Federal Court  Cour fédérale

Date: 20201026

Docket: T-1075-18

Citation: 2020 FC 1003

Ottawa, Ontario, October 26, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

JAMES BESSE

Plaintiff

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE ROYAL CANADIAN MOUNTED POLICE

Defendants

ORDER AND REASONS

I. Overview

[1] James Besse had to submit to fingerprinting many years ago to obtain a vulnerable sector criminal record check so he could continue volunteering with his sons' minor league hockey team. He was told the fingerprinting was required because he shared the gender and birth date of one of the thousands of pardoned registered sex offenders in Canada. Mr. Besse believes the state requiring fingerprints for a vulnerable sector check from everyone who shares the birth date

of a registered sex offender is contrary to the *Canadian Charter of Rights and Freedoms* and seeks declarations to that effect.

[2] On this motion, the Minister of Public Safety and Emergency Preparedness and the Royal Canadian Mounted Police ask that Mr. Besse's claim for declaratory relief be struck. They argue that declaratory relief against a "federal board, commission or other tribunal" can only be sought through an application for judicial review brought under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, and that the Court has no jurisdiction to grant such a declaration in an action.

[3] I conclude that Mr. Besse's action should have been commenced as an application for judicial review. It seeks declaratory relief in an administrative law context, which subsection 18(3) of the *Federal Courts Act* states can only be obtained on an application for judicial review. However, I consider it appropriate in this case to exercise my discretion under Rule 57 of the *Federal Courts Rules*, SOR/98-106, to convert the matter to an application for judicial review. In my view, the commencement of a proceeding in the wrong form does not make the matter one of "jurisdiction" as the Defendants contend, and in any event, the Court should not strike a potentially meritorious challenge to government action on the basis that it was commenced using the wrong originating document.

[4] The question then becomes the appropriate process for the remaining steps to bring this matter to a hearing. In light of the nature and status of the proceeding and the steps taken to date, I conclude that it is appropriate that the matter be treated as an action, to be subject to the Rules governing simplified actions, and in accordance with the order given below.

II. Issues

[5] The main issue on this motion is whether the Court ought to strike Mr. Besse's Statement of Claim as disclosing no reasonable cause of action since it seeks remedies that can only be obtained on an application for judicial review.

[6] The parties' submissions raise a number of issues surrounding this main issue. These include whether the Defendants' delay in bringing the motion should act as a bar to the motion; and whether and to what extent the Court should consider the affidavit evidence and/or draft amended pleadings filed by Mr. Besse. I will address these surrounding issues first as they provide context for the main issue on the motion. If the proceeding is to continue, the question then becomes what procedure should be used to bring it to a hearing.

[7] I will therefore address the issues arising on this motion in the following order:

A. Is the timing of the Defendants' motion to strike a bar to the motion?
B. Is Mr. Besse's affidavit admissible on the motion?
C. To what extent should the Court consider Mr. Besse's draft amended Statement of Claim or draft Notice of Application for Judicial Review?
D. Should Mr. Besse's Statement of Claim be struck as disclosing no reasonable cause of action?
E. If not, what procedure should be followed for any remaining proceeding?

III. Analysis

A. *Timing of the Motion*

[8] The Defendants' motion to strike is based on a single argument, namely that the claim seeks remedies that are only available on an application for judicial review and not in an action. That issue arose as soon as the Statement of Claim was filed. The Defendants were clearly aware of the issue, having successfully raised similar arguments in the Court of Queen's Bench of Alberta. In 2016, Mr. Besse started an action in that Court related to the same issues and seeking the same declaratory relief he now seeks from this Court. At the request of the RCMP, represented by the same counsel appearing in this matter, Master Harrington of the Alberta Court dismissed Mr. Besse's claim as against the RCMP, expressly on the basis that section 18 of the *Federal Courts Act* allocates exclusive jurisdiction over the claim for declaratory relief to the Federal Court: *Besse v Calgary (Police Service)*, 2018 ABQB 424 at paras 1, 10–11, 26, 28.

[9] Yet when Mr. Besse commenced this action before the Federal Court a week later, the Defendants took no steps to bring this motion until some 17 months had passed. During that time, the Defendants participated in the conduct of the action, including by requesting particulars, pleading in defence, serving an affidavit of documents, and, after the matter remained dormant for about a year, agreeing to a case management schedule that provided timelines for examinations for discovery. The Defendants have not explained the delay in bringing the motion, except to state that Mr. Besse took no steps to pursue his case for a one-year period. Even accepting this, it does not explain the Defendants' own steps taken in the action.

[10] Mr. Besse argues the Defendants should be barred from bringing their motion because of this delay. He argues that given the time and costs associated with pursuing the action to date, the motion to strike is an abuse of process or procedurally unfair. He also argues that the Defendants have waived their right to challenge the claim by pleading in response to it. He further contends that the motion is in essence a complaint that he commenced the proceeding with the wrong originating document, and that this is a mere procedural irregularity, which Rules 58(2) and 59(*a*) require be challenged as soon as practicable. He argues that the Defendants should not be able to circumvent these Rules by framing their motion as a motion to strike under Rule 221(1)(*a*).

[11] The Defendants argue that a motion under Rule 221(1)(*a*) is not precluded by the timing of the motion, and the ability to bring such a motion is not waived by pleading in response. They argue that their motion goes to the core of the action and the Court's jurisdiction to grant the remedies sought, and is not a mere procedural irregularity.

[12] Assessing these arguments requires a consideration of the essential nature of the Defendants' motion.

[13] The Defendants' motion is based on the different mechanisms set out in the *Federal Courts Act* for obtaining administrative law relief on the one hand, and for asserting other claims for relief against the Crown or its officers, servants or agents on the other. These different mechanisms were introduced in 1990, in amendments to sections 17, 18, and 18.1 of what is now the *Federal Courts Act* (then the *Federal Court Act*). Some of the history of those amendments

has been described in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at paras 57–59 and *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paras 16–19, among other cases. Of particular importance are subsections 18(1) and (3) of the *Federal Courts Act*, which I set out here:

Extraordinary remedies, federal tribunals	**Recours extraordinaires : office fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18 (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	**a)** décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	**b)** connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.
[…]	[…]
(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.	**(3)** Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

[Emphasis added.] [Je souligne.]

