Federal Court  Cour fédérale

Date: 20170117

Docket: T-604-16

Ottawa, Ontario, January 17, 2017

PRESENT: Case Management Judge Mandy Aylen

BETWEEN:

DONALD BEST

Applicant

and

THE ATTORNEY GENERAL OF CANADA and THE HONOURABLE MR. JUSTICE J. BRYAN SHAUGHNESSY

Respondents

ORDER AND REASONS

[1] This is a motion filed by the Respondent, the Honourable Mr. Justice J. Bryan Shaughnessy [Justice Shaughnessy], on November 9, 2016, for an order:

A. Striking paragraphs 1-20 of the affidavit of Donald Best sworn April 27, 2016 [Best Affidavit];

B. Striking paragraphs (a)(ii) and (a)(vii) of the Notice of Application;

C. Dismissing the application as against Justice Shaughnessy; and

D. For the costs of this motion.

[2] The Applicant opposes all relief sought by Justice Shaughnessy. The Respondent, Attorney General of Canada [Attorney General], supports the striking of paragraphs 1 through 20 of the Best Affidavit and does not oppose the balance of the relief sought.

I. Facts

[3] The Applicant was involved in a series of motions before Justice Shaughnessy in respect of the jurisdiction of the Ontario Superior Court of Justice to hear an action brought by a corporation controlled by the Applicant in Ontario. In the course of that proceeding, Justice Shaughnessy ultimately found the Applicant to be in contempt and a warrant of committal was signed by Justice Shaughnessy, which imposed upon the Applicant a jail sentence of three months.

[4] On January 5, 2016, the Applicant brought a complaint against Justice Shaughnessy to the Canadian Judicial Council [CJC]. In the complaint, the Applicant alleged that:

A. Justice Shaughnessy secretly created a new and changed warrant of committal that stated "no remission", which had the effect of changing the sentence imposed on the Applicant;

B. Justice Shaughnessy improperly excluded the Applicant, a self-represented litigant, from the process of reviewing the order and warrant of committal; and

C. Justice Shaughnessy improperly ordered that he was to have no further involvement in the Applicant's case.

[5] Upon receipt of the Applicant's complaint, the CJC engaged in step one of its six-step complaint investigation process. Pursuant to step one, the Executive Director [ED] of the CJC conducted an initial screening of the complaint to determine whether it warranted further consideration. By letter dated January 28, 2016, the ED of the CJC advised the Applicant that the CJC would be taking no further action in relation to the complaint. Specifically, the CJC advised:

> The mandate of the Canadian Judicial Council (Council) was previously explained to you in a letter sent by the Council and which related to a complaint you had filed against the same judge and the same court matter.
>
> In your correspondence to the Council, you allege that Justice Shaughnessy secretly created and substituted a new and changed Warrant of Committal that illegally denied you statutory remission and secretly increased your jail time by a month, that Justice Shaughnessy ordered your exclusion from the normal court process and, that Justice Shaughnessy ordered that your case was never to be brought before him again.
>
> As also previously explained to you in previous correspondence, the Council is not a court. Given the principle of independence of the judiciary, the Council's complaints process is not concerned with judicial decision-making or the exercise of judicial discretion. Your allegations concern the judicial decision-making process and not conduct. In your correspondence, you make various demands related to how you want the complaint process to unfold. The early process of screening complaints is governed by the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (the "*Review Procedures*"). Under the Review Procedures, my duties as Executive Director include the initial review of complaints. Once I complete this review, I must decide whether or not the matter warrants further consideration by Council. This complaint process does not and will not vary on demand.
>
> I have carefully considered your complaint and conclude that it does not involve misconduct. Accordingly, I will be taking no further action.

[6] On April 14, 2016, the Applicant commenced this application seeking a review of the decision of the ED of the CJC, as reflected in his letter dated January 28, 2016, dismissing the Applicant's complaint.

[7] In his Notice of Application, the Applicant seeks various forms of relief, including an order in the nature of *certiorari* quashing the decision of the ED of the CJC and an order in the nature of *mandamus* returning the matter to the CJC and requiring the CJC to investigate or to refer the matter to a committee for consideration on the merits of the complaint in accordance with any directions and declarations granted by the Court.

[8] The Applicant seeks ten declarations from the Court on the application. At issue on this motion is the propriety of two of those declarations [the Impugned Declarations]. The first Impugned Declaration is found in paragraph (a)(ii) of the Notice of Application, which states:

> A declaration that…the Applicant's complaint concerned the conduct of Justice Shaughnessy in a criminal or quasi-criminal proceeding (application to set aside a finding of civil contempt) that violated the Applicant's constitutional rights. The constitutional rights violated include one or more of the following rights in respect of or under:
>
> (A) The unwritten constitutional principle of:
>
> (1) The Rule of Law, generally; and/or
>
> (2) Judicial Independence, generally; and/or
>
> (3) The following specific rights that flow from these principles:
>
> (a) Non-arbitrary application of the law;
>
> (b) Duty to act judicially;

(c) The judicial duty to act with diligence, integrity, independence and impartiality; and/or

(d) The open court principle; and/or

(B) The *Canadian Charter of Rights and Freedoms* (the "*Charter*") pursuant to:

(1) Section 7 (liberty and security of the person interests) contrary to the fundamental justice principles, *inter alia*:

(a) Non-arbitrary application of the law;

(b) The duty to act judicially;

(c) The judicial duty to act with diligence, integrity, independence and impartiality;

(d) The open court principle;

(e) The judicial duty to ensure the presence of a person accused of a criminal or quasi-criminal act, in circumstances may impact on liberty or security of the person during a judicial hearing;

(f) The right to make full answer and defence; and/or

(g) The right to a fair hearing; and/or

(2) Section 9 (arbitrary detention); and/or

(3) 11(d) (right of a person charged with an offence to a fair hearing before a fair and impartial tribunal);

in circumstances that cannot be justified under s.1 of the *Charter*, if applicable.

