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Submission to the Victorian Law Reform Commission

Reference on Contempt of Court

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1. I am pleased to provide the Victorian Law Reform Commission (**VLRC**) with this submission to its review on contempt of court, the *Judicial Proceedings Reports Act 1958* and enforcement processes. This submission responds to relevant parts of the VLRC's May 2019 Consultation Paper, *Contempt of Court* (**the Consultation Paper**).

2. The role of Chief Examiner was established to help combat organised crime by obtaining evidence through the use of coercive powers aimed at breaking the 'code of silence' that can thwart organised crime investigations. Under the *Major Crime (Investigative Powers) Act 2004* (**the MCIP Act**), where the Supreme Court has authorised the use of coercive powers in an organised crime investigation through the making of a coercive powers order, the Chief Examiner has the power to issue a witness summons requiring a person to:

   - attend an examination to give evidence; or
   - attend an examination to give evidence and produce specified documents or things;
   - attend at a specified time and place to produce specified documents or things.[1]

3. The Chief Examiner, in conducting coercive examinations under the MCIP Act, has a statutory power to charge a person attending before them to give evidence with contempt, in certain circumstances. Once charged, they are brought before the Supreme Court to be dealt with according to law.

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[1] Section 15 of the MCIP Act. Where a witness is held in a prison or police gaol, the Chief Examiner may issue a custody order requiring the prisoner to be delivered into custody for the purpose of attending before the Chief Examiner to give evidence at an examination: s 18 of the MCIP Act. Section 18(8) of the MCIP Act provides that section 49 applies to a custody order.

4. The arrangements for charging and prosecuting the statutory offence of contempt of the Chief Examiner have, in my view, been effective in dealing with contumacious breaches of the MCIP Act conduct in a timely manner. The scope of the offence – which applies to conduct constituting a common law contempt of court – has also played an important role in deterring non-compliance with the MCIP Act.

5. This submission outlines the Chief Examiner's experience in prosecuting contempt matters, and outlines the ways in which reforms to the common law of contempt of court may impact the statutory contempt power in the MCIP Act.

Current arrangements for charging and prosecuting contempt of the Chief Examiner

6. The contempt provisions in the MCIP Act have existed – in substantially the same form – since the Act first came into force in November 2004. They prescribe, in part, the conduct that will constitute contempt; and set out, in part, a procedure for charging and prosecuting contempt.[2] However, the MCIP Act adopts the common law of contempt in some key respects.

7. First, the conduct that constitutes contempt of the Chief Examiner is defined non-exhaustively by reference to common law contempt. Section 49(1) provides that a person attending before the Chief Examiner is guilty of a contempt of the Chief Examiner if the person –

   (a) fails without reasonable excuse to produce any document or other thing the person is required by the witness summons to produce; or

   (b) being called or examined as a witness at an examination, refuses to be sworn or to make an affirmation, or without reasonable excuse refuses or fails to answer any question relevant to the subject matter of the examination; or

   (c) engages in any other conduct that would, if the Chief Examiner were the Supreme Court, constitute a contempt of that court.

8. Section 49(1)(c) extends the Chief Examiner's contempt power to conduct engaged in during an examination which would , if it was committed in a court, be punishable as a common law contempt. This integration of the common law of contempt provides the Chief Examiner, like the courts, with the flexibility to deal with contemptuous behaviour that may arise in a potentially infinite number of situations. Though we are aware of only one instance where a charge has been laid under section 49(1)(c) anecdotally it appears to have been effective in deterring disruptive or other types of contemptuous behaviour.

[2] Section 49 of the MCIP Act.

