice has been sought to whether the skills of a lawyer were required for the assigned task.

[241] This is based upon the Supreme Court's comment at paragraph 10 of *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 that solicitor-client privilege extends 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*" (emphasis added). This comment appears as an introduction to the Supreme Court's legal analysis.

[242] The precise issue in *Blood Tribe* was whether the Privacy Commissioner could access documents that were covered by solicitor-client privilege. Whether the documents were privileged was not in issue. Therefore, this introductory comment is surplusage.

[243] Further, in adding the comment, "otherwise acting as a lawyer," I query whether the Supreme Court might have been alluding, infelicitously, to a different privilege, litigation privilege.

Under that privilege, lawyers acting as a lawyer under a litigation retainer enjoy a zone of privacy. Of note, some of the cases cited in the same paragraph deal mainly with litigation privilege or, indeed, a different concept, professional secrecy under Quebec civil law. None of the cases cited support the proposition that solicitor-client privilege includes situations where a lawyer is "otherwise acting as a lawyer."

[244] Outside of this infelicitously worded introduction in *Blood Tribe*, the Supreme Court has never considered "otherwise acting as a lawyer" to be enough for solicitor-client privilege to apply. Indeed, that would be contrary to its own authorities that the privilege is not triggered just because a lawyer is involved, and many other authorities to the effect that the activities of lawyers doing things typically done by lawyers are not necessarily privileged: *Pritchard*, *supra* at paragraphs 19-20; *Campbell*, *supra* at paragraph 50; authorities cited above at paragraphs 224-232.

[245] Have decades of well-accepted jurisprudence in the law of solicitor-client privilege suddenly been swept aside by a sidewind – a fleeting, introductory comment in *Blood Tribe*? I think not.

[246] In my view, it is not open to us to pluck the words "otherwise acting as a lawyer" from the introductory part of the Supreme Court's reasoning in *Blood Tribe*, reify them to the level of a general principle, and then, contrary to authority, apply that principle to impose secrecy over an information gathering report that formed the basis of a public administrative decision.

(7) An assertion of privilege beyond its proper purposes

[247] Not only is the extension of solicitor-client privilege proffered by the Council inconsistent with the case law that binds this Court. It also takes solicitor-client privilege beyond its proper purposes.

[248] As my colleague Justice Evans suggests in paragraphs 65 and 66 above, the privilege exists to allow the seeking of legal advice and the full and frank disclosure of information necessary for that advice.

[249] Without the privilege, people may not reveal necessary information to their lawyer, impairing proper understanding of their legal rights. All persons, whether natural, corporate, or governmental, must have access to expert legal counsel without fear that this recourse may be used to their detriment: *Smith v. Jones*, [1999] 1 S.C.R. 455, at page 474-475; *R. v. Gruenke*, [1991] 3 S.C.R. 263 at page 289. This is a basic democratic right.

[250] The Supreme Court has characterized this purpose as protecting and promoting the seeking of *legal advice*: *Solosky*, *supra*, at pages 834-835; *Descôteaux et al.*, *supra*, at page 871; *Campbell*, *supra* at paragraph 49; *Pritchard*, *supra* at paragraph 14; *Blood Tribe*, *supra* at paragraph 9. Provided legal advice or practical advice drawing upon knowledge of legalities is sought, all communications within the relationship, even mundane administrative matters in the relationship, can conceivably fall within its scope. As Lamer J. (as he then was) in *Descôteaux et al.*, *supra* stated (at pages 892-893):

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

See also Adriane Keane, James Griffiths & Paul McKeown, *The Modern Law of Evidence*, 8th ed. (Oxford: Oxford University Press, 2010) at page 607. Legal advice, liberally construed, is the gist of the privilege.

[251] Protecting factual information from disclosure where no legal advice of any kind has been sought – indeed where, as here, the instructions are *not* to give advice of any kind – does not further the purposes of privilege. This is especially so where the disclosure of factual information reveals nothing about legalities or legal views held by the author. What possible interests, other than secrecy for secrecy's sake, are being served here? We are far from the realm of clients needing secrecy so that they may speak candidly to their lawyers and obtain necessary legal advice. To the extent confidentiality interests exist here, they relate to the claim of public interest privilege, not solicitor-client privilege.

[252] For the foregoing reasons, I conclude that the Friedland Report is not covered by solicitor-client privilege. But even if it were, the privilege has been waived.

(8) If the privilege exists, it was waived

[253] Professor Friedland was retained to gather information, nothing more, and to report that information to Chief Justice Scott for his screening decision. In the circumstances, the Friedland Report was Chief Justice Scott's main source of factual information. In the public decision letter dismissing the complaint, some of the content of the Friedland Report and the facts recounted in it were disclosed. Further, the report has found its way into the hands of a third party without explanation. These two things have worked a waiver of any privilege that might have attached to the Friedland Report.