The Applicant seeks a declaration that his constitutional rights were so violated by Justice Shaughnessy and which the rights set out above were violated.

[9] The second Impugned Declaration is found in paragraph (a)(vii) of the Notice of Application, which states:

> A declaration that…the Applicant's complaint that a judge changed his sentence by signing a warrant of committal against a self-represented person without notice or an opportunity to address or challenge such an act constituted judicial misconduct.

[10] In support of his application, the Applicant has filed the Best Affidavit. The Best Affidavit is 32 paragraphs in length, 20 of which are challenged on this motion.

[11] In accordance with an Order of the Court dated November 1, 2016, the Attorney General advised the Court by letter dated November 10, 2016 of its position on the motion. Specifically:

> With respect to items 2 through 5 of the request for relief, on the revised Notice of Motion dated November 8, 2016, i.e., the relief requested in the original notice of motion, the AGC is mindful of the independence of the judiciary and her dual role as Minister of Justice and potential involvement in matters before the Canadian Judicial Council where there is alleged improper judicial conduct, and accordingly in view of the fact that Justice Shaughnessy is represented, the AGC will not oppose these items of relief sought by Justice Shaughnessy, but will not participate further with respect to those issues. This position is taken without prejudice to the AGC advancing arguments about the proper scope of the judicial review and the availability of certain relief within the judicial review as it proceeds.
>
> With respect to the first item of the request for relief, i.e., the request for an order striking paragraphs 1-20 of the affidavit of Donald Best, sworn April 27, 2016, relief which directly concerns the propriety and admissibility of certain evidence before the court on the judicial review going forward, the AGC will support this relief.

[12] The Attorney General did not file any materials in response to the motion other than the November 10, 2016 letter. However, the Attorney General did appear on the motion and was granted permission to make submissions in relation to relief sought on the motion.

[13] On December 2, 2016, the Applicant attempted to file an Amended Notice of Application which, by way of amendment, removed Justice Shaughnessy as a respondent. The Applicant asserted that the amendment was made pursuant to Rule 200 of the *Federal Courts Rules*. By Direction dated December 6, 2016, the Court rejected the proposed Amended Notice of Application and advised the parties that Rule 200 does not apply to applications and that there is no provision in Part 5 of the *Rules* that permits a unilateral amendment of an originating document.

[14] By letter dated December 9, 2016, the Applicant advised the Court that it disagreed with the Court's Direction and that the Applicant intended to argue at the hearing of this motion that his amendment to the Notice of Application should be permitted pursuant to Rule 200 or alternatively, pursuant to Rules 75 and 76.

[15] The relevance of the Applicant's proposed amendment to the Notice of Application to this motion is apparent from a review of the Applicant's written representations, as the Applicant asserts that the amendment renders Justice Shaughnessy's request to be removed as a respondent moot and that the balance of the motion must be dismissed as Justice Shaughnessy would no longer have standing as a party to strike any portion of the Notice of Application or any portion of the Best Affidavit.

[16] At the commencement of the hearing of this motion, I advised the parties that I would not, as part of this motion, be making any determination of the Applicant's informal request to amend the Notice of Application.

II. Analysis

A. *Preliminary Objection to Motion*

[17] At the commencement of the hearing, the Applicant raised a preliminary objection to the hearing of this motion, arguing that the motion constitutes an abuse of process. I instructed the parties to make submissions on the preliminary objection as part of their submissions on the merits on the motion and that I would make a decision on the preliminary objection as part of my Order.

[18] The Applicant asserts that it is an abuse of process for Justice Shaughnessy to bring a motion seeking to strike portions of the Notice of Application and portions of the Best Affidavit while simultaneously asserting that he is not directly affected by the application and therefore should be removed as a respondent. Put differently, Justice Shaughnessy cannot use his "temporary status" as a party to change the nature of the application – namely, to change the relief sought on the application and the evidence put before the Court – and then be removed from the proceeding. The Applicant asserts that motions to strike can only be brought by parties who will continue on in the proceeding. Accordingly, the question of whether Justice Shaughnessy is a proper respondent must be determined before he is entitled to seek orders striking portions of the Notice of Application and the Best Affidavit. Justice Shaughnessy asserts that as he is currently a respondent, he has standing to bring this motion in its entirety.

[19] I find that the Applicant's objection is premised on a mischaracterization of Justice Shaughnessy's position. Justice Shaughnessy accepts that he is directly affected by the application for so long as the Impugned Declarations remain in the Notice of Application. Therefore he is not asserting that he is presently unaffected yet seeking to change the nature of the application. To the contrary, he acknowledges that he is presently directly affected and seeks to change the nature of the application so as, in his view, to remove its direct effect on him. On that basis, I find that it is not an abuse of process for Justice Shaughnessy to move to strike the Impugned Declarations from the Notice of Application.

[20] The same may not hold true for the motion to strike portions of the Best Affidavit, as presumably once he is removed from the application, Justice Shaughnessy has no interest in the evidence that is before the Court on the application. However, the request to strike portions of the Best Affidavit is supported by the Attorney General who will maintain her status as a respondent in this proceeding. While the Attorney General has no independent motion seeking to strike portions of the Best Affidavit, such a motion could inevitably be brought in the future.

