MEMORANDUM OF FACT AND LAW

PART I - FACTS

A. OVERVIEW

1. The Applicant (Responding Party on the motion, hereinafter referred to as the Applicant) filed a complaint to the Canadian Judicial Council ("CJC") in 2016 about the change of his sentence for civil contempt by the Honourable Mr. Justice Shaughnessy ("Justice Shaughnessy" or the "Moving Party") in an Ontario Superior Court proceeding in 2013 that increased the time he would have to serve in jail without any notice or opportunity to respond. Facts are alleged in his complaint that this violated the Applicant's rights and was judicial misconduct. This complaint was summarily dismissed by the Executive Director ("ED") of the CJC, Norman Sabourin, because the internal policy of the CJC (the "Review Procedure") purported to permit such dismissal. The dismissal was based on the assertion that judicial decision-making was not "conduct" that could be judicial misconduct and that there was "no" [judicial] "misconduct". The Applicant seeks to judicially review ("JR") the summary dismissal of his CJC complaint by the ED. In addition to the errors in respect of the merits of the complaint, as part of that JR he challenges the legal and constitutional authority of the ED of the CJC to summarily dismiss a complaint. As a part of the JR of the CJC dismissal of the complaint, the Applicant also seeks declarations that the complaint involves conduct, which it must be assumed at this screening stage, that was unconstitutional and was judicial misconduct.

2. Justice Shaughnessy was included as a Respondent based on Rule 303, that his non-legal interests were directly affected by the declaratory orders sought or by the legal determinations to the same effect on the JR (on the basis that these declarations/determinations could impact on his reputation). However, Justice Shaughnessy has stated that he is not affected by the judicial

review and wants to be removed as a party. In fact, he has brought a motion to that effect. He also moves for other relief. The Applicant has advised Justice Shaughnessy that if he feels that he is not affected by the JR, he is willing to have him removed as a party to the judicial review. However, the Applicant has indicated that Justice Shaughnessy cannot be removed because he is not affected and at the same time seek to address or change the judicial review. If he is not affected, he has not standing to change the judicial review.

3. Justice Shaughnessy insists on eating his cake and still having it. He insists on trying to change a judicial review that he says does not affect him. Although a motion has been set to deal with this and this factum responds to that motion, the Applicant has now rendered the motion moot by serving and filing an Amended Notice of Application under Rule 200. While Rules 75 and 76 allow for amendment of pleadings with leave, Rule 200 overrides this requirement when there has been no response to pleadings. Since Justice Shaughnessy has been removed as a party by amendment, his application to be removed is moot. He has no standing to seek any other relief because he is no longer a party. He is not prejudiced. The motion must be dismissed.

4. On the off chance that there is some legal impediment to the Amendment of the Notice, the issues raised in the motion, pre-amendment will be addressed.

5. If Justice Shaughnessy continues to be a party and the motion is not summarily dismissed for mootness and lack of standing, he has moved to strike the declarations under Rule 221 on the bases that:

- the declarations are sought against him; and
- the declarations seek or permit fact finding by the Federal Court.

He also seeks to strike paras 1-20 (the substance) of the Applicant's affidavit. He also seeks that he be removed as a Respondent on the judicial review.

6. As a preliminary matter, if the motion is not summarily dismissed, it must be dismissed on the merits for the same reason that the Notice has been amended. The Applicant takes the position that the Moving Party cannot have it both ways. Either he is affected by the declarations sought and is a proper party or he is not affected and therefore has no standing to move to strike. He has no standing to move to strike declarations or portion of affidavits if he takes the position that he is not affected. Even if the declarations had not been sought, legal determinations to the same effect are a necessary part of the JR as set out in the GROUNDS of the Notice. Directions to the CJC under s. 18.1(3) of the *Federal Courts Act* ("the Act") will be necessary, especially if there are no declarations. Such determinations or directions either directly affect him or not. The Applicant is content to have the Moving Party removed as a party as long as the fact that he is not a party is not used to the Applicant's detriment. Instead, the Moving Party seeks to limit the relief sought and exclude evidence on the JR, to the detriment of the Applicant, and also wants to not participate as a party.

7. Further, the dual premises set out in paragraph 2 of this Memorandum are clearly false. The Notice of Application does not seek declarations **against** Justice Shaughnessy. The Applicant seeks declarations relevant to the judicial review, as part of the judicial review, in respect of the decision of the CJC, through its ED, dismissing the complaint. The Notice of Application does not seek, through these declarations, that any facts be found by the Federal Court. The declarations sought are founded upon presumed facts. If a complaint is dismissed without investigation because the facts could not constitute judicial misconduct, then the facts must be presumed to be true in respect of that dismissal. The basis for this motion is therefore premised on propositions that are clearly false and an inappropriate and abusive attempt to

mischaracterize the application contrary to the Court of Appeal's decision in *Arsenault*[1].

8. On the merits, there is no basis to strike the declarations sought. The declarations serve a practical utility in respect of the merits of the JR and the challenge to the CJC process.

9. The Applicant has always been willing to have Justice Shaughnessy removed as a Respondent if he feels that his reputational interests are not affected. The Applicant only wishes to ensure that this removal is not used against the Applicant.

B. THE FACTS

10. The facts are based on the allegations in the complaint that was before and dismissed by the CJC. The following summary is based on the allegations in the complaint summarized in the affidavit of the Applicant..

11. The complaint alleges that Honourable Mr. Justice Shaughnessy ("Shaughnessy, J." or "Justice Shaughnessy" or the "Moving Party") heard a series of motions in respect of the jurisdiction to hear the action brought by a corporation controlled by the Applicant in Ontario.[2]

12. Shaughnessy, J. found the Applicant to be in contempt and he was sentenced to 3 months in jail as punishment in January 2010. There was no mention of remission in the order or warrant of committal.[3]

13. The Applicant applied to set aside the finding of contempt. Initially, the Applicant was represented by counsel on an application to stay the warrant of committal, which was stayed pending the application to set aside the contempt order. Later, and throughout most of the proceedings to set aside contempt before Justice Shaughnessy, the Applicant was self-represented. The hearing to set aside the contempt took place on April 30 and May 3, 2013. At the end of the

[1] *Canada v. Arsenault*, [2009] F.C.J. 896 (C.A.).
[2] **Responding Motion Record, Affidavit of the Applicant,** para 5
[3] **Responding Motion Record, Affidavit of the Applicant,** para 5 and Exhibits 3A, 3C-E

hearing, Justice Shaughnessy removed the stay and gave effect to the original 2010 warrant of committal. He provided reasons, Judgment and an order to this effect. The new order merely gave effect to the original 2010 order and the original warrant of committal. There was no mention of remission or requiring the Applicant to be brought before Justice Shaughnessy in the future.[4]

14. At the end of the May 3, 2013 proceeding, Justice Shaughnessy ordered that the Applicant be taken into custody and that he have no input in respect of the order. He ordered that anything further to do with the case was to be brought before another judge, and not him. Justice Shaughnessy left the courtroom and then the Applicant was taken into custody.[5]

15. Thereafter, Justice Shaughnessy signed a new warrant of committal in which he added the words: "no remission is ordered", presumably in Chambers, without any notice to the Applicant. This new warrant created a new sentence that was inconsistent with the previous order and warrant in 2010 and inconsistent with the sentence, order and reasons made that same day, May 3, 2013. Had it not been set aside by Justice Molloy on a *habeas corpus* and *Charter* application, with the consent of the AG of Ontario, the Applicant would have had to serve an additional month in jail as a result of the words "no remission" added to the new warrant.[6]

16. This new warrant and the issue of remission were not addressed in open court that day or on any prior occasion. There was no notice to the Applicant that such a wording might be inserted and no opportunity to address it before Justice Shaughnessy, who had directed that he no longer be involved in the case.[7] Since he was unrepresented, the Applicant had no notice or input into the wording of the warrant.

