Federal Court  Cour fédérale

Date: 20160902

Docket: T-668-15

Citation: 2016 FC 1003

Ottawa, Ontario, September 2, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

BALRAJ SHOAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

Background

[1] At all material times, the applicant, Commissioner Shoan, was a member of the Canadian Radio-television and Telecommunications Commission [CRTC], having been appointed by Order-in-Council pursuant to subsection 3(1) of the *Canadian Radio-television and Telecommunications Commission Act*, RSC 1985, c C-22.

[2] By letter dated September 18, 2014, Amanda Cliff, Executive Director, Communications and External Relations, CRTC, lodged a complaint of harassment [the Complaint] against Commissioner Shoan asking the CRCT to "take further action in accordance with [Treasury Board Secretariat] Policy on Harassment Prevention and Resolution [TBS Policy]."

[3] The Complaint, in relevant part, reads as follows:

> Attached is a series of email exchanges in which he makes repeated insinuations and unfounded accusations about me. You will see in the exchanges that I have in the past indicated that I find their contents inappropriate and unfortunate. Commissioner Shoan copies other Commissioners and my staff on his inappropriate email correspondence, which I feel is an attempt on his part to undermine my credibility with my CRTC superiors and staff and to humiliate me in front of colleagues.
>
> By involving my employees, I am increasingly concerned that they could be drawn into this inappropriate situation or be subjected to Commissioner Shoan's aggressive behavior [*sic*].
>
> Commissioner Shoan's inappropriate emails culminate in a message dated September 17, 2014, in which he tries to intimidate and coerce me into doing as he wants by threatening to lodge a complaint about me to the Office of the Commissioner for Public Service Integrity, and by telling me to govern myself accordingly. As a loyal public servant for over 30 years, I take Commissioner Shoan's attempt to destroy my career and my reputation very seriously.
>
> I have informed you previously of Commissioner Shoan's inappropriate behaviour and understand that you have raised the issue with him. I appreciate your support, however things have escalated. This harassment is affecting my work and my sense of personal wellbeing, and I request that you take further action in accordance with the TBS Policy on Harassment Prevention and Resolution.

[4] The emails referenced in the Complaint comprised seven email exchanges between Mr. Shoan and Ms. Cliff, from February 22, 2014, to September 17, 2014.

[5] Pursuant to the CRTC Guidelines on Formal Harassment Conflict Resolution Mechanisms [CRTC Guidelines], John Traversy, the Secretary General, was the delegated manager responsible for reviewing and evaluating the Complaint to ensure it complied with TBS Policy, advising the respondent of the Complaint, attempting mediation and, failing resolution, referring the Complaint to an impartial third party for an investigation.

[6] Ms. Cliff refused mediation and accordingly, the Secretary General retained the services of Diane Laurin, LL.B., Med.C. of Laurin & Associates to investigate the Complaint [the Investigation]. It is evident from the record that more than one person was involved in the Investigation; however I shall refer throughout as if there was one investigator [the Investigator]. This is necessary, in part, because the final report does not disclose who conducted the interviews but is written as if Ms. Laurin did them all.

[7] In her report dated March 17, 2015 [the Report], the Investigator concluded that:

> [T]he complaint has merit.
>
> a. Mr. Raj Shoan's behaviour since February 2014 was inappropriate and constituted harassment towards the complainant.
>
> b. He attempted to undermine the complainant's credibility with her superiors and staff and commissioners.
>
> c. He humiliated the complainant in front of colleagues by sending the emails to her staff, colleagues and Commissioners.
>
> d. Staff was subject to the respondent's aggressive behaviour.
>
> e. On September 17, 2014, the respondent threatened the complainant so as to try to intimidate and coerce her to comply with his demands. He attempted to destroy her career and reputation.

[8] The Secretary General, by letter dated April 1, 2015, informed Commissioner Shoan that he agreed with the conclusions of the Report. He said that he would be recommending to Jean-Pierre Blais, Chairman and Chief Executive Officer [the Chairman] five "measures to deal with the conclusions" of the Report; namely:

> I. With the exception of the Administrative Officer in the Toronto regional office, that you copy me on all e-mails that you initiate and send to Communication staff.
>
> II. With the exception of the Administrative Officer in the Toronto regional office, all calls that you plan on initiating to Commission staff members should be coordinated through my office. You would be asked to call or send my office an e-mail outlining the Commission staff member you would like to talk with and the subject of the call, my office will organize the call.
>
> III. You refrain from any communication with Ms. Cliff.
>
> IV. No changes to the open dialogue that takes place between you and staff during Full Commission Meetings, Broadcasting Committee Meetings, Telecommunication Commission Meetings and panel meetings.
>
> V. That a copy of the report be sent to the Minister for her review and consideration on any further action may be required.

[9] The Chairman, by letter dated April 7, 2015, accepted and immediately put in place the five measures recommended by Mr. Traversy.

[10] Commissioner Shoan initiated this application for judicial review seeking review of the decision of the Chairman which he says in his Notice of Application "accepted the results of an investigation into allegations of harassment against [him], concluding that [he] did commit harassment," and imposing the five corrective measures. Among other grounds, he alleged that

the Chairman had no jurisdiction over him because he was a GIC Appointee and not an employee of the CRTC.

[11] The Crown's position is that the only decision under review is the decision of the Chairman to impose corrective measures. Commissioner Shoan's position is that the Investigation and Report leading to the issuance of the corrective measures is also within the scope of his application for review. He submits that bringing this application prior to the Chairman's decision would have been premature as "it remained for the chairperson to decide to accept, or not, the findings and recommended corrective measures within the process established by the CRTC."

[12] In my view, the scope of this application is not restricted as the Crown submits. Appendix A to the CTRC Policy provides that the "Complaint process" includes the investigation, the report, the decision on the report, and the measures taken as a result. Accordingly, it is arguable that all these steps constitute but one decision. Appendix A to the CRTC Policy provides:

> On the basis of the investigator's report, the submissions made by the parties to the complaint and possibly the recommendations of Human Resources, the Delegated Manager makes a finding as to whether or not the allegations are founded. He/she communicates his/her decision to the parties and ensures the corrective and/or disciplinary measures are taken, if warranted.

[13] The Secretary General wrote in his letter to Commissioner Shoan that he accepted the conclusions of the Report and that he would be "recommending to the Chair and CEO of the CRTC the following measures to deal with the conclusions of the investigator's report." Under

the TBS Policy the imposition of corrective measures would have fallen to the Secretary General, and there would have been no dispute that the decision to accept the Report and impose corrective measures constituted a single decision subject to review.

[14] In the present circumstances, and probably because of Commissioner Shoan's position, the Secretary General referred the question of corrective measures to the Chairman. It was open to the Chairman to accept all, some, or none of the recommendations; regardless, the Chairman had to first consider whether he accepted the Report and its conclusions. If he did not turn his mind to that fundamental question and accept the finding of the Report, his decision to impose any corrective measure would be unreasonable.

[15] In any event, had it been necessary, I would have exercised my discretion under Rule 302 of the *Federal Courts Rules*, SOR/98-106 and permitted both the decision finding harassment and the decision imposing corrective measures be included in this application. This permits the real issues between the parties to be adjudicated and thus is in the interest of justice. The respondent is not prejudiced as it knew from the filing of the application that Commissioner Shoan was challenging the Investigation, the Report, and the corrective measures, including the question of jurisdiction over him as a GIC Appointee.

Issues

[16] Commissioner Shoan raises four issues:

1. What is the appropriate standard of review for the issues raised?

2. Did the CRTC and its Chairman have jurisdiction to investigate the Complaint and impose measures following a finding that harassment had occurred, given that Mr. Shoan is a Governor-in-Council appointee [GIC Appointee] and not an employee of the CRTC?