[21] However, I am not required to decide the preliminary issue of whether Justice Shaughnessy has standing to bring the motion to strike portions of the Best Affidavit as, as detailed below, I find that Justice Shaughnessy is a proper respondent even if the Impugned Declarations are struck. As such, he remains a respondent in this proceeding and accordingly, has standing to challenge the content of the Best Affidavit.

[22] Accordingly, the Applicant's preliminary objection is hereby dismissed.

B. *Removal of Justice Shaughnessy as a Respondent*

[23] Justice Shaughnessy seeks an order dismissing the application as against him on the basis that he will no longer be a proper respondent to the application if the Impugned Declarations are struck. Justice Shaughnessy asserts that the Impugned Declarations are sought "against" him, such that he is directly affected by that relief. However, the balance of the requested relief does not have a similar direct effect on him. During the course of the hearing, counsel for Justice Shaughnessy acknowledged that if the declarations are not struck, Justice Shaughnessy remains a proper respondent.

[24] The Applicant asserts that Justice Shaughnessy was included as a respondent as his reputational interests are engaged by the declarations, legal determination and directions sought from the Court on the application. The Applicant asserts that the conduct alleged, if determined to be constitutional violations and/or judicial misconduct, would reflect negatively on Justice Shaughnessy's reputation and therefore regardless of whether any relief is sought directly against Justice Shaughnessy, he was properly named as a respondent. The Applicant asserts that even if the Impugned Declarations are not granted, the application nonetheless engages Justice Shaughnessy's reputational interests. However, the Applicant is content to have Justice Shaughnessy removed as a party if his removal will not prejudice the Applicant's ability to raise all of the legal issues and seek the various forms of relief as set out in the Notice of Application.

[25] Pursuant to Rule 104(1)(a), the Court may order that a person who is not a proper or necessary party cease to be a party. The question before the Court is whether Justice Shaughnessy is a proper or necessary respondent on this application and whether that determination would change if the Impugned Declarations are struck from the Notice of Application.

[26] In order to determine who is a proper or necessary respondent on an application for judicial review, the Court must look to Rule 303. Rule 303(1)(a) provides that an applicant must name as a respondent every person directly affected by the order sought on the application. A person will be directly affected where the relief sought will affect a person's legal rights, impose legal obligations upon him or prejudicially affect him in some direct way [see *Forest Ethics Advocacy Assn. v. Canada (National Energy Board)*, 2013 FCA 236 at para. 21; *Reddy-Cheminor, Inc. v. Canada (Attorney General)*, 2001 FCT 1065 at para. 30, aff'd 2002 FCA 179].

[27] I find that Justice Shaughnessy is prejudicially affected, in a direct way, by the totality of the relief sought on this application. As noted above, the Applicant will be asking this Court to accept as true for the purpose of this application the allegations that Justice Shaughnessy secretly created a new and changed warrant of committal, improperly excluded the Applicant from the proceeding and improperly ordered that he was to have no further involvement in the Applicant's case, and to thereafter consider whether such conduct could constitute judicial misconduct and/or constitutional rights violations. Placing such issues before the Court for consideration clearly affects Justice Shaughnessy's reputational interests. Moreover, the application could result in the

complaint being referred back to the CJC for an investigation. A judge is certainly directly affected by any potential investigation by the CJC into his or her conduct.

[28] When asked at the hearing to explain why Justice Shaughnessy is not directly affected by the balance of the relief sought by the Applicant (excluding the Impugned Declarations), counsel for Justice Shaughnessy stated that it is because a judge is not given a participatory role in the initial complaint screening phase conducted by the ED of the CJC. It is only if the complaint progresses beyond the initial screening phase that a judge gains participatory rights. Counsel for Justice Shaughnessy asserted that the absence of participatory rights therefore is determinative of the question of whether Justice Shaughnessy is directly affected. I reject that assertion, as it takes an overly narrow view of the meaning of "directly affected" in Rule 303(1)(a). While the presence (or absence) of participatory rights in the CJC process may be informative of the engagement of Justice Shaughnessy's legal interests, it is not determinative of the engagement of his reputational interests. His reputational interests were engaged once the complaint was placed before this Court and the Court was asked to consider the issues raised in the Notice of Application.

[29] Accordingly, I find that regardless of whether the Impugned Declarations are struck, Justice Shaughnessy is a proper respondent to this application. I note that while persons named as respondents have the right to participate fully in an application, they are under no obligation to do so. Accordingly, notwithstanding Justice Shaughnessy's continued inclusion as a respondent in this application, he is at liberty to choose not to participate any further in these proceedings.

C. *Striking Portions of the Best Affidavit*

[30] As a general rule, the evidentiary record before the Court on an application for judicial review is restricted to the evidence that was before the decision-maker, in this case, the ED of the CJC. The Court has recognized a number of exceptions to this restriction on the evidentiary record, which include:

A. The receipt of an affidavit that provides general background in circumstances where the background information may assist the Court in understanding the issues relevant to the judicial review.

B. The receipt of an affidavit that brings to the attention of the Court procedural defects that cannot be found in the existing evidentiary record of the decision-maker, so as to permit the Court to properly determine whether there has been any procedural unfairness.

C. The receipt of an affidavit that highlights the complete absence of evidence before a decision-maker when it made a particular finding [see *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras. 19-20]

[31] The Respondents urge this Court to make an advance ruling on the admissibility of the Best Affidavit. Whether or not the Court will do so is a discretionary matter, which is constrained by the requirement in section 18.4(1) of the *Federal Courts Act* that applications for judicial review be heard and determined without delay and in a summary way. The Court may be inclined to issue such an advance ruling where such a ruling would allow the hearing to proceed

in a timelier and more orderly fashion, where the issue of admissibility turns on a clear question of law or where the issue is relatively clear cut or obvious [see *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, *supra*, paras. 10-12].