[14] The extraordinary remedies identified in subsection 18(1) of the *Federal Courts Act* have been in the exclusive jurisdiction of the Federal Court since its creation: *Strickland* at paras 16–18. Prior to the 1990 amendments, such remedies could only be sought by way of action: *Sweet v Canada*, 1999 CanLII 8927 (FCA) at para 13. The 1990 amendments to the *Federal Courts Act* added subsection 18(3), stating that the remedies can be obtained only on an application for judicial review brought under section 18.1. Importantly, the new provisions called for applications for judicial review to be heard and determined "without delay and in a summary way," and placed a 30-day time limitation on the commencement of a judicial review application that is "in respect of a decision or order": *Federal Courts Act*, ss 18.1(2), 18.4(1).

[15] In the wake of these amendments, the Federal Court of Appeal confirmed that the Court had jurisdiction to grant the extraordinary remedies, but found that it "can do so only in the context of a section 18 application, not in the context of an action initiated by way of a statement of claim": *Lake Babine Band v Williams*, [1996] FCJ No 173 at para 4. This general principle continues to be clearly and consistently applied: see, *e.g.*, *Brake v Canada (Attorney General)*, 2019 FCA 274 at paras 25–26.

[16] In *Lake Babine Band*, the Court of Appeal struck an action seeking extraordinary relief, noting that there did not seem to be a mechanism to convert it into an application, but that in any event, the 30-day limitation on applications for judicial review had long expired: *Lake Babine Band* at para 4. Shortly thereafter, however, the introduction of what was then the *Federal Court Rules, 1998* (now the *Federal Courts Rules*) brought significant changes to the Rules of this

Court. Among other changes, the new Rules introduced Rule 57, which provides that "[a]n originating document shall not be set aside only on the ground that a different originating document should have been used." The Court quickly concluded this Rule could be applied to remedy situations where requests for judicial review had been brought by way of action instead of application, although the timeliness of an application for judicial review remained an issue: *Mclean v Canada*, 1999 CanLII 7783 at paras 26–31; *Khaper v Canada*, 1999 CanLII 8914 (FC) [*Khaper I*] at paras 28–29; *Khaper v Canada*, 1999 CanLII 9144 (FC), aff'd 2001 FCA 52 [*Khaper II*] at paras 11–12; *Métis National Council of Women v Canada*, 2000 CanLII 16556 (FC) at paras 4–7.

[17] In *Sweet*, the Federal Court of Appeal addressed the "procedural uncertainty" created by the amendments to the *Federal Courts Act*, and the resulting practice of granting motions to strike actions with leave to file an application for judicial review. At paragraphs 14 to 15, Justice Décary questioned whether a motion to strike was the proper way to proceed when a proceeding was brought in the wrong form:

> This unfortunate merry-go-round is a waste of resources for the litigants as well as for the Court. I am not at all convinced that a motion to strike on the ground that pleadings show no reasonable cause of action is the proper vehicle in cases where the issue is whether a party should have proceeded by way of judicial review or by way of action. It seems to me that whether the procedure used is or is not the proper one does not relate to whether the procedure, if proper, discloses a reasonable cause of action. The intent of the Rules is precisely to avoid striking out pleadings that should have originated in another form. Once it is ascertained that a given proceeding falls into one or the other of the two categories (judicial review and action), the duty of the Court is to determine which is the applicable category and to allow the proceeding to continue in that way. Means must be found by counsel and by the Court to address the issue intelligently and with a sense of practicality.

> The new *Federal Court Rules, 1998* give the Court, and counsel, ample guidance to avoid resorting to drastic means such as motions to strike whenever possible. Rule 57 is particularly instructive. It ensures that "an originating document shall not be set aside only on the ground that a different originating document should have been used". While new in form, I venture to say that this rule codifies the practice already followed by the Court. […]
>
> [Emphasis added.]

[18] Justice Décary concluded that it "serves no useful purpose to move to strike pleadings" when the Court would ultimately allow the applicant or plaintiff to file a new proceeding, and that a motion to attack the irregularity under Rule 58 "could well prove to be a useful, yet less drastic, means to bring about the change required": *Sweet* at paras 16, 18.

[19] These comments were contextualized by the Court of Appeal in *Canada v Tremblay*, 2004 FCA 172. Justice Desjardins noted that there was no issue of timeliness in *Sweet*, and that the 30-day time limit on applications for judicial review was an important issue. She underscored that bringing an action could not be used as a way to circumvent that time limit: *Tremblay* at paras 18–22. A number of the principles discussed in *Tremblay* (notably, that a government decision must be set aside on judicial review before an action for damages is brought) have since been set aside by the Supreme Court of Canada: *Telezone* at paras 4–6, 18–23. However, the importance of timeliness to whether an action can or should be converted into an application for judicial review pursuant to Rule 57 remains relevant both before and after *Telezone*: see, *e.g.*, *Sander Holdings Ltd v Canada (Minister of Agriculture)*, 2006 FC 327 at paras 27–35, aff'd 2007 FCA 322, lv to app ref'd [2007] SCCA No 608; *Rosenberg v Canada (National Revenue)*, 2015 FC 549 at paras 53–63.

[20] Given this context, I agree with the Defendants that a motion based on subsection 18(3) and the unavailability of administrative law remedies in an action is not, as Mr. Besse suggests, simply a motion to "attack an irregularity" under Rule 58, at least where there is an issue as to whether an application for judicial review would have been timely. I say this for two related reasons. First, while the commencement of an action rather than an application for judicial review has been sometimes referred to as an "irregularity" that may be corrected under Rule 58 (*e.g.*, *Khaper II* at para 12; *Sweet* at para 16), it is an irregularity that goes to the fundamental distinction between applications for judicial review and actions for other remedies, and to the Court's very ability to grant the requested relief: *Brake* at paras 23–27.