9. Second, while section 49 of the MCIP Act sets out a procedure for the laying of a charge of contempt and the institution of proceedings, matters are heard and determined by the Supreme Court applying its civil procedure rules. The prosecution of a charge of contempt of the Chief Examiner is commenced by the Chief Examiner who, during the course of the examination, issues a written certificate charging the person with contempt and setting out or attaching details of the alleged contempt (a certificate of charge).[3] A person who is charged by the Chief Examiner under section 49(1) is subject to a power of arrest upon the issue of a warrant of arrest by the Chief Examiner, pursuant to which they are to be "brought before the Supreme Court forthwith to be dealt with according to law".[4] The Supreme Court is required to deal with the contempt as though it were a contempt of an inferior court,[5] which sees the court adopt the summary procedure set out in Order 75 of the *Supreme Court (General Civil Procedure) Rules 2015*. The proceedings are brought in the name of the Chief Examiner, and are conducted on his or her behalf by the Chief Examiner's Legal Unit.[6] The certificate of charge is dealt with as though it were both an application to the Supreme Court and evidence of the matters set out in or attached to it.[7]

10. The summary procedure adopted by the Court for the disposition of contempt of Chief Examiner matters has meant that alleged contemnors are ordinarily dealt with more swiftly than persons who are prosecuted for a criminal offence in respect of the same conduct. I believe that this and the ability to charge a witness immediately with contempt has been an important factor in dissuading uncooperative witnesses from continuing to engage in potentially contemptuous conduct.

11. Third, in sentencing an offender for contempt of the Chief Examiner, the Court is required to apply the same approach as it would in sentencing a person found guilty of the common law offence of contempt. Courts have accepted that the *Sentencing Act 1991* does not apply directly to contempt proceedings commenced under section 49 of the MCIP Act, but that it applies by analogy.[8] However my experience, and the experience of the previous Chief Examiner, has been that courts have applied some of the sentencing principles set out in the Sentencing Act, including in relation to:

    - whether sentences are concurrent or cumulative (section 16).[9]
    - the declaration of pre-sentence detention (section 18);[10] and
    - the making of a declaration pursuant to section 6AAA.[11]

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[3] Section 49(2)(a).
[4] Subsections 49(2) – (4).
[5] Subsection 49(10)(a).
[6] Rather than the Office of Public Prosecutions or Victoria Police Prosecutions.
[7] Subsections 49(10)(b) and (11).
[8] *R v Hopkins (a pseudonym)* [2018] VSC 756; *R v Miles* [2018] VSC 669; *R v DF (No 2)* [2014] VSC 213.
[9] *R v Miles* [2018] VSC 669; *R v Brigham* [2018] VSC 284.
[10] *R v Murray (Contempt Sentence)* [2018] VSC 133
[11] *R v Hopkins (a pseudonym)* [2018] VSC 756; *R v Debono* [2013] VSC 413.

12. Given the above, any changes to the law of contempt – for example, to specify the conduct subject to sanction, to apply the rules of criminal procedure to contempt proceedings, or to set maximum penalties – would have implications for the exercise of the Chief Examiner's statutory contempt powers.

13. The overarching concerns for the Chief Examiner are that:

    - the Chief Examiner, and the Court in determining whether a person is guilty of contempt of the Chief Examiner, retains flexibility in dealing with the wide array of conduct that may interfere with the conduct of an examination and therefore in the administration of justice;

    - contempt proceedings be conducted in an expedited manner in order to maintain the integrity of the examination process and deter non-compliance by witnesses with the MCIP Act, while ensuring that there are appropriate procedural safeguards in place to protect the rights of the respondent; and

    - the Court has a sentencing discretion that reflects the range of possible contemptuous conduct, and the serious implications of a contempt committed in the context of an examination by the Chief Examiner (which is conducted in furtherance of an investigation into one or more organised crime offences, which has the capacity to be frustrated by contemptuous conduct), and the elevated need for general deterrence in this context.

Specific responses to questions posed in the Consultation Paper – general issues with the law of contempt of court

Uncertainty of scope

Do the courts need a general power to punish any conduct that has a tendency to interfere with the proper administration of justice? *Alternatively, should the law specify the conduct subject to sanction?* *If so, should only conduct that is intended to interfere with the administration of justice be subject to punishment?*

14. Given the many and varied forms a contempt might take, the existence of a general power for the court to punish any conduct that does, or has a tendency to, obstruct or interfere with the proper administration of justice has considerable utility with respect to examinations conducted by the Chief Examiner. As noted above, this is primarily because of its deterrent value. The limited extent to which contempt has been charged under section 49(1)(c) is likely to reflect the discretionary nature of the power (as some witnesses – usually after a warning – ultimately cease to engage in the potentially contemptuous conduct).