---

[4] **Responding Motion Record, Affidavit of the Applicant,** paras 6, 7, 11, 12 and Exhibits 3F-H, 3R-T
[5] **Responding Motion Record, Affidavit of the Applicant,** paras 7-11 and Exhibits 3S-T
[6] **Responding Motion Record, Affidavit of the Applicant,** paras 9-11 and Exhibit 3B
[7] **Responding Motion Record, Affidavit of the Applicant,** paras 7, 8, 10-13 and Exhibits 3B, 3S-T

17. The Applicant made a complaint to the CJC on January 5, 2016 regarding:

- the secret creation of a new warrant of committal reading "no remission" that changed the sentence imposed;
- the exclusion of the self-represented Applicant from the process of review of orders and warrants;
- the order that Justice Shaughnessy have no further involvement in the case.[8]

18. In a letter dated January 28, 2016, but only received on March 29, 2016, the Executive Director and Senior General Counsel of the CJC, Norman Sabourin ("ED") summarily dismissed the complaint of the Applicant on the bases that:

- He was applying the Review Procedure of the CJC (pp. 1-2). Item 5 of this procedure purports to allow the Executive Director of the CJC to summarily dismiss a compliant if it: is frivolous, vexatious or abusive (5(a)); does not relate to "conduct" (5(b)); or it is not in the "public interest" to proceed (5(c)).
- the CJC "complaints process is not concerned with judicial decision-making or the exercise of judicial discretion. The allegations concerned the judicial decision-making process and not conduct" (p.1);
- the complaint "does not involve misconduct" (p.2).[9]

19. The Moving Party was included as a Respondent on the JR because declarations are sought on the JR and legal determinations and the need for directions arise in the JR at, based on the facts set out in the complaint, which at this stage must be taken at face value, he violated the Applicant's constitutional rights and committed judicial misconduct. The declarations, legal determinations and directions are necessary in respect of the process and to the merits of the JR.

[8] **Responding Motion Record, Affidavit of the Applicant,** paras 15-16 and Exhibits 1-3
[9] **Responding Motion Record, Affidavit of the Applicant,** paras 17-18 and Exhibits 4-5

PART II- THE ISSUES

20. The issues that arise in this motion are:

(a) Can the Notice be amended without the need for leave under Rule 200. If so, is the motion moot?

(b) If the motion is not moot, does the Moving Party have standing to challenge the application (Rule 221) and strike portions of the Applicant's affidavit while at the same time seeking his removal as a party on the basis that the application does not affect him (Rule 303) and/or is such a motion an abuse of process?

(c) If the motion is not moot, should the impugned declarations be struck from the Notice?

(i) What principles apply to a motion to strike parts of a Notice or affidavit on a judicial review?

(ii) Do these principles allow for the striking of any declaratory relief or affidavit?

(A) Are the declarations sought against the Moving Party?

(B) Do the declarations sought seek or permit the Federal Court to make findings of fact on evidence?

(C) Are the declarations sought available as being of practical utility?

(d) Should the Moving Party be removed as a Respondent?

(i) If the Amendment is effective, is the motion is moot?

(ii) If the motion is not moot, even if the impugned declarations were struck, do determinations or directions to the same effect arise in the JR?

(iii) If the motion is not moot, is the Moving Party affected by such determinations or directions on the JR?

(iv) If the motion is not moot, should the Moving Party be removed as a Party?

PART III – ARGUMENT

A. RIGHT TO AMEND/MOTION IS MOOT

21. Under Rule 200, the Applicant has a right to amend the Notice of Application up until there has been a response to pleadings. Rule 200 states:

> ***Amendment as of right***
>
> 200. **Notwithstanding rules 75 and 76**, a party may, **without leave, amend any of its pleadings at any time before another party has pleaded thereto** or on the filing of the written consent of the other parties.

22. There has been no affidavit filed or response to the Applicant's application for JR by any Respondent. A motion to strike is not a response to pleadings.[10] A response to pleadings is an affidavit and/or a responding factum on the merits. These have not been provided.

23. While a party may not be added by amendment without leave[11], there is can be no prejudice in removing a party who takes the position that they should never have been included as a party.

24. Accordingly, there is a right to amend the Notice and remove the Justice Shaughnessy as a party. Having been removed as a party, Justice Shaughnessy has no standing to seek any relief unless he brings a motion to be given standing and presents evidence, contrary to his present position, that he is affected.

---

[10] *Waterside Ocean Navigation Co. v. International Navigation*, [1977] 2 F.C. 257, in Which, Thurlow, A.C.J. dealt with whether an amendment as of right was precluded by the fact that a motion to strike had been filed. He said:

> **15** The submission was that the **notice of motion** was an answer to the statement of claim. Such a notice, however, **is not a pleading in the ordinary sense and, in my view, it is not an answer to a pleading**. Whether filed or not, it has no effect until the application of which it gives notice is made to the Court. Even if the application itself might conceivably be looked upon as a sort of answer to the claim, it is not a document and this, in my view, holds true whether or not the Court is requested to deal with the application without personal appearance under Rule 324. Accordingly, I am of the opinion that the plaintiff was entitled to amend under Rule 421(1) on November 3, 1976, and as no application has been made under Rule 422 to disallow the amendment, **the amended statement of claim filed on that day stands as the statement of claim in the action.**

This was approved by the Court of Appeal in *Le Corre v. Canada*, [2005] F.C.J. No. 590 (C.A**.)**, at para 16

[11] *Institut National des Appellation d'origine v. Cellar Craft Int. (Can)* (1999), 164 F.T.R. 317 (Prothonotary)

B. ABUSE OF PROCESS: INCONSISTENT POSITIONS ON MOTION

25. The Moving Party says that he should not be a party to this judicial review because it does not affect him. At the same time, he moves to strike relief sought and portions of an affidavit. If the JR does not affect him, he should not be a party and therefore cannot bring such a motion. He has no standing to bring such a motion if he is not affected by the JR.

26. A person can only have standing to bring a motion (other than a motion to be removed or a motion for intervener stratus) if he is a party.

27. Only a party can bring a motion to strike a part of the Notice or an affidavit. A party can move to be removed as a party if he is not properly named as such based on Rule 303.

28. However, if the person says that he is improperly named as a party that must be dealt with at the outset. He cannot defer the bringing of such a motion and use his temporary status as a party to change the litigation if he says he is unaffected by it. To do so would be to an abuse of process as taking inconsistent positions.[12] On the one motion to remove, the Moving Party says

---

[12] That taking inconsistent positions in an action, application or motion is an abuse of process that disentitles a party from bringing a motion, including a motion to strike, is clear from the following cases:
Crown Trust v. Canada, [1977] 2 F.C. 673, at para 12:

> **12** ... where, as in the present case, the Minister has made for the same taxation year regarding the same asset, **two absolutely contradictory and mutually exclusive assessments arising out of the same transaction, it would be ludicrous for the Court to allow the Minister, in such a case, to enjoy the benefit of the burden of proof which he normally enjoys** in assessment appeal cases, **since the Minister is, in the same action, seeking to have the Court confirm two contradictory statements...**
>
> **14** Although there appears to be no **legal bar to the Minister assessing two different amounts for the same asset** in the same taxation year then the value to be determined arises out of the same transaction, **I feel that this custom is highly improper and fundamentally unfair and constitutes the kind of conduct which is most likely to bring the taxing authority into disrepute.**

Wewayakum Indian Band v. Wewayakum Indian Band, [1991} 3 F.C. 420 (T.D.), at para 46:

> "**a party may be prevented from adopting a completely contradictory position in the same action**.";

Underwriters Laboratories Inc. v. San Francisco Gifts Ltd., [2009] F.C.J. No. 1091:

> **9** Defendants' counsel attempts to overcome this difficulty by saying that his motion is also based on Rule 221(1)(f). It is argued that to implead a defendant without alleging a cause of action against him is an abuse of process. **The argument is unacceptable**. As already shown, **it is in direct contradiction of defendants' own motion materials.**

To change a position is conceptually no different from taking an inconsistent position. There are a series of cases making it clear that Government changing its position is an abuse of process (for example: *R. v. Varga* (1994), 90 C.C.C,(3d) 484 (C.A.); *R. v. G.B.*, [2000] O.J. No. 2983 (C.A.) ("riding two horses" an abuse of process: at paras 39,

that he is not affected by the JR and therefore he should not have been included as a Respondent under Rule 303. On the other hand, the Moving Party brings a motion under Rule 221 as an affected Party (otherwise he would have no standing) to strike a remedy sought on the basis that it affects him. To use a metaphor from Aesop's Fables: he would be acting as a wolf in sheep's clothing. If he says that I am a sheep (unaffected; not a proper party), he cannot then act as a wolf (affected and therefore a party) and act as a party. He must make a choice. Only a party, someone affected by the proceeding, has a right to seek relief in respect of the proceeding. A motion to strike can only be brought on "motion" under Rule 221 by a party, because only a party has an interest in preventing unnecessary litigation of issues in a proceeding to which they are a party. The purpose of a motion to strike is not to narrow the scope of the litigation to attempt to change it so that it will no longer affect a person. The purpose of a motion to strike is to prevent unnecessary, time consuming and costly litigation that serves no purpose in the actual litigation between the parties.