3. Did the Investigation offend principles of procedural fairness and natural justice?

4. Was the ultimate finding and the imposition of corrective measures reasonable?

Analysis

1. Standard of Review

[17] Commissioner Shoan submits that the question of whether the Chairman had jurisdiction over him and issues of procedural fairness are subject to a correctness review and that all other issues are subject to a reasonableness review. The respondent submits that all issues raised are subject to a reasonableness review.

[18] The respondent reminds the Court that the Supreme Court of Canada has indicated that "[t]rue questions of jurisdiction are narrow and will be exceptional:" *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 39, [2011] 3 SCR 654. It was for that reason that the Court went on to observe that decisions of an administrative tribunal interpreting or applying its home statute should be presumed to be reviewable on a reasonableness standard.

[19] Here there is no "home statute" *per se* but there are policies that applied to the CRTC and the Investigation, and I see no reason why the words of the Supreme Court of Canada should not apply with equal force to decisions and interpretations made by persons authorized to act under those policies.

[20] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court of Canada held that the correctness standard will be applied to constitutional questions, questions of general law that are of central importance to the legal system as a whole and outside the tribunal's field of expertise, questions regarding the jurisdictional line between two or more competing specialized tribunals, and to true questions of jurisdiction. In my view, the only possible category described in *Dunsmuir* into which the issue of CRTC jurisdiction to investigate a complaint of harassment against a GIC Appointee might be said to fall is that of a "true question of jurisdiction."

[21] In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, Justice Rothstein, writing for the majority, noted at paragraph 33 that since *Dunsmuir*, the Supreme Court of Canada had not identified a single true question of jurisdiction. Although Justice Rothstein said at paragraph 42 that he was "unable to provide a definition of what might constitute a true question of jurisdiction" he left the possibility open that counsel might be able to satisfy a court that a true question of jurisdiction exists and applies in a particular case. That being so, he proposed the following two-step approach: (1) when considering a decision of an administrative tribunal interpreting or applying its home statute, there is a presumption that the appropriate standard of review is reasonableness; and (2) as long

as the true question of jurisdiction category remains, the party seeking to invoke it has to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[22] No such demonstration was made by Commissioner Shoan, and I am unable to see any basis on which it could be said that the suggested immunity of a GIC Appointee from the harassment policies of the organization he is a part of is a true question of jurisdiction. Accordingly, the decision that the CRTC had jurisdiction to conduct a harassment investigation regarding the conduct of the applicant, a GIC Appointee, shall be determined on the reasonableness standard.

[23] In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, the Supreme Court of Canada said at paragraph 43, that *Dunsmuir* affirmed correctness as the standard of review for procedural matters. It reaffirmed this view in *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 [*Khela*], and added that some deference should be owed to the administrative decision-maker on some elements of the procedural decision.

[24] I am bound to follow the view of the Supreme Court of Canada in *Khela*. Accordingly, the correctness standard will be applied where it is alleged that there was a denial of procedural fairness.

2. <u>The Chairman's Jurisdiction Over Commissioner Shoan</u>

[25] Commissioner Shoan submits that as a GIC Appointee he was responsible only to the Governor in Council [GIC], and not to the Chairman of the CRTC or any other governmental agency. He submits that the Chairman's decision to invoke the TBS Policy and institute a harassment investigation, to accept the conclusion, and to impose corrective measures was a decision made without jurisdiction and therefore, is a nullity.

[26] Commissioner Shoan candidly acknowledges that there is no jurisprudence dealing with the imposition of corrective measures or investigations being taken against GIC Appointees; however, he submits that "there is a well-established body of law which makes it clear that a GIC appointment is accountable to the GIC, particularly where, as is the case with Commissioner Shoan, the appointment is on 'good behaviour'." As support for that view, he cites Christopher Rootham, *Labour and Employment Law in the Federal Public Service* (Toronto: Irwin Law 2007) at 322, and *Wedge v Canada (Attorney General)*, [1997] FCJ No 872, 133 FTR 277 (FCTD).

[27] In my view, these authorities only stand for the rather obvious proposition that having been appointed by the GIC, one may only be removed by the GIC. They do not stand for the overarching principle advanced by Commissioner Shoan that only the GIC may take actions that affect or have an impact on a GIC Appointee. That being said, I do accept that actions taken that materially impair the ability of a GIC Appointee to perform his or her mandated duties and responsibilities do not lie with anyone other than the GIC. In an employment context, such actions would be considered to be a "constructive dismissal" and actions that amount to the constructive termination of a GIC Appointee can only be done by the GIC, and then only to the

extent permitted by law. No submission was made by Commissioner Shoan that the corrective measures imposed by the Chairman constituted a constructive termination of his appointment because they prevented him from doing the job he was appointed to do, and I find nothing in the record that would support such a claim had it been made.

[28] I am supported in the view that Commissioner Shoan is not immune from having his actions examined by the CRTC based on the long-accepted principle in human rights law that an employer has a duty to prevent discrimination and harassment of its employees from clients, vendors, service-users, friends and family members of employees, and other non-employees who may be visiting the workplace or affiliated with the workplace: See for example *Laskowska v Marineland of Canada Inc*, 2005 HRTO 30 at para 57, [2005] OHRTD No 30 (OHRT); *Clarendon Foundation v OPSEU, Local 593* (2000), 60 CLAS 129, 91 LAC (4th) 105 at 120 (Ont Arbitration); *Lanteigne v Sam's Sports Bar Ltd*, [1998] BCHRTD No 40 at para 15, 98 CLLC 230-045 (BCHRT); *Jalbert v Moore*, [1996] BCCHRD No 37, 1996 CarswellBC 2983 at para 39 (BC Human Rights Council); *Milay v Athwal*, 2004 BCHRT 132 at para 14, 50 CHRR D/386; *Nixon v Greensides*, 20 CHRR D/469, 1992 CarswellSask 766 at para 22 (Sask Human Rights Board of Inquiry); *Garland and Tackaberry, Re*, [2013] MHRBAD No 105 at para 9, 2013 CLLC 230-023 (Man Human Rights Commission).

[29] This enlarged scope is also evident in the Directive on the Harassment Complaint Process issued by TBS pursuant to the TBS Policy, which provides at section 2.4:

> In circumstances where an employee files a harassment complaint against an individual who is not an employee as defined in Appendix A, managers must apply the complaint process as established in this directive to the extent possible.

[30] Commissioner Shoan argues that "applying the 'spirit of the policy' does not grant a deputy head the authority to make findings in respect of a GIC appointee." He submits that the Chairman ought to have received the Complaint and then referred it to the GIC, which "would appoint an investigator, determine the scope of the investigation, and then determine whether the appointee breached the principle of good behavior [sic] thus terminating his appointment." No authority was cited to support that this would be the only or the appropriate or the preferred option.

[31] Indeed, in my view, it is unlikely to be seen as the preferred option because it can achieve only one of two results – the GIC Appointee is terminated or the appointment is retained. It does little to address the real issue of the relationship between the GIC Appointee and the alleged victim of harassment. On the other hand, in utilizing the TBS Policy, as was done here, the person having the ultimate authority over the workplace may impose measures with a view to stabilizing the workplace and eliminating any harassment. It is not within the jurisdiction of the GIC to impose any internal restrictions or obligations on persons other than the GIC Appointee.

[32] For these reasons, I reject Commissioner Shoan's submission that the Chairman had no jurisdiction to investigate the Complaint and impose measures (within the scope outlined previously) following a finding that harassment had occurred, because Commissioner Shoan was a GIC Appointee.