[32] Motions to strike all or part of an affidavit should only be brought in exceptional circumstances, especially when the element to be struck out is related to the relevancy of the evidence. The striking of an affidavit at this stage will only be warranted where prejudice is demonstrated and the evidence is obviously irrelevant. Failing demonstrable prejudice, the admissibility of evidence is a matter that should be left to the discretion of the judge hearing the application on the merits [see *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8 at para. 18; *Gravel v. Telus Communications Inc.*, 2011 FCA 14].

[33] In his Notice of Motion, Justice Shaughnessy seeks to strike paragraphs 1 through 20 of the Best Affidavit on the basis that the paragraphs contain facts that are irrelevant and inadmissible to the issue of whether the CJC improperly declined jurisdiction over the Applicant's complaint. However, no submissions were made in support of this relief by Justice Shaughnessy in his written representations and no submissions were made by the Attorney General in his letter dated November 10, 2016 as to why the striking of these paragraphs is warranted.

[34] I agree with Justice Shaughnessy that the paragraphs at issue in the Best Affidavit can be characterized as follows:

A. Paragraphs 1 to 4 – contain background information concerning the Applicant.

B. Paragraphs 5 to 14 – contain allegations concerns the events underlying the Applicant's complaint to the CJC.

C. Paragraphs 15 to 20 – contain assertions that the Applicant filed a complaint, attaches the complaint as an exhibit and includes comments regarding the disposition of the complaint.

[35] During the course of the hearing, counsel for Justice Shaughnessy advised that Justice Shaughnessy was abandoning his request to strike paragraphs 1 through 4 and 15 through 20 of the Best Affidavit and requested that the Court only strike paragraphs 5 through 14.

[36] When pressed to articulate the demonstrable prejudice to the Respondents that would occur should paragraphs 5 through 14 not be struck at a preliminary stage, Justice Shaughnessy asserted that these paragraphs are improper as they contain a factual narrative of what the Applicant states happened before Justice Shaughnessy. The facts detailed therein were not established before the ED of the CJC, but rather only alleged to be true in the complaint. As the ED of the CJC made no findings of fact as part of his decision, it is improper to place before the Court a factual record in the form of a sworn affidavit when the ED of the CJC only had unproven allegations made in an unsworn complaint. Justice Shaughnessy asserts that this could be prejudicial to the Respondents given what the Court "might do" with such sworn facts.

[37] Moreover, Justice Shaughnessy asserts that by allowing these paragraphs to remain in the Best Affidavit, the Respondents would be compelled to cross-examine the Applicant on his various factual assertions as the Respondents cannot risk leaving these facts unchallenged.

[38] With respect to the position of the Attorney General, at the hearing, the Attorney General advised that while the Attorney General agreed with Justice Shaughnessy that paragraphs 15 through 18 of the Best Affidavit need not be struck on a preliminary basis, the Attorney General continued to assert that paragraphs 1 through 14, 19 and 20 should be struck.

[39] The Attorney General asserts that paragraphs 1 through 4 contain background information that was not before the ED of the CJC and that is unnecessary for the Court to understand the issues relevant to the judicial review, thus not falling within a recognized exception.

[40] The Attorney General asserts that paragraphs 5 through 14 contain a highly selective and slanted re-characterization of facts that are already contained in the evidentiary record that was before the ED of the CJC. It would be improper to permit the Applicant to include such a selective recital of facts in an affidavit, as it could "confuse" the Court. The Attorney General asserts that such confusion could result in prejudice to the Respondents should the Court misunderstand the facts.

[41] The Attorney General asserts that paragraphs 19 and 20 contain impermissible argument regarding the propriety of the CJC's decision and include tertiary materials that were not before the ED of the CJC when he made his decision.

[42] The Attorney General asserts that, in their totality, the paragraphs at issue contain evidence that could be "misused" by the Court, as she asserts was the case in *Canada (Attorney*

General) v. Delios, 2015 FCA 117, by permitting the Trial Judge access to evidence that could be used in determining this application that was not before the ED of the CJC.

[43] Moreover, the Attorney General asserts that there is a risk to the Respondents if they do not cross-examine the Applicant on this irrelevant evidence, as the evidence will then stand unchallenged. Conducting such cross-examinations will result in a "huge" waste of time and resources.

[44] In response to Justice Shaughnessy's abandonment of his request to strike paragraphs 1 through 4 and 15 through 20 of the Best Affidavit, the Applicant asserted that it was no longer open to the Court to strike paragraphs 1 through 14, 19 and 20 as requested by the Attorney General. The Attorney General has not brought an independent motion seeking such relief and in the absence of such motion, the Court has no jurisdiction to strike these paragraphs.

[45] Given that the Applicant had a fair opportunity to respond to the broader request to strike paragraphs 1 through 20 of the Best Affidavit, I see no prejudice to the Applicant for the Court to entertain the Attorney General's request to strike paragraphs 1 through 14, 19 and 20 notwithstanding the change in Justice Shaughnessy's position. It would be inconsistent with Rule 3 to require that the Attorney General bring a separate motion to strike these paragraphs returnable at a later date. Accordingly, I will consider whether the Respondents have met the onus of establishing demonstrable prejudice warranting the striking of paragraphs 1 through 14, 19 and 20 of the Best Affidavit.