29. This is clear from the *Imperial Tobacco* case, where the SCC said that the purpose of the motion is to ensure effective and fair litigation of the issues between the parties:

> **19** The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to **effective and fair litigation**. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> **20** This promotes two goods -- efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes **litigation efficiency, reducing time and cost. The litigants can focus on serious claims**, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless ... The more the evidence and arguments are trained on the **real issues**, the more likely it is that the trial process will successfully come to grips with **the parties' respective positions on those issues** and the merits of the case.[13]

Since the rationale s to streamline the litigation for the parties, a person cannot bring a motion to

---

40, 42, 43, 46, 47)

[13] *R. v. Imperial Tobacco*, [2011] S.C.J. No. 42

strike to narrow the litigation or to exclude evidence in a proceeding to which he will not be a party or use the motion to remove aspects that concern him and then not participate as a party.

30. Accordingly, the very nature of a motion to strike dictates that, if a person claims that he is not affected by an application and therefore he should not be a party under Rule 303, his only option is to move to be removed as a party. He cannot say, as the Moving party says here: I am affected, but if you change the application, I will not be affected. The nature of a motion to strike or to strike an affidavit is that it deals with litigation **between the parties**. Only a party has the right to say: I should not have to address an issue in the application because what is sought is so clearly improper as to be bereft of any possibility of success.

C. MERITS: MOTION TO STRIKE PORTIONS OF APPLICATION/AFFIDAVIT

31. In the alternative or if the Moving Party abandons any plan to be removed as a party and undertakes to continue as a party, there is no basis to strike the declarations sought.

1. GENERAL PRINCIPLES ON MOTION TO STRIKE/DECLARATIONS

(a) Narrower scope to a motion to strike in a JR application as opposed to an action

32. A motion to strike in the *Federal Court Rules* arises in respect of actions. Rule 221 is in the Section of the Rules (Part 4) that deals with actions. It does not apply to applications for judicial reviews except by analogy and then only in very exceptional cases. The possibility of motions to strike, appeals of such motions, amendment, new motions, new appeals runs counter to the rule in respect of judicial reviews that they be done "without delay and in a summary way" (section 18.4 of the *Federal Courts Act*)[14]. The appropriate approach in the Federal Court is to deal with any such issues at the time the judicial review is heard on its merits unless what is sought is "so clearly improper as to be bereft of any possibility of success".

[14] *David Bull Laboratories (Canada) v. Pharmacia Inc.* [1995] 1 F.C. 588 (C.A.).

33. The Federal Court of Appeal in *David Bull Laboratories*, said:

> **7** ...We need go no farther than to confirm that the **remedy of striking out a notice of motion was not available** in these circumstances…
>
> **9** For Rule 5 to apply there must be a "gap" in the Federal Court Rules. Simply because those Rules do not contain every provision found in provincial court rules does not necessarily mean that there is a gap. ...
>
> **10** **The basic explanation** for the lack of a provision in the Federal Court Rules for striking out notices of motion **can be found in** the **differences between actions and other proceedings.** ... the **process of striking out is much more feasible in the case of actions because. there are numerous rules which require precise pleadings as to the nature of the claim or the defence and the facts upon which it is based There are no comparable rules with respect to notices of motion.** ...the relevant rule in the present case which involves an application for judicial review, merely require that the **notice of motion identify "the precise relief" being sought, and "the grounds intended to be argued." The lack of requirements for precise allegations of fact in notices of motion would make it far more risky for a court to strike such documents**. Further, the disposition of an **application commenced by originating notice of motion does not involve discovery and trial**, matters which can be avoided in actions by a decision to strike. In fact, the disposition of an originating notice proceeds in much the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus, **the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself. This case well illustrates the waste of resources and time in adding on to what is supposed to be a summary judicial review proceeding the process of an interlocutory motion to strike** … **The originating notice of motion itself can and will be dealt with definitively on its merits at a hearing before a judge of the Trial Division** now fixed for January 17, 1995.
>
> **11** **The contrast between actions and motions in this Court is even more marked where the motion involved is for judicial review** … Unlike the rules pertaining to actions, the 1600 **rules** [as enacted by SOR/92-43, s. 19] **pertaining to judicial review provide a strict timetable for preparation for hearing and a role for the Court in ensuring there is no undue delay.** Time limits fixed by the rules can only be extended by a judge, not by consent. **The Court can of its own motion** dismiss applications due to delay and can also take the initiative in **correcting originating documents**. This all reinforces the view that **the focus in judicial review is on moving the application along to the hearing stage as quickly as possible. This ensures that objections to the originating notice can be dealt with promptly in the context of consideration of the merits of the case...**
>
> **15** For these reasons we are satisfied that the Trial Judge properly declined to make an order striking out, under Rule 419 or by means of the "gap" rule, as if this were an action. **This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success.** Such cases

must be **very exceptional and cannot include cases such as the present where there is simply a debatable issue** as to the adequacy of the allegations in the notice of motion.

As noted above, the need for expedition and summary procedure in judicial review applications is specifically mandated in section 18.4(1) of the *Federal Courts Act*.[15] This rationale, approach and the *David Bull* case itself have been consistently reaffirmed by the Court of Appeal.[16]

34. The Federal Court of Appeal has used this principle to preclude motions to strike an application in respect of a particular remedy on the basis of alternative remedies being available, especially where, as in the case at bar, the process itself is being challenged. In *P.I.P.S.C. v. Canada* (2002) 216 F.T.R. 96 (affirmed (2003) 301 N.R. 356 (C.A.)) the Court said:

> **22** … **this issue alone points to the existence of a justiciable issue.** As a result, the application is "not so clearly improper as to be bereft of any possibility of success" (David Bull Laboratories (Canada) Inc. v. Pharmacia Inc., supra). **This issue should be determined by the Judge hearing the application.** Accordingly, I would exercise my discretion and not allow the motion to summarily dismiss the application on this ground. **The CCRA argued that the application of PIPSC should fail as there is an adequate alternative remedy available by way of applications for judicial review in respect of specific decisions. I do not agree as in this case it is the process itself that is in question**.[17]

b) Other Principles in respect of Motions to strike (with modifications for FCC JR)

35. If notwithstanding the foregoing the Court still considers this motion to be available to the Moving Party, the Supreme Court of Canada and other Appellate Courts have established general

---

[15] 18.4. Hearings in Summary Way — (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

[16] *Apotex v. Canada*, (2007) 370 N.R. 336; 2007 FCA 374 (para 16); *Canada v. Canadian Generic Pharmaceutical Association,* 2007 FCA 375, at para 5; *Odynsky v. B'nai Brith* (2009), 387 N.R. 376 (F.C.A.), at para 5-6. See also: *Bouchard v. Canada (Minister of National Defence)* (1999) 187 D.L.R. (4th) 314, 255 N.R. 183 (F.C.A.) at paragraph 12; *Syntex (U.S.A.) L.L.C. v. Canada (Minister of Health)* 2002 FCA 289, 292 N.R. 147, 20 C.P.R. (4th) 29 at paragraph 5; *Scheuneman v. Canada (Attorney General)* [2003] F.C.J. No. 686,2003 FCA 194 at paragraph 7.