[254] First, the Council waived any privilege by voluntarily giving the Friedland Report to a third party.

[255] In her reasons, reproduced at paragraph 50 of Justice Evans' reasons, the Prothonotary found that a copy of the Friedland Report had found its way into the hands of the Law Society of Upper Canada and the Deputy Attorney General of Ontario.

[256] Voluntarily giving a document to third parties is an "obvious scenario" of waiver, because confidentiality, the prerequisite to the maintenance of privilege, has been lost: Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Canada: LexisNexis Canada, 2009) at page 957; C. Tapper, *Cross and Tapper on Evidence*, 11th ed. (Oxford: Oxford University Press, 2007) at page 472; Hodge M. Malek, Q.C, ed., *Phipson on Evidence* (London: Sweet & Maxwell, 2010) at page 645. If a client receives a letter in confidence

from the solicitor and forwards it to third parties, privilege in it is lost absent a "joint" or "common" interest between the client and the third parties. See Bryant *et al.* at pages 927-28.

[257] In this case, the Prothonotary found that a common interest existed between the Council and the Law Society, namely, an interest in investigating complaints of misconduct. Consequently, in her view, giving the report to the Law Society did not waive the privilege. This is a finding of mixed fact and law suffused by facts that cannot be set aside absent palpable and overriding error. None has been demonstrated.

[258] However, the Prothonotary did not make any finding of common interest concerning the arrival of the Friedland Report into the hands of the Deputy Attorney General. At the time this happened, the Attorney General was retaining Mr. Slansky in some cases to prosecute charges under provincial labour legislation. In short, the Friedland Report has been transmitted to one of Mr. Slansky's clients.

[259] This loss of confidentiality over the Friedland Report calls for explanation, but none has been given by the Council, upon whom the burden of establishing privilege rests. For example, the Council has not offered evidence showing the transmission of the Friedland Report was unauthorized or that it is trying to recover the document. It has not offered evidence establishing some common interest between it and the Deputy Attorney General. To the extent there was ever any privilege over the Friedland Report, it has been lost.

[260] Second, in its decision letter, the Council has disclosed some of the facts set out in the Friedland Report, but not all. For example, it describes some of the contents of the witness interviews described in the Friedland Report, but not all of the contents.

[261] A party cannot disclose part of the content of a privileged document and unfairly withhold the rest of it: David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011) at page 220. Privilege is not a swinging door, open when there is information to communicate, but slammed shut when information is sought. See, *e.g.*, *Bone v. Person*, 2000 CanLII 26955, 145 Man. R.(2d) 85 at paragraph 14 (C.A.); *Ranger v. Penterman*, 2011 ONCA 412, O.J. No. 2414 at paragraph 16. A party may not cherry-pick privileged communications, disclosing what is helpful to it and withholding the rest: *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CanLII 34954, [2004] O.J. No. 4468 at paragraph 78 (S.C.J.).

[262] The Council should not be permitted to disclose bits of information in the Friedland Report that support its decision, but withhold the rest of it. In the interests of fairness and consistency, the Council should be taken to have waived whatever privilege might have existed over all of the Friedland Report.

(9) Severance

[263] Even if Professor Friedland's task included providing legal advice, and even if the Council did not waive any privilege which existed, the Friedland Report should be included in the record of the Court, with any privileged portions severed.

[264] At paragraph 112 of his reasons, my colleague, Justice Evans, states that courts may not "sever findings of fact made in an investigative report covered by solicitor-client privilege when they form the basis of, and are inextricably linked to, the legal advice provided." He concludes (at paragraph 113) that in this case disclosing the factual portions of the report would "erode the confidentiality on which the lawyer-client relationship fundamentally rests."

[265] With respect, I disagree.

[266] First, severance is possible, legally speaking. This Court has held that privileged statements can be severed from non-privileged statements: *Canada (Public Safety and Emergency Preparedness) v. Information Commissioner of Canada*, 2013 FCA 104, 444 N.R. 268 (in the context of the *Access to Information Act*, R.S.C. 1985 c. A-1).

[267] Second, severance is possible, practically speaking. The factual portions are not linked inextricably to the gratuitous recommendations and analyses contained in the report. Nor are the factual portions recounted by the client, let alone recounted for the purpose of legal advice. The Prothonotary so found (at paragraph 30):

> …it is possible to sever the 'fact-gathering' investigative work product prepared by 'Counsel'…These facts are separate and distinct from the advice given on legal issues that is privileged.

This finding, mainly one of fact, should be respected: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

[268] Third, whether severing facts from legal advice would, as my colleague says, "erode the confidentiality on which the lawyer-client relationship fundamentally rests," depends on the context. If a lawyer recites facts provided by a client, privilege likely applies. Protecting those facts advances the purpose of solicitor-client privilege – enabling clients to speak candidly to their lawyers. On the other hand, if the lawyer acts more like a conduit for information flowing from third parties, privilege does not apply, and the underlying information can be severed: see, *e.g.*, *College of Physicians of B.C.*, *supra*, at paragraphs 60-69 (lawyer's summary of the oral opinions of two experts severed from legal advice based on those opinions).