[21] Second, if such a motion could be rejected on timing grounds, under Rules 58 and 59 or otherwise, the Court might be put in the position of entertaining an action for administrative law remedies, which would be contrary to subsection 18(3) of the *Act*. Neither the passage of time nor the conduct of the Defendants can give this Court the ability to grant administrative law remedies in an action when this is precluded by subsection 18(3) of the *Federal Courts Act*. Mr. Besse has pointed to no case in which this Court has concluded that a motion based on subsection 18(3) of the *Federal Courts Act* should be dismissed because of delay in bringing the motion. To the contrary, this Court has granted such motions brought after the action had been set down for trial, and even brought on the morning of trial: *Khaper I* at paras 1, 4, 24–27; *Niederauer v Canada (Minister of National Revenue)*, 2000 CanLII 15761 (FC) at paras 2–4.

[22] This Court has often heard and decided motions based on subsection 18(3) as motions to strike under Rule 221, while recognizing that Rule 57 affects the question of remedy: *Khaper I* at

paras 4, 29–30; *Métis National Council of Women* at paras 1–6; *Rosenberg* at paras 1, 59. Motions under Rule 221 may expressly be brought "at any time," and this Court has recognized that motions under Rule 221(1)(*a*) in particular may be brought "at any stage of the proceedings": *Verdicchio v Canada*, 2010 FC 117 at para 19, citing *Dene Tsaa First Nation v Canada*, 2001 FCT 820, aff'd *Canada v Wolf*, 2002 FCA 117, at para 4. This is because such a motion goes "to the very heart of the action itself": *Dene Tsaa* at para 4.

[23] I am therefore satisfied that the Defendants appropriately brought this motion pursuant to Rule 221(1)(*a*), and that it may therefore be brought at any time. In any case, even if the motion is more properly viewed as a motion to attack a procedural irregularity, as Mr. Besse contends, I conclude it would not be precluded by the passage of time or the Defendants' conduct, for the reasons set out above.

[24] I reach this conclusion without necessarily accepting the Defendants' proposition that the matter is one of "jurisdiction" of this Court. In *Lake Babine Band*, the Court of Appeal stated that there was "no doubt" that the Court had "jurisdiction *per se*," and that the Court "has jurisdiction to address the issue but it can do so only in the context of a section 18 application" [emphasis added]: *Lake Babine Band* at para 4. Justice Pelletier similarly noted in his concurring reasons in *Mikisew Cree* that section 18 acts as a constraint on the jurisdiction of the provincial superior courts, and not the jurisdiction of the Federal Courts, a statement I do not consider disturbed by the Supreme Court of Canada's different reasons for affirming the decision on appeal: *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311 at para 78, aff'd *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC

40 at paras 13–18, 54, 101, 148; see also *Telezone* at para 5; *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64 at para 18.

[25] In other words, while subsection 18(1) of the *Federal Courts Act* is jurisdictional, ascribing exclusive jurisdiction over federal judicial review to this Court and removing that jurisdiction from the provincial superior courts, subsection 18(3) appears to be largely procedural, specifying the form of a proceeding to obtain the extraordinary remedies available. This is not to say that the Federal Court can grant administrative law remedies in an action. It cannot: *Brake* at para 26. It is to say that this is dictated by a question of procedure, not a question of jurisdiction as that term is typically understood.

[26] For similar reasons, I agree with the Defendants that they have not waived the right to bring a motion to strike the Statement of Claim by pleading in defence to it. Mr. Besse argues that filing a defence constitutes a waiver of a right to object to the action, pointing to the reasons of Justice Stratas for the majority of the Court of Appeal in *Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 37. However, as the Defendants point out, Justice Stratas's reference to waiver pertained to the ability of Canada to object to the claim on the basis that it contained insufficient particulars: *Paradis Honey* at paras 87, 153. This simply applies the general rule that a party cannot request particulars for pleadings purposes after it has pleaded in response: *Coe Newnes/McGehee ULC v Valley Machine Works Ltd*, 2005 FC 685. Justice Stratas addressed the argument that the claim disclosed a reasonable cause of action on its merits, even though Canada had pleaded in defence to it: *Paradis Honey* at paras 87, 94, 111; see also *Khaper I* at para 4.

[27] I therefore conclude that the Defendants' motion is not barred by the passage of time or by its conduct in the proceedings, including defending the action or agreeing to a schedule for steps in the proceeding including discoveries. Motions based on subsection 18(3) should of course be brought as soon as possible, and there may be cost consequences for a delay in bringing a motion to strike: *Verdicchio* at para 19. The timing of the motion may also be relevant to the process to be followed to bring the application for judicial review to a hearing. However, the motion to strike can and should be addressed on its merits.

B. *Mr. Besse's Responding Affidavit*

[28] In response to the Defendants' motion, Mr. Besse filed an affidavit that sets out the background facts to his claim, including details of the fingerprinting incident he alleges breached his *Charter* rights; the steps he took to complain to the Calgary Police Service, the Privacy Commissioner of Canada, and the Office of the Information and Privacy Commissioner of Alberta; the procedural history of the action he brought in the Court of Queen's Bench of Alberta challenging the fingerprinting policy; and the procedural history of this action. The affidavit attaches a number of exhibits relating to these issues. As discussed further below, it also attaches a draft Amended Statement of Claim and a draft Notice of Application for Judicial Review.

[29] The Defendants object to Mr. Besse's affidavit on the basis of Rule 221(2). That Rule states that "[n]o evidence shall be heard on a motion" under Rule 221(1)(*a*) seeking to strike a pleading for failure to disclose a reasonable cause of action or defence: *NOV Downhole Eurasia Limited v TLL Oil Field Consulting*, 2014 FC 889 at para 21, aff'd 2015 FCA 106.

[30] Although Rule 221(2) generally precludes the filing of evidence on a motion to strike, the Federal Court of Appeal has recognized an exception in cases where the motion is based on a want of jurisdiction: *MIL Davie Inc v Hibernia Management & Development Co*, 1998 CanLII 7789, 226 NR 369 (FCA) at para 8; *Kaquitts v Council of the Chiniki First Nation*, 2019 FC 498 at para 10. Where an objection is taken to the Court's jurisdiction, the Court must be satisfied that there are facts either in the pleadings or in supporting affidavits that support an attribution of jurisdiction: *Kaquitts* at para 10; *MIL Davie* at para 8; see also *Karim v Canada (Attorney General)*, 2018 FC 453 at para 23.