3. Procedural Fairness and Natural Justice

[33] Commissioner Shoan submits that he was denied procedural fairness and natural justice because:

1. Assurance made to him that he would have input into the identity of the investigator were unfulfilled;

2. The Investigator "was biased, and was adversarial with [Commissioner Shoan]" during the Investigation;

3. "The Chairperson was biased, as he participated both as witness in the investigation and as the ultimate arbiter of the complaint" and "his evidence was excessively critical and hostile toward" Commissioner Shoan;

4. The Investigator refused Commissioner Shoan's request that she review the "Complainant's own conduct with respect to the impugned email exchanges" as part of the Investigation; and

5. The Investigation was broadened by the Investigator beyond the scope of the Complaint.

[34] In my view, many of these issues overlap, especially those relating to the allegations of bias, the alleged failure to examine the Complainant's behaviour, and the expanded scope of the Investigation. The procedural fairness issues will be analysed under two headings: issues occurring prior to the Investigation, and issues occurring in the course of or at the conclusion of the Investigation.

[35] Commissioner Shoan submits, and I agree, that a harassment investigation has significant consequences for all parties involved, and thus procedural fairness is required: *Puccini v Canada (Director General, Corporate Administrative Services, Agriculture Canada)*, [1993] FCJ No 619, [1993] 3 FC 557 at 11, and *Potvin v Canada (Attorney General)*, 2005 FC 391 at para 19, [2005] FCJ No 547.

[36] He further submits that when one considers the factors outlined by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39, [1999] 2 SCR 817 at paragraphs 23 – 28, the content of that duty is heightened. Those factors are (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself.

[37] I accept that the potential serious and profound impact on the reputations and careers of both the Complainant and Commissioner Shoan in itself is sufficient to put procedural fairness requirements of the Investigation at the upper end of the flexible and variable scale enunciated by the Supreme Court of Canada.

A. Issues Occurring Prior to the Investigation

[38] In his affidavit, Commissioner Shoan attests that in the initial telephone call advising him of the Complaint, the Secretary General assured him that the process would be impartial and “to

assuage any potential concerns, Mr. Traversy indicated that the Commission would be issuing a Request For Proposal (RFP) for a potential investigator to assist with the complaint's resolution [and] before settling on an investigator, Mr. Traversy assured me that both the Complainant and I would be provided with a list of potentials and would be provided an opportunity to 'veto' candidates with whom we were not comfortable."

[39] About a month later, Commissioner Shoan received a call informing him that the Investigator had been selected. He complains that there was no explanation offered as to why the process of selection had changed or on what basis the Investigator had been selected.

[40] The Crown provided an affidavit of Helen McIntosh, Director General, Human Resources at CRTC. She attests that the Secretary General tasked her to search for and provide advice as to an appropriate investigator. She says that they could have gone the RFP route, but feared it would delay any investigation by months and might result in elements of the Complaint becoming public. Instead, she looked at the Standing Offer List at Public Works and Government Services Canada, from which to select potential investigators. Persons on that list have already been retained on contract, meet the competency profile, and meet other conditions including security and confidentiality requirements. Ms. McIntosh says that she consulted with colleagues in the Public Service for their experience in dealing with "complaints involving lawyers and high level officials" and based on her review of the list and references provided by colleagues selected four potential investigators. She contacted each as to their availability and approach to conducting an investigation. Three responded, but one of those was unavailable until January 2015. She had telephone conversations with the remaining two, and based on that

conversation and a review of Ms. Laurin's credentials, selected her as the person to recommend to the Secretary General. She attests that in particular she "was satisfied that [Ms. Laurin] complied with the competency profile, she had the appropriate experience dealing with high level government employees, and had a legal background," such as Commissioner Shoan, and "she was available immediately." The Secretary General accepted her recommendation.

[41] There is no evidence from the Secretary General regarding the "veto" assurances given Commissioner Shoan and the Complainant or any explanation why that was not ultimately provided.

[42] Based on the record before the Court, including the experience and qualifications of Ms. Laurin, I cannot find that at the time of her selection that she appeared to be anything other than an impartial investigator. The allegation that as the investigation proceeded her impartiality was brought into question is a separate issue.

[43] I further note that Commissioner Shoan has not said that at the commencement of the process, he would have vetoed her selection, nor has he suggested that there was any immediate impact on him or the investigation arising out of the failure to satisfy the assurances he was given.

[44] Absent any prejudice to Commissioner Shoan or adverse impact on the Investigation, the breach is not one that would attract any remedial action by the Court: See *Uniboard Surfaces Inc v Kronotex Fussboden GmbH & Co KG*, 2006 FCA 398 at paras 24-25, [2007] 4 FCR 101.

Accordingly, although the assurances given to Commissioner Shoan were unfulfilled, this alone is not a basis to upset the decision.

B. Issues During and at the Conclusion of the Investigation

[45] Commissioner Shoan alleges that the Investigator was biased. He makes this allegation based on his own experience and comments he received from others the Investigator questioned.

[46] Commissioner Shoan has argued that the Investigator exhibited bias, but that is not the test to be used when examining whether an investigation was procedurally fair and proper. Actual bias need not be shown. The test this Court has applied to investigative bodies, such as the Investigator here, is that they must not have a closed mind. Justice Richard in *Bell Canada v Communications, Energy and Paperworks Union*, [1997] FCJ No 207, 1997 CarswellNat 347 at para 31 (FCTD), articulated the test as follows:

> The standard of conduct which is applicable to those performing an adjudicative function is different from those performing a purely administrative or investigative function. In the case of an administrative or investigate function, the standard is not whether there is a reasonable apprehension of bias on the part of the investigator, but rather whether the investigator maintained an open mind, that is whether the investigator has not predetermined the issue. [emphasis added]

[47] In *Canadian Broadcasting Corp v Canada (Human Rights Commission)*, [1993] FCJ No 1334, 1993 CarswellNat 597 at para 47 (FCTD), the Court stated the same test but in slightly different words:

> [I]t is not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue

> before the investigative body has been predetermined. [emphasis added]

[48] In matters where claims have been made of an apprehension of bias or a closed mind, the grounds must be substantial; mere suspicions are not sufficient.

[49] The question the Court must ask is this: "Would an informed person viewing the matter realistically and practically, having thought the matter through, conclude that the Investigator had failed to keep an open mind such that the question of whether Commissioner Shoan had harassed Ms. Cliff had been pre-determined by the Investigator?"

[50] In addition to the Investigator being biased, Commissioner Shoan also submits that the Chairman was biased "as he participated both as a witness in the investigation and as the ultimate decision-maker as to whether harassment occurred." The Chairman was not performing an investigative function, but an adjudicative one, and so the question to ask in that respect is: "Would a reasonable person properly informed apprehend that there was conscious or unconscious bias on the part of the decision-maker?": See *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 66, [2003] 2 SCR 259. The dissenting opinion of Justice de Grandpré in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369, 68 DLR (3d) 716 at 735 has become the universally accepted test for reasonable apprehension of bias in Canada. He stated:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that

> it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

[51] The best evidence of a closed-mind is found in statements made by the decision-maker during the investigation: See for example *Pelletier v Canada (Attorney General)*, 2008 FC 803, [2008] FCJ No 1006. More usually, a closed-minded determination is deduced from evidence relating to the process and the decision itself.

[52] A closed-mind has been found when there is unequal treatment of a complainant and the respondent. For example in *Woolworth Canada Inc v Newfoundland (Human Rights Commission)*, [1995] NJ No 324, 35 Admin LR (2d) 264 (Nfld CA), the court found that giving the complainant access to the investigator's report and to the memorandum prepared for the Commission by its solicitor and inviting and receiving a lengthy memorandum urging the complainant's position on the Commission, and not doing the same for the respondent was such that a "reasonable observer could conclude that the decision to appoint a board was a forgone conclusion, and was simply a formality to be effected so that [the complainant] and the Commission could further pursue the complaint against [the respondent]."