[17] *P.I.P.S.C. v. Canada* (2002) 216 F.T.R. 96; affirmed (2003) 301 N.R. 356 (C.A.). The Federal Court has also said that whether there is an argument that there is an adequate alternate remedy (which is what the Moving Party argues here (*certiorari* is adequate)), this issue should be left to the judge hearing the application on its merits.[17] In light of the limited nature of the jurisdiction to strike, the fact that it is the process itself that is being challenged and the fact that the motion is based on arguments of adequate alternate relief, this is not one of those "very exceptional" cases where relief sought in a Notice of Application for judicial review should be struck by motion, but the issues should be dealt with on the hearing of the judicial review itself.

principles in respect of motions to strike in actions, that have some utility in the context of applications in procedure, principles and defining the lower threshold[18].

36. The facts pleaded by the Plaintiffs must be taken as proven fact.[19] While evidence can be presented to support other grounds of attack under Rule 221(1)(b)-(f), this does not allow for dispute of any facts pleaded, but only to provide additional evidence for the advanced motion. The nature of a motion to strike, as a means of preventing litigation at trial, must necessarily accept the facts pleaded since contested facts require a determination on the merits.[20]

37. It has been held, that on a motion to strike, onus on the moving party is a heavy and high one.[21] While the test is even higher in respect of a JR (*David Bull*), the case law on motions to strike in actions is still useful as a demarcation of that lower standard. If that lower standard has not been met, then the higher standard of "so clearly improper as to be bereft of any possibility of success" clearly cannot be met.

c) <u>Declaratory Relief</u>

(i) Are the declarations sought AGAINST the Moving Party?

38. The Applicant acknowledges that there can be no judicial review of decisions of judges of the superior courts of the Provinces in the Federal Court.

39. This judicial review does not seek to review the decision of Justice Shaughnessy. That is

---

[18] See *Apotex Inc. v Canada*, footnote 11, para 16

[19] *A.G. Canada v. Inuit Tapirasat of Canada* [1980] 2 S.C.R. 735; *Vulcan*, [1982] 2 F.C. 77 (C.A.); *Nelles v. Ontario*, [1989] 2 SCR 170, 60 DLR (4th) 609, at paras 3-4; *Operation Dismantle Inc. v. The Queen,* [1985] 1 S.C.R. 441; *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at paras 49, 52; *Dumont v. A.G. Canada*, [1990] 1 S.C.R. 279, paras 2-3; *Trendsetter Ltd. v. Ottawa Financial Corp*. (1989) 32 O.A.C. 327 (C.A.); *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Apotex v. Ely Lilly* (2001), 13 C.P.R. (4th) 78; *Canada v. Arsenault,* 2009 FCA 242; *Imperial Tobacco, supra*, at para 21

[20] The SCC in *Radio Corp. v. Hazeltine*, (1972) 1 C.P.R. (2d) 22 (S.C.C.) made it clear that it is an error of law to determine a motion to strike based on disputed facts or in respect of mixed questions of fact and law; also see *Nidek v. Visx Inc*. (1998), 82 C.P.R. (3d) 289 (F.C.A.) with respect to the latter

[21] *Edell v. Canada,* [2010] 399 N.R. 115 (F.C.A.); *Apotex*, 2006 FCA 60

unnecessary as this was already done by way of a successful *habeas corpus/Charter* application before Justice Molloy. On that application, the present Moving Party's counsel (albeit a different lawyer), Counsel for the AG of Ontario already conceded that the conduct violated the Applicant's *Charter* rights.[22]

40. Declarations are not sought **against** anyone.[23]

41. The Notice of Application for Judicial Review is clearly and expressly only a review of the CJC decision dismissing the Applicant's complaint. The opening paragraph of the Notice is framed in respect of the dismissal of the complaint and each declaration is expressly sought in respect of that complaint (see, in particular, the impugned declarations sought (Relief: paragraph (a)(ii) and (v)). A declaration to characterize the legal nature of the complaint is a legitimate part of a judicial review in respect of the dismissal of such a complaint. It is not an attempt to seek a declaration regarding against the Moving Party or in respect of the conduct outside the context of the JR or as a freestanding determination of fact against anyone.

42. The fact that Justice Shaughnessy is named as a Respondent does not mean that the declarations are sought against him. A party must be included in a judicial review under Rule 303 if his legal or other interests are directly affected by the judicial review.[24] Since this is not a review of Justice Shaughnessy's decision but a judicial review of the dismissal of the complaint, it does not engage Justice Shaughnessy's legal interests. However, *prima facie*, his reputational interests are affected.[25] The Federal Court of Appeal has made it clear that such a person should be included as a Respondent even if the relief sought is not sought against that person.[26] The

---

[22] **Responding Motion Record, Affidavit of the Applicant,** Endorsement of Molloy, J., Exhibit 3V
[23] *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at paras. 143:
"...declarations ... [are] not awarded **against** the defendant in the same sense as coercive relief..."
[24] *Reddy Cheminor Inc. v. Canada*, [2002] F.C.J. No. 675 (C.A.)
[25] *Morneault v. Canada*, [2000] F.C.J. No. 705 (C.A.), at para 42
[26] *Friends of Oldman River Society v. Banff National Park*, [1993] 2 F.C. 651 (C.A.):" …under section 18 of the

failure to include such a person as a Respondent can be fatal to an application.[27]

43. Accordingly, the nature of the judicial review and the fact that Justice Shaughnessy is named as a Respondent do not support the assertion that is at the foundation of the motion: that the declarations are sought **against** Justice Shaughnessy. This is not a basis to strike.

(ii) Do the Declarations Seek, Involve or Allow Findings of Fact on evidence?

44. Judicial reviews can sometimes involve the presentation of evidence to show jurisdictional error. Although a document is included in the affidavit on this basis, this judicial review does not seek the Court to make findings of fact. As is clear from the Notice of Application, this is a judicial review on the record before the federal board/tribunal.

45. As a matter of law, applications for declarations that legislation is unconstitutional can sometimes involve the presentation of evidence in respect of legislative or social facts. This is not the nature of the declarations challenged by the Moving Party.

46. A declaration of right as part of a judicial review (as opposed to an action), cannot be a free-standing vehicle to ask the Court to make findings of fact. Except for the situations described above (evidence to show jurisdictional error; application to strike legislation), declarations on a judicial review must be tied to and based on the record upon which the decision was made. The application for declarations is part of the judicial review based on the record and does not and cannot seek findings of fact on evidence.

47. The declarations sought that are challenged by the Moving Party involve presumed facts in the complaint in the CJC record. The decision of the Executive Director ("ED") of the CJC, Mr. Sabourin, to dismiss the complaint was based on the nature of the conduct alleged in the

---

Federal Court Act against a "federal board, commission or other tribunal", **a person against whom the applicant seeks no relief but whose interest would be directly affected by the order sought may be added as a party respondent** to the mandamus proceedings so as to be in a position to appeal from the order granting it."

[27] *Nu Pharm v. Canada*, [2000] 1 F.C. 463 (C.A.)

complaint. The ED of the CJC characterized the nature of the complaint as being in respect of judicial decision-making and not constituting judicial misconduct. The declarations sought must be and are real, not hypothetical.[28] Accordingly, the declarations are sought in respect of the dismissed complaint against Justice Shaughnessy by the ED of the CJC. However, the declarations does not seek determinations of fact regarding the actions of Justice Shaughnessy. The declarations essentially raise an issue of whether, in circumstances such as those disclosed in this complaint, the dismissal of a complaint is lawful and reasonable. To dismiss a complaint without investigation, as with any preliminary screening process (e.g., committal for trial; directed verdict; motion to strike for no reasonable cause of action), the facts alleged must be presumed to be true. The assessment must be that, assuming the facts alleged in the complaint to be true, would the relief sought be available as a matter of law. The impugned declarations proceed on that basis:

- if, in these kinds of circumstances, the complaint alleges facts which, if presumed to be true, amount, as a matter of law, to constitutional violations, does the CJC have jurisdiction (or is it otherwise lawful and reasonable) to dismiss the complaint at this stage?
- if, in these kinds of circumstances, the complaint alleges facts which, if presumed to be true, amount, as a matter of law, to judicial misconduct, does the CJC have jurisdiction (or is it otherwise lawful and reasonable) to dismiss the complaint at this stage?

