Federal Court  Cour fédérale

Date: 20170428

Docket: T-1053-16

Citation: 2017 FC 426

Ottawa, Ontario, April 28, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

BALRAJ SHOAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

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[1] This is an application for judicial review of the decision of the Governor-in-Council ("GIC") dated June 23, 2016, terminating the appointment of the Applicant, Balraj Shoan, as a Commissioner of the Canadian Radio-television and Telecommunications Commission ("CRTC"), for cause, by way of Order-in-Council PC 2016-651 ("decision"). This application is brought pursuant to ss 18, 18.1 and 18.2 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] On July 3, 2013 the Applicant was, pursuant to s 3(1) of the *Canadian Radio-television and Telecommunications Commission Act*, RSC 1985, c C-22 ("*CRTC Act*"), appointed as a Commissioner of the CRTC by Order-in-Council of the GIC, PC 2013-080 as amended by PC 2013-0838. His appointment was to hold office during good behaviour for a five year term.

[3] The Applicant's relationship with the CRTC was a difficult one, as demonstrated by the record before me. In September 2014 a complaint of harassment was laid against the Applicant by the CRTC's Executive Director, Communications and External Relations. Pursuant to the CRTC Guidelines on Formal Harassment Conflict Resolution Mechanisms, the Secretary General of the CRTC was responsible for dealing with the complaint and, ultimately, referred the complaint to a third party for an investigation, Laurin & Associates ("Harassment Investigator").

The Harassment Investigator prepared a report which concluded that the complaint had merit ("Harassment Report"). The Secretary General recommended that the Chairperson of the CRTC accept the Harassment Report and implement the measures it recommended. By letter of April 7, 2015 the Chairperson did so. On April 28, 2015, the Applicant filed an application for judicial review of that decision with this Court.

[4] On October 22, 2015 the Applicant also brought an application for judicial review in the Federal Court of Appeal challenging three decisions of the Chairperson of the CRTC alleging that the Chairperson did not have the authority to establish panels of CRTC Commissioners to hear matters before it.

[5] Various other concerns arose such as the use of social media by the Applicant in a way that the Minister of Canadian Heritage and Official Languages ("Minister") viewed as highly critical of the CRTC, as she advised the Applicant by letter of May 1, 2015.

[6] This culminated with a letter from the Minister dated February 26, 2016 ("Minister's Letter"). The letter advised the Applicant that the Minister was writing to express her concerns about the Applicant's capacity to serve as a Commissioner of the CRTC as matters had been brought to her attention that suggested that the Applicant had not carried out his duties ethically and responsibly and that his conduct had impaired the capacity of the CRTC to carry out its functions and the confidence of the public and stakeholders in its capacity to do so. The Minister stated that she was writing to share her concerns, to inform the Applicant of the information upon which her concerns were based, and to allow the Applicant an opportunity to provide the

Minister with any submissions the Applicant believed should be considered by the Minister before she took any further action. The Minister stated that the Applicant should know that she was considering whether to recommend to the GIC that the Applicant's appointment as a Commissioner be terminated. The letter went on to specify four categories of concern and attached a seven page document entitled "Expected Standard of Conduct & Summary of Concerns" ("Summary") which appended and referenced approximately 1200 pages of documentation. The Minister asked that the Applicant provide, by March 14, 2016, any written representations that he believed should be taken into account before a decision was made regarding his continued role as a Commissioner of the CRTC and that any such submission would be carefully considered before the Minister decided whether or not to make any recommendation to the GIC.

[7] On March 14, 2016 the Applicant, through his counsel, submitted his response in which he addressed the Minister's concerns ("Applicant's Response" or "Response").

[8] Ultimately, the Minister recommended that the Applicant's appointment be terminated and, as noted above, the GIC terminated his appointment by Order-in-Council dated June 23, 2016.

[9] Subsequently, on September 2, 2016 Justice Zinn of this Court concluded that the investigation of the Harassment Investigator had exceeded the scope of its mandate and had been conducted with a closed mind (*Shoan v Canada (Attorney General)*, 2016 FC 1003). In the result, as the process leading to the decision of the Chairperson had been conducted in a manner

that denied the Applicant procedural fairness and natural justice, the application for judicial review was granted and the Chairperson's decision to accept the Harassment Report and effect the measures it had recommended was set aside. However, Justice Zinn declined to order that the matter be referred back to be re-determined by another person as such an order would have no value given that the GIC had rescinded the Applicant's appointment. The Applicant was awarded his costs.

[10] On September 9, 2016 Justice Mactavish declined to grant a motion brought by the Applicant seeking to stay the decision of the GIC, and to reinstate him in his position as a Commissioner of the CRTC, pending determination of his application for judicial review of the GIC's decision to terminate his appointment (*Shoan v Canada (Attorney General)*, 2016 FC 1031).

[11] On October 24, 2016 the Federal Court of Appeal in an oral judgment dismissed the Applicant's application for judicial review of the challenged three decisions of the Chairperson of the CRTC. The Federal Court of Appeal held that the Chairperson was fully authorized to establish the panels at issue. Subsection 6(2) of the *CRTC Act* stated that the Chairperson was the chief executive officer of the CRTC, had supervision over and direction of the work and staff of the CRTC and would preside at CRTC meetings. Implicit in such power was the authority to assign cases and members to cases as explicitly recognized in the by-laws of the CRTC. The Federal Court of Appeal found that the application was sufficiently lacking in merit to warrant an increased award of costs against the Applicant (*Shoan v Canada (Attorney General)*, 2016 FCA 261 ("*Shoan FCA*")).