[53] A lack of even-handedness has also been found when relevant material information was omitted in the investigative report: *Canadian Broadcasting Corp v Paul*, [1998] FCJ No 1823, [1999] 2 FC 3 (FCTD). The court there held that the failure was of such significance that it provided evidence of bias rendering an investigation procedurally unfair.

[54] I have concluded that an informed person viewing the Investigation and Report realistically and practically, having thought the matter through, would conclude that the standard of open-mindedness had been lost to the point where on the balance of probabilities it would be said that the issue the Investigator was to determine had been predetermined. In my view, Commissioner Shoan was denied procedural fairness and natural justice. I reach this decision based on the cumulative impact of many aspects of the investigative process and the Report it produced.

[55] Commissioner Shoan filed two affidavits in this application: the first sworn June 8, 2015, and the second sworn on August 20, 2015.

[56] In his first affidavit, he attests that throughout his interview "the investigators were argumentative" and interrupted him. He says that the "body language of the investigators was one of a negative pre-disposition; they shook their heads often and frowned openly."

[57] While the conduct of the Investigator as described was inappropriate, it cannot be said, without more, that this raises above mere speculation on Commissioner Shoan's part as to the bias of the Investigator. However, and critically in my view, other witnesses independently came to a similar conclusion based on the Investigator's interview with them.

[58] Commissioner Shoan attests that Vice-Chairman Tom Pentefountas told him that "in his view, it was clear that the investigators had already made their minds up and that they were

'unbelievably biased' against me." Commissioner Shoan goes on to recount that the Vice-Chairman "warned me that the 'fix is in'."

[59] Commissioner Shoan also recounts an SMS [i.e. text message] exchange he had with Vice-Chairman Peter Menzies "who expressed similar concerns following his interview with the investigators, namely that they had clearly made up their minds and that it was a foregone conclusion that they would find me in contravention of the Policy."

[60] Commissioner Shoan says that Vice-Chairman Menzies also shared his view that the Investigator appeared to be influenced by the reputation of the Chairman:

> Later, in person, Vice-Chairperson Menzies expanded upon the experience and indicated that the investigators had dominated discussion during his interview and repeatedly stressed that the Chairperson was a 'highly decorated' and 'respected' executive in the public service. He also indicated that the investigators appeared to be giving career advice to him such that it was safest for him to not get too involved in the complaint process as, typically, in these situations, the impugned executive was quietly dismissed from their post without much public attention. In the view of Vice-Chairperson Menzies, the investigator seemed inordinately focused on the Chairperson until he commented that the complaint was between myself and Ms. Cliff, at which point the investigators hastily turned their questioning back to the complaint itself. Lastly, Vice-Chairperson Menzies indicated that the investigators appeared resistant to include in his statement his position that a 'toxic environment' was already evident at the Commission prior to the raising of my issues with the Chairperson and the Complainant. [footnote - In this respect I note that the investigators redacted this portion of Vice-Chairperson Menzies' witness statement.]

[61] In his second affidavit he attests that Vice-Chairman Menzies told him that he was also told by Vice-Chairman Pentefountas in January 2015 that "the fix is in" regarding the Complaint and that Commissioner Shoan was "fucked."

[62] Commissioner Shoan attests that he made an attempt to rebuild his relationship with Commissioner Simpson in light of his "negative witness statement as contained in the Preliminary Statement of Facts." Commissioner Shoan attests that during their lunch, Commissioner Simpson "indicated that he was pressured by the Chairperson to provide a witness statement in the complaint process that was negative towards me." He further attests that Commissioner Simpson stated that "the investigators asked 'heavily leading' questions during the interview in order to obtain the answers they were seeking."

[63] These concerns regarding the perceived bias of the Investigator are not of recent origin. Some were raised by Commissioner Shoan with the Investigator on March 13, 2015, in his reply to the Preliminary Statement of Facts:

> At my December interview, it was apparent that the investigators had determined my 'guilt' prior to the commencement of the meeting. … Throughout the three-hour interview, the body language of the investigators was one of doubt towards me. I was repeatedly interrupted by one investigator when I was speaking to the point where the other investigator asked her to refrain from doing so. Additionally, one investigator would shake her head when I was replying to questions or would frown openly - clear indications that she had pre-determined my guilt in her own mind. In fact, after the completion of the investigators' initial round of interviews, one Commissioner contacted me to state that they were appalled at the obvious bias of the investigators and warned that the 'fix is in'.

[64] The Investigator provided her response to these concerns in the Report. As to body language, the Investigator writes that she "makes no comment in this regard as it is the perception of the respondent." She then goes on to describe, in general terms that investigators are neutral and unbiased, and she made no credibility findings concerning Commissioner Shoan. As to the comment of a Commissioner that the 'fix is in' she responds that she "wonders how this Commissioner could make such a remark since the questions put to the witness were based on the emails submitted" and other events.

[65] No affidavit of the Investigator was filed and I find that the response in the Report does not address the principal allegation of Commissioner Shoan that his experience and that of two other witnesses was that the Investigator had made up her mind before all the evidence was in.

[66] The Investigator's response that no credibility findings were made in the Report is insufficient and does not address at all the concern that Commissioner Shoan's interview was not done in an impartial and professional manner. Likewise, stating that she "wonders how the Commissioner could make such a remark since the questions put to the witness were based on the emails submitted" and other events does nothing to address their perception following the interview that "the fix is in." At a minimum, I would have expected the Investigator, having received this information, to return to those witnesses to ask whether this is how they felt and why they had that perception. Instead, the Investigator acted as if these statements were just wrong and the witness had not formed this perception.

[67] The statements made to Commissioner Shoan by his two colleagues is not evidence that the Investigators were in fact biased or that the fix was in; but they are evidence that these statements were made. These statements describe the perception of two witnesses. These are witnesses with no direct involvement in the matters complained of and no interest in the outcome. Given that they would have to continue working with Commissioner Shoan, the Chairman, and the Complainant, I can see no motive either would have to fabricate or exaggerate. I can only conclude that these Commissioners, following their interviews by the Investigator, formed the view that the Investigator had a closed mind.

[68] There is no direct evidence from these Commissioners as to how or why they formed this conclusion, but I do not find that affects the submission of Commissioner Shoan. Would a reasonable person on hearing two impartial witnesses after their interviews say that the outcome has been pre-determined, not conclude that the Investigator has a closed mind? The obvious answer might be otherwise if there was any evidence from which the reasonable person or the Court could conclude that nothing was said or happened in the interviews that warranted these witnesses reaching the view that the fix was in. There is nothing of that sort here.

[69] There are no records before the Court from the Investigator. The Court was informed that the Investigator's notes were destroyed. Given the potential for a future application for judicial review of the Report's conclusions, one would reasonably expect that an experienced and impartial investigator would retain his or her notes, correspondence and audio recordings until well after the time limit for such an application. While the Court is not prepared to draw an

adverse inference from the destruction of these records, and none was asked to be drawn, in another case such an inference might well be justified.

[70] The comments made by the Investigator to witnesses during the investigation concerning the reputation and status of the Chairman are very troubling and in my view support the closed-mind finding. I can see no reason why any such statement would have been made, and it is not referenced in the Report. It is troubling because, as is discussed below, the investigation veered from the initial Complaint to explore whether Commissioner Shoan created a toxic work environment at the CRTC – a view that appears to have been first expressed by the Chairman to the Investigator and then found by her as a fact.

[71] The comment supports the closed-mind finding because it sends the message that the assessment of the "highly decorated" and "respected" Chairman is correct. It was known within the CTRC that the Chairman and Commissioner Shoan had a difficult relationship and the Chairman's responses in his interview coming from such a respected person could frankly only be viewed to lead to one outcome. Additionally, there is the statement made by Commissioner Simpson to Commissioner Shoan that he felt pressured by the Chairman to provide a witness statement that was negative of Commissioner Shoan.