(iii) The recasting or re-characterization of the application is an abuse of process

48. The approach of the Moving Party, alleging that the application seeks relief against him and seeks findings of fact from the Federal Court, is an abuse of process. This application for judicial review clearly does not seek and the law does not allow for declarations in a judicial

[28] *Operation Dismantle* [1985] S.C.J. No. 22; *Khadr*, [2010] 1 S.C.R. 44; *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12, at para 11

review on these bases, but is expressly based on the facts alleged in "the complaint".[29] This motion is based on a recasting or re-characterization of the application to set up a straw man and then seeks to knock it down. This cannot be done on a motion to strike. The Federal Court of Appeal in *Arsenault* said:

> **10** In my view, for the purposes of Rule 221(1) of the *Federal Courts Rules*, SOR/98-106, **the moving party must take the opposing party's pleadings as they find them, and cannot resort to reading into a claim something which is not there**. **The Crown cannot, by its construction of the respondents' claim, make it say something which it does not say.**[30]

(iv) Are the Declarations sought available? Need for Practical Utility

49. The Applicant submits that declaratory relief directly relates to the constitutional right to judicial review, which right the Supreme Court of Canada has re-affirmed in *Dunsmuir*:

> [31] ... As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, **"[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada,** particularly with regard to the definition and enforcement of jurisdictional limits…[31]

50. This Court, in *Singh,* re-affirmed a broad right to seek declaratory relief, in quoting the Supreme Court of Canada in *Solosky* [32] This ruling was recently re-affirmed by the SCC in *Daniels.*[33]

51. The Supreme Court of Canada in *Manitoba Metis*, made clear the breadth of declaratory relief:

---

[29] **Responding Motion Record, Amended Notice of Application**, opening para and Relief, para (a)(ii) and (v)
[30] *Arsenault, supra*, footnote 1. The fact that the Moving Party is a judge is irrelevant to the issue of whether his motion is an abuse of process. In *Southam v. Canada* , [1990] 3 FC 465 (C.A.), the Court of Appeal said: "courts must be quick to respond to uphold the rule of law no matter how mighty or privileged the party before the tribunal or how unpopular the decision that has to be rendered".
[31] *Dunsmuir v. N.B.,* [2008] S.C.J. No. 9, at paras. 27-31.
[32] *Singh v. Canada, 2010 FC 757 citing Canada v. Solosky,* [1980] 1 S.C.R. 821, p. 830: "Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined."
[33] *Daniels, supra*.

> [134] ...**The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is ultra vires...**
>
> [140] ... **The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less;** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72. …
>
> [143] **Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available**. As argued by the intervener Assembly of First Nations, **it is not awarded against the defendant in the same sense as coercive relief:** factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. **In some cases, declaratory relief may be the only way to give effect to the honour of the Crown...**[34]

52. The *Federal Courts Act* and *the Rules* make it clear that there is a statutory right to seek declaratory relief, even when it is unenforceable. Rule 64 of the *Federal Courts Rules* reads:

> 64. Declaratory relief available —No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding **whether or not any consequential relief is or can be claimed.**[35]

which is consistent with the Supreme Court jurisprudence.[36]

53. The SCC in *Daniels* mades it clear that the right to seek and obtain declaratory relief is only constrained by the practical utility of a declaration. Even if the declaration has no direct means of enforcement, if it serves a practical purpose, it will be an available remedy.[37]

---

[34] *Manitoba Metis, supra* at paras. 134, 140, 143.
[35] *Federal Courts Rules,* r. 64.; see: *Morneault v. Canada*, [2001] 1 F.C. 30 (C.A.)
[36] *Kelso v. The Queen*, [1981] 1 S.C.R. 199; *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44
[37] *Daniels, supra:*

> **11** This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44. The party seeking relief must establish that **the court has jurisdiction to hear the issue**, that **the question is real and not theoretical**, and that **the party raising the issue has a genuine interest in its resolution**. **A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties:** see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.
>
> **12 The first disputed issue in this case is whether the declarations would have practical utility.** There can be no doubt, in my respectful view, that granting the first declaration meets this threshold. **Delineating and assigning constitutional authority** between the federal and provincial governments **will have enormous practical utility for**

54. In the case of interpretation of legislation or discretion pursuant to legislation, the legislature cannot give the ED a discretion to violate the Constitution because it is beyond Parliament's legislative competence to create legislation that violates the Constitution.[38]

d) Motion to strike affidavit in a JR

55. On a JR, the case is usually decided primarily on the record before the tribunal.[39] While the Rules provide for affidavit evidence under Rule 306 in addition to the tribunal record,[40] it should not raise additional facts beyond the scope of the application or the record except for purposes of: (1) showing procedural unfairness or jurisdictional error;[41] (2) providing background or context;[42] or (3) to show that material was available but not considered.[43] Generally, based on the principles set out in *David Bull* and its progeny, such issues should be almost always be left to the judge hearing the JR.[44] This is especially the case regarding issues of relevance. The Court on

---

these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution...

15 ... finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, but it has the **undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress.** The existence of a legislative vacuum is self-evidently a reflection of the fact that neither level of government has acknowledged constitutional responsibility. **A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute.**

[38] *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45; *Canada v. Inuit Tapirisat*, [1980] 2 S.C.R. 735 makes it clear that failure to meet statutory conditions goes to jurisdiction: "... If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity..."

[39] *O.A. of Architects v. A.T.O.*, [2002] F.C.J. No. 813 (C.A.), at para 30;

[40] The Rules specifically provide for the filing of affidavits to provide a factual basis for the JR separate and apart from the tribunal record, which may be delayed, may not be complete or may not be available (See *Slansky v. Canada* cite). The availability or admissibility of one source of the record is discrete from the other: *Pfeiffer v. Canada*, 2004 FCA 74, at para 20

[41] *Ibid.,* and *infra*, at Footnote 42

[42] *Association of Universities and Colleges of Canada v. C.C.L.A.,* [2012] F.C.J. No. 93 (C.A.), at paras 19-20; *Connolly v. Canada*,[2014] F.C.J. No. 1237 (C.A.) at paras 7-11; see also: re background: *Chopra v. Canada*, [1999] F.C.J. No. 835, at para 9; *Canada v. Callaghan*, 2011 FCA 74, at para 82-83; *Canada v. Delios*, [2015] F.C.J. No. 549 (C.A.), at paras 51-53; and re context: *Tsleil-Waututh Nation v. Canada*, [2016] F.C.J. No. 974 (C.A.), at para 81.

[43] Ibid., see *Callaghan, supra* at 82-83

[44] According to Justice Reed, there is no jurisdiction to strike affidavits in a JR in advance (*Laminadze v. Canada*, [1998] 143 F.T.R. 310, at paras 19-23; referred to in *Chopra, supra*) However, there are cases where portions of affidavits have been struck in JRs. According to the Court of Appeal in *Mayne, infra*, this is where its impropriety is obvious and the material is so prejudicial that it cannot merely be disregarded (see also *Gitxaala Nation v. Canada*,

the JR can always disregard improper material. Accordingly, it is extraordinary to strike portions of an affidavit in advance of a JR.

2) PRINCIPLES APPLIED:

(a) Declarations

(i) Constitutional Violations

56. The issuance of a declaration that the conduct alleged in the complaint constitutes a violation of the Applicant's constitutional rights is relevant to the challenges to the CJC Review Procedure policy used in this case and to the merits of the judicial review of the CJC decision.