[31] The Defendants acknowledge this exception for "jurisdictional facts" but submit, without further explanation, that it does not apply in this case. As set out above, the Defendants describe their own motion as being based on jurisdiction: they summarize the grounds for their motion as being that "the Court clearly lacks jurisdiction to award the Plaintiff the remedy sought via action and his claim in this Court is therefore bound to fail." On this characterization, the facts supporting an attribution of jurisdiction can therefore be found in the pleadings or in a supporting affidavit: *Kaquitts* at para 10; *MIL Davie* at para 8.

[32] At the same time, I have discussed the reasons that I do not view the Defendants' challenge as one of "jurisdiction." Rather, it is based on the allegation that Mr. Besse followed the wrong procedure by starting this proceeding as an action rather than an application for judicial review. In my view, the assessment of that question can be and is best determined on the face of the pleadings, rather than through reference to additional evidence describing, for

example, the underlying fingerprinting incident that triggered Mr. Besse's challenge, or evidence going to the merits of Mr. Besse's complaint.

[33] That said, in my view, the procedural information provided in Mr. Besse's affidavit relating to his efforts to pursue the matter is relevant to the question of whether the 30-day time limit on judicial review of a decision or order applies or, if so, whether an extension of time is warranted. Evidence can and should be considered on that issue: *Sander* at paras 29–30. Similarly, this information, and the aspects of Mr. Besse's affidavit relating to the conduct of this action to date, are relevant to the Defendants' alternative request for an order under Rule 292(*d*) that the action be conducted as a simplified action. That is to say, these aspects of Mr. Besse's affidavit go to the question of remedy in the event that the Court concludes that the Defendants' motion is well founded, and will be considered in that context.

C. *Mr. Besse's Amended Pleadings*

[34] As noted above, Mr. Besse's affidavit attached a draft Amended Statement of Claim. The draft contains substantial revisions to the Statement of Claim. It is, as the Defendants point out, over twice as long as the original pleading, adding 30 paragraphs containing extensive new factual and legal allegations. Most of these simply provide more detailed particulars of the allegations already made. However, the amendments also add new matters of substance. Of note, the Amended Statement of Claim:

- raises new alleged contraventions of the *Canadian Bill of Rights*, SC 1960, c 44; the *Statutory Instruments Act*, RSC 1985, c S-22; the *Criminal Records Act*, RSC 1985, c C-47; and the *Constitution Act, 1867*;

- raises allegations of negligence and abuse of authority; and

- adds requests for additional declaratory relief, as well as a claim for compensatory damages pursuant to section 3 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 and section 24(1) of the *Charter*.

[35] Mr. Besse's affidavit states that "alternatively, I am also willing to proceed by an application for judicial review if required." To that end, he attaches a draft Notice of Application for Judicial Review. With minor variations, the Notice of Application is substantially the same as the Amended Statement of Claim, including as to the relief sought.

[36] Mr. Besse's written submissions in response to the Defendants' motion to strike seeks, in the alternative, leave to file an amended originating document, in the form of either the draft Amended Statement of Claim or the draft Notice of Application for Judicial Review.

[37] The Defendants argue Mr. Besse should not be permitted to amend his Statement of Claim. They rely on *Viiv Healthcare*, in which Justice Manson recently reiterated that once a notice of motion is filed, any act done afterwards that affects the rights of the moving party should be ignored by the Court: *Viiv Healthcare Company v Gilead Sciences Canada, Inc*, 2020 FC 11 at para 26. They also point to the December 20, 2019 order of Case Management Judge Ring, which declined to allow Mr. Besse to bring a motion to amend the Statement of Claim before the motion to strike, relying on the same principle and jurisprudence as Justice Manson in *Viiv Healthcare*.

[38] At the same time, Case Management Judge Ring recognized that a respondent to a motion to strike may appropriately make submissions on whether any defects in the claim could potentially be cured by amendment, citing the Federal Court of Appeal's decision in *Simon v Canada*, 2011 FCA 6 at paras 8, 14. There, the Court of Appeal confirmed that a claim should only be struck without leave to amend if the defect is one that is not curable by amendment: *Simon* at para 8.

[39] The Court of Appeal expanded on this point in *Paradis Honey*. Justice Stratas found that delivering a proposed amended statement of claim in response to a motion to strike (as opposed to moving to amend) was proper and accepted practice to show how difficulties with the claim, such as a lack of particularity in the allegations, could be overcome: *Paradis Honey* at paras 78–80. The majority then accepted the allegations in both the original and amended statement of claim as true in assessing whether the action should be struck: *Paradis Honey* at paras 87, 115, 147. This was so even though the amendments were proposed after the motion to strike was brought: *Paradis Honey* at paras 13–16, 79–80.

[40] The Defendants recognize that the Court may consider whether any defects are curable by amendment. However, they contend that even the draft Amended Statement of Claim fails to identify a reasonable cause of action, and continues to seek essentially administrative law remedies.

[41] In keeping with the approach set out in *Paradis Honey*, and the order of Case Management Judge Ring, I consider that the draft Amended Statement of Claim is properly

before me for the purpose of assessing whether any defects in the Statement of Claim may be cured by amendment. In other words, while my assessment is whether the Statement of Claim as originally brought ought to be struck, I will consider that question and construe the Statement of Claim in light of both the claim as it stands and the proposed amendments.

[42] With respect to the Notice of Application for Judicial Review, as noted above it is cast in largely the same language as the Amended Statement of Claim. In my view, it would therefore only need to be considered as part of Mr. Besse's alternative request for leave to file it, or to amend the claim in accordance with the Amended Statement of Claim, in the event that the action is struck.

D. *Should Mr. Besse's Claim be Struck as Disclosing no Reasonable Cause of Action?*

[43] On a motion to strike under Rule 221(1)(*a*), the question is whether, assuming the facts in the Statement of Claim to be true, it is "plain and obvious" that the claim cannot succeed: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p 980; *Paradis Honey* at para 37.

[44] For the reasons below, I reach the same conclusion that Justice Bédard reached in *Rosenberg*, namely that Mr. Besse's claim cannot succeed in its current form, but that there is nonetheless a live issue between the parties and it is not plain and obvious that Mr. Besse cannot succeed in the context of an appropriate proceeding: *Rosenberg* at para 35. I reach this conclusion because the declarations Mr. Besse seeks can only be obtained on an application for judicial review, but the appropriate manner in which to address his erroneous commencement of

an action instead of an application is by converting the action to an application for judicial review.