[72] Commissioner Shoan complains that the Chairman was biased as he participated both as a witness and as the final decision-maker, and that his "evidence was excessively critical and hostile" towards him.

[73] In particular, he submits that the Chairman was in a conflict of interest because "he directed the governance changes and decisions of the Direct Reports that formed the basis of the seven impugned email exchanges." I am unable to accept this submission relating to a conflict of interest. The mere fact that the emails at issue relate to decisions made by the Chairman is not, in my view, sufficient to support that he was in a conflict of interest.

[74] Commissioner Shoan further submits that the Chairman "had a vested interest in discrediting Commissioner Shoan and supporting a long-time colleague and close friend." Again, there is no evidence in the record to support the allegation of any relationship – other than professional – between the Chairman and the Complainant.

[75] The Chairman's dual roles are a different matter.

[76] The Chairman was a witness interviewed by the Investigator. The scope of that interview went beyond a description of the roles and responsibilities of Commissioners and their functioning with CRTC staff. It also went beyond questioning the Chairman as to the "facts" relating to the impugned emails or any actions he took as a consequence of being informed of them. It became an opportunity for the Chairman to express his personal views on Commissioner Shoan's conduct and behaviour generally.

[77] Eight of the paragraphs of the Report summarizing the Chairman's evidence do not relate to the Complainant (paragraphs 7, 8, 10, 11, 12, 13, 15, and 17) and are not the subject of the Complaint. Only three paragraphs (paragraphs 9, 14, and 16) are directly relevant to the

Complaint. The other eight paragraphs contain statements of the Chairman about Commissioner Shoan that are negative and colour both the objectivity of the Chairman and the Investigation.

[78] Given the destruction of the records by the Investigator, we do not have the benefit of the Chairman's actual words but the Report summarizes a number of his personal opinions about Commissioner Shoan that he gave during his interview, including the following:

- "As soon as he arrived, Commissioner Shoan gave the impression that he wanted to take more and more of the spotlight."
- "Given his opinions and conduct, it is difficult to trust him."
- "The Chairman concluded that Commissioner Shoan's conduct and remarks have a serious impact on staff and the organization."
- "He tries to intimidate and he has damaged his relations with key people at the CRTC."
- "He has made the working environment toxic."

[79] No part of the Complaint suggested that Commissioner Shoan had created a toxic work environment and this, in particular, was well outside the scope of the Investigation. It is impossible to see how, in light of these opinions expressed by the Chairman and summarized in the Report, it could be said that he, whether consciously or unconsciously, could decide the matter fairly.

[80] Moreover, given the views of the Investigator as to the reputation of the Chairman, a reasonable person looking at these statements would conclude that the views of the Chairman

would carry considerable weight, if not be determinative, when the Investigator was reaching a conclusion on whether the Complaint had been made out.

[81] To be clear, the views of the Chairman may be accurate; but they go far beyond what was to be decided.

[82] Despite the Investigator in her Report repeatedly stating that the issues to be determined were only those set out in the Complaint, she went far beyond the scope of the seven email chains (32 emails) complained of. She acknowledges in the Report that she received another 88 emails covering the period from June 2013 to January 2015. None were mentioned in the Complaint, and many were outside the time frame referenced in the Complaint.

[83] The Investigator takes the position that all of these emails are relevant to the Complaint:

> The undersigned finds the 120 documents and emails relevant to the determination of this complaint, even though eight emails date prior to February 2014 and 20 emails were written and sent after the submission of the complaint on September 18, 2014. This documentation is relevant on the ground that they relate to the incidents alleged and are consistent with the tone of the emails referred to in the complaint and context. [emphasis added]

[84] Elsewhere in the Report, in response to Commissioner Shoan's objection to the expanded scope of the Investigation, the Investigator observes that some of the additional emails provide context for those referenced in the Complaint, and are thus directly relevant. She adds that "In addition, an investigator can consider other relevant evidence as proof of aggravating factors to be considered in the decision by the Deputy Head/manager in the imposition of measures, e.g. administrative or disciplinary action to correct the situation."

[85] I agree that the Investigator is not restricted to the 32 email messages attached to the Complaint and that others that "relate to the incidents alleged" may be considered. However, the Investigator, and it appears the Chairman, examined a number of emails that had nothing to do with the specific incidents alleged. Absent a direct relationship with the incidents under investigation, it is unfair and prejudicial to examine other emails even if they "are consistent with the tone of the emails referred to in the complaint."

[86] Moreover, the justification that "an investigator can consider other relevant evidence as proof of aggravating factors to be considered in the … imposition of measures" only provides some justification to examine them after a finding of harassment has been made, and not during the investigation, as they may, and I suspect here they did, colour the finding. In any event, this rationale is not valid as the Investigator was not tasked with examining any aggravating factors.

[87] The expanded scope of the Investigation is put in full perspective when one looks at the Investigator's analysis in her Report of the specific allegations made by the Complainant. Her analysis covers four and one-half pages (mid page 42 to end of page 46). Following these pages is her analysis of "further evidence submitted concerning the Respondent's conduct" which covers six pages (end of page 47 to end of page 52). She then concludes with a one-half page section entitled "Toxic Environment." None of the last six and one-half pages is relevant to the mandate given to the Investigator.

[88] The Investigator's Mandate is set out at page 4 of the Report, as follows:

> [T]he undersigned is mandated to determine whether the respondent's emails [to the Complainant] and behaviour [towards

> the Complainant since February 2014 as set out in the emails] constitute harassment as defined in the Policy, directives and CRTC Guidelines.

[89] In her analysis, and outside her mandate, the Investigator considers two emails written by Commissioner Shoan to Mr. Traversy, and concludes that, "[p]ursuant to the harassment criteria, the undersigned finds any reasonable person would find these two emails to Mr. Traversy to be rude, offensive and inappropriate."

[90] As further aggravating evidence, the Investigator weighs in on an incident between Commissioner Shoan and Paulette Leclair at the 2013 CRTC Christmas party, during which the pair "had an exchange … over a document she sent him." The Investigator provides her opinion on the contents of the document in dispute and in finding Commissioner Shoan exhibited poor judgment in discussing the document and his dissatisfaction with Ms. Leclair's service at the party, the Investigator concludes: "The respondent's statement and submissions on the incident are consistent with his view of his priority status as GIC and attitude towards CRTC staff."

[91] The Investigator further considers Commissioner Shoan's behaviour during a dinner with Commissioner Simpson and Commissioner Simpson's colleague and his behaviour at staff meetings, at which, "he used to play with a stressball but he seems to have stopped this last behaviour."

[92] All of this, even if true, is beyond the scope of the mandate as set out above. All of this, even if true, vilifies Commissioner Shoan to the extent that the Investigator concludes:

> His conduct is not compatible with his role as CRTC Commissioner and the interests of the CRTC. He is not a team player and, at this point, may even be a risk to the reputation of the CRTC…."

None of these conclusions are even remotely within the Investigator's mandate or suggested by the substance of the Complaint. I concur with the following submission made by Commissioner Shoan:

> Despite the fact that the harassment complaint related solely to the seven (7) email exchanges between Commissioner Shoan and the Complainant, the investigator significantly expanded the scope of the investigation beyond her mandate, such that it became procedurally unfair. The investigation turned into a "witch hunt", where the investigator looked into essentially every detail and interaction Commissioner Shoan had with CRTC Staff to try to find harassment, rather than examining the complaints themselves to determine if harassment occurred.

[93] Not only was expanding the scope of the Investigation procedurally unfair to Commissioner Shoan, it supports the view that the Investigator had a closed-mind; she was following the direction described by the Chairman in his evidence and was not examining the Complaint objectively and fairly.