57. The approach of the CJC, to use a policy to allow the ED of the CJC to summarily dismiss complaints, is challenged as unlawful and unconstitutional. If the application judge does not find it unlawful without regard to the Constitution, the constitutionality of the process must be assessed.[45] One of the arguments with respect to the unconstitutionality of the process is that where the judicial misconduct alleged is a violation of the complainants constitutional rights, the seeking of statutory relief must be done in accordance with the Constitution. Accordingly, a declaration to this effect is of practical utility to ensure that the other relief sought is based on violations of the Applicant's rights and not a hypothetical situation[46]. In addition to quashing the dismissal and referring the complaint back to the CJC, the application judge would likely also need to provide a direction under ss. 18.1(3) of the *Federal Courts Act*, that the CJC consider the complaint in accordance with specific directions or in accordance with the declaration(s) sought

---

[2016] F.C.J. No. 705 (C.A.), at 88-91 re ability to disregard). Such cases are rare: *Mayne Pharma v. Canada*, 2005 FCA 50, para 10; *Association of Universities and Colleges, supra; Connolly, supra*

[45] **Responding Motion Record,** Affidavit of the Applicant, Exhibit 6, Ethical Principles for Judges

[46] *Operation Dismantle, supra*; *Montana Band of Indians v, Canada*, [1991] 2 F.C. 30 (C.A.); *Khadr, supra*; *Daniels, supra*

and granted.[47] In light of the fact that a tribunal need not explain how it has complied with directions[48], the clarity of such directions is enhanced by clear declarations. Accordingly, a declaration is of practical utility on the judicial review. [49]

58. The Applicant, being a person affected by the decision, has standing in respect of his own rights and can also advance his arguments in respect of the public interest.[50] A legal determination in respect of the Applicant's case alone is not as effective in respect of the public interest.

59. The declaration that the Applicant's constitutional rights have been violated supports part of the argument on the merits that (a) the definition of "conduct" or judicial misconduct in such a way as to exclude judicial decision-making is unconstitutional, at least when there are constitutional rights at stake; (b) the conduct alleged in the compliant is judicial misconduct and it is sufficiently important to be in the "public interest".

60. In terms of the argument of the Moving Party that it is premature to issue any declaration at this stage of CJC process, it must be remembered that no declaration is being sought against the Moving Party but the declaration is in respect of the CJC decision to dismiss the complaint and the CJC process. Insofar as the complaint is over until overturned on the judicial review, as long as the facts or presumed facts allow for adjudication, it cannot be said to be premature at this stage to properly characterize the nature and implications of the complaint to determine the propriety of the process and the decision to dismiss it.[51] In fact, the Federal Court of Appeal has indicated that

---

[47] 18.1(3) *Federal Courts Act*; *Canada v. Superior Propane Inc*., [2003] 3 F.C. 529 (C.A.)
[48] *Lee v. Canada* (2004) 320 N.R. 184; 2004 FCA 143
[49] The only declarations that were refused in *Daniels, supra* (at paras 53 and 56) were in respect of law that was settled. While the principles underlying the arguments in the case at bar are well-supported, the application of these principles in this context is novel and have never before been litigated. The declarations therefore would have practical utility
[50] *Canada v. LSBC (Jabour*), [1982] 2 S.C.R.307; *LeBar v. Canada*, [1989] 1 F.C. 603 (C.A.)
[51] *Canada v. Canadian Council for Refugees*, [2009] 3 F.C.R. 136; 2008 FCA 229

a declaration is especially appropriate in respect of a tribunal engaged in investigation[52], which is the next stage if the JR succeeds.

61. The argument of the Moving Party that the CJC process does not engage the Moving Party until later stages and to involve him at this stage would prejudice his procedural rights, is misplaced. First, the declarations sought do not have any impact on the legal procedural rights of the Moving Party. If the complaint is referred for investigation or hearing, the Moving Party will have all the protections to which he is entitled. Second, the declarations do not give rise to any prospect of issue estoppel or abuse of process unless the facts are unchallenged or unexplained. If the facts are challenged or explained, there would be a different factual foundation and the declarations could not have any effect in terms of issue estoppel or abuse of process. Third, to the extent the Moving Party relies upon the practice of the CJC at the first stage, in which the ED makes a determination of whether the complaint should proceed, this is illogical.[53] The process being relied upon is being challenged as unlawful and/or unconstitutional.[54]

(ii) Judicial misconduct

62. The declaration that the conduct of the Moving Party alleged in the compliant was judicial misconduct is relevant to the challenges to the CJC process used in this case and others and to the merits of the judicial review.

63. If judicial decision-making is capable of being judicial misconduct, the CJC judges are the only decision-makers who might be said to have special expertise in determining whether judicial decision-making is misconduct.[55] As a lawyer, the ED has no special judicial expertise. If the

[52] *Bell Canada v. AG of Canada*, [1978] 2 F.C. 801 (C.A.)
[53] The practice of the Government is irrelevant to the JR of the Applicant: *West Hill Redevelopment v. The Queen*, [1987] 87 D.T.C. 5210
[54] *P.I.P.SC, supra,* at para 22, (quoted *supra)*
[55] *Moreau-Berube v. N.B.,* [2002] S.C.J. No. 9, at para 60

conduct alleged is declared to be judicial misconduct or potential judicial misconduct, then this affects the legality and constitutionality of a process that allows the ED to make such a determination.

64. The Applicant, being a person affected by the decision, has standing in respect of his own rights and can also advance his arguments in respect of the public interest. A legal determination in respect of the process in the Applicant's case, without a declaration, is not as effective in respect of the public interest.

65. The declaration that the Applicant's rights have been violated supports part of the argument on the merits that (a) the definition of "conduct" or judicial misconduct in such a way as to exclude judicial decision-making is unlawful and unreasonable; (b) the conduct alleged in the compliant is judicial misconduct. These were the bases upon which the complaint was dismissed.

66. The same arguments advanced by the Moving Party, addressed by the Applicant in paragraphs 60 and 61, apply in this context.

(b) <u>Striking paras 1-20 of the Applicant's Affidavit</u>

67. To the extent this is based on the false assertion and mischaracterization of the application as seeking relief against the Moving Party and seeking factual determinations (See Notice grounds, para 9(b) (referring back to paras 6-7)), this aspect of the motion is untenable.

68. The affidavit does not advance additional facts that are not part of the application or the record. The affidavit almost mirrors the complaint that is part of the record and does not advance issues that are not in Notice or the record.[56] The fact that paras 17-18 of the affidavit overlaps with the tribunal record (see Notice of Motion, Grounds, para 9(c)) is irrelevant according to the

[56] In *Mayne, supra*, paras 18, 32-35, the fact that portions of the affidavit were covered by the Notice warranted that the material was not additional and resulted in the affidavit not be struck

Court of Appeal in *Pfeiffer*.[57]

69. To the extent that this aspect of the motion is based on concerns about background (paras 1-4 of the affidavit) or context (paras 5-14 of the affidavit), this is not additional or is an exception to that rule.[58] It is certainly not obviously improper or so prejudicial that it cannot be disregarded.[59] This aspect of the motion must be dismissed.