[46] The Applicant opposes the striking of any paragraphs in the Best Affidavit, noting that it is extraordinary to strike portions of an affidavit in advance of the hearing of the merits of the application. The Applicant asserts that the Best Affidavit advances facts that form part of the evidentiary record that was before the ED of the CJC and evidence that is relevant to the issues raised in the Notice of Application. Any background or context information contained in the Best Affidavit falls within the recognized exceptions to the expansion of the evidentiary record beyond what was before the ED of the CJC at the time he made his decision.

[47] With respect to paragraphs 19 and 20 of the Best Affidavit, the Applicant asserts that the evidence contained in those paragraphs relates to two documents that were drafted by the CJC ("Ethical Principles for Judges" and "Statement of Principles of Self-represented Litigants and Accused Persons"). The principles articulated in those documents should, according to the Applicant, have informed the ED of the CJC's decision as they are relevant to the issue of what constitutes "conduct". The Applicant denies that the paragraphs contain opinion evidence, but rather were intended to simply point out to the Court the existence of these documents.

[48] While the Applicant does not accept the Respondents' assertion that any of the paragraphs of the Best Affidavit are improper, even if they were, the Applicant asserts that the evidence is not so clearly prejudicial to the Respondents or improper that it ought to be struck by way of an advance ruling on its admissibility. Rather, the admissibility of the Best Affidavit should be left to the Trial Judge for determination. If he or she ultimately finds that the paragraphs at issue are inadmissible, the Applicant asserts that those paragraphs can simply be disregarded by the Trial Judge.

[49] Having considered the submissions of the parties and having reviewed the Best Affidavit together with the Notice of Application, I decline to make any findings regarding the admissibility of paragraphs 1 through 14, 19 and 20 of the Best Affidavit, as this is a matter that should be left to the Trial Judge to determine at the hearing of the application. I find that the Respondents have not met their onus of establishing that there will be demonstrable prejudice to either of the Respondents by leaving the admissibility of the evidence contained in the Best Affidavit to be assessed by the Trial Judge.

[50] The arguments put forth by the Respondents regarding potential prejudice had at their core the assertion that the impugned paragraphs place before the Court the allegations made in the complaint, no longer in the form of unsworn allegations, but rather as sworn evidence from which the Court could make findings of fact. The Respondents assert that they cannot leave such factual assertions untested by cross-examination, as to do so would be too risky for the Respondents. It is obviously up to the Respondents to decide what factual assertions warrant cross-examination for the purpose of responding to the issues raised in the application. However, the potential need to conduct cross-examinations does not constitute “prejudice” within the meaning of the jurisprudence.

[51] Moreover, I fail to see how the inclusion of the same allegations made by the Applicant in his complaint before the CJC in a sworn affidavit, in and of itself, introduces any potential for prejudice to the Respondents. It does not change the nature of the exercise to be undertaken by the Court in determining the application, as it is not for this Court to make any findings of fact regarding whether or not the events alleged in the complaint actually happened.

[52] While the Respondents assert that the Applicant has made selective and slanted factual assertions in the Best Affidavit, it will be entirely open to the Respondents to clearly set out for the Trial Judge the complete assertions made by the Applicant in the evidentiary record that was before the ED of the CJC at the time his decision was made.

[53] Accordingly, I decline to strike any paragraphs of the Best Affidavit at this stage in the proceeding and leave it open to the Respondents to make submissions regarding the inadmissibility of portions of the Best Affidavit before the Trial Judge.

D. *Striking Portions of the Notice of Application*

[54] This Court has jurisdiction to grant motions to dismiss an application for judicial review on a summary basis in exceptional circumstances where the application is "so clearly improper as to be bereft of any possibility of success". There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of the Court's power to entertain the application. Unless this stringent test can be met, the proper way to contest an application is to appear and argue at the hearing of the application [see *David Bull Laboratories (Canada) Inc. v Pharmacia Inc*., [1995] 1 FC 588 (FCA); *Canada (Minister of National Revenue – M.N.R.) v. J.P. Morgan Asset Management (Canada) Inc*., 2013 FCA 250].

[55] As stated by the Federal Court of Appeal, the rationale for this high threshold is two-fold:

> …First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes…Second, applications for judicial review must be brought quickly and must proceed "without delay" and in a

> "summary way….An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective. [see *Canada (Minister of National Revenue – M.N.R.) v. J.P. Morgan Asset Management (Canada) Inc.*, *supra*, para. 48]

[56] In this case, Justice Shaughnessy seeks to dismiss or strike only a portion of the Notice of Application – namely, the Impugned Declarations. In *876947 Ontario Ltd. (c.o.b. RPR Environmental) v. Canada (Attorney General)*, 2013 FCA 156, the Federal Court of Appeal considered such circumstances and stated at paragraph 10:

> In my view, particular caution is required on a motion to strike when only a portion of a notice of application is impugned, and that portion is integrally related to the remaining portion of the application. As noted in *David Bull*, objections to the application can be dealt with promptly and efficiently in the context of consideration of the merits of the case, particularly where a portion of the application is to proceed to hearing in any event. As well, the Judge hearing the application may be constrained if integrally related portions of the application have been struck out.

[57] The Court will summarily dismiss an application for judicial review where the Court lacks jurisdiction to grant the relief sought by an applicant [see *Lavoie v. Canada*, [2000] F.C.J. No. 360 at para6]. The question then becomes, in this case, whether the Court lacks the jurisdiction to grant the Impugned Declarations such that it can be concluded that the relief is so clearly improper as to be bereft of any chance of success. There are a number of bases upon which Justice Shaughnessy asserts that this Court is without jurisdiction to grant the Impugned Declarations, which I will address in turn.