[94] Throughout the Investigation, Commissioner Shoan advanced the position that the impugned emails related to the work of the CRTC and his work. He attests that he observed changes in the governance structure of the CRTC which he believed "threatened the ability of Commissioners to operate independently and to serve their regions." He submits that many of the impugned email exchanges relate to these concerns and must be seen in that light.

[95] I agree with the Investigator when she writes that the principal evidence to be considered in determining whether there was harassment are the words used in the impugned emails, but I do not agree that she made her determination based only on the words used by Commissioner Shoan:

> It is also important to emphasize that the principal evidence for the determination of the complaint is documentary (emails). The determination of this complaint on whether harassment and threats occurred is based on the words and comments made in writing by the respondent.

[96] Commissioner Shoan told the Investigator that "the emails must be read in context" and I agree. Context includes the governance issues that were of concern to Commissioner Shoan as many of the exchanges had their genesis in them or were coloured by them, and the context also includes the emails sent to Commissioner Shoan by the Complainant.

[97] I do agree with the Investigator when she writes that "the legitimacy of his queries and their legal and policy basis are not relevant to the determination whether the emails constitute harassment, abuse and a threat." That being said, there is nothing that suggests that these concerns were frivolous or raised by Commissioner Shoan for any improper purpose. Where Commissioner Shoan's emails to the Complainant had some basis or context of this sort, it had to be read in that context and weighed given the "dialogue" between the parties.

[98] I find that the Investigator failed to critically and impartially analyze some if not most of the impugned email chains, with the result that her tainted analysis supports the finding that she was closed-minded. I will point out only a few examples where the analysis of the Investigator is so deficient that it supports the closed-minded finding.

[99] The first example of this is the exchange of February 22-23, 2014, regarding the names used in the CRTC Choicebook Survey [the Choicebook Emails]. This is the first chain complained of by the Complainant.

[100] On the evening of February 22, 2014, Commissioner Shoan emails the Complainant (and no one else) to pass on that "some friends" who had participated in the CRTC Choicebook Survey observed that the names used, save one, were all from Caucasian cultures, there were no "names of overtly ethnic origins" or "overtly francophone names" either. He asks: "Was this a purposeful strategy? I would like to understand more clearly the rationale behind these name selections."

[101] The Complainant replies within an hour and one-half saying: "I do not appreciate getting this knowing that you had it in advance and said nothing. People are working hard to make this work."

[102] Commissioner Shoan replies the following evening, explaining why he had not noted this fact earlier, and repeating his request for the rationale in choosing the names:

> It's not a personal attack, Amanda. In truth, I received this during the week of the Vancouver hearing and skimmed it; after trying repeatedly to engage with staff during phase 1 and providing pages of input with zero effect, I have little enthusiasm to voice my concerns on this process as you clearly don't want to hear them. That issue aside, what rationale was used to select those names? I would like to be able to tell people who contact me about this issue that a thoughtful and considered process was employed when choosing to go with them.

[103] The Complainant responds within 10 minutes: "Are you serious?"

[104] Commissioner Shoan replies within minutes:

> I'm confused. Is there something inappropriate about requesting an explanation of the rationale used to select those names? Is it something that you can't provide?

[105] The next morning, the complainant forwards the email chain to the Secretary General, with no written explanation. She never responded to Commissioner Shoan's question about the process used to select the names or to his question about whether it was inappropriate to ask for an explanation of the rationale used.

[106] The Investigator's analysis is that Commissioner Shoan's emails constitute harassment because they are "offensive" and he "must have known they would offend and cause harm to the reputation of the complainant." She further found them to be "threatening" because he threatened "that he may go public if asked about the rationale for the choice of names." Further she finds that Commissioner Shoan "insinuated also that the complainant might not be able to provide a rationale."

[107] I note first that in making these findings, the Investigator accepts entirely the evidence of the Complainant and discounts the evidence of Commissioner Shoan, and in particular, his observation that her response - "Are you serious?" - was "dismissive and inappropriate" and that her tone "sets out the tone of the emails between them." The Investigator discounts the Complainant's words because Commissioner Shoan "did not bring this matter to the attention of the chairman" and made no comment on her words in his reply. I note that prior to making the Complaint, the Complainant also did not bring this matter to the attention of the Chairman and she too made no comment on his words in her reply, except for "Are you serious?"

[108] I find the interpretation given the exchange by the Investigator to be patently unreasonable. She interprets the words in a manner that stretches their plain meaning and she simply ignores that the Complainant "gives as good as she gets" and never actually responds to the valid concerns of Commissioner Shoan that the survey chose only Caucasian names and was not reflective of Canadian society.

[109] It was unreasonable for the Investigator to find that the words of Commissioner Shoan "would … cause harm to the reputation of the complainant" when they were addressed only to her and to no-one else. It was the Complainant's choice to share the exchange with the Secretary General.

[110] I further find the Investigator's conclusion that Commissioner Shoan "may inform persons of the public and possibly stakeholders that no thoughtful and considered process was employed" in choosing the names and that such a "possibility would seriously compromise the credibility and integrity of the CRTC" is purely speculative. There is nothing to suggest that Commissioner Shoan would do such a thing; rather he was looking for the response to give <u>if</u> he were contacted. In any event, it appears to me that no thoughtful and considered process was employed in selecting the names, so if he made any such statement in response, it would be the truth. He can hardly be faulted for that.

[111] The Investigator implies that Commissioner Shoan has or may have inappropriate conversations with his friends. There is no factual basis to support that conclusion. Commissioner Shoan clearly indicated that the issue of the names used was brought to his

attention by "friends" who had completed the survey. He appropriately brought this to the attention of the Complainant as the Director of Communications. There is nothing inappropriate in receiving such information from friends or otherwise. I would have thought that the Complainant as Director of Communications responsible for such matters would have been the appropriate person to hear of these concerns so she could take steps to ensure that such non-inclusive choices were not made again.

[112] The Investigator concludes that Commissioner Shoan's email is "further egregious in that it insinuates that the complainant may not be able to provide a rationale" [emphasis added]. In so finding, the Investigator has completely ignored that the Complainant never did provide any explanation (even to the Investigator) as to how the names were selected, nor has she ever admitted the obvious – that it was not appropriate to include only Caucasian names. I can only conclude that she can provide no rationale for the selection other than it was made in error and was an oversight. It can hardly be said that it is "egregious" that Commissioner Shoan is insinuating (and it is far from clear to me that he is) that she has no rationale when none has ever been provided and none is remotely obvious.

[113] Another impugned email chain was an exchange of emails regarding Mr. Shoan's invitation to speak at the Bi-annual Technical Seminar at Ryerson University [the Ryerson Seminar]

[114] Commissioner Shoan had been asked to make a presentation at this conference. By email dated May 8, 2014, Pierre-Marc Perrault of the Communications Department informed

Commissioner Shoan that the senior managers saw no strategic opportunity for the CRTC in his attendance at this conference. Commissioner Shoan replied the next day, copying Eric Rancourt of the Communications Department, informing him that he had decided to attend nevertheless. Eric Rancourt was copied as the message contained the following statement: "Eric, they've asked me to present on June 12; I'll contact them and ask whether they would like me to do a keynote address or simply a presentation."

[115] Pierre-Marc Perrault forwarded that email chain to the Complainant who then sent Commissioner Shoan an email copying two others saying that there was no problem with Commissioner Shoan attending and presenting. She then referenced the in-camera FCM lunch where speaking engagements had been discussed. She wrote: "In the case where it is considered a strategic opportunity for the CRTC and you are essentially being asked to attend and speak, staff will provide support. We will be sending out a summary of the discussion soon."

[116] Her response ran contrary to Commissioner Shoan's understanding of the earlier discussion and he responded accordingly:

> That seems to run counter to what we all discussed at the FCM last week; namely that [Communications Department] has no role to play in approving/denying speaking engagements of Commissioners and that staff assistance will be provided if sufficient advance notice of the engagement is provided. In this case, I am providing a month's advance notice. Can you confirm that staff will be assigned to assist me, please?