[269] Fourth, severance – the redaction of isolated, privileged material – plays a regular and important role in Canadian litigation. Justice Corbett aptly described this role in *Guelph (City)*, *supra* at paragraph 119:

> The practice of "redacting" documents has been in wide use in commercial litigation in Ontario for at least two decades. It follows a practice developed in American jurisdictions to balance the goals of full disclosure and protection of privilege. It is very common for documents that are otherwise producible to contain a portion that deals with receipt of legal advice on the topic at hand. For example, the minutes of a board meeting might contain twelve business items, one of which concerned receipt of legal advice pertaining to litigation. An "all or nothing" approach to disclosure would see the document entirely produced (thus breaching solicitor client privilege in respect to the advice given concerning the litigation), or entirely suppressed (depriving the opposing party with the record of the balance of the document). The proper solution is to produce the portion of the document that is not privileged, delete the portion that is privileged, and show the deletion on the face of the document to alert the opposing party that privileged material has been removed. [footnote omitted]

See also *Canada (Public Safety and Emergency Preparedness)*, *supra*, where this court redacted three paragraphs out of seventeen, albeit under legislation which contemplated redaction. See also *Southern Railway of British Columbia Ltd. v. Canada (Deputy Minister of National Revenue*), 1991

CanLII 2083, [1991] 1 C.T.C. 432 (B.C.S.C.); *PSC Industrial Services Canada Inc. v. Thunder Bay (City)*, 2006 CanLII 7029, [2006] O.J. No. 917 (S.C.J.), *British Columbia (Securities Commission) v. BDS*, 2002 BCSC 664, [2002] B.C.J. No. 955 at paragraph 15; *1225145 Ontario Inc. v. Kelly*, 2006 CanLII 19425, [2006] O.J. No. 2292 (S.C.J.).

(10) Conclusion on solicitor-client privilege

[270] For the foregoing reasons, I reject the Council's claim of solicitor-client privilege over the Friedland Report.

C. Public interest privilege

[271] The Council submits that the Friedland Report is protected by public interest privilege. For the reasons that follow, I cannot accept this submission.

[272] Public interest privilege is designed to protect against the disclosure of a document where the public interest in confidentiality predominates. But, as we shall see, confidentiality can be accommodated in ways short of total secrecy from all. As a precursor to this discussion, it is useful to review some preliminary matters governing the Rule 318 motion before us.

(1) Preliminary matters

[273] This is an appeal from the Federal Court's disposition of a motion brought under Rule 318, challenging the Council's refusal to produce the Friedland Report to Mr. Slansky so it can be included in the record before the reviewing court. Rule 318 relates directly to the content of the record before the reviewing court.

[274] The reviewing court, not the administrative tribunal being reviewed, decides the content of the record before the court. On this question, the court is not reviewing the administrative tribunal's decision about what to produce. In other words, analytically, it is not asking itself whether the Council's decision not to produce certain material falls within a range of acceptability and defensibility, deferring to its assessments. Instead, it is considering what evidence should be before it when it determines the judicial review. The reviewing court is to apply its own standards and evaluate the evidence filed before it on the motion, not defer to the Council's view.

[275] Turning to the applicable Rules, Rule 317 allows a party to request material from a tribunal relevant to the application for judicial review. The requesting party is entitled to be sent everything that was before the decision-maker (and that the applicant does not have in its possession) at the time the decision at issue was made: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224 at paragraph 7; *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 1432 (C.A.). Put another way,

> In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question.

(*Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24.)

[276] This passage recognizes the relationship between the record before the reviewing court and the reviewing court's ability to review what the tribunal has done. If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to

detect reversible error on the part of the tribunal. In other words, an inadequate evidentiary record before the reviewing court can immunize the tribunal from review on certain grounds.

[277] Rule 318 requires the tribunal to produce this material to the requesting party and to the Registry unless the tribunal objects to disclosure and the Court upholds this objection. Two legitimate grounds of objection are solicitor-client privilege and public interest privilege.

[278] Viewed in isolation, Rules 317 and 318 can work an injustice. There may be cases where an administrative decision-maker based its decision on material over which there may be substantial confidentiality interests. As a result, under Rule 318, a valid objection may lie against the applicant getting the material. Similarly, a valid objection may lie against the Registry, and thus, any member of the public on request, getting the material. If access to the material is denied, the material will never be placed before the reviewing court. As a result, some or all of the decision may be immunized from review – the concern expressed in *Hartwig*.