Decision Under Review

[12] The GIC's decision to terminate the Applicant's appointment as a Commissioner of the CRTC states as follows:

> Whereas by Order in Council P.C. 2013-809 of June 13, 2013 as amended by Order in Council P.C. 2013-838 of June 21, 2013, Raj Shoan was appointed as a full-time member of the Canadian Radio-television and Telecommunications Commission (CRTC) for the Ontario region, to hold office during good behaviour for a term of five years, effective July 3, 2013;
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> Whereas on February 26, 2016, the Minister of Canadian Heritage wrote to Raj Shoan informing him that certain of his actions brought to her attention called into question his capacity to continue serving as a Commissioner of the CRTC, providing him with information regarding these concerns including the documentation upon which they were based, and inviting him to make any representations that he wished to have taken into account before any decision was made on whether to terminate his appointment for cause;
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> Whereas the Governor in Council has carefully considered the February 26, 2016 correspondence sent by the Minister, as well as the material communicated to Raj Shoan with that correspondence, and the submissions made by Raj Shoan on March 14, 2016, as well as the material enclosed with that submission;
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> And whereas the Governor in Council has concluded that Raj Shoan's actions are fundamentally incompatible with his position and that he no longer enjoys the confidence of the Governor in Council to be a Commissioner of the CRTC;
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> Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister for the purposes of the *Canadian Radio-television and Telecommunications Commission Act*, pursuant to subsection 3(2) of the *Canadian Radio-television and Telecommunications Commission Act*, terminates for cause the appointment of Raj Shoan as a full-time member of the CRTC for the Ontario Region, effective June 24, 2016.

Issues

[13] The parties submit and I agree that this application for judicial review raises the following four issues:

1. What is the appropriate standard of review?
2. Did the GIC violate the duty of procedural fairness owed to the Applicant?
3. Was the GIC's decision to terminate the Applicant's appointment unreasonable?
4. What is the appropriate remedy?

[14] In addition, there is a preliminary issue to be addressed. This arises from a motion filed by the Respondent on January 20, 2017 seeking to have certain paragraphs of and exhibits to the Affidavit of the Applicant, sworn on July 4, 2016 and filed in support of this application for judicial review ("Shoan Affidavit") struck out together with certain related paragraphs of the Applicant's Memorandum of Fact and Law. I heard that motion immediately prior to and on the same date of this application for judicial review.

Preliminary Issue: Should portions of the Applicant's affidavit be struck out?

Respondent's Position

[15] As to the timing of the motion, the Respondent submits that applications for judicial review are intended to proceed as expeditious and summary proceedings. Therefore, motions to strike out affidavit evidence are expected to be brought before the judge hearing the application on its merits, to avoid unnecessary delay, rather than earlier in the proceedings by way of an interlocutory motion (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18

("*Quadrini*"); *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 11 ("*Assn of Universities and Colleges*")).

[16] The Respondent submits that it objects to the admissibility of portions of the Shoan Affidavit on three grounds: i) it contains inadmissible opinion and argument; ii) it contains the Applicant's gloss and explanation of the material that was before the GIC when it rendered its decision; and, iii) it contains evidence that was not before the GIC when it made its decision.

[17] Evidence for use in an application for judicial review is restricted to the record that was before the decision-maker, in this case the GIC, because of the differing roles of the decision-maker and the Court. While there is an exception to this general rule with respect to the admissibility of evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that was not before the decision-maker, this is only the case if the evidence could not have been put before the decision-maker. Further, an affidavit for use in an application for judicial review must be confined to the facts within the affiant's personal knowledge. Opinion, argument or legal conclusions are not facts and are not admissible. Facts must be presented without gloss or explanation. Commenting on the evidence in the record before the decision-maker in order to provide the reviewing court with the affiant's assessment of the evidence is inadmissible argument (*Federal Courts Rules*, SOR/98-106, s 81(1) ("Rules"); *Quadrini* at para 18; *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at para 2 ("*Duyvenbode*"); *Canadian Tire Corporation v Canadian Bicycle Manufacturers Association*, 2006 FCA 56 at paras 11-12 ("*Canadian Tire Corp*")).

[18] And, while an affidavit may contain non-argumentative orienting statements, such evidence is admissible only for the narrow purpose of providing background information for the reviewing court and may not engage in spin or advocacy (*Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45 ("*Delios*")). The Respondent then identified each of the paragraphs in the Shoan Affidavit that it objected to as inadmissible and explained the basis for each objection. It also identified the corresponding inadmissible portions of the Applicant's written submissions.

Applicant's Position

[19] The Applicant acknowledges that as a general rule the evidentiary record before the reviewing court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker, the GIC in this case. However, the Applicant submits that there are recognized exceptions to this rule (*Assn of Universities and Colleges*). Further, that motions to strike on the issue of relevance should not be routinely brought, but rather only where the evidence is obviously irrelevant, is prejudicial and goes to a controversial issue (*Mayne Pharma (Canada) Inc v Aventis Pharma Inc*, 2005 FCA 50 ("*Mayne*")). The Applicant submits that to strike irrelevant allegations, the Court must find the allegations to be abusive or it must be convinced that its admissibility would be better resolved at an earlier stage than at the hearing of the application (*Quadrini* at para 18). The discretion to strike portions of an affidavit should be exercised sparingly and only when it would be in the interests of justice to do so (*Armstrong v Canada (Attorney General)*, [2005] FCJ No 1270 (FC) at para 40).