15. It is appropriate that the courts retain the ability to punish a person for contempt even where he or she does not intend his or her conduct to interfere with (or tend to interfere with) the administration of justice. To provide otherwise would, in my view, be setting the bar too high. For example, prevarication by a witness who falsely asserts an inability to recall material facts may interfere, or tend to interfere with, the administration of justice, however it may be difficult to prove that the witness intended that result. This is particularly so in circumstances where the witness will not ordinarily be aware of the extent of the investigation or understand the evidentiary or intelligence value of their evidence to the investigation.

16. The content of the common law contempt offence is necessarily nebulous. If the law were to specify the conduct subject to sanction, it is foreseeable that novel or uncommon types of conduct would be inadvertently overlooked. There are also foreseeable difficulties in legislating to encapsulate conduct that, though seemingly innocuous, takes on a contemptuous character because of the circumstances in which, or the frequency with which, it is carried out. For example, a witness who, without proper basis, objects to the nature of questioning during an examination may be engaging in behaviour that has a tendency to disrupt proceedings, depending on the extent to which that behaviour is sustained.

17. The rights of an alleged contemnor to a fair trial are, however, clearly important. They can, and should, be protected through the application of appropriate procedural safeguards and the fair and consistent application of sentencing principles (discussed below).

Procedural safeguards

Should the procedure for filing and prosecuting a charge of contempt of court be the same as for other criminal offences? If not, what are the reasons necessitating a different procedure for contempt of court and what should be the features of that procedure?

18. As outlined above, procedural provisions in section 49 of the MCIP Act and the Supreme Court's civil procedure rules govern the conduct of matters involving the determination of statutory contempt charges laid under section 49 of the MCIP Act. The key features of those procedures are:

    - the certificate of charge issued by the Chief Examiner must set out or attach details of the alleged contempt;[12]

    - the determination of the charge is carried out by a court, being independent of the person charging the contempt;[13]

[12] Subsection 49(2)(a).
[13] Subsection 49(10).

- at an early stage, the Chief Examiner engages Counsel (who are not only subject to a range of ethical duties to the court and other legal practitioners but also provide objective and independent advice on the conduct of the matter) to conduct the litigation on his or her behalf; and

- the proceedings are timetabled in a way that affords alleged contemnors the opportunity to obtain legal advice and representation (if they have not already done so), in order to properly defend the charge.

19. In my view, the procedures outlined above appropriately safeguard the rights of the respondent in a contempt matter.

20. If standard criminal procedure applied to the filing and prosecuting of a charge of contempt of court, the utility of the contempt power may be undermined or significantly diminished in that contempt proceedings would be subject to essentially the same time frames relevant to substantive offences. The lengthy delay between the time of charge and ultimately the imposition of a sentence is precisely one of the matters a contempt proceeding is initiated to avoid. In the context of the exercise of coercive powers, the contempt power is more likely to be effective in encouraging a witness to comply with their obligations where the threat of punishment is more immediate.

21. The adoption of special procedural rules for the disposition of common law contempt matters may be the most appropriate way to ensure that prosecutions are conducted in a timely way, that alleged contemnors are afforded procedural fairness, and that the procedural uncertainty referred to by the Victorian Court of Appeal in *CFMEU v Grocon*[14] (referred to at paragraph 3.29 of the Consultation Paper) is avoided.

22. Alternatively, criminal procedure could be applied with some modification – that is, to legislate shorter timeframes (see for example section 126 of the *Criminal Procedure Act 2009* in relation to time limits for conducting committal mention hearings for sexual offences). In the majority of contempt matters though, time may not be of the essence in the manner it is in relation to examinations conducted pursuant to the MCIP Act.

Overlap with criminal law

Is there a need for statutory guidance on when the court may exercise its power to punish for contempt of court in circumstances where the conduct is also a statutory offence? If so, what guidance should be provided?

23. The MCIP Act provides for the prosecution of statutory offences involving conduct that may also amount to contempt.[15] Section 50 of the MCIP Act – perhaps in an effort to resolve the uncertainty at common law referred to in the Consultation Paper – provides:

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[14] *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527.