[279] But Rules 317 and 318 do not sit in isolation. Rules 151 and 152 allow for material before the reviewing court to be sealed where well-established confidentiality interests outweigh the substantial public interest in openness: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Further, under Rule 53, terms can be attached to any order. Finally, there are plenary powers in the area of supervision of tribunals: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paragraphs 35-38; *M.N.R. v. Derakhshani*, 2009 FCA 190 at paragraphs 10-11; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 at paragraphs 35-36.

[280] In my view, the interaction of these Rules and powers gives the court considerable remedial flexibility. On a Rule 318 motion, in cases where the strict *Sierra Club* test for sealing is met, the Court can do more than just uphold or reject the administrative decision-maker's objection to disclosure of the material that was before it. Among other things, the Court can order that the requesting party and the Registry receive the material with suitable deletions to respect confidentiality, and the reviewing court receive the original, unedited version of the material so it can meaningfully review the administrative decision.

[281] Where sealing orders are warranted under the strict *Sierra Club* test, they can come in all shapes and sizes, limited only by the creativity and imagination of counsel and courts. They can be tailored to meet the exact needs of each case: see, for example, the creative and detailed sealing order made in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281.

[282] This sort of remedial flexibility is useful in reconciling confidentiality interests against the need for meaningful review of decisions. In some cases, valid reasons against allowing the Registry (and, thus, the public) access to the material may exist, but no such reasons may exist against the applicant or the Court. In other cases, valid reasons may exist against allowing the Registry and the applicant access, but not against the Court. It depends on the evidence placed before the Court.

[283] Therefore, in my view, where, as here, a Court is faced with a motion under Rule 318, it should keep front of mind the remedial flexibility it has. It should make an order that allows for

necessary protection of confidentiality interests but meaningful review of administrative action. This principle governs my approach in this case.

(2) An exception to disclosure: public interest privilege

[284] One recognized ground of objection under Rule 318 is public interest privilege, namely where including a document in the judicial review record "would interfere with the public interest": *Carey v. Ontario*, [1986] 2 S.C.R. 637 at pages 670-671. In assessing the existence of this privilege, the Court must balance the confidentiality interests at stake against the need for the document to be included in the judicial review record.

[285] The latter concern – the needs of the administration of justice – deserves significant weight in the balancing. Public interest privilege should not become a shield used to repel judicial scrutiny of decisions that lack legality or are unreasonable: *Carey*, *supra*, at page 673. It is often said that the secrecy afforded by the privilege is needed so that government institutions can function effectively. But sometimes including the document in the judicial review record is necessary for the same reason – courts need to vet an administrative decision to ensure the decision-maker functioned properly.

[286] Sometimes a charge of misbehaviour by a governmental institution justifies disclosure. Put another way, "the course of justice must not be unnecessarily impeded by claims to secrecy": *Sankey v. Whitlam* (1978), 21 A.L.R. 505 at pages 532 and 534 (H.C.), approved in *Carey*, *supra* at pages 664-65. As Lord Scarman asked in *Burmah Oil Co. v. Bank of England*, [1979] 3 All E.R.

700 at page 733 (H.L.), "[W]hat is so important about secret government that it must be protected even at the price of injustice in our courts?"

[287] Accordingly, where upholding the privilege might cause injustice in the judicial review, only a strong interest in confidentiality, well-established in the evidence, will suffice: *Carey*, *supra* at pages 653-654, 668, 671 and 673.

(3) Assessing the arguments in favour of public interest privilege

[288] In this case, a public administrative decision-maker, the Council, has made a public decision under a statutory power. Specifically, Chief Justice Scott made the decision for the Council. The Council claims public interest privilege over a largely factual investigative report that it relied upon in making the decision under review. As a result, it says that the Federal Court judge reviewing the Council's decision cannot see it.

[289] At the outset, one might wonder how the public interest might be hurt if, in addition to Chief Justice Scott, a Federal Court judge sitting in review also sees the Friedland Report. This question assumes greater urgency when one recognizes that the Law Society of Upper Canada and the Attorney General of Ontario have also seen the Friedland Report. And in this matter – Mr. Slansky's motion to have the Friedland Report included in the judicial review record – the Prothonotary, the Federal Court judge, and the judges on this panel of the Court have all seen the Friedland Report. In my view, the Council must demonstrate a strong interest in confidentiality, well-established in the evidence, that explains why the Federal Court judge reviewing the Council's decision cannot see it when so many others have already seen it.

[290] This, the Council has not done.

[291] The Council urges that if its claim of public interest privilege is rejected, serious consequences will follow. In his affidavit, Mr. Sabourin deposes that the Council needs to obtain "candid and reliable" information. Some will feel "vulnerable to the adverse opinions of the judge" or other court staff if they speak and their words become known. The judge might well have significant privacy interests over the information, such as "medical conditions, family situations, or a judge's state of mind during the deliberative or decision-making process." No further light is shed on these matters. As the Prothonotary, the fact-finder in this motion, observed at paragraph 36 of her reasons, the evidence offered by the Council is general, unparticularized and, to some extent, speculative.