[58] First, Justice Shaughnessy asserts that the Impugned Declarations seek findings of fact from the Court, which is improper on an application for judicial review. Justice Shaughnessy

relies on a number of authorities from this Court and the Federal Court of Appeal which have clearly established that this Court does not have jurisdiction to make declarations pertaining solely to findings of fact and that this Court cannot allow itself to become a forum for fact-finding on the merits of the matter [see *Delios v. Canada (A.G.)*, 2015 FCA 117 at para. 41; *Brychka v. Canada (Attorney General)*, [1998] F.C.J. No. 124; and *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, *supra* at para. 19].

[59] Moreover, Justice Shaughnessy asserts that even if the Court had jurisdiction to grant declarations of fact, there is no admissible evidence before this Court upon which findings of fact could be made. The Court is therefore not in a position to make an assessment of whether Justice Shaughnessy's conduct constituted a violation of the Applicant's constitutional rights and/or judicial misconduct.

[60] The Applicant asserts that Justice Shaughnessy has misconstrued the Impugned Declarations. According to the Applicant, at stage one of the CJC's assessment of a complaint, the ED of the CJC must assume the facts asserted in the complaint to be true. The Impugned Declarations therefore do not require any findings of fact in relation to, or any assessment of, Justice Shaughnessy's conduct. At paragraph 53 of his written representations, the Applicant states:

> 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 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?

[61] Accordingly, the Applicant asserts that he is not asking the Court to make a declaration that his constitutional rights were violated by Justice Shaughnessy as pleaded in paragraph (a)(ii) or that Justice Shaughnessy's change in the Applicant's sentence by signing a warrant of committal against a self-represented person without notice or an opportunity to address or challenge such an act constituted judicial misconduct as pleaded in paragraph (a)(vii) of the Notice of Application. Rather, the Applicant asserts that he is seeking declarations that if the conduct detailed in the complaint is ultimately proven to have occurred, such conduct constitutes a violation of the Applicant's constitutional rights and judicial misconduct.

[62] Contrary to the Applicant's assertion at the hearing, the Notice of Application was far from clear as to the nature of the actual declarations being sought by the Applicant. A fair reading of the Notice of Application would lead the Respondents to assume that the Applicant is asking the Court to make findings of fact related to the conduct of Justice Shaughnessy, which findings would underpin the Impugned Declarations.

[63] The issue before the Court on the application for judicial review is not to find whether Justice Shaughnessy engaged in misconduct, but rather whether the ED of the CJC made a

reviewable error in holding that the CJC had no jurisdiction to deal with the complaint [see *Taylor v. Canada (Attorney General)*, [1997] F.C.J. No. 1748 at para. 18]. The Court will clearly be in no position to assess Justice Shaughnessy's conduct, as there is no evidentiary record before the Court upon which to do so. The Applicant acknowledges that the Court cannot make a finding of fact regarding Justice Shaughnessy's conduct and that he is not seeking any such findings of fact by way of the Impugned Declarations. Accordingly, I will not strike the Impugned Declarations on this basis.

[64] Second, Justice Shaughnessy asserts that the Court has no jurisdiction to grant declaratory relief against an entity other than the tribunal whose decision is under review. The Impugned Declarations, however, are intended to be relief against Justice Shaughnessy and on that basis, Justice Shaughnessy asserts that the Court is without jurisdiction to grant them.

[65] Justice Shaughnessy relies on section 18.1(a) of the *Federal Courts Act* [*Act*], which provides that the Court has exclusive original jurisdiction to grant declaratory relief "against any federal board, commission or other tribunal" and section 18.1(3) of the *Act*, which Justice Shaughnessy asserts limits the power of the Court to ordering relief only against the tribunal whose decision is subject to review. In that regard, he further relies on section 18.1(3) of the *Act*, which provides:

> 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 that 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.

[66] Justice Shaughnessy also relies on section 18.1(4) of the *Act*, which he states limits the grounds of review available to the Applicant to the actions of the tribunal that is subject to judicial review.

[67] While the Notice of Application does not particularize against whom the Impugned Declarations are sought, Justice Shaughnessy asserts that on its face, coupled with the fact that Justice Shaughnessy was named as a respondent, the relief is clearly sought solely against him. As he is not a federal board, commission or other tribunal, Justice Shaughnessy asserts that this Court lacks jurisdiction to grant the Impugned Declarations against him.

[68] The Applicant asserts that merely because Justice Shaughnessy was included as a respondent does not mean that the declarations are sought against him. Rather, Justice Shaughnessy was included as a respondent as his reputational interests were engaged by the totality of the relief sought on the application. The Applicant asserts that generally speaking, declarations are not necessarily awarded against anyone, relying on the Supreme Court of Canada's decision in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14.

[69] I am not convinced that Justice Shaughnessy has established that the Impugned Declarations are "directed" at him and that as a result, the Court clearly lacks jurisdiction to grant the Impugned Declarations. The issue of whom, if anyone, the Impugned Declarations are

sought against and whether the Court has jurisdiction to issue a declaration against an entity other than the federal board, commission or other tribunal whose decision is under review is a determination that should appropriately be made by the Trial Judge and not on a preliminary motion to strike.