(1) Declaratory relief, public law, private law, and administrative law remedies

[45] Mr. Besse's action, as currently constituted, seeks the following remedies, in addition to costs and "[s]uch other or further relief that is just":

> a. A declaration that the present policy of requiring fingerprints from every person who requests a vulnerable sector check and shares the birthday of a sex offender is contrary to the *Charter* and therefore unconstitutional.
>
> b. A declaration that any regulation or legislation, including but not limited to the *Criminal Records Act*, or regulations requiring such fingerprinting is of no force or effect only to the extent it requires fingerprinting without discretion. To be clear, the Plaintiff's position is that the offending unconstitutional provisions can be severed.

[46] As described in paragraph [34] above, the draft Amended Statement of Claim adds further requests for declaratory relief related to alleged constitutional and statutory breaches. The draft Amended Statement of Claim also makes clear that the challenge to the "policy of requiring fingerprints" is directed primarily at a directive issued by the then Minister of Justice dated August 4, 2010. The draft Amended Statement of Claim defines this as the "Ministerial Directive" and seeks a number of declarations in respect of it, including that it infringed Mr. Besse's rights under the *Charter* and the *Canadian Bill of Rights*.

[47] The Defendants argue it is plain and obvious that such declarations cannot be obtained in an action, relying on subsections 18(1) and (3) of the *Federal Courts Act*, reproduced above.

Mr. Besse argues that his Statement of Claim does disclose viable causes of action and that section 18 does not prevent a claim for declaratory relief, which he describes as a private law remedy, from continuing as an action under section 17.

[48] In *Brake*, Justice Stratas addressed some "foundational legal propositions" regarding the distinction between applications for judicial review and actions. These include that damages cannot normally be had through a judicial review, and that administrative law remedies against administrative decision-makers, such as *certiorari* and *mandamus*, cannot normally be had in an action: *Brake* at paras 23–26. At paragraph 26 of his reasons, Justice Stratas summarized the distinctions as set out in section 18:

> In the Federal Courts system, section 18 of the *Federal Courts Act* and associated jurisprudence set out the substantive and remedial distinctions:
>
> - Damages for an administrative decision cannot be sought on a judicial review. The remedies on judicial review are restricted to the administrative law remedies set out in subsection 18(1) of the *Federal Courts Act* such as injunction, *certiorari*, prohibition, *mandamus*, *quo warranto* and declaration. […]
>
> - Administrative law remedies such as *certiorari* and *mandamus* can only be obtained on an application for judicial review: *Federal Courts Act*, subsection 18(3).
>
> - If administrative law remedies are not being sought, damages caused by an administrative decision can be sought in an action. In such circumstances, it is not always necessary to bring a separate application for judicial review. See *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585.
>
> [Emphasis added; some citations omitted.]

[49] In my view, the fact that Mr. Besse seeks a declaration does not alone answer the question. Unlike the purely administrative law remedies of *certiorari* and *mandamus,* declarations are not limited to the administrative law context. Nor are they, as Mr. Besse suggests, simply private law remedies. Rather, as Justice Evans stated in concurring reasons in *Canadian Council for Refugees*, "[t]he declaration is a flexible public and private law remedy, unencumbered with historical and technical baggage" [emphasis added]: *Canadian Council for Refugees v Canada*, 2008 FCA 229, lv to app ref'd, [2008] SCCA No 422, at para 108.

[50] Even within the context of public law, declarations are not restricted to the sphere of administrative law: see, *e.g.*, *Daniels v Canada (Indian Affairs and Northern Development*), 2016 SCC 12 at paras 2–4, aff'g 2013 FC 6 at paras 3–6, 19–20; *Strickland* at para 37. Thus, public law declarations may be obtained, in some instances, in an action under section 17, as can private law declarations. As Mr. Besse points out, declarations expressly fall within the definition of "relief" in section 2 of the *Federal Courts Act*, which may be the subject of an action against the Crown under section 17.

[51] However, contrary to Mr. Besse's suggestion, the fact that declarations fall within the definition of "relief" does not mean that all declarations are private law declarations, or that all private or public law declarations can be obtained on an action under section 17. If this were so, the reference to declaratory relief in subsection 18(1) would be meaningless. Declaratory relief as an administrative law remedy has been long recognized, including to determine whether a statute applies in a particular case, and as an "efficient remedy against ultra vires action by

governmental authorities of all kinds": *Krause v Canada*, [1999] 2 FC 476 at para 18, quoting W Wade & C Forsyth, *Administrative Law*, 7th ed (Oxford: Clarendon Press, 1994) at p 593.

[52] Also untenable is Mr. Besse's argument that the term "remedies" in subsection 18(3) refers only to the prerogative writs of *certiorari*, prohibition, *mandamus* or *quo warranto*, rather than the broader "relief" that includes declarations and injunctions. In addition to not being supported by a fair reading of the provisions (which refer to the "remedies provided for in subsections (1) and (2)" without making a distinction between remedies and relief) this would be in direct contradiction to the statement in *Brake* that the "remedies on judicial review are restricted to the administrative law remedies set out in subsection 18(1) […] such as injunction […] and declaration": *Brake* at para 26.

[53] Similarly, I reject Mr. Besse's contention that the reference in paragraph 18(1)(*b*) to an "application or other proceeding for relief" means that a declaration can be sought on either an application or another proceeding, namely an action. This language pre-existed the procedural limitation found in subsection 18(3), and treating paragraph 18(1)(*b*) and subsection 18(3) as permitting two different procedural structures depending on whether the relief sought is one of the prerogative writs on the one hand, or declaratory or injunctive relief on the other, would be inconsistent with both the structure and purpose of section 18.

[54] Rather, the distinction between declarations that may only be obtained on an application for judicial review and those that can be obtained by way of action is made clear by the context of subsection 18(1), which both lists declarations alongside the prerogative writs and requires

that they be "against any federal board, commission or other tribunal." Where the declaration sought *is in the nature of administrative law remedy*, it may only be obtained on an application for judicial review.