[292] When considering evidence of this sort, we must follow the Supreme Court's decision in *Carey*. There, the Supreme Court considered general, unparticularized evidence claiming that, without confidentiality, candour in Cabinet discussions would suffer, injuring policy formulation and the public interest. Consistent with its view that claims of public interest privilege can only be founded upon strong confidentiality interests well-established in the evidence, the Supreme Court found the evidence wanting. In its view, the party seeking to justify the withholding of a document needed in court proceedings must file evidence that is "as helpful as possible," providing "as much detail as the nature of the subject matter [will] allow": *Carey*, *supra* at page 654; see also, *e.g.*, *Burmah Oil*, *supra*. It added that high quality evidence matters even more where, as here, the party is "not a wholly detached observer of events": *Burmah Oil*, *supra* at page 720.

[293] In *Carey*, the Supreme Court did not stop there. Before it were confidential Cabinet deliberations. Nevertheless, it scorned the idea that the need for candour, by itself, can justify withholding a document needed in court proceedings.

[294] It observed that it is "very easy to exaggerate [the] importance" of candour arguments (at page 657). It also observed that candour arguments have "received heavy battering in the courts"; indeed, they have been dismissed as being of "doubtful validity," "grotesque," and an "old fallacy": *ibid.* at pages 657-70, citing *Conway v. Rimmer*, [1968] A.C. 910 at page 957, *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.) 1 at page 20, *Rogers v. Home Secretary*, [1973] A.C. 388 at page 413, *Burmah Oil, supra* at page 724, and *Sankey, supra*.

[295] Turning to the Council's assertion that judges and others have privacy interests deserving of protection, in some cases this is undoubtedly so. In Mr. Slansky's complaint to the Council, he recognized that in the "early stages of any investigation, assurances of confidentiality may be necessary to obtain information." It is true that Professor Friedland interviewed certain witnesses, assuring them their confidentiality would be respected. With more particularity in the evidence, one might share the Council's concern that absent privacy protection, as a general matter people will be reluctant to cooperate and the Council's summary screening process will be impeded. But all of these concerns can be addressed in any judicial review proceeding, if necessary, by sealing sensitive information from the public, the other side, or both.

[296] Denying the reviewing court access to the information, however, overshoots the mark. As we shall see, there is a strong public interest in courts reviewing exercises of public power

regardless of the sensitivities involved. With the help of sealing orders in appropriate cases, the public interest in reviewing exercises of public power can be vindicated with no effect on privacy interests or the Council's summary screening procedure.

[297] The sorts of confidentiality concerns raised by the Council also exist in the case of other professionals whose conduct is scrutinized by disciplinary bodies. Doctors, engineers, lawyers, architects and teachers also have privacy concerns and their colleagues may well be reluctant to speak without assurances of confidentiality. But courts review the decisions of these disciplinary bodies with the benefit of all of the confidential and sensitive material before them, protected, when necessary, by a sealing order. Why should a court reviewing the decisions of the Council be any different?

[298] The Council also raises the principle of judicial independence in support of its privilege claim – an argument rejected by the Court below (at paragraph 78 of its reasons). Mr. Sabourin deposes as follows (at paragraph 24):

> …judicial independence may be threatened if Council cannot give assurances of confidentiality about information provided by a judge regarding a judge's state of mind during the deliberative or decision-making process.

[299] Again, this is asserted, not demonstrated or explained with particularity. The Council has not demonstrated that any parts of the Friedland Report contain elements of deliberative secrecy as that term is understood in the jurisprudence: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796. If there were such elements and if the *Sierra Club* test were met, again, a sealing order would suffice. But here, Mr. Slansky's complaint very much focused upon the judge's demeanour and conduct in open

court. In any event, the legitimate sphere of deliberative secrecy in the context of judicial discipline proceedings is relatively narrow: see Charles Gardner Geyh, "Rescuing Judicial Accountability from the Realm of Political Rhetoric," 56 Case Western Reserve L.R. 911 (2006) at pages 922-35.

[300] But, in any event, I do not see the causal link between: (i) disclosure under seal to the reviewing court of a largely factual report relied upon by the Council in its decision; and (ii) injury to judicial independence. Under a stringent sealing order, only the judge reviewing the Council's decision will see the report. That judge, as a beneficiary of judicial independence, will appreciate its importance.

[301] Indeed, as I shall demonstrate later, withholding the Friedland Report from the reviewing court will likely injure judicial independence.

[302] Finally, I note that all of the concerns asserted by the Council, described above, relate to Council investigations generally, not this particular investigation. If public interest privilege applies to a report like the Friedland Report, it will apply to all such reports in the future. Thus, the Council is asserting that an entire class of documents – investigation reports – should be privileged. Such class privileges should not be lightly expanded because, cast as they are in absolute terms, they "run the risk of occasional injustice": *Gruenke*, *supra* at page 296; *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at paragraph 32. The "modern Canadian trend" is "to accord privilege only where necessary, on a case-by-case basis, and on as limited a basis as possible": Bryant *et al.*, *supra* at page 911. As the Supreme Court said in *Carey* (at page 655), "a claim that a document should not be disclosed on the ground that it belongs to a certain class has little chance of success."