[117] The Complainant responded quickly saying that the Chairman had "concluded by saying that staff would provide support when Commissioners were essentially being asked to speak at an event vs the various other events where a Commissioner may also wish to speak/present."

[118] The obvious difference in views between the Complainant and Commissioner Shoan fundamentally relates to whether a Commissioner will be given staff support for a presentation that is not seen as a strategic opportunity, but sufficient advance notice is given. I add that Commissioner Shoan was not the only Commissioner who was of the view that the Complainant's view of the decision at the FCM did not accord with their recollection.

[119] Commissioner Shoan also responded quickly saying that he did not believe that "the point you are making was entirely clear to all Commissioners in attendance." He adds: "It is possible, of course, that the confusion is at my end; I shall consult my fellow commissioners on this point and get back to you."

[120] None of these emails were objected to by the Complainant but they are necessary to understand what followed.

[121] At this point Commissioner Shoan has been informed that staff would not be provided to assist him, despite having given a month prior notice. He believes that this is contrary to what was previously discussed. As the Seminar approached, Commissioner Shoan emailed Eric Rancourt of the Communication Department on May 28, 2014, obviously in response to an email from Eric Rancourt to the Commissioner with the reference line "BEAC Speech Posting" writing:

> Thanks very much, Eric. Much appreciated.
>
> I've begun my preparation for the speech I'll be giving to Ryerson on June 12th. I know Amanda has forbidden you from assisting me so I won't ask you to help. When do you need a copy of the speech for translation once a final draft is completed?

[122] Eric Rancourt gave the email to the Complainant and she discussed it with the Chairman "and it was decided that she would respond." That the Chairman asked the Complainant to deal with this rather than dealing with it himself is consistent with an observation of Vice-Chairman Menzies in the Report that: "the Chairperson's leadership style [is] to work through staff."

[123] The Complainant responded to Commissioner Shoan in a lengthy email dated May 30, 2014, writing that "the use of the word 'forbidden' is inappropriate." She says that it was discussed at the earlier FCM lunch that the CRTC has limited resources and that choices have to be made. The Ryerson Seminar was not a priority to advance the CRTC's agenda, and that they would provide Commissioner Shoan with no resources to translate and post his remarks on the CRTC web site. She then continues with the substance of her concern:

> Secondly, and of serious concern to me, your use of the word "forbidden" is very aggressive, especially coming from a Commissioner to a CRTC employee.
>
> My interpretation of your email is that you are trying to discredit me and put a wedge between me and Eric. Neither will succeed.
>
> …
>
> I promote a respectful workplace and protect my team from disrespect – aggressive and inappropriate language and innuendo in this case.

[124] Two days later Commissioner Shoan responds and copies Eric Rancourt "to allow him to appreciate that there was no ill-intent on my part."

[125] Commissioner Shoan sets out his review of meanings of the word "forbidden" and concludes that the "consensus definition is 'not allowed' … [which] is exactly the meaning that I

intended to convey; Eric is 'not allowed' to provide me with support." He explains that his email was not an aggressive statement and was "certainly not intended to 'discredit'" the Complainant. He apologizes to Eric if he made him feel uncomfortable. He points out to the Complainant that her reference to limited resources is new and that this was not the justification used earlier when he was informed that no staff resources would be provided; rather the explanation was that this was not a supported speaking engagement. I add that his observation appears to be correct.

[126] The Investigator accepts the evidence of the Complainant that both she and Eric Rancourt "took offence to this email" and that Eric Rancourt "was uncomfortable with the tone of the email." That may be, however the Investigator never interviewed Mr. Rancourt. This is another example where she accepted the evidence of the Complainant without question. The Investigator notes Commissioner Shoan's apology to Eric Rancourt but also says that he did not apologize to the Complainant:

> He denied discrediting her. He added, "I do not contemplate discrediting my colleagues". It is interesting to note that in his submissions, the respondent indicated that he apologized to Mr. Rancourt and that he considered him a "colleague"; however, the respondent never apologized to the complainant and never acknowledged that she may also be "colleague" since both, the complainant and Mr. Rancourt are CRTC employees. The respondent had no intention to apologize to the complainant for the tone of his emails and his behaviour towards her."

[127] This analysis is based on a fundamental flaw in the Investigator's reading of Commissioner Shoan's response which can only reasonably be read as an acknowledgment that he also views the Complainant as a colleague. He writes to the Complainant:

> It is not an aggressive statement and certainly not intended to 'discredit' you. I do not contemplate 'discrediting' my colleagues.

> I hope that you have not suggested to others that I actively 'discredit' them or you.

Moreover, the Investigator notes elsewhere that Commissioner Shoan said that "he considers that they all, Commissioners and staff, part of a team." In his reply to the Investigator on the Preliminary Report, he said that he "used the term 'colleague' in its broad sense" and that he considers "Eric Rancourt to be my colleague, as well as all other employees of the CRTC" [emphasis added].

[128] As noted above, Commissioner Shoan objected that the explanation of limited CRTC resources was a new explanation for why he was not being offered assistance, as he thought he would, when advance notice was provided. Again, he references the in-camera meeting and his different understanding of the conclusion reached but says he will take it off-line. The Investigator's conclusion regarding Commissioner Shoan's behaviour ignores that, rightly or wrongly, he had a different view than that of the Complainant as to what had been agreed. The Investigator writes: "His emails show arrogance and he plays his GIC appointment card as a right to full service regardless of explanations on budgetary or staff constraints" [emphasis added] In making this statement, the Investigator fails to mention Commissioner Shoan's statement in his reply to the Proposed Report acknowledging that resources are limited:

> Exercises of discretion on the part of senior staff due to limited resources should always be made in a transparent and equitable basis in order to ensure that no Member of the Commission is receiving preferential treatment in accordance with the *CRTC Act*.

[129] The Complainant testified that Commissioner Shoan's statement to Eric Rancourt "to raise any concerns with me in person ... we are a team at the CRTC and my door is always open

to you" is "another attempt to undermine her relationship with the employee and an inappropriate gesture by a Commissioner" [emphasis added]. Despite my best effort, I am unable to understand how one can interpret these words as an attack on the Complainant rather than see them for what they clearly are - kind words to an employee. The Investigator's acceptance of the Complainant's view, without question, results in her making unreasonable findings on the content of the emails.

[130] Similarly, the Complainant's interpretation of Commissioner Shoan's email as "condescending and threatening" is not one I share, nor I believe is it a reasonable interpretation when one considers his email in its proper context.

[131] I would note that in a subsequent email exchange regarding the posting of Commissioner Shoan's speech on the web site and the failure to include his reference to Canadian broadcasters being caught flat-footed by Netflix, the Complainant responds to his concern in some detail and then concludes by writing that "I haven't copied all Commissioners on this reply because I find it all so unfortunate. Put some headphones on and listen to Brian Eno's Just Another Day On Earth." I don't know what she intended by that comment but it strikes me as condescending. I also see that other than noting that Commissioner Shoan said he found the statement inappropriate, the Investigator makes no mention of it in her Report.

[132] Another analysis made by the Investigator that is unreasonable relates to the exchange regarding participation in the 'YouTube University' project of Blue Ant Media and Google.

[133] The project was one that Commissioner Shoan in his initial email to Commissioners said he found to be fascinating. "It's truly an innovative way to engage the next generation of broadcasters and discover a business model while doing so." He thought it would be great to share the experience with CRTC staffers and Commissioners. He asked Pierre-Marc Perrault whether he was available to assist. He responded that it would be treated like all invitations and would be considered at the next Direct Reports meeting. Commissioner Shoan responded that it was not an invitation but a "learning opportunity/workshop" that he was proposing to develop for the benefit of CRTC staff and he added that it was an initiative of the CRTC Toronto Regional Office.