[15] For example, section 36(3) (witness refuse or fail to take an oath of make an affirmation); section 37(3) (failure of witness to attend and answer questions); section 38(3) (give false or misleading

50 No double jeopardy

(1) If an act or omission constitutes both an offence against this Act and a contempt of the Chief Examiner, the offender is liable to be proceeded against for the offence or for contempt or both, but is not liable to be punished more than once for the same act or omission.

24. It is necessary for Courts to retain the option to punish conduct for contempt where the same or similar conduct is also criminalised by a more specific statutory offence. That is because, as it was put by the Court in *Solicitor-General v Cox*[16] (referred to at paragraph 3.40 of the Consultation Paper), in some cases "swifter or more condign action is required to uphold the due administration of justice". Though it is a discretionary exercise, the court or officer with the conduct of the relevant proceedings is well-placed to determine whether the particular circumstances warrant resorting to the laying of a charge for contempt.

25. The penalty for contempt of the Chief Examiner is not specified and is therefore at large. When the contempt power was first introduced in 2004, the Minister, in her Second Reading Speech, outlined the way in which it was originally intended that matters would proceed:

> The examiner will be able to certify the commission of contempt in writing to the Supreme Court in such cases. This bill also empowers the examiner to issue a warrant for a person alleged to be in contempt to be brought by the police before the Supreme Court. Among other sanctions, the court may imprison the person for an indeterminate period. In some cases, the person may be held in custody until the contempt is purged - that is, until the witness answers the questions to which he or she had previously declined to respond.[17]

26. In my experience, Chief Examiner contempt matters have not proceeded as originally envisaged and contemnors have not been imprisoned for an indeterminate period, or until such time as the contempt is purged. However, it is apparent that the Chief Examiner's contempt power was designed to maximise the likelihood that a witness will comply with their obligation to provide information, the evidentiary value of which would – if subject to the delays inherent in the prosecution process – potentially be lost.

27. This rationale for giving statutory contempt powers to officers, such as the Chief Examiner, who conduct coercive examinations of witnesses, was also considered in a series of reviews relating to what was then the Australian Crime Commission.[18] Ultimately, those reviews culminated in the insertion of contempt powers into the

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evidence); section 43(3) (makes a publication or communication in contravention of a direction given by the Chief Examiner)

[16] [2016] 2 Cr App R 15 193.

[17] Hansard, Legislative Assembly, 5 October 2004 – Minister for Community Services Second Reading Speech on the Major Crime (Investigative Powers) Act 2004, accessible via http://www.legislation.vic.gov.au/.

[18] See *Independent review of the provisions of the Australian Crime Commission Act 2002: report to the Inter-Governmental Committee*, tabled in the House of Representatives on 21 February 2008 and reports by the Parliamentary Joint Committee on the Australian Crime Commission (as it then was) between 2007 and 2008.

Australian Crime Commission Act 2002 (Cth) in 2010, which mirror statutory offences in that Act.[19] As is explained in the Explanatory Memorandum for the amending legislation:[20]

> Under the new contempt provisions, the ACC, where appropriate, will be able to deal promptly with an uncooperative witness, while avoiding the delays which are a part of the prosecution process.
>
> Allowing an examiner to refer a person to a court to be dealt with for contempt will provide a swift mechanism for dealing with uncooperative witnesses contempt proceedings bring with them the threat of immediate detention. It is anticipated that the new contempt provisions will motivate an uncooperative witness to reconsider his or her position and comply with the requirements of an examination, and avoid the immediate threat of detention.
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> Allowing a person to be dealt with through contempt provisions will maintain the integrity of the examination process as an important investigative and intelligence-gathering tool in combating serious and organised crime. The new contempt procedures will bring the ACC into line with other State and Territory agencies similar to the ACC who have had contempt provisions for some time. The experience of those agencies is that the power to cite an uncooperative witness for contempt is used sparingly, and that the threat of such action will be often sufficient to secure compliance.