[303] In summary, in order to succeed in its claim of public interest privilege, the Council had to demonstrate an interest in confidentiality, well-established in the evidence, one that justifies withholding a document that a reviewing court would normally get to see. In my view, as the Prothonotary found (at paragraph 36 of her reasons), the Council has failed to do this and so its claim for public interest privilege must fail.

[304] For completeness, however, and to address the submissions made by the parties and my colleagues' views on this point, I wish to address the needs of the administration of justice in this case. They are substantial.

(4) The needs of the administration of justice

[305] To recap, Mr. Slansky raises two grounds in his application for judicial review: the Council's investigation of the facts was inadequate and its decision is unreasonable because the facts placed before the Council do not sustain the decision. No one has suggested he cannot assert these grounds.

[306] The Federal Court judge (at paragraph 84 of his reasons) and my colleagues say that the Council's decision letter gives enough to Mr. Slansky for him to make out his case. I disagree.

[307] Mr. Slansky is not obligated to take the statements made and the information given in the Council's decision letter at face value. By challenging the reasonableness of the decision and the adequacy of the investigation, he asserts that the statements made and the information given in the decision letter are unsustainable.

[308] Without the Friedland Report – the main source of facts for the Council's decision – how can Mr. Slansky argue the decision is not supported by the facts placed before the Council? And without the Friedland Report – the only investigation in the case – how can Mr. Slansky argue the investigation was inadequate?

[309] Further, under Rule 318, Mr. Slansky is entitled to everything relied upon by the Council in making its decision, unless the Council can establish a valid objection. No case stands for the proposition that "the applicant has enough to make out the argument" is a valid objection under Rule 318. I would add that a prothonotary or judge acting on a motion under Rule 318 should not engage in weighing evidence and assessing whether litigants have "enough." Litigants should get everything to which they are entitled.

[310] In this case, however, the most serious harm to the administration of justice is the reviewing court's inability to have access to the material the Council relied upon in making its decision.

[311] If the Council's public interest claim is upheld, the reviewing court will not see the Friedland Report. As a result, the reviewing court will be unaware of facts (if any) identified in the Report that go against the Council's decision. It will be unaware of the facts learned by Professor Friedland and why, based on those facts, he considered it unnecessary to pursue other sources of information in his investigation. As a result, the reviewing court will not be able to assess the grounds of review Mr. Slansky asserts. In the words of the Prothonotary (at paragraph 38 of her reasons), disclosure of the Friedland Report is necessary "to ensure that the application for judicial review can be conducted in a meaningful way."

[312] By not providing the Friedland Report to the reviewing court, to some extent the Council is shielding its decision from review. That may well not be its intention, but that is certainly the effect.

[313] This is no mere trifle. Immunizing part of the Council's decision offends the principle that all holders of public power should be accountable for their exercises of power.

[314] This principle finds voice in many areas of our law:

- *Review is constitutionally guaranteed*. As a matter of constitutional law, courts must be able to review the decisions of administrative decision-makers for defensibility and acceptability on the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 27-31.

- *Federal Courts have a plenary power to supervise administrative decision-makers.* This power can even survive legislative attempts to oust it: *Canadian Liberty Net*, *supra* at paragraphs 35-38; *Derakhshani*, *supra* at paragraphs 10-11; *RBC Life Insurance Company*, 2013 FCA 50 at paragraphs 35-36.

- *Privative clauses are read down.* Parliament, wielding its constitutional power to make laws, sometimes tries to block the courts from reviewing administrators' decisions. Nevertheless, the courts can review administrators' decisions, albeit with appropriate deference: *Dunsmuir*, *supra* at paragraph 31; *Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120 at page 127; *U.E.S.*,

Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 at page 1090; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220 at pages 237-38.

- *Exercises of public power cannot be immunized from challenge.* On occasion, those who are not personally or directly affected in a significant way nevertheless are permitted to challenge the exercise of a public power. The paramount concern, consistently mentioned in the case law, is that exercises of public powers cannot be immune from review: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 at paragraphs 31-34; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at page 256; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at page 631; *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 at page 692; *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.). In the words of Laskin J. (as he then was), "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication": *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 at page 145.

- *Deliberative secrecy can sometimes be overridden.* Administrative decision-makers' deliberations are usually highly confidential. But, in appropriate cases, that confidentiality must give way so that the reviewing court can engage in meaningful

review: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221.