70. To the extent that this aspect of the motion supposedly makes "comments concerning the appropriateness" of the dismissal (Notice of Motion, Grounds, para 9(c)), this characterization is incorrect in respect of paras 15-18 of the affidavit and unobjectionable in respect of paras 19 and 20. Paras 19 and 20 of the affidavit merely attach and refer to two CJC documents (Ethical Principles for Judges and the CJC policy about how to deal with self-represented litigants). The "comments" are explicitly advanced on the basis that these documents exist and contain certain statements which are merely highlighted for convenience. The documents themselves are foundational documents of the CJC and the failure to advert to them is significant in determining whether the complaint disclosed "conduct" or judicial "misconduct" and is an exception to the rule about additional materials.[60]

71. Para 18 of the Affidavit, which refers to the CJC Review Procedure policy is only technically additional. It is not part of the tribunal record. However, it is referred to in the reasons for the decision and is the asserted basis for the ED jurisdiction and an important part of the challenge to the jurisdiction of the tribunal, specifically included as part of the JR in the Notice. Paragrpahs 19 and 20 of the affidavit and the documents referred to therein are also relevant to jurisdiction. If these documents make it clear (as they do) that "conduct" includes

[57] *Supra*, Footnote 40
[58] *Supra* footnote 42
[59] *Supra*, footnote 44
[60] *Supra*, footnotes 42 & 43

judicial decision-making, that the conduct complained of (if assumed to be true for purposes of the JR) constitutes judicial misconduct and violations of the Applicant's constitutional rights, this goes to the jurisdiction of the tribunal to dismiss the complaint. Evidence relevant to the fairness of the process or jurisdiction is an exception to the rule against additional evidence.[61]

(3) CONCLUSION:

72. The motion is premised on a mischaracterization of the application. It does not seek relief against the Moving Party and does not seek findings of fact from the Court on evidence. It seeks declarations ancillary to the judicial review of the CJC dismissal on the record based on the facts alleged in the complaint in the record. With respect to the process issues and/or the merits, the declaration serves a practical purpose to show that this is not a hypothetical case and as a means to provide clear direction in this case and for other similar cases. It is not plain and obvious that the declaration is not an appropriate remedy. There is nothing improper about the affidavit and certainly nothing obviously improper and so prejudicial as to warrant the extraordinary step of advance striking of any portion of it. It has not been shown by the Moving Party that the relief sought is so clearly improper as to be bereft of any possibility of success. That should be determined at the hearing of the judicial review after full argument and consideration of all of the implications. In light of the need for judicial reviews to be expeditious (s. 18.4 of the *Federal Courts Act*) and the fact motions to strike in respect of such applications should rarely be granted, this motion should be dismissed.

D. <u>REMOVAL AS RESPONDENT</u>

73. In light of the Amendment of the Notice, this issue is moot.

[61] *Supra*, footnote 39 (*Architects* case)

1. WITHOUT DECLARATION: DETERMINATIONS NECESSARY TO THE JR

74. Regardless of whether declarations are sought or obtained, there must be determinations to the same effect as a part of the judicial review in respect of the process. If the conduct that is the basis of the complaint constitutes a violation of the Applicant's constitutional rights, the statutory remedy in the *Judges Act,* through the CJC process, cannot allow for a summary dismissal by the Executive Director. If the conduct that is the basis of the complaint constitutes a violation of the Applicant's constitutional rights, then it is more likely to constitute judicial misconduct and cannot be in the "public interest" to dismiss the complaint at this stage. If the conduct that is the basis of the complaint, which is judicial decision-making, constitutes judicial misconduct, whether contrary to the constitution or not, the process that allows for dismissal on the basis that it is not "conduct" or that it is in the "public interest" to dismiss is unlawful, unreasonable and/or unconstitutional.

75. Regardless of whether declarations are sought or obtained. there must be determinations to the same effect as a part of the judicial review in respect of the merits of the decision to dismiss. If judicial decision-making can constitute judicial misconduct, whether contrary to the constitution or not, the decision to summarily dismiss the complaint is unlawful, unreasonable and/or unconstitutional. If the conduct that is the basis of the complaint constitutes a violation of the Applicant's constitutional rights or is otherwise judicial misconduct, then decision to dismiss the complaint is unlawful, unreasonable and/or unconstitutional.

76. Whether the declarations are sought/obtained or not, this does not obviate the need to make determinations of questions of law as raised in the GROUNDS of the Notice[62] as a part of

[62] Notice of Application, GROUNDS, *inter alia*, paras 18, 19 and 22

the JR[63]. Any legal issue in the GROUNDS of a Notice of Application for JR may have to be determined as part of that JR with or without the need to make a formal declaration. For instance, in a JR on a deportation case involving a foreign conviction, whether there is a declaration or not, whether the crime would be criminal in Canada (equivalency) may be an issue in the JR that has to be determined.

77. Accordingly, if the Moving Party seeks to remain as a party, he must now apply to do so on the basis that he is affected by the JR. If the Moving Party says that he is unaffected, with or without the declarations, he is still unaffected. If the Moving Party claims that he is affected he must move to be included as a party. However, if the Amendment is, for some unknown reason, ineffective, the removal of the impugned declarations does not negate the need to make determinations or directions.

2. DETERMINATIONS AFFECT THE REPUTATION OF THE MOVING PARTY

78. Under Rule 303 of the *Federal Court Rules,* a person must be included as a party if the application has an adverse impact on his or her legal or other interests.[64] The declarations, legal determinations and directions under s. 18.1(3) of the *Federal Courts Act* that arise in this JR are not sought against the Moving Party and do not directly impact on his **legal** interests since the Moving Party is not subject to any proceedings before the CJC under the *Judges Act* until and unless a decision is made by the CJC to proceed.[65] That has not yet happened. However, the declarations, legal determinations and/or directions sought, *prima facie*, do directly impact on his **other** interests, since the facts alleged, if determined to be constitutional violations and/or judicial misconduct, will reflect negatively on the Moving Party's reputation in a proceeding commenced

[63] While the Court was dealing with factual determinations in the course of a judicial enquiry, the Federal Court of Appeal has made it clear that, unlike declarations, determinations are not binding: *Stevens v. Canada*, [1998] F.C.J. No. 93 (C.A.), at para 7 (citing *AG of Canada v. Krever Commisssion*, [1997] S.C.J. No. 83 (paras 21-23; 34, 35, 43))
[64] *Ready Cheminor, supra*
[65] *Gratton v. CJC,* [1994] 2 F.C. 769

directly in respect of the Moving Party.[66] Such a person should be named even if no relief is sought against them.[67] Had the Moving Party not been named as a Respondent when he should have been under Rule 303, any order obtained could be set aside.[68]

79. As discussed in the previous section, regardless of whether a declaration is made, a legal determination must be made, to deal with the issues raised on this application, whether the conduct alleged, which must be presumed true at this stage, violated the Applicant's constitutional rights and whether it constituted judicial misconduct. Accordingly, whether the declarations are sought or made or not, if the reputation of the Moving Party is at stake, it will be directly affected and therefore he should remain as a Party. However, since the Moving Party has requested his removal, he is saying that his reputational interests are not at stake. Accordingly, through amendment or otherwise, the Applicant is content to have the Moving Party removed as a Respondent

3. SHOULD THE MOVING PARTY BE REMOVED AS A RESPONDING PARTY?

80. If the Amendment is effective, this issue is moot. The Moving Party is no longer a party.

81. However, if, for some unknown reason, the Amendment is not effective, the Moving Party should be removed unless he claims to be affected and seeks to move to strike relief sought and portions of the affidavit on the basis that he would be affected. He has not provided any legitimate factual or legal basis to show that he is affected. His motion for removal must be based on the proposition that is not affected. However, it is inappropriate to remove a Respondent by preliminary motion to strike.[69]

---

[66] *Morneaux, supra*
[67] *Friends of Oldman River Society, supra*
[68] *NuPharm, supra*
[69] *Apotex*, supra, cited in *Mancuso v. Canada*, [2014] FCJ No. 732:
50 With respect to the proper parties to the action, the Plaintiffs argue that while Her Majesty the Queen is normally the only Defendant in claims against the government, in cases dealing with constitutional issues this

E. COSTS

82. If the motion is dismissed, the Applicant should have his costs against the AG of Ontario.

83. In light of the abusive aspects of this motion (inconsistent positions; motion based on premises that were known or should have been known to be false; and offers to settle) and the public interest aspects of the case, costs should be ordered on a solicitor client basis [70]

PART IV - ORDER REQUESTED

84. The Applicant seeks the dismissal of the Moving Party's motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT TORONTO, this 2nd day of December, 2016.