28. The broader implications of any proposal to limit courts to exercising their contempt power only where the relevant conduct is not also the subject of a criminal offence should be carefully considered. If that were to occur, the scope of the Chief Examiner's contempt power could be dramatically reduced. For example, the offence of using profane, indecent or obscene language or threatening, abusive or insulting words[21] overlaps with the common law offence of contempt. That offence applies to conduct engaged in or near a public place such as a court but not a confidential examination before the Chief Examiner. If the common law offence were narrowed so as not to be exercisable in relation to that conduct, it would create a gap with respect to the Chief Examiner's contempt power.

Penalties

Should there be a statutory maximum penalty for contempt of court? If so:
(a) What penalties should apply?
(b) Should different penalties apply for different manifestations of contempt?

29. The setting of a maximum penalty for contempt may fetter what is an important discretion for the court to punish a wide array of potentially contemptuous conduct. The current arrangements with respect to sentencing for contempt of the Chief Examiner (that is, that the Court applies its power to punish contempt committed in the

[19] By the *Crimes Legislation Amendment (Serious and Organised Crime) Amendment Act (No.2) 2010.*
[20] Explanatory Memorandum accessible at: https://www.legislation.gov.au/Details/C2009B00187/Explanatory%20Memorandum/Text.
[21] Offence under s 17(1)(c) of the *Summary Offences Act 1966*. Note that the offence applies to *conduct engaged* in "in or near a public place or within the view or hearing of any person being or passing therein or thereon."

course of a coercive examination as though it were a contempt committed in an inferior court) serve to illustrate the point that relevant sentencing considerations may vary not only according to the circumstances of the case, but also given the statutory context in which the contempt was committed.

30. Contempt of the Chief Examiner is a serious offence. In *Murray v The Chief Examiner*[22] the court observed that –

> Section 49 created a statutory form of contempt and carried with it the consequence that there is no maximum sentence prescribed. Its purpose is to enable the gathering of evidence and intelligence in circumstances where, for obvious reasons, that evidence would otherwise remain unavailable to investigators. The abrogation of the privilege against self-incrimination, and the restrictive secrecy regime that surrounds the making of a coercive powers order and examinations under the Act, highlights the importance that the Act attaches to the obtaining of evidence and intelligence about organised crime offences.
>
> The ability to obtain such information depends on being able to enforce the obligation imposed on witnesses, who will often be reluctant or recalcitrant, to answer questions before the Chief Examiner. For that reason, deterrence and punishment are critical factors in sentencing for an offence against s 49 of the Act.

31. The absence of a statutory maximum does not mean that there are no parameters for courts to apply in sentencing for contempt. In imposing a sentence, the courts have taken into account the penalties for comparable offences in the MCIP Act[23] when dealing with contemptuous conduct that may otherwise have been dealt with by the issuing of a charge for a criminal offence. For example, in the recent case of *R v Hopkins*, Taylor J, in her opening remarks, commented that –

> The Act is silent as to penalty for contempt of the Chief Examiner under s49(1). The penalty is at large. The Act provides a maximum penalty of five years imprisonment for refusing or failing to answer a question that a person is required to answer by the Chief Examiner under s37(3) of the Act. This maximum penalty is a useful comparator for present sentencing purposes.[24]

32. The yardstick of the comparative offence provision also provides an indicator for would-be contemnors as to the seriousness of the penalty their conduct may attract.

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[22] [2018] VSCA 144, [78], [79] (Whelan, Beach, Niall JJA).

[23] Section 36(3) – refuse or fail to take an oath or make an affirmation (Level 6 imprisonment [5 years maximum]); s 37(3) – fail to attend and answer questions, or fail to produce a document or thing (Level 6 imprisonment [5 years maximum]); s 44 – hinder or obstruct the Chief Examiner in the exercise of his/her functions, or disrupt an examination before the Chief Examiner (10 penalty units or 12 months imprisonment or both).

[24] [2018] VSC 756. See also *R v Miles* [2018] VSC 669, 4 and *R v QF* [2014] VSC 81.

Should the Sentencing Act 1991 (Vic) apply to contempt proceedings?