- *Administrative decision-makers' attempts to immunize themselves from review are forbidden*. A statutory body subject to judicial review cannot immunize itself or its process by arriving at decisions on considerations that are not revealed by the record it files with the court: *Payne v. Ontario Human Rights Commission* (2000), 192 D.L.R. (4th) 315 at paragraph 161 (Ont. C.A.).

[315] Some of the authorities in the preceding paragraph show that Parliament cannot immunize the factual determinations of administrative decision-makers by passing a law. How then can administrative decision-makers immunize their factual determinations by withholding documents containing facts?

[316] In this case, immunization weakens the accountability and transparency of the Council and the judicial disciplinary system it administers. With less accountability and transparency, public confidence in the judiciary will fall, ultimately threatening judicial independence. The Prothonotary correctly recognized this at paragraphs 35 and 38 of her reasons.

[317] A hypothetical example – worse ones can be imagined – illustrates this well.

[318] Suppose a judge receives a bribe from one of the parties in a case and deposits it into his bank account. Four people witness the bribe. One complains to the Council. The Council retains a lawyer, such as Professor Friedland, to gather information from the complainant, the witnesses, the judge, the bank, and others.

[319] The lawyer prepares a report for the Council setting out the information gathered. The lawyer also sends along the documents he has gathered in the course of his investigation. But his report contains some facts not otherwise apparent.

[320] The Council, undertaking no other factual investigation of its own, reads the report and the documents gathered by the lawyer. It dismisses the complaint.

[321] Surprised by the decision, the complainant brings a judicial review. She alleges the Council could not have dismissed the complaint based on the facts it had before it. She also alleges that the investigation was inadequate.

[322] The reviewing court dismisses the judicial review. The judge writing the reasons explains that the Council – the judges' disciplinary body, run by judges, staffed mainly by judges – does not have to disclose the factual report because judges are independent. The judge further explains that, without the report relied upon by the Council, it cannot be said the exoneration of the judge by the

judges' disciplinary body was unsupported by the facts, nor can it be said the investigation was inadequate.

[323] Based on what they see, fair-minded observers might justifiably describe the decision as a whitewash regardless of the actual merits of the complaint. Worse, fair-minded observers might speculate as to misconduct committed by other judges that has gone unpunished by the Council and has been similarly immunized from review.

[324] Over time, as more and more such cases arise, pleas that judicial independence is important would increasingly fall on deaf ears. As public confidence and respect for the judiciary plummets, legislative incursions into judicial independence may become more acceptable in the public's eye.

[325] This is no idle speculation. Many have noted and confirmed the role that accountability and transparency of the judiciary plays in fostering public confidence in the courts and maintaining respect for judicial independence.

[326] Many expert commentators have studied the interrelationship between judicial independence on the one hand and, on the other, judicial disciplinary processes and the transparency and accountability surrounding them. These commentators have found that transparent and fully accountable judicial disciplinary processes enhance judicial independence. In particular, four propositions appear to be well-founded:

1. Judicial independence depends not only upon constitutional texts or court judgments, but also upon public respect and support for the judiciary.

2. Public respect and support for the judiciary is furthered by assurances that judicial disciplinary authorities will investigate and decide complaints of judicial misbehaviour fairly and objectively.

3. Public respect and support is furthered even more by the existence of judicial review mechanisms that ensure that judicial disciplinary authorities are held fully accountable for their decisions on the facts and the law, with reasons offered to the public explaining what took place.

4. Attacks upon the independence of the judiciary often stem from perceptions that judges are insufficiently accountable for their exercises of power.

See Geyh, *supra*; Abimbola A. Olowofeyeku, "The Crumbling Citadel: Absolute Judicial Immunity De-Rationalized," 10 Legal Stud. 271 (1990); Robert N. Strassfeld, "'Atrocious Judges' and 'Odious' Courts Revisited," 56 Case Western Reserve L.R. 899 (2006); David C. Brody, "The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence and Public Trust," 86 Denv. L.R. 115 (2008) at pages 121-26; Carmen Beauchamp Ciparick and Bradley T. King, "Judicial Independence: Is It Impaired or Bolstered by Judicial Accountability?" 84 St. John's L. Rev. 1 (2010).

[327] It has been said that "provided the people … have confidence," courts do not need "the power of the purse or the power of the sword to make the rule of law effective": former Chief Justice Brennan of the Australian High Court, quoted in Enid Campbell and H.P. Lee, *The Australian Judiciary* (Cambridge: Cambridge University Press, 2001) at pages 6-7. The Court's authority, exercised independently, "ultimately rests on sustained public confidence in its moral sanction": *Baker v. Carr*, 369 U.S. 186 at page 267 (1962) *per* Frankfurter J. (dissenting).