[20] The Applicant submits that the motion to strike could have been brought at an earlier stage, rather than five months after confirmation that the Shoan Affidavit would be relied upon and two months after the Applicant's Memorandum of Fact and Law was served. It would be unjust to permit the motion at this stage in the proceedings.

[21] The Applicant also submits that the impugned portions of the Shoan Affidavit contain important background information about the main issues of the judicial review which is necessary to a contextual evaluation of the reasonableness of the GIC's decision. Further, that they are relevant as they relate to issues concerning the procedural fairness and reasonableness of the GIC's decision. In particular, that the Minister had a closed mind, was dismissive of the Applicant's explanations of events as well as issues he raised as to the conduct of others. The Applicant submits that the Respondent has not established that the impugned affidavit evidence is irrelevant, prejudicial or controversial. Additionally, in principle, s 221 of the Rules does not apply in the context of an application for judicial review in order to strike out a pleading and it is only if it is deemed necessary that a judge may strike out parts of a memorandum of fact and law, which has not been established. The Respondent also responds to each of the impugned paragraphs.

Analysis

[22] As to the timing of the motion to strike portions of the Shoan Affidavit, I do not agree with the Applicant that the motion should have been brought earlier or that it would be unjust to permit the motion at this stage.

[23] In *Assn of Universities and Colleges* the applicant submitted that the issue of the admissibility of an affidavit should be determined by the panel hearing the application and not by way of advance ruling. Justice Stratas of the Federal Court of Appeal stated:

> [11] Whether the Court should provide an advance ruling is a matter of discretion. This discretion is constrained by the instruction in subsection 18.4(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, that applications for judicial review be "heard and determined without delay and in a summary way." **As a result, the Court will only exercise its discretion to provide an advance admissibility ruling where it is clearly warranted. Those embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive.**
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> [emphasis added]

(Also see *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 9-11 ("*Bernard*") and *Mayne* at para 16).

[24] In this matter the Applicant did not oppose the Respondent's request that the motion to strike portions of the Shoan Affidavit be set down to be heard on the same date as the hearing of the application for judicial review. And, when appearing before me, the Applicant did not seek to have the motion dealt with and the application for judicial review then adjourned until a decision on the motion had been rendered. Accordingly, as neither party sought an advance ruling there is, in my view, no issue arising from the timing of the motion which would, in the normal course, be heard by the applications judge (*Mayne* at para 16). Indeed, prior to the hearing of the Applicant's application for judicial review challenging the authority of the Chairperson to appoint panels, the Federal Court of Appeal refused a motion brought by the Respondent seeking to strike portions of the supporting affidavit of the Applicant, in part, on the

basis that the Minister had attempted to seek an advance ruling (*Shoan v Canada (Attorney General)*, February 18, 2016, Docket A-464-15 (FCA)).

[25] I would also note that the Applicant has not indicated why it would be unjust or prejudicial to permit the motion at this stage nor is a potential injustice apparent to me. In my view, it was appropriate for the Respondent, in the context of this application for judicial review, to have brought the motion at a time when it could be decided by the judge presiding over the hearing itself.

[26] As to the content of the Shoan Affidavit, in *Assn of Universities and Colleges* Justice Stratas of the Federal Court of Appeal pointed out that in determining the admissibility of an affidavit in support of an application for judicial review the differing roles played by the Court and the administrative decision-maker must be kept in mind. Parliament gave the administrative decision-maker, and not the Court, jurisdiction to determine certain matters on their merits. Because of this demarcation of roles, the Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before a reviewing Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible. Justice Stratas listed three such exceptions and noted that the list may not be closed. The exceptions are an affidavit that provides: general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review; brings to the attention of the judicial review Court procedural defects that cannot be found in the evidentiary record of the

administrative decision-maker, so that the judicial review Court can fulfil its role of reviewing for procedural unfairness; and, highlighting the complete absence of evidence before the administrative decision-maker when it made a particular finding (at paras 19-20).

[27] Justice Statas revisited the general rule in *Bernard*, referencing the Federal Court of Appeal's prior decisions in *Assn of Universities and Colleges*, *Connolly v Canada (Attorney General)*, 2014 FCA 294 and *Delios*, and elaborated on the three recognized exceptions:

> [23] The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker. In no way is the reviewing court encouraged to invade the administrative decision-maker's role as merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.
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> [24] The second recognized exception is really just a particular species of the first. Sometimes a party will file an affidavit disclosing the complete absence of evidence on a certain subject-matter. In other words, the affidavit tells the reviewing court not what is in the record-which is the first exception-but rather what cannot be found in the record: see *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.) and *Access Copyright*, above at paragraph 20. This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence at all. This too is entirely consistent with the rationale behind the general rule and administrative law values more generally, for the reasons discussed in the preceding paragraph.

[25] The third recognized exception concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider: see *Keeprite* and *Access Copyright*, both above; see also *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (improper purpose); St. John's Transportation Commission v. Amalgamated Transit Union, Local 1662 (1998), 161 Nfld. & P.E.I.R. 199 (fraud). To illustrate this exception, suppose that after an administrative decision was made and the decision-maker has become *functus* a party discovers that the decision was prompted by a bribe. Also suppose that the party introduces into its notice of application the ground of the failure of natural justice resulting from the bribe. The evidence of the bribe is admissible by way of an affidavit filed with the reviewing court.