[70] Third, Justice Shaughnessy asserts that striking the Impugned Declarations will avoid the need to canvass a number of unnecessary and complex legal issues that arise given the nature of the declarations. These issues are likely to include the jurisdiction of the Court to grant relief against superior court judges, the applicability of the doctrine of judicial immunity, whether the declarations constitute an improper collateral attack on prior judicial proceedings, the availability of *Charter* relief against non-state actors, justification analysis under section 1 of the *Charter*, and possible intervention by the Attorney General of Ontario. Justice Shaughnessy asserts that the resources required to respond to these issues would be extensive and the prospect for recovery of the Respondents' costs are minimal, given that the Applicant has previously asserted that he is impecunious and has numerous prior unsatisfied cost awards from other proceedings.

[71] The Applicant disagrees that the various issues described above will need to be canvassed on the application if the Impugned Declarations are allowed to stand, as he asserts that Justice Shaughnessy has mischaracterized the Notice of Application as requiring that findings of fact be made by the Court in determining the application. Without such findings needing to be made, the Applicant asserts that the application is not nearly as complex as Justice Shaughnessy would allege.

[72] While advance rulings in some circumstances may be warranted to allow a hearing to proceed in a timelier and more orderly fashion, I am not satisfied that the circumstances of this case warrant the striking of the Impugned Declarations on that basis. I do not agree with Justice Shaughnessy that the various issues detailed in paragraph 42 of his written representations arise on this application in light of the clarification provided by the Applicant regarding the nature of the Impugned Declarations. Moreover, reducing the complexity of the legal issues to be argued on the application is not, in and of itself, a basis to strike relief.

[73] Fourth, Justice Shaughnessy asserts that the Court lacks jurisdiction to grant the Impugned Declarations as they are hypothetical, based on facts that have not yet been proven and may never been proven. In such circumstances, Justice Shaughnessy asserts that the Impugned Declarations have no utility and therefore cannot be granted.

[74] There is no dispute between the parties that the Court lacks jurisdiction to make declarations regarding purely hypothetical issues and will very rarely grant a declaration regarding the future [see *Solosky v. Canada*, [1978] 2 F.C. 632 at para. 6, aff'd [1980] 1 S.C.R. 821]. The dispute between the parties centres on whether the Impugned Declarations are, in fact, hypothetical in nature.

[75] The Applicant asserts that the Impugned Declarations are based on a concrete, non-hypothetical situation. According to the Applicant, for the purpose of screening the complaint, the ED of the CJC must assume the facts as pleaded in the complaint as true, particularly here where the ED of the CJC concluded that the circumstances complained of do not constitute

"conduct" for the purpose of assessing potential judicial misconduct. The declarations are therefore sought to ensure that if the decision is remitted back to the CJC for a redetermination, the CJC will take the facts as pleaded in the complaint as true for the purpose of its preliminary screening. In that sense, the Applicant asserts that there is nothing hypothetical about the Impugned Declarations.

[76] Whether or not the ED of the CJC must assume the facts as pleaded in the complaint to be true for the purpose of his preliminary screening is a live issue. At the hearing of the motion, the parties confirmed that they did not share a unanimous view on the issue. The determination of this issue will impact upon the characterization of the Impugned Declarations – namely, whether they are hypothetical – and by consequence, whether the Court has jurisdiction to grant the Impugned Declarations. These are issues to be determined by the Trial Judge and not on a preliminary motion to strike.

[77] Fifth, Justice Shaughnessy asserts that the Impugned Declarations are improper as they would usurp the role of the CJC by declaring that the conduct complained of (if ultimately proven to have transpired) constitutes "conduct" for the purpose of a judicial misconduct determination. Justice Shaughnessy asserts that the Court cannot issue a declaration that amounts to a directed decision.

[78] The Applicant asserts that as part of the application for judicial review, this Court will need to make an assessment as to the types of conduct that could constitute judicial misconduct and in doing so, whether the circumstances alleged in the complaint could fall within the

meaning of "conduct". The Applicant will be asking the Court, as one of his forms of relief, to send the decision back to the CJC for a re-determination with specific guidance as to how to assess what constitutes "conduct", which guidance could be in the form of the Impugned Declarations, legal determinations or directions.

[79] The Applicant asserts that the Impugned Declarations would not usurp the initial screening function of the CJC as even if the Court declares that the circumstances of the type complained of constitute "conduct" for the purpose of assessing judicial misconduct, the CJC still has discretion to exercise in terms of how to resolve a potential finding of judicial misconduct. The Applicant asserts that not all judicial misconduct is resolved by way of a formal investigation. In certain circumstances, an appeal from the judicial determination made (in this, case an appeal which ultimately struck the language "no remission" from the warrant of committal) may be the appropriate means of resolving any potential judicial misconduct. Granting the Impugned Declarations would therefore not tie the CJC's hands in terms of how it may choose to resolve this complaint of alleged judicial misconduct.

[80] This Court has the jurisdiction under section 18.1(3)(b) to issue a direction that amounts to a directed decision, but it has been recognized that it is an exceptional power that should be exercised in only the clearest of circumstances. Where issues of fact remain to be resolved, the Court should refer the matter back to the decision-maker and not issue directions amounting to a directed decision [see *Cekaj v. Canada (Minister of Citizenship and Immigration),* 2014 FC 661 at para. 18-19]. In my view, the same principle should apply in the case of a declaration that would similarly decide the issue that was before the decision-maker. I share

Justice Shaughnessy's concern that the Court could usurp the initial screening role of the CJC by issuing the Impugned Declarations, but in my view this is an issue that should be left to the Trial Judge and not determined on a preliminary motion to strike.