[redacted]

Barrister and Solicitor
SLANSKY LAW PROFESSIONAL CORP.
1062 College Street, Lower Level
Toronto, Ontario, M6H 1A9
Tel: (416) 536-1220; Fax (416) 536-8842
Email: paul.slansky@bellnet.ca
LSUC # 25998I
Counsel for the Applicant

Court has determined that others can be personally named: *Liebmann*, above, at paras 51-52. Furthermore, **the determination of the standing of parties is not best done at the stage of a motion to strike:** *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 13 [*Apotex*].

[70] *Carter v. Canada,* 2015 SCC 5; See also *Mackin v. New Brunswick* [2002] 1 S.C.R. 405, at para 86

PART V - LIST OF AUTHORITIES

1. *Canada v. Arsenault*, [2009] F.C.J. 896 (C.A.)
2. *Waterside Ocean Navigation Co. v. International Navigation*, [1977] 2 F.C. 257
3. *Le Corre v. Canada*, [2005] F.C.J. No. 590 (C.A.)
4. *Institut National des Appellation d'origine v. Cellar Craft Int. (Can)* (1999), 164 F.T.R. 317 (Prothonotary)
5. *Crown Trust v. Canada*, [1977] 2 F.C. 673
6. *Wewayakum Indian Band v. Wewayakum Indian Band*, [1991} 3 F.C. 420 (T.D.)
7. *Underwriters Laboratories Inc. v. San Francisco Gifts Ltd.*, [2009] F.C.J. No. 1091
8. *R. v. Varga* (1994), 90 C.C.C,(3d) 484 (C.A.)
9. *R. v. G.B*., [2000] O.J. No. 2983 (C.A.)
10. *R. v. Imperial Tobacco*, [2011] S.C.J. No. 42
11. *David Bull Laboratories (Canada) v. Pharmacia Inc.* [1995] 1 F.C. 588 (C.A.)
12. *Federal Courts Act*, 18.4.
13. *Apotex v. Canada*, (2007) 370 N.R. 336; 2007 FCA 374
14. *Canada v. Canadian Generic Pharmaceutical Association,* 2007 FCA 375
15. *Odynsky v. B'nai Brith* (2009), 387 N.R. 376 (F.C.A.)
16. *Bouchard v. Canada (Minister of National Defence)* (1999) 187 D.L.R. (4th) 314, 255 N.R. 183 (F.C.A.)
17. *Syntex (U.S.A.) L.L.C. v. Canada (Minister of Health)* 2002 FCA 289, 292 N.R. 147, 20 C.P.R. (4th) 29
18. *Scheuneman v. Canada (Attorney General)* [2003] F.C.J. No. 686; 2003 FCA 194
19. *P.I.P.S.C. v. Canada* (2002) 216 F.T.R. 96; affirmed (2003) 301 N.R. 356 (C.A.)
20. *Lazar v. Canada* [1998] F.C.J. No. 867
21. *AG of Canada v. Information and Privacy Commissioner*, [2000] F.C.J. No. 1648
22. *A.G. Canada v. Inuit Tapirasat of Canada* [1980] 2 S.C.R. 735;
23. *Nelles v. Ontario*, [1989] 2 SCR 170, 60 DLR (4th) 609
24. *Operation Dismantle Inc. v. The Queen,* [1985] 1 S.C.R. 441
25. *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959
26. *Dumont v. A.G. Canada*, [1990] 1 S.C.R. 279
27. *Trendsetter Ltd. v. Ottawa Financial Corp*. (1989) 32 O.A.C. 327 (C.A.)

28. *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.)
29. *Radio Corp. v. Hazeltine*, (1972) 1 C.P.R. (2d) 22 (S.C.C.)
30. *Nidek v. Visx Inc*. (1998), 82 C.P.R. (3d) 289 (F.C.A.)
31. *Edell v. Canada,* [2010] 399 N.R. 115 (F.C.A.)
32. *Apotex*, 2006 FCA 60
33. *Hanson v. Bank of Nova Scotia* (1994), 19 O.R. (3d) 142 (C.A.)
34. *Adams-Smith v. Christian Horizons* (1997), 14 C.P.C. (4th) 78 (Ont. Gen. Div.)
35. *Miller (Litigation Guardian of) v. Wiwchairyk* (1997), 34 O.R. (3d) 640 (Gen. Div.)
36. *Prentice v. Canada*, [2006] 3 F.C. 135
37. *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.)
38. *Apotex v. Ely Lilly* (2001), 13 C.P.R. (4th) 78; *Vulcan*, [1982] 2 F.C. 77 (C.A.)
39. *Dalex Co. v. Schawartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (Gen. Div)
40. *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14
41. *Reddy Cheminor Inc. v. Canada*, [2002] F.C.J. No. 675 (C.A.)
42. *Morneault v. Canada*, [2000] F.C.J. No. 705 (C.A.)
43. *Friends of Oldman River Society v. Banff National Park*, [1993] 2 F.C. 657 (C.A.)
44. *Nu Pharm v. Canada*, [2000] 1 F.C. 463 (C.A.)
45. *Canada v. Khadr*, [2010] 1 S.C.R. 44
46. *Southam v. Canada* , [1990] 3 FC 465 (C.A.)
47. *Dunsmuir v. N.B.,* [2008] S.C.J. No. 9
48. *Singh v. Canada, 2010 FC 757*
49. *Canada v. Solosky,* [1980] 1 S.C.R. 821
50. *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12
51. *Federal Courts Rules,* r. 64.
52. M*orneault v. Canada*, [2001] 1 F.C. 30 (C.A.)
53. *Kelso v. The Queen*, [1981] 1 S.C.R. 199
54. *Slaight Communications Inc. v. Davidson,* [1989] S.C.J. No. 45
55. *Canada v. Inuit Tapirisat*, [1980] 2 S.C.R. 735:
56. *Montana Band of Indians v, Canada*, [1991] 2 F.C. 30 (C.A.)
57. 18.1(3) *Federal Courts Act*
58. *Canada v. Superior Propane Inc*., [2003] 3 F.C. 529 (C.A.)

59. *Lee v. Canada* (2004) 320 N.R. 184; 2004 FCA 143
60. *Canada v. LSBC (Jabour*), [1982] 2 S.C.R.307;
61. *LeBar v. Canada*, [1989] 1 F.C. 603 (C.A.)
62. *Canada v. Canadian Council for Refugees*, [2009] 3 F.C.R. 136; 2008 FCA 229
63. *Bell Canada v. AG of Canada*, [1978] 2 F.C. 801 (C.A.)
64. *West Hill Redevelopment v. The Queen*, [1987] 87 D.T.C. 5210
65. *Moreau-Berube v. N.B.,* [2002] S.C.J. No. 9
66. *Gratton v. CJC,* [1994] 2 F.C. 769
67. *Mancuso v. Canada*, [2014] FCJ No. 732
68. *Carter v. Canada,* 2015 SCC 5
69. *Mackin v. New Brunswick* [2002] 1 S.C.R. 405

PART VI - LEGISLATIVE PROVISIONS

1. ***Federal Courts Act,***

18.1(3):

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

s.18.4(1).

Hearings in Summary Way

(1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

s. 64.

Declaratory relief available

No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed.

2. ***Federal Court Rules:***

Rule 75

Amendments with leave

75. (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

Limitation

(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

(a) the purpose is to make the document accord with the issues at the hearing;

(b) a new hearing is ordered; or

(c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations

Rule 76

Leave to amend

76. With leave of the Court, an amendment may be made

(a) to correct the name of a party, if the Court is satisfied that the mistake sought to be corrected was not such as to cause a reasonable doubt as to the identity of the party, or

(b) to alter the capacity in which a party is bringing a proceeding, if the party could have commenced the proceeding in its altered capacity at the date of commencement of the proceeding,

unless to do so would result in prejudice to a party that would not be compensable by costs or an adjournment.

Rule 200

Amendment of Pleadings

Amendment as of right

200. Notwithstanding rules 75 and 76, a party may, without leave, amend any of its pleadings at any time before another party has pleaded thereto or on the filing of the written consent of the other parties.

Rule 221

Striking out pleadings

Motion to strike

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.
Evidence

(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

Rule 303

Respondents

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person

(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.

Application for judicial review

(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.