[26] I note parenthetically that if the evidence of natural justice, procedural fairness, improper purpose or fraud were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review: *Zündel v. Canada (Human Rights Commission)*, (2000), 195 D.L.R. (4th) 399; 264 N.R. 174; In *re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.).

[27] The third recognized exception is entirely consistent with the rationale behind the general rule and administrative law values more generally. The evidence in issue could not have been raised before the merits-decider and so in no way does it interfere with the role of the administrative decision-maker as merits-decider. It also facilitates this court's ability to review the administrative decision-maker on a permissible ground of review (*i.e.*, this Court's task of applying rule of law standards).

[28] The list of exceptions is not closed. In some cases, reviewing courts have received affidavit evidence that facilitates their reviewing task and does not invade the administrative decision-maker's role as fact-finder and merits-decider: *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24. For example, in one case the applicant wished to submit that the administrative decision-maker's decision was unreasonable because it wrongly construed

> certain submissions made by counsel as admissions. But counsel's submissions to the administrative decision-maker were not in the record filed with reviewing court. The reviewing court admitted evidence of counsel's submissions so that it could assess whether the decision was unreasonable: *Ontario Shores Centre for Mental Health v. O.P.S.E.U.*, 2011 ONSC 358. In another case, a reviewing court admitted a partial transcript of proceedings before an administrative decision-maker. The transcript was prepared by one of the parties, not by the administrative decision-maker. In the circumstances, the reviewing court was satisfied that the partial transcript was reliable, did not work unfairness or prejudice, and was necessary to allow it to review the administrative decision: *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, 336 D.L.R. (4th) 577.

[28] In *Delios*, Justice Stratas stated, with respect to the general background exception:

> [44] Under this exception, a party can file an affidavit providing "general background in circumstances where that information might assist [the review court to understand] the issues relevant to the judicial review": *Access Copyright*, above at paragraph 20(a).
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> [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy - that is the role of the memorandum of fact and law - it is admissible as an exception to the general rule.
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> [46] But "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20(a).

[29] Justice Stratas went on to state that, even though the Court below in that matter had considered evidence in an affidavit to be familiar to the parties, accurate, disclosed in a timely way and not prejudicial, that this did not make the evidence admissible (at para 51). The test for admissibility of background information exception is as set out in paragraphs 44 to 46 of his reasons.

[30] The Federal Court of Appeal has also held that an affidavit must be premised upon personal knowledge and that its purpose is to adduce facts relevant to the dispute without gloss or explanation. The purpose of an affidavit is not to be confused with the written submissions a party is entitled to make in support of their application (*Duyvenbode* at paras 2-3). Affidavits must be free from argumentative materials and the deponent must not interpret evidence previously considered by a tribunal or draw negative conclusions (*Canadian Tire Corp* at paras 9-10; also see *Quadrini* at para 18).

[31] In Appendix A of these reasons I have set out the specifics of the challenged paragraphs, portions of paragraphs and the exhibits of the Shoan Affidavit which, having regard to the principles above, I have concluded must be struck out and the reasons for this.

[32] It is sufficient to say here that the 82 paragraph Shoan Affidavit is not typical of an affidavit submitted in support of an application for judicial review in order to provide the factual backdrop of events occurring prior to the hearing of the application or useful background information to assist the Court in its understanding of the matter. Such affidavits could, for example, provide a non-controversial description of a complicated regulatory regime in order to

position the matter before the Court within that regime and to assist the Court's understanding of its application. The Shoan Affidavit, while containing some relevant background facts, is much closer in form to a memorandum of argument. Many of the paragraphs contain opinion and argument, the contents of which go far beyond factual background information. Some of the impugned paragraphs also contain information that was not before the decision-maker, the GIC, and are not admissible on that basis.

Issue 1: What is the appropriate standard of review?

[33] The Applicant submits that questions of procedural fairness are not subject to a standard of review analysis and deference. Rather, the Court is to determine the level of fairness required and then, based on that, determine whether a procedure was fair or not (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74; *Canada (Citizenship and Immigration) v Grandmont*, 2009 FC 1211 at para 13; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at paras 102-103; *Jogiat v Canada (Citizenship and Immigration)*, 2009 FC 815 at para 36). The Applicant submits that the standard of review that applies to the GIC's finding of cause for dismissal in light of the good behaviour standard is that of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*"); *Wedge v Canada (Attorney General)*, [1997] FCJ No 872 (FCTD) ("*Wedge*")).

[34] The Respondent submits that the standard of review on questions of procedural fairness is correctness and adds that the nature and extent of the duty of procedural fairness is eminently variable and its content is to be decided in the specific context of each case (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21 ("*Baker*"); *Re Sound v*

Fitness Industry Council of Canada, 2014 FCA 48 at para 42 ("*Re Sound*")). The Respondent agrees that the reasonableness standard applies to the substantive review of the GIC's decision. In that regard, the question to be addressed is whether the decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and the law. As Parliament has not constrained the GIC's discretion by setting out a precise definition of the requirement that a member of the CRTC hold office during "good behaviour", this points to a broader range of possible, acceptable outcomes at the GIC's disposal in addressing whether the Applicant's appointment should have been terminated for cause (*Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56 at paras 88-91).