33. In contempt proceedings commenced under the MCIP Act, courts have applied the Sentencing Act by analogy.

34. In *Murray v the Chief Examiner*[25] His Honour referred to the decision in *Wood v Staunton (No 5)*[26] as providing guidance on the relevant matters in relation to sentence for a charge of contempt. Those matters included:

    a) the seriousness of the contempt proved;
    b) whether the contemnor was aware of the consequences to himself or herself of what he or she did;
    c) the actual consequences of the contempt on the relevant trial or enquiry;
    d) whether the contempt was committed in the context of serious crime;
    e) the reason for the contempt;
    f) whether the contemnor has received any benefit by indicating an intention to give evidence;
    g) whether there has been any apology or public expression of contrition;
    h) the character and antecedents of the contemnor;
    i) general and personal deterrence; and
    j) denunciation of the contempt.[27]

35. His Honour stated that these matters could be subsumed within the categories established by the sentencing guidelines in section 5 of the Sentencing Act.[28]

36. Likewise, when dealing with minors, the *Children Youth and Families Act 2005* (**the CYF Act**) has no direct application in matters of contempt but is considered relevant. Taylor J, in *Hopkins*[29] stated –

> However, in my view, the principles of sentencing child offenders enunciated in the CYF Act remain relevant. There are sound reasons of policy for ensuring that, so far as possible, the sentencing of a child for contempt is approached in a manner consistent with that in respect of a child facing an ordinary criminal offence.

37. Adherence to the principles set out in the relevant sentencing legislation supports consistency in sentencing and flexibility in achieving sentencing outcomes. It also gives effect to the policy objectives of the modern approach to sentencing, as expressed in the legislative provisions. Arguably, however, this objective would be more easily achieved by directly applying the Sentencing Act to contempt matters. This submission does not consider whether there are legal barriers to this type of reform.

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[25] [2018] VSCA 144, [62]-[63].
[26] (1996) 86 A Crim R 183.
[27] (1996) 86 A Crim R 183, [16].
[28] (1996) 86 A Crim R 183, [17].
[29] [2018] VSC 756, [25].

Warnings

In what circumstances do the courts give warnings for contempt?
When should contempt warnings be given?
Is there a need for guidance to the courts on the use of contempt warnings? If so, should such guidance be set out in statutory provisions?

Is there a need for greater clarity as to whether, when a court gives a contempt warning, there has been a finding that a contempt has in fact been committed and, if so, the status or effect of such a finding?

38. Section 30(1) of the Act states that the Chief Examiner is not bound by the rules of evidence in conducting an examination and may regulate the conduct of proceedings as he or she thinks fit. Additionally, there is no statutory requirement that the Chief Examiner warn a witness for contempt.

39. However, it is generally the practice of the Chief Examiner and Examiners to give a contempt warning. The warning aims to set out the conduct that appears to the Chief Examiner or Examiner to potentially constitute contempt.

40. Importantly, the warnings are expressed to reflect a preliminary view, rather than a determination of guilt, as the MCIP Act provides that the Chief Examiner may issue a certificate charging a person with contempt if it is alleged or appears to the Chief Examiner that a person is guilty of contempt of the Chief Examiner. A warning given in the context of an examination under the MCIP Act may be akin to a 'show cause warning' in that it affords the witness the opportunity to put forth a reasonable excuse for their conduct, the absence of which is an element of a contempt under section 49(1)(a) and (b) of the MCIP Act.[30] If the Chief Examiner is satisfied, on the facts, that the witness has a reasonable excuse, a certificate of charge may not be issued.

41. Other benefits of giving a warning include that an alleged contemnor –

- is made aware of the specific conduct that may be perceived as contemptuous;
- is reminded of their obligations;
- is reminded that there are serious consequences for such conduct;
- is given the opportunity to cease the contemptuous conduct and avoid being charged;
- may seek a further opportunity to obtain legal advice and/or representation.

42. Warnings are therefore given by the Chief Examiner as a matter of legal necessity, fairness and operational expedience. A consistent and careful approach is imperative to ensure that they are delivered clearly, effectively and appropriately.

[30] *R v DA & GFK* [2016] VSCA 325.

43. Thank you for the opportunity to provide input to the VLRC's review on contempt of court, the progress of which I will follow with interest.

44. I do not object to the VLRC publishing this submission without further reference to me.

Joanne L Smith
Chief Examiner

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