[55] Justice Binnie made this distinction clear at paragraph 52 of his decision in *Telezone*, stating that the reference to declarations and injunctions in section 18 was to that relief "in the administrative law context":

> All of the remedies listed in s. 18(1)(*a*) are traditional administrative law remedies, including the four prerogative writs — *certiorari*, prohibition, *mandamus* and *quo warranto* — and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.
>
> [Emphasis added.]

[56] The question, then, is not simply whether Mr. Besse seeks declaratory relief, but whether he seeks it "in the administrative law context," *i.e.*, seeks it in respect of the legality, reasonableness, or fairness of the procedures employed and actions taken by a "federal board, commission or other tribunal" acting in its public capacity and in an executive or administrative (as opposed to legislative) function: *Telezone* at para 24; *Air Canada v Toronto Port Authority et al*, 2011 FCA 347 at paras 21–30, 46–60; *Mikisew Cree (SCC)* at paras 13–18, 54, 101, 148; *Federal Courts Act*, s 2 ("federal board, commission or other tribunal").

[57] Master Harrington of the Court of Queen's Bench of Alberta concluded that the declarations Mr. Besse sought in that Court, which are the same as those sought in the original Statement of Claim in this Court, were administrative law declarations: *Besse v Calgary Police Service* at paras 6–11, 28. I concur. The Minister and the RCMP, in implementing the fingerprinting policy, including by Ministerial Directive as alleged, are acting in an executive or administrative public capacity, and exercising or purporting to exercise jurisdiction or powers conferred by an Act of Parliament. They are clearly "federal boards, commissions or other tribunals" within the meaning of section 2 of the *Federal Courts Act*. The declarations sought are in the nature of administrative judicial review of the exercise or purported exercise of jurisdiction by the Minister and the RCMP, seeking declarations that the policy is unlawful and unconstitutional, and of no force and effect. In accordance with subsection 18(3) of the *Federal Courts Act*, such declarations may be obtained only on an application for judicial review under section 18.1.

[58] Nor, despite Mr. Besse's contrary arguments, do I find that the other factual and legal allegations in the original Statement of Claim support a "non-administrative" cause of action or a request for a private law declaration. I note as a general matter that some allegations in a pleading—such as an allegation of *Charter* infringement—may support either an administrative law remedy or a non-administrative law remedy, such as damages. Put simply, "the policy breaches my *Charter* rights and I seek to set aside that policy" is an administrative law claim to be brought by way of application for judicial review. "The policy breaches my *Charter* rights so I seek damages" is a claim for *Charter* damages to be brought by way of action. The fact that a claim alleges facts that could potentially form the basis for a damages claim does not mean that it

discloses a non-administrative cause of action, where the claim neither sets out the basis for such a claim, nor makes the claim for damages.

[59] I conclude that it is plain and obvious that Mr. Besse's action, as originally drafted, effectively seeks judicial review, and should have been commenced as an application for judicial review. I therefore conclude that it is plain and obvious that Mr. Besse's action cannot succeed in its current form.

(2) Proposed claim for damages

[60] The foregoing conclusion is not changed by the additional remedies proposed in the draft Amended Statement of Claim. Most of these seek additional declarations that are similarly administrative law declarations. For example, Mr. Besse proposes to seek declarations that the Ministerial Directive on fingerprinting is *ultra vires*; comprises an infringement on his integrity and rights under the *Charter* and the *Canadian Bill of Rights*; and is not authorized by the *Criminal Records Act* or other statutes. As they relate to his request to invalidate the fingerprinting policy, these are similarly administrative law questions.

[61] Other aspects of Mr. Besse's proposed Amended Statement of Claim, however, raise different issues. In particular, Mr. Besse proposes to seek compensatory damages. The causes of action on which the claim of damages is based are not very clearly pleaded, even in the proposed amendments, but reading the claim generously, it appears to include potential actions in negligence, the tort of abuse of statutory authority, *Charter* damages, and monetary relief based

on public law principles, discussed as a novel potential claim by Justice Stratas at paragraphs 115 to 118 of *Paradis Honey*.

[62] Damages, as discussed above, cannot normally be obtained on an application for judicial review: *Brake* at paras 23, 26. The result of these proposed amendments would therefore be a pleading that seeks both relief that can only be obtained on an application for judicial review, and relief that can only be obtained on an action. As Justice Stratas noted in *Brake*, "to seek both administrative law remedies and damages simultaneously, one must launch two separate proceedings": *Brake* at para 27. To avoid the adverse impacts on access to justice that this might entail, such proceedings may be consolidated, while remaining distinct substantive proceedings: *Brake* at paras 28–29. In some cases, an application for judicial review that is treated as an action may also be amended to seek damages: *Paradis Honey* at para 151; *Canada (Citizenship and Immigration) v Hinton*, 2008 FCA 215 at para 45.

[63] In the present case, Mr. Besse has not indicated that he wishes to abandon his request for administrative law remedies. His proposed amended pleadings still seek declarations that would effectively invalidate the Ministerial Directive. Indeed, he proposes a Notice of Application for Judicial Review as an alternative pleading to replace his Statement of Claim. I am also conscious of the concern that a claimant ought not to be able to simply convert what is primarily an application for judicial review into an action for damages just by proposing an amendment to add a claim for damages: *Telezone* at paras 75–78.

[64] As stated above, while I can consider proposed amendments to the pleadings on a motion to strike, the motion remains one directed to the current Statement of Claim. I conclude that the proposed amendments do not change the nature of the Statement of Claim, which seeks administrative law remedies and ought to have been commenced as an application for judicial review. However, for the reasons set out in the next section, I conclude that the appropriate remedy is to convert the current proceeding into an application for judicial review.

(3) Remedy

[65] As discussed at paragraphs [16] to [19] above, this Court and the Court of Appeal have on a number of occasions recognized that the principle in Rule 57 that "[a]n originating document shall not be set aside only on the ground that a different originating document should have been used" applies to applications for judicial review that were improperly started as actions: *Khaper II* at paras 11–12; *Sander* at para 27; *Rosenberg* at para 24; *Sweet* at paras 15–18. In my view, this approach is also consistent with the recognition in paragraph 18 of *Telezone* that the *Federal Courts Act* ought to be interpreted and applied in a manner consistent with access to justice:

> This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.
>
> [Emphasis added.]