[35] I agree with the Respondent that issues of procedural fairness are reviewed on the correctness standard (*Mission Institute v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Re Sound* at paras 34, 35 and 39). The concept of procedural fairness is variable and its content is to be determined in the specific context of each case and considering all of its circumstances (*Baker* at paras 21-22). I also agree with both parties that the standard of review of the GIC's decision to terminate the Applicant for cause is reasonableness. This was a discretionary decision reached by the GIC in exercising a power that is delegated to it by Parliament (*Wedge* at para 29; *Weatherill v Canada (Attorney General)*, [1998] FCJ No 58 (FCTD) at paras 26-28 ("*Weatherill 1998*"); *Dunsmuir* at paras 51 and 53; *Vennat v Canada (Attorney General)*, 2006 FC 1008 at para 80 ("*Vennat*"); also see *Canada (Attorney General) v Pelletier*, 2008 FCA 1 at paras 48 and 55 ("*Pelletier 2008*") and *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15 at para 30 ("*Prophet River*")). A discretionary decision made by the GIC will be afforded a high degree of deference

(*Prophet River First Nation v Canada (Attorney General)*, 2015 FC 1030 at paras 46-48, aff'd in *Prophet River* as above; *Peace Valley Land River Association v Canada (Attorney General)*, 2015 FC 1027 at paras 31 and 68 ("*Peace Valley*")).

Issue 2: Did the GIC violate the duty of procedural fairness owed to the Applicant?

Applicant's Position

[36] The Applicant submits that the process undertaken by the Minister and the GIC's decision to terminate his appointment as Commissioner violated the rules of procedural fairness that apply to protect the independence of good behaviour appointees to quasi-judicial bodies.

[37] The Applicant notes that the rules of natural justice and procedural fairness extend to all administrative bodies acting under statutory authority (*Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14 ("*Cardinal*"); *Baker* at para 20; *Knight v Indian Head School Division No 19 (Saskatchewan Board of Education)*, [1990] 1 SCR 653 at 669 ("*Knight*"); *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1113 ("*Kane*")). The nature and extent of the duty is eminently variable and its content is to be decided in the specific context of each case (*Baker* at para 21). And, procedural fairness is required to ensure that public power is not exercised capriciously regardless of whether the appointment is "at pleasure" or "during good behaviour", although the scope of procedural fairness owed is not identical (*Dunsmuir* at paras 115-116).

[38] The Applicant relies heavily on this Court's decision in *Vennat*, including for the proposition that individuals appointed during good behaviour deserve greater procedural protections than individuals appointed at pleasure (also see *Keen v Canada*, 2009 FC 353 at paras 46-48 ("*Keen*")), the latter having been described as an intrinsically precarious appointment (*Pelletier 2008* at para 33; *Keen* at para 48), that the GIC had an obligation to provide a real opportunity to respond, and that it was the responsibility of the GIC, not the Applicant, to provide sufficient procedural safeguards (*Vennat* at paras 80, 105 and 186). As well, a high degree of good faith is owed to GIC appointees prior to their sanctioning, including a requirement to be honest, reasonable, candid and forthright (*Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras 86-96 ("*Potter*")).

[39] The Applicant submits that the duty of fairness in this case required that he be afforded an individualized inquiry, that the Minister and GIC were required to act fairly and transparently and that he be provided with clear reasons or analysis for the GIC's decision.

[40] In that regard, the Applicant submits that the GIC erred as it failed to engage in an individualized inquiry into the allegations against him. This is an inquiry with some degree of autonomy in researching information that contemplates the person facing removal from office and which must shed light on the specific conduct of the affected individual (*Vennat* at paras 165-166, 169, 178-179). The decisions in *Wedge* and *Weatherill v Canada*, [1999] FCJ No 787 (FCTD) ("*Weatherill 1999*") also support this view as does *Keen* (at paras 54-57). Further, no inquiry was held under s 69 of the *Judges Act*, RSC 1985, c J-1 ("*Judges Act*") in this case.

[41] The Applicant submits that he was provided with only notice that the Minister was considering making a recommendation of termination to the GIC and an opportunity to make only initial submissions. No further dialogue or independent inquiry was engaged and he was not provided with adequate information about the exact grounds upon which it was believed that he lacked good behaviour. Further, that many of the concerns raised were "stale dated" as they referred to alleged events that pre-dated the current Minister's appointment and were deemed by the previous Minister to be insufficient to warrant any action.

[42] The Applicant also takes issue with the timing of the GIC's decision. Specifically, that a meaningful inquiry was not possible until the related judicial reviews were concluded. Although he had requested that the Minister's process not proceed until those matters were concluded, his request in this regard, as well as his request for procedural safeguards, were ignored. The Applicant submits that the judicial review pertaining to the harassment complaint was at the core of the GIC's decision and the Chairperson's decision in that regard was quashed shortly after the GIC rendered its decision. Further, the GIC's decision was a collateral attack on the judicial review proceeding before Justice Zinn. The GIC's hasty decision operated as a *de facto* extension of the "witch hunt" conducted against him.

[43] With respect to transparency and fair play, the Applicant submits that the Minister and GIC were required to meet a high standard of justice and to observe transparency and fair play but failed to do so (*Vennat* at para 221). In that regard, his requests for safeguards and to meet with the Minister were ignored, he was provided with merely a summary of the allegations against him and no indication as to the extent, or whether his response was considered and he

was not provided with any clear reasons as to the basis of the GIC's decision to terminate his appointment for cause. The Order-in-Council referred only to conduct fundamentally incompatible with his position, a standard not defined in the *CRTC Act* or any applicable legislation. As such, the Applicant is left without any real understanding as to the basis for his termination.