[134] On July 23, 2014, Mr. Perrault emailed that it had been considered at the Direct Reports meeting and it "was determined that there is not sufficient interest to justify sending staff." Commissioner Shoan responded: "that's an interesting conclusion. Interest by whom?" The response was: "Interest on the part of Direct Reports." Commissioner Shoan's response, which was complained of was: "Well, it goes without saying that this opportunity would have little appeal to 50+/60+ year olds. What of the Commission's younger employees? Was there any thought to canvassing their opinion?" The Complainant was copied on this correspondence.

[135] The Report outlines the evidence of the Complainant:

> The complainant found this email insulting and disrespectful and understood it to be directly aimed at her as well as the other sector heads and the Chairperson. Two of the complainant's employees were copied on his email, including her Executive Assistant who was traumatized by it and by the obvious escalation of the respondent's inappropriate and aggressive emails to the complainant.

> The complainant discussed this email with the Chairperson and Human Resources and they decided that it had gone beyond anything that was appropriate for her to handle. It is the complainant's understanding that the chairperson wrote to the respondent about the nature of his email.

[136] When he was interviewed, Commissioner Shoan explained that the Direct Reports are older employees and that Google's demographic for YouTube was that "only 2.9% of all YouTube users are over the age of 50, hence, his response to the complainant."

[137] The Investigator finds this response to be an "afterthought" and says that Commissioner Shoan, knowing the age group of the Direct Reports, knew or ought to have known that his remark would be insulting to the Complainant (and other members of the Direct Reports).

[138] First, this appears to be a credibility finding regarding Commissioner Shoan's explanation, despite the Investigator stating that she made none. Second, it is beyond my comprehension how anyone reading this email would be "traumatized" by it and yet the Investigator never questions the employee nor does she question the evidence of the Complainant. Again, she accepts the Complainant's evidence whole cloth without any critical examination.

[139] The Investigator's conclusion recites that "Mr. Perraualt found this email terribly insulting and atrocious" [emphasis added], yet her summary of his evidence recites only that he finds the email "overly insulting" and "offensive." This unnecessary embellishment of his evidence again suggests closed-mindedness on the part of the Investigator.

[140] In any event, as someone in the 50+/60+ age group, I fail to understand how anyone in my age group could take offence to the email when it is read in context and as a complete thought. It reads:

> Well, it goes without saying that this opportunity would have little appeal to 50+/60+ year olds. What of the Commission's younger employees? Was there any thought to canvassing their opinion?

[141] In my view, there is only one reasonable interpretation of this statement; namely, there are some things that appeal differently to different age groups and the project at hand would be unlikely to appeal to those making the decision, given their ages but might well appeal to younger staff. I would have thought that those at the CRTC and the Investigator would appreciate that people of differing ages have differing interests. Broadcasters and others direct their programs to different age groups and it is not discriminatory to observe for example that most older adults are not interested in Saturday morning cartoons or Sesame Street and most younger persons are not interested in Dancing with the Stars or Coronation Street.

[142] I further find the Investigator's remark that Commissioner Shoan's statement "may also be discriminatory under the *Canadian Human Rights Act*" to be without merit, baseless, and speculative. It falls outside the Complaint and unnecessarily paints Commissioner Shoan in a poor light and as such is evidence that the Investigator had a closed-mind.

4. Reasonableness of the Findings and Corrective Measures

[143] Based on the denial of procedural fairness and natural justice, the application must be allowed. As such, it is not necessary to engage in a detailed discussion on the reasonableness issue.

[144] I have set out above some aspects of the Report's conclusions that I find unreasonable. This should not be interpreted as a finding that there were no issues with any of Commissioner Shoan's emails. He has a tendency to use direct and often confrontational language. His detailed analysis of the Complainant's emails on occasion and his copying other Commissioners would not likely be well received by anyone; however, it is not for this Court to determine whether they constitute harassment of the Complainant.

[145] The culminating email message to Ms. Cliff that he was of the view that he had grounds to file a complaint with the Office of the Commissioner for Public Service Integrity concerning her and ending with "Govern yourself accordingly" would reasonably be viewed as a threat. Indeed the ending phrase was commonly used by lawyers more than 30 years ago (but has thankfully fallen out of use), and was intended as just that.

[146] It is not for the Court to speculate as to what the result would have been had the Investigator done what she said and just focused on the words used in the impugned emails and kept an open mind. Similarly, given the Chairman's views of Commissioner Shoan as he expressed them to the Investigator, his involvement in the final decision is procedurally unfair. The failure of procedural fairness by the Investigator and the Chairman make the entire Report and the corrective measures suspect and unreliable.

Confidentiality

[147] Early in this application, the respondent sought a confidentiality order pursuant to Rules 151 and 152 of the *Federal Courts Rules*. The Court ultimately issued a Confidentiality Order on August 11, 2015, on consent. The Order applied only to materials filed and not to the hearing of this application. The Confidentiality Order redacted the names, titles, and gender identifiers of individuals referenced in the Report.

[148] Upon full review of the unredacted materials filed, I was satisfied that the materials should not be treated as confidential.

[149] The Court appreciates that the CRTC Guidelines stress the need for confidentiality when dealing with harassment complaints; however, even it recognizes that confidentiality is subject to the provisions of the *Privacy Act* and the *Access to Information Act*. Had the matter stayed internal to the CRTC, it was the master of its own process. When the decision became subject to review, the Court controls its own process and the public interest in an open and accessible court must be the prime consideration. There will undoubtedly be instances where the need for confidentiality supersedes that interest. An allegation of sexual misconduct is one likely exception. I see nothing in the matter before me that suggests that the identities of the Complainant, the alleged harasser, or witnesses justifies such an Order. I indicated at the hearing that the Confidentiality Order was rescinded, and the hearing proceeded on that basis.

[150] I would add that the attendance in the courtroom of representatives of the press illustrates the public interest in the application and the Court hearing and process.

Remedy

[151] Where the process leading to a decision being made has been found to have been done in a manner that breaches natural justice and procedural fairness, the decision must be set aside. Where a decision is set aside, the Court may refer the issue back to be decided by another person in a proper manner. In this case, I see no value in making such an order as the Court is aware that Commissioner Shoan had his appointment rescinded by the GIC a few days after this application was heard.

[152] Commissioner Shoan is entitled to his costs. Written submissions were received following the hearing from each party. The respondent sought costs of $7,140.00 plus its disbursements in accordance with the Column III of Tariff B. Subsequently, the respondent noted that it had included in error some pre-hearing motions where costs had already been determined. Commissioner Shoan sought costs on a solicitor-client basis, alternatively on a partial indemnity basis, and in the final alternative he sought $24,933.08 representing recovery based on the mid-point of column IV of Tariff B.

[153] The Court notes and accepts the respondent's submission that some of the items included in the Applicant's Bill of Costs have been previously determined, namely two pre-hearing motions.

[154] The Court does not find there to be any extraordinary circumstances that would warrant costs payable on a solicitor client basis. The hearing judge has discretion when determining awards of costs. In my view, given the complexity of the matters at issue, the volume of material

to be reviewed and the importance of the application to both parties, it is appropriate that the applicant be awarded costs, inclusive of disbursements, fixed at $30,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the Confidentiality Order dated August 11, 2015, is rescinded; the application is allowed, the Report into the Complaint of harassment against the applicant and the decision of the Chairman of the CRTC imposing corrective measures on him are set aside, and the applicant is awarded costs, inclusive of disbursements and taxes fixed at $30,000.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-668-15
STYLE OF CAUSE:	BALRAJ SHOAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 21, 2016
JUDGMENT AND REASONS:	ZINN J.
DATED:	SEPTEMBER 2, 2016

APPEARANCES:

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