[66] Despite these cases, the Defendants argue that Rule 57 does not apply, and that commencing an action rather than an application for judicial review is not simply a procedural

irregularity. They rely on Justice Pelletier's statement in *Docherty* that the discretion set out in Rule 57 "is subject to the opening words of Rule 63 which direct the Court to respect Parliament's choice as to the form of originating document in a particular case": *Docherty v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 89 at paras 13–14.

[67] I do not read Justice Pelletier's statement to mean that Rule 63 prevents the Court from providing relief pursuant to Rule 57 where a proceeding is started using the incorrect originating document. Indeed, if that were so, Rule 57 would have little meaning. Rather, it appears that Justice Pelletier was addressing the particular situation arising in *Docherty*, in which certain decisions under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, may be judicially reviewed under sections 18 and 18.1 of the *Federal Courts Act*, while others are to be appealed by action to the Federal Court: *Docherty* at paras 5–8; *Tourki v Canada (Public Safety and Emergency Preparedness)*, 2007 FCA 186 at paras 16–18. This statutory structural difference and the resulting need to address the two decisions in separate proceedings could not be overcome simply by reference to Rule 57: *Docherty* at para 14.

[68] Based on the foregoing, I am satisfied that Rule 57 gives me the discretion to convert Mr. Besse's action seeking administrative law remedies into an application for judicial review. In exercising that discretion, I must consider the timing issue identified in *Tremblay*, *Sander*, *Khaper*, and *Rosenberg*. In other words, does the passage of time since Mr. Besse was first fingerprinted in November 2012 prevent him from seeking judicial review?

[69] I note that as a general rule, this Court will not strike applications for judicial review on a preliminary motion based on timing: *Kaquitts* at paras 23–26. However, different considerations arise in assessing whether an action should be converted to an application for judicial review under Rule 57, notably the concern about the potential use of an action to circumvent the time limits on judicial review: *Tremblay* at para 22. As a result, this Court has considered the issue of the timing of the commencement of proceedings before exercising its discretion to convert an action into a judicial review application: *Sander* at paras 28–35; *Khaper II* at paras 13–18; *Rosenberg* at paras 53–60.

[70] The Defendants argue that the Court should not exercise its discretion under Rule 57 since it has been almost eight years since Mr. Besse was fingerprinted. Mr. Besse argues that his challenge, like that in *Rosenberg*, pertains not to a particular "decision" communicated to him, but to the broader "matter" of the Defendants' fingerprinting policy. It has long been recognized that the reference to a "matter" in subsection 18.1(1) encompasses matters beyond a particular decision or order and may include an ongoing policy: *Krause* at para 21; *May v CBC/Radio Canada*, 2011 FCA 130 at para 10; *Rosenberg* at para 56; *Fortune Dairy Products Limited v Canada (Attorney General)*, 2020 FC 540 at paras 82–85.

[71] On review of the Statement of Claim as drafted and the proposed amendments, I conclude that Mr. Besse's challenge is effectively to the Defendants' fingerprinting policy, and not to any specific decision, such as the requirement that he be fingerprinted. The original Statement of Claim states at the outset that "Mr. Besse seeks a declaration that this policy is contrary to the *Charter*" and the declarations sought relate to the policy, rather than any request

to quash a decision. Indeed, any relief directed to the particular decision requiring him to be fingerprinted would likely be of no practical benefit. He was fingerprinted, and obtained the vulnerable sector criminal records check that he required. These are not matters that are easily "undone" through, for example, an order in the nature of *certiorari*. While some of the declaratory relief proposed in the draft Amended Statement of Claim pertains to Mr. Besse's particular rights under the *Charter* and the *Canadian Bill of Rights,* most continue to pertain to the fingerprinting policy itself.

[72] The Federal Court of Appeal has indicated that "[o]ngoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment": *May* at para 10, *Sweet* at para 11. In my view, Mr. Besse's challenge is of this nature, and is not precluded by the 30-day time limit in subsection 18.1(2) of the *Federal Courts Act*.

[73] Mr. Besse asked, in the alternative, that he be granted an extension of time without having to proceed by way of motion, referring to the approach taken by Justice Bédard in *Rosenberg*. As did Justice Bédard, I will address this request in case I am wrong that Mr. Besse's application is in respect of a decision to require him to submit to fingerprinting in late 2012 and thus subject to the 30-day time limitation.

[74] The test for an extension to commence an application for judicial review considers four factors in assessing whether granting the extension is in the interests of justice: *Canada v Larkman*, 2012 FCA 204 at paras 61–62. These factors are (1) whether the moving party had a

continuing intention to pursue the application; (2) whether there is some potential merit to the application; (3) whether the Crown has been prejudiced by the delay; and (4) whether the moving party has a reasonable explanation for the delay.

[75] These four factors favour an extension in Mr. Besse's case, despite the length of time. Mr. Besse has been engaged in contesting the fingerprinting requirement since the issue arose in late 2012, with a clear intention to challenge it. The fact that it took him until mid-2018 to commence this action appears to be due to his efforts to uncover information about the source of the policy, and to pursue other avenues of redress, including through provincial and federal privacy commissioners, the Calgary Police Commission and the Court of Queen's Bench of Alberta. In the current circumstances, I consider this to be an adequate explanation for the delay in proceeding in this Court.

[76] I also note that there appears to be some potential merit to the application, raising as it does substantial issues with respect to the potential impact of the fingerprinting policy on *Charter* and other rights. I note in this regard that the Defendants' motion to strike did not argue that the claim did not raise any reasonable administrative law grounds, or that there was no reasonable possibility of success on the substantive grounds raised. Similarly, while the Defendants did point to the lengthy passage of time, they did not identify any prejudice arising from the delay. The Defendants have been aware of Mr. Besse's complaints regarding the policy for a considerable time, and have been engaged in litigation with him in respect of it. I conclude that the Defendants have suffered no prejudice from the delay and similarly would suffer no

prejudice if the extension were granted. I would therefore be prepared to grant the requested extension of time if it were necessary, which I conclude is not the case.

[77] I will therefore order that Mr. Besse's action be converted to an application for judicial review. This order requires me to address certain procedural issues regarding the conduct of the application.