[328] Commenting on Justice Frankfurter's observation, Aharon Barak, former President of the Israeli Supreme Court, added that all a judge has is "the public's confidence in him [or her]": A. Barak, *The Judge in a Democracy* (Princeton, N.J.: Princeton University Press, 2006) at page 209. Elsewhere, he has observed that "an essential condition for an independent judiciary is public confidence"; indeed "public confidence in the judiciary is the most precious asset that this branch of government has": *Tzaban v. Minister of Religious Affairs*, 40(4) P.D. 141 at page 148.

[329] Justice Ian Binnie has stated that "[t]he principal bulwark to outside interference" with the judiciary is not written guarantees but rather "the deep-rooted acceptance of the need for judicial independence in Canadian society": speech to the *World Conference on Constitutional Justice*, 2nd Congress, Rio de Janeiro, January 16-18, 2011. The Court of which he was a distinguished member, the Supreme Court of Canada, itself has recognized that openness – an aspect of accountability – is "a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts": *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332 at paragraph 25. Openness "serves to reinforce the faith of the citizen," a matter that "has important

implications for the administration of justice": *Carey*, *supra* at page 673; see also Chief Justice McLachlin, "Courts, Transparency and Public Confidence," 8 Deakin L.R. 1 (2003).

[330] Even the Council itself has declared that "[p]ublic confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law": Canadian Judicial Council, *Ethical Principles for Judges*.

[331] How is public confidence and respect best fostered, maintained, and enhanced? There are many ways: see *The Judge in a Democracy*, *supra* at pages 111-12. Foremost among these is ensuring accountability and transparency to the greatest extent possible. Allowing the reviewing court to consider Mr. Slansky's grounds of challenge with the benefit of the Friedland Report does not undercut judicial independence at all. If anything, it strengthens it. And allowing others to see as much of the Friedland Report as possible – sealing portions of it under the strict *Sierra Club* test only where well-established confidentiality interests outweigh the significant public interest in openness – strengthens judicial independence even more.

[332] Overall, for the foregoing reasons, the needs of the administration of justice favour the reviewing court having the benefit of the Friedland Report when it determines the judicial review. But, to recap, the Council has failed in the first place to establish a sufficient interest justifying withholding the Friedland Report, in its entirety, from the reviewing court. Therefore, I reject the Council's claim of public interest privilege over the Friedland Report.

D. Other issues

[333] I agree with my colleagues that we should not interfere with the Federal Court's exercise of discretion to refuse to convert the application into an action.

[334] Mr. Slansky also requests that all of the raw material forming the basis of the Friedland Report, including certain transcripts, be produced. The Federal Court was of the view that the transcripts should be produced.

[335] As mentioned, Rule 317 captures only material that the decision-maker relied upon when making its decision. To the extent that Professor Friedland transmitted this raw material to the Council and the Council relied upon it for its decision, it should be before the reviewing court.

[336] On this motion, the Council based its entire argument upon the existence of privileges. It did not seek partial sealing orders to protect the confidentiality of portions of the raw material. In fact, it declined the suggestion of the Prothonotary that a sealing order be made: see paragraph 38 of the Prothonotary's reasons.

[337] In these reasons, I have offered views concerning how sealing orders can be used to achieve a proper balance between protecting legitimate confidentiality interests and meaningful judicial review of the Council's decisions. Now with the benefit of these views, the Council may wish to revisit whether it should seek a sealing order. Accordingly, I would exercise my discretion in favour of the Council being given an opportunity to move for an order sealing material from Mr. Slansky,

the Registry or both, such motion to be determined on the basis of the sensitive balancing test set out in *Sierra Club, supra*.

[338] Whether or not the Council makes such a motion, the Friedland Report and the raw material relied upon by the Council should be placed before the reviewing court.

[339] Mr. Slansky does not seek any of the gratuitously offered advice and recommendations in the Friedland Report. Accordingly, the Prothonotary was correct in ordering that any advice and recommendations be severed from the Friedland Report before it is included in the judicial review record and that she be available to resolve any disputes regarding severance.

E. Proposed disposition

[340] Accordingly, I would allow the appeal and set aside the orders of the Federal Court and the Prothonotary. I would order that the Friedland Report and the material forming the basis of it (to the extent it was before the Council) be placed before the reviewing court. I would allow the Council to move for an order sealing material from Mr. Slansky, the Registry or both. Absent such a motion within ten days of this order, I would order that the Friedland Report and the material forming the basis of it (to the extent it was before the Council) be produced to Mr. Slansky and the Registry, with the gratuitously offered advice and recommendations in the Friedland Report removed. I would grant Mr. Slansky his costs throughout.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-497-11
APPEAL FROM THE ORDER OF THE HONOURABLE JUSTICE DE MONTIGNY DATED DECEMBER 31, 2011, DOCKET NO. T-716-06	
STYLE OF CAUSE:	Paul Slansky v. Canada (Attorney General)
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 16, 2013
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRING REASONS BY:	MAINVILLE J.A.
DISSENTING REASONS BY:	STRATAS J.A.
DATED:	September 9, 2013

APPEARANCES:

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