Respondent's Position

[44] The Respondent submits that the process undertaken by the GIC satisfied the duty of fairness that was owed to the Applicant.

[45] As to the content of the duty of procedural fairness owed, the Respondent submits that the Applicant, as a GIC appointee, was entitled to notice and an opportunity to be heard (*Wedge* at para 22; *Canada (Attorney General) v Pelletier*, 2007 FCA 6 at para 49 ("*Pelletier 2007*"); *Pelletier v Canada (Attorney General)*, 2005 FC 1545 at para 87, aff'd in *Pelletier 2007* as above ("*Pelletier 2005*"); *Pelletier 2008* at para 43; *Keen* at para 57). In reviewing the process followed by the GIC in past termination cases, this Court has recognized that the GIC has significant leeway in determining what means will achieve the procedural fairness objective (*Vennat* at para 148) and is not required to follow complex, costly procedures that are incompatible with its nature (*Pelletier 2005* at para 86). Termination cases are not adjudicative processes to which full, formal, court-like procedures apply (*Wedge* at para 24). The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations (*Baker* at para 33; *Pelletier 2007* at para 36) which must be kept in mind when reviewing prior jurisprudence concerning the termination of GIC appointees.

[46] As to the right to notice, the Minister advised the Applicant in writing that his office was in jeopardy and the reasons why this was so. The Applicant was given notice of the specific allegations of misconduct asserted against him and was provided a summary of the Minister's concerns, organized into four categories and referring to specific incidents within each category, as well as supporting documentation. There was no real factual dispute as to what happened and the material provided was all material of which the Applicant was aware. The information and documentation provided the Applicant with notice of the case that he had to meet.

[47] The Respondent submits that the Applicant was also given a meaningful opportunity to respond and be heard. He was represented by legal counsel and provided his comprehensive response in writing. He had the opportunity to, and did respond by putting forward his version of events, pointing out what he felt were inadequacies or deficiencies in the evidence and submitting his own evidence to correct or supplement the record, giving explanations for his actions and making submissions as to how the decision-maker should interpret his conduct. The Applicant accepted the process that the Minister set out in her letter and his counsel made no complaint that he was being deprived of a meaningful opportunity to be heard. He did not assert that he was not given sufficient time to respond nor did he ask for more time. He did not assert that he could not adequately respond without having additional disclosure and at no point did he advise the Minister that he wanted to make additional submissions or that his response was incomplete.

[48] The Minister followed the process that she set out in her letter and was transparent in that regard. The GIC provided the Applicant with a fair hearing as it considered those allegations

which were disclosed to him and to which he was given an opportunity to respond. There is also no basis for the Applicant's suggestion that he was provided with merely a summary of allegations nor that there was no indication as to what extent, or whether, his response was considered. The GIC stated in the Order-in-Council that it carefully considered his evidence and submissions before coming to a decision and the validity of such a recital is not open to question (*Keen* at para 55; also see *Peace Valley* at para 63).

[49] The Respondent also submits that procedural fairness did not require face-to-face meetings between the Minister and the Applicant. Unlike *Weatherill 1999*, where several meetings were necessary in order for Mr. Weatherill to seek disclosure of additional documents and information and so that he could understand the allegations against him and adequately reply, in this matter the Minister took the approach of first collecting the supporting documentation available to her and articulating her concerns in an organized way before commencing the proceedings, thereby negating the need for multiple back-and-forth communications. Here, the Applicant has also not shown that this is a complex case where an oral hearing would be necessary to ensure that he had a meaningful opportunity to be heard. This was not a case where the decision-maker could not fully appreciate the facts or the Applicant's responding written submissions without oral submissions and, as such, it was reasonable for the Minister to exercise her discretion not to meet with the Applicant. *Vennat* is distinguishable on the basis that it involved an extraordinarily complex dispute.

[50] The Respondent submits that *Vennat* is also distinguishable in other respects. There the unfairness in the process stemmed from the fact that the GIC had relied on the findings of a

process that was not personal to Mr. Vennat. Specifically, the GIC had relied on findings of a process in which Mr. Vennat's conduct was not the focus, being a civil proceeding in which he was merely a witness. As such, he had no right to call evidence in response, to make legal submissions or to appeal. The process in this case was personalized to the Applicant. The concerns set out in the Minister's Letter were about the Applicant's conduct, the articulation of those concerns and the supporting documentation were prepared specifically for a process aimed at deciding whether he should be removed from office and was not collateral to some other process. Nor was the timing or length of the decision-making process unfair.

[51] The Respondent also submits that there is no merit to the Applicant's position that any of the Minister's allegations were stale-dated or that the GIC made a hasty decision. The Minister explained in her letter that the concerns were cumulative. While the incidents of misconduct began during the tenure of the prior Minister, they continued until the recurring inappropriate behaviour caused the new Minister to commence the process to determine if the Applicant should be removed from office. Further, although the earlier incidents of misconduct did not cause the previous Minister to recommend removal, in her correspondence she warned that all information related to this matter remained under active consideration. Nor was it inappropriate for the GIC to act while the judicial review proceedings initiated by the Applicant were ongoing. In *Weatherill 1998*, the Court declined to grant an injunction prohibiting the GIC from acting to remove the applicant from office and exercising its statutory and prerogative powers (at paras 26-28). Further, there is no basis for any insinuation of malice concerning the timing of the GIC's decision. There is no evidence that the decision was made in order to thwart or prejudice the application before Justice Zinn.

Analysis

(1) Content of the duty of fairness

[52] The CRTC is established pursuant to the *CRTC Act* and consists of not more than thirteen members, to be appointed by the GIC. Subsection 3(2) states that a member shall be appointed to hold office during good behaviour for a term not exceeding five years but may be removed at any time by the GIC for cause. The *CRTC Act* does not define either "good behaviour" or "cause", nor does it prescribe a process to be undertaken in the event that removal for cause is being considered.

[53] The parties agree that a duty of procedural fairness applies to the GIC's decision (*Cardinal* at para 14; *Baker* at para 20). They also agree that the concept of procedural fairness is variable and that its content is to be decided in the specific context of each case and that all of the circumstances of the case must be considered in determining the content of the duty owed (*Baker* at para 21). In that regard, the Supreme Court of Canada in *Baker* stated:

> 22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[54] The question, therefore, is first what is the content of the duty of fairness imposed on the GIC in this circumstance and, second, whether that duty was met by affording the Applicant the applicable procedural protections or safeguards (*Pelletier 2005* at para 39).

[55] *Baker* identified several factors that are relevant in determining what is required by the duty of fairness in a given set of circumstances. One of these is the nature of the decision being made and the process followed in making it. The closer the administrative process is to the judicial process, the greater the procedural protections required (at para 23). In this case, the process adopted by the Minister and the GIC did not resemble a judicial process, thus, this factor does not point to a high level of procedural fairness (*Vennat* at paras 77-78, 127-132 and 146; *Wedge* at para 24; *Pelletier 2008* at para 59).

[56] The next factor is the nature and terms of the statutory scheme (*Baker* at para 24). Here there is little within the *CRTC Act* to assist in this analysis, other than s 3(2)). I note, however, that there is no right of appeal, although the Applicant does have the ability to seek judicial review of the GIC's decision.

[57] A third factor is the importance of the decision to the individual affected. The Supreme Court of Canada in *Baker* held that the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated (at para 25). In this case, the GIC's decision removes the Applicant from his appointed office as a Commissioner of the CRTC and it is reasonable to assume that this could have a negative consequence on his future career. As such,

this factor weighs in favour of greater procedural protections, requiring "a high standard of justice" (*Baker* at para 25; referencing *Kane* at p 1113; *Vennat* at paras 119-124) and is a significant factor affecting the content of the duty of fairness in the present case.

[58] The Supreme Court of Canada in *Baker* next discussed the legitimate expectations of the person challenging the decision, however, this factor is not in play in the matter before me. Finally, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself (*Baker* at para 27). This is particularly so where the statute leaves to the decision-maker the ability to choose its own procedures or where the agency has an expertise in determining what processes are appropriate in the circumstances. In this matter, the *CRTC Act* is silent as to procedure and the Minister and GIC chose the process they deemed appropriate. This would not point to a high level of procedural fairness.

[59] While the *Baker* factors provide important guidance, they are not particularly instructive in the circumstances of this matter, overall suggesting a lower level of procedural fairness. However, the Supreme Court of Canada also concluded, more generally, that:

> 28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[60] Removal of a GIC appointee is rather a rare event. In my view, it is appropriate and helpful to also review the four prior relevant removal decisions for the purpose of ascertaining the previously identified content of the duty of fairness in the circumstances of those matters.

[61] The first of these is *Wedge*, decided by Justice MacKay of this Court in 1997. In *Wedge* the application for judicial review concerned a decision of the GIC to terminate the appointment, during good behaviour, of the applicant as a member of the Veterans Appeal Board ("VAB"). Following allegations of participation in election irregularities, criminal charges were not laid against Mr. Wedge but a complaint was made to the VAB. Subsequently, Mr. Wedge received a letter from the Privy Council Office expressing concern regarding his suitability as a member of the VAB arising from his conduct in connection with the election. The letter advised that the Privy Council Office had requested that a representative of that office and the chairperson of the VAB review his conduct and prepare a report. The letter also enclosed a copy of an earlier report of an investigation completed for the Department of Justice by private investigators. After outlining in detail the allegations giving rise to the concern regarding his suitability to remain in office, the letter advised Mr. Wedge that in order to afford him with an opportunity to provide any further facts or circumstances which should be taken into account or to comment on the accuracy of the facts included in the investigation report, a meeting had been scheduled with those representatives.

[62] At the meeting Mr. Wedge and his counsel raised several concerns, including general objections to the manner in which the investigation was being conducted. The representatives then prepared a report for the Privy Council. A copy was provided to Mr. Wedge who was

invited to respond by written submissions which would be forwarded to the GIC for consideration. Mr. Wedge responded outlining his concerns. His written submissions, the report, the earlier investigation report and related material were forwarded to the GIC for consideration. The GIC subsequently determined that Mr. Wedge's conduct during the election was incompatible with his position as a member of the VAB and terminated his appointment.

[63] Mr. Wedge sought judicial review of that decision. Justice MacKay concluded that there had been no breach of procedural fairness. He found that Mr. Wedge had been informed of the allegations against him and given an opportunity to respond. The essence of the allegations had been set out in the letter of notification and were more fully described in the investigation report and the grounds for the action by the GIC were set out in the final report. Both reports were provided to Mr. Wedge with an opportunity to respond by comment orally at the meeting and, thereafter, in writing in response to the initial report and the final report. Mr. Wedge was thereby able to address any alleged inadequacies and omissions in the final report and to place any concerns before the decision-maker. Justice MacKay held that it was not reasonable to suggest that Mr. Wedge did not have a full and fair opportunity to present his comments to the GIC prior to its decision. As to Mr. Wedge's submission that he was also denied procedural fairness because he was not provided with the opportunity to cross-examine witnesses, Justice MacKay held that while the initial investigation and the review conducted by the representatives may have been significant steps in the process of considering Mr. Wedge's future as a member of the VAB (at para 24):

> …those steps did not constitute an adjudicative process to which the procedures normally associated with a criminal proceeding, such as cross examination, should apply. Accordingly, the applicant was not entitled to cross-examine witnesses interviewed,

> or to a full, formal, court like hearing of the matter. In my opinion, the requirements of procedural fairness were satisfied in this case in that the applicant was apprised of the substance of the allegations against him, and of the investigation report and the final Report about these allegations, and he was accorded a fair opportunity to respond orally once at the June 1994 meeting, and twice thereafter in writing.

[64] As to the standard of good behaviour, Justice MacKay stated that while members of the VAB hold their office during "good behaviour", s 4(4) of the *Veterans Appeal Board Act*, SC 1985 c V-1.2 broadly authorized the GIC to remove a member for "cause", neither of which terms were defined. Rather, this was a discretionary decision reached by the GIC exercising the power delegated to it by Parliament (at para 29). Justice MacKay held that:

> 30 In my view, there is no evidence to suggest that the Governor in Council improperly exercised its discretion in the present case. In order to determine whether a holder of public office meets the standard of good behaviour necessary to remain in office, Cabinet, that is, the Governor in Council, must examine the conduct of that individual to assess whether it is consistent with the measure of integrity the Governor in Council deems necessary to maintain public confidence in federal institutions and the federal appointment process.
>
> 31 In the present case, the decision by Cabinet to remove the applicant from the VAB was based on consideration of the submissions of the applicant and of the Bloodworth-Whalen Report. In light of this evidence, the Governor in Council determined the conduct of the applicant during the 1993 P.E.I. provincial election to be incompatible with the requirement of "good behaviour" upon which his appointment as a member of the VAB was based. There is no basis for the Court to intervene in regard to that decision unless it is clear that the Governor in Council acted upon a wrong principle or perversely, without regard to the evidence before it.
>
> 32 The argument raised by counsel for the applicant, that Cabinet improperly applied a "judicial standard" of "good behaviour" to the applicant's conduct, in my view, is simply not sustainable. The issue to be determined by the Governor in Council was whether the applicant's conduct was consistent with the

> requirement of "good behaviour" pursuant to s.4 of the *Act*. As mentioned earlier, no standard or definition for "good behaviour" or "cause" is provided in the *Act* itself. Instead, the language of s. 4(4) confers upon the Governor in Council a broad discretion to remove a member of the VAB "at any time for cause". Accordingly, in my view, in determining whether "cause" exists, the Governor in Council is entitled to assess whether the conduct of the applicant was consistent with the terms of his appointment to that office, including, in its judgment whether his conduct could undermine public confidence in the federal institution with which he had been appointed to serve.
>
> 33 As an appointed member to a public office involving quasi-judicial functions, the applicant had been placed by the Governor in Council in a position of public trust and confidence. In order to maintain this position, the appointee is required to abide by the requirement of "good behaviour" and is subject to the proviso that, at any time, he or she may be removed by the Governor in Council for cause. In my view, given the position of trust and influence conferred upon appointees to federal office, including the Veterans Appeal Board, and their influence as representatives of that office on the public's perception, it is not for this Court to limit the scope of discretion vested by Parliament in the Governor in Council…

[65] On this basis, Mr. Wedge's application for judicial review was denied and the Order-in-Council terminating his appointment was not quashed.

[66] The second decision in this group is *Weatherill 1999*, decided by Justice Sharlow in 1999, in which she reviewed the decision of the GIC to remove Mr. Weatherill, who had been appointed to hold office during good behaviour, as the chairman of the Canada Labour Relations Board ("CLRB").

[67] There, on the same day as an Auditor General's report reviewing travel expenses and other allowances and benefits reimbursed to the applicant was tabled in Parliament, Mr. Weatherill was advised by letter from the Deputy Clerk of the Privy Council and Counsel

("Deputy Clerk") that the GIC would be considering, in light of the Auditor General's report, whether there was cause for his removal pursuant to s 10(2) of the *Canada Labour Code*, RSC 1985, c L-2. The letter identified specific statements in the Auditor General's report that were of concern and invited Mr. Weatherill to provide any information that he considered relevant or to otherwise comment on the accuracy of the Auditor General's report and offered to meet with the applicant that week.

[68] On December 5, 1997 counsel for Mr. Weatherill met with the Deputy Clerk and advised that Mr. Weatherill had not been given sufficient time to respond to the Auditor General's report and could not adequately respond to her December 2, 1997 letter without having access to the working papers and data collected by the Auditor General in forming its report and sufficient time to analyze them. That same day, counsel for Mr. Weatherill attended a meeting arranged by the Deputy Clerk with officials of the Office of the Auditor General at which time he was given some information orally but the officials wished to further consider his request for documents. By letter of December 9, 1997 Mr. Weatherill made a formal