E. *Procedure to be Followed*

[78] By default, applications for judicial review are to be heard and determined in a summary way: *Federal Courts Act*, s 18.4(1); *Federal Courts Rules*, Rules 300 *et seq*. This is due in part to the nature of judicial review, which typically proceeds on the basis of a record that was the basis of a challenged decision and involves the Court's restricted oversight of administrative decision making: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 18–20.

[79] However, subsection 18.4(2) of the *Federal Courts Act* provides for the possibility that "an application for judicial review be treated and proceeded with as an action." The Federal Court of Appeal has described subsection 18.4(2) as a "legislative response to the concerns […] that an application for judicial review did not provide appropriate procedural safeguards where declaratory relief was sought": *Haig v Canada*, [1992] 3 FC 611 (CA) at p 618 (para 9), aff'd [1993] 2 SCR 995; *Hinton* at para 44. There is no limit on the considerations that may be taken into account, but issues such as facilitating access to justice and avoiding unnecessary costs and delays may be relevant: *Meggeson v Canada (Attorney General)*, 2012 FCA 175 at para 32. To

this end, a "broad approach to the treatment of applications as actions" is appropriate: *Meggeson* at paras 37–38. At the same time, the Court of Appeal has reiterated that the situations where conversion is allowed are "exceptional" and "most rare": *Canada (Attorney General) v Lafrenière*, 2018 FCA 151 at paras 24–25.

[80] In my view, the circumstances of this case support treating the matter as an action. I consider the following factors as relevant to this conclusion:

- the fact that Mr. Besse seeks declaratory relief in respect of an ongoing policy, such that there is no easily defined record for the purposes of the judicial review: *Hinton* at para 44;

- the fact that Mr. Besse has indicated a desire to amend his pleadings to assert a claim for damages, which may be claimed in a judicial review that is being treated as an action, thereby avoiding a potential duplication of proceedings: *Meggeson* at paras 33–35; *Hinton* at paras 45–50; and

- the fact that the matter has already proceeded through several steps in the action process with the involvement of the Defendants, and it is preferable to avoid the unnecessary costs, delays, and uncertainties that might arise from proceeding forward from this point as an application: *Meggeson* at para 37.

[81] In respect of the third of these points, I wish to underscore that I do not take into account the mere fact that the judicial review proceeding was started as an action. Were this alone to be a positive factor in favour of treating an application for judicial review as an action under

subsection 18.4(2), this would have a perverse effect of encouraging parties who wished their application for judicial review to be treated as an action to commence it in the wrong form. This is not to be encouraged. Rather, the appropriate approach is to commence an application for judicial review and seek an order that it be treated as an action under subsection 18.4(2). However, the fact that the matter has proceeded as an action for a significant period owing to the delay in bringing the motion to strike is a factor for consideration.

[82] As has been recently reinforced by the Court of Appeal, the treatment of the application as an action is simply procedural. It does not "convert" it into an action: *Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228 at paras 23–24; *Brake* at para 43. The application for judicial review will simply be treated procedurally as an action in accordance with the *Federal Courts Rules*.

[83] The final question, then, is "what kind of action?" The Defendants ask in the alternative that the matter proceed as a simplified action. They argue that the matter is not particularly complex, and as currently formulated does not seek damages: *Polchies v The Queen*, 2003 FC 961. While asking that the matter continue as an action, Mr. Besse did not address the Defendants' request that the matter continue as a simplified action. I note that while Mr. Besse has proposed an amendment seeking damages in the total amount of $90,000, that claim is not yet part of the claim and, in any case, is only modestly above the $50,000 limit set out in Rule 292(*b*).

[84] The differences between a regular action and a simplified action include the procedure for examinations for discovery (Rule 296) and trial procedure (Rule 299). In my view, the simplified action procedures should be sufficient to address the concerns about discovery and trial evidence raised by Mr. Besse, while facilitating bringing the matter to trial in a prompt fashion, which is of particular importance given how long Mr. Besse's concern about the fingerprinting policy has been outstanding.

[85] I will therefore order that the matter be treated as a simplified action. For clarity, the matter should remain case managed by Case Management Judge Ring. Further details regarding the applicable procedure are set out in my order below. For further clarity, I make no determination as to whether the amendments proposed by Mr. Besse should be allowed if Mr. Besse wishes to proceed with them. This is a matter that can be addressed by the Case Management Judge.

IV. Conclusion

[86] As can be seen from the foregoing, considerable procedural complexity can be avoided through the appropriate choice of proceedings at the outset of a matter. The *Federal Courts Act* defines procedures to preserve the important distinctions between applications for judicial review and actions. These procedures ought to be respected, but errors in pursuing the wrong process should not result in the summary striking of proceedings that may have merit.

[87] While the Defendants' motion to strike is dismissed, the Defendants correctly identified that the matter was brought in the incorrect form, and some form of relief was necessary to

regularize the proceeding. In the circumstances, I consider that costs of this motion should be in the cause.

ORDER IN T-1075-18

THIS COURT ORDERS that

1. The motion to strike the Statement of Claim is dismissed.
2. The action is converted into an application for judicial review, with the Statement of Claim filed by the plaintiff to be treated as the notice of application for judicial review.
3. The application for judicial review shall be treated and proceeded with as an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, pursuant to the following procedure:
    a. The Statement of Claim, Statement of Defence and Reply filed by the parties shall be considered the pleadings filed pursuant to Rule 171;
    b. Any amendment to the pleadings shall be in accordance with Rules 75 to 79;
    c. Remaining steps in the proceeding shall be conducted in accordance with Rules 292 to 299 governing simplified actions, save that any motion in respect of amendment to the pleadings may be brought prior to a pre-trial conference notwithstanding Rule 298.
4. The parties shall request a case management conference with the Case Management Judge to address next steps in the proceeding.
5. Costs of this motion are in the cause.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1075-18
STYLE OF CAUSE:	JAMES BESSE v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS ET AL

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCHAFFIE J.
DATED:	OCTOBER 26, 2020

WRITTEN RESPRESENTATIONS BY:

Melodi E. Ulku	FOR THE PLAINTIFF
Cameron G. Regehr	FOR THE DEFENDANTS

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