[81] Sixth, Justice Shaughnessy asserts that the Impugned Declaration related to an alleged violation of the Applicant's constitutional rights is improper as that allegation was not before the ED of the CJC and therefore cannot be raised for the first time on the application for judicial review. Justice Shaughnessy asserts that the CJC's mandate under the *Judges Act* is not to determine whether a judge has violated an individual's constitutional rights and accordingly, it would be entirely improper for the Court to grant any declaration to that effect when reviewing the decision.

[82] The Applicant acknowledges that the CJC's mandate is not to make constitutional determinations, but asserts that the issue of the alleged violation of the Applicant's constitutional rights is a valid consideration that must be taken into account by the ED of the CJC in assessing whether the circumstances of the complaint constitute "conduct" for the purpose of an assessment of potential judicial misconduct. Moreover, he asserts that constitutionality is relevant to the judicial review as the screening process adopted by the CJC must be constitutionally compliant.

[83] I find that this argument raised by Justice Shaughnessy appears to be based on a misapprehension of the position to be asserted by the Applicant on the application for judicial review. In light of the clarification provided by the Applicant at the hearing (as reflected in

paragraph 82), I am not satisfied that this is an appropriate basis to strike the Impugned Declaration in paragraph (a)(ii) of the Notice of Application at this stage of the proceeding. Rather, this is an issue that should be addressed by the parties before the Trial Judge.

[84] Finally, during the course of the hearing, there were numerous submissions made by counsel for Justice Shaughnessy which effectively asserted that the Impugned Declarations should be struck as they are simply not needed. He asserts that the more appropriate and likely remedy would be to set aside the decision and send it back for a re-determination.

[85] However, the question to be answered on a motion to strike relief from a notice of application is not whether the impugned relief is the likely or best remedy, but whether the Court lacks jurisdiction to issue the relief such that the relief is so clearly improper as to be bereft of any chance of success. As detailed above, I am not satisfied that Justice Shaughnessy has established that the Impugned Declarations are so clearly improper as to be bereft of any chance of success. As such, I am not prepared to tie the hands of the Trial Judge by foreclosing the availability of certain types of declaratory relief.

[86] I would also note that the hands of the Respondents are similarly not tied as a result of this Order. The Respondents are in no way foreclosed from making submissions at the hearing of the application as to the appropriate remedy and to repeat all of the arguments raised on this motion as to why the Impugned Declarations are improper.

III. Costs

[87] In his motion materials, the Applicant sought costs of this motion on a solicitor-client basis given what the Applicant described as the public interest aspects of this case and the abusive aspects of this motion – namely, the inconsistent positions advanced by Justice Shaughnessy, the fact that the motion was based on premises that were known or should have been known to be false and given various offers to settle that had been exchanged between the parties. At the hearing of the motion, the Applicant proposed that the parties agree that there should be no costs of the motion or alternatively, that the costs should be in the cause.

[88] As the Respondents did not have instructions to agree to the Applicant's proposal made at the hearing, I asked parties to attempt to resolve the issue and report back to the Court by January 13, 2017 with either a joint agreement on how costs should be addressed or alternatively, their respective submissions on the issue of costs.

[89] By submission dated January 13, 2017, the Applicant requested that the Court make an order for solicitor-client costs payable to the Applicant by Justice Shaughnessy or alternatively, by the Attorney General of Ontario, on the basis noted above. The Applicant did not provide a bill of costs or any particulars of the quantum of costs sought.

[90] By letter dated January 13, 2017, the Attorney General submitted that she should be awarded costs fixed in the amount of $2,100.00 as against the Applicant, as the issues raised on

the motion were eminently resolvable and should not have had to have been heard by way of a contested motion.

[91] By submission dated January 13, 2017, Justice Shaughnessy requested that he be awarded costs in the amount of $2,800.00 should he be successful on the motion, in whole or in part. He submitted that the motion was necessitated by the Applicant's re-characterization of the Impugned Declarations and the Applicant's assertion that even if the Impugned Declarations were struck, directions or legal determinations to the same effect as the Impugned Declarations would be sought. As a result, Justice Shaughnessy asserts that he had no option but to proceed with the motion.

[92] In the circumstances of this case, I find that it is appropriate to award the Applicant his costs of the motion in the cause. I find that this motion was precipitated, in large measure, by the lack of clarity in the Notice of Application regarding the remedies being sought by the Applicant, either by way of the Impugned Declarations or by way of directions or legal determinations. Accordingly, I see no basis to award a heightened cost amount, even taking into consideration the settlement offers made by the parties. I find that it is appropriate to fix costs in the amount of $2,500.00, together with reasonable disbursements.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed in its entirety.

2. Costs of the motion shall be payable to the Applicant in the cause, hereby fixed in the amount of $2,500.00, together with reasonable disbursements.

"Mandy Aylen"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-604-16
STYLE OF CAUSE:	DONALD BEST v ATTORNEY GENERAL OF CANADA AND THE HONOURABLE MR. JUSTICE J. BRYAN SHUAGHNESSY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 19, 2016
ORDER AND REASONS:	AYLEN P.
DATED:	JANUARY 17, 2017

APPEARANCES:

PAUL SLANSKY	FOR THE APPLICANT
JEFFREY CLAYDON	FOR THE RESPONDENT THE HONOURABLE MR. JUSTICE J. BRYAN SHAUGHNESSY
DEREK C. ALLEN	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Slansky Law Professional Corporation Toronto, Ontario	FOR THE APPLICANT
Ministry of the Attorney General Toronto, Ontario	FOR THE RESPONDENT THE HONOURABLE MR. JUSTICE J. BRYAN SHUAGHNESSY

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT
ATTORNEY GENERAL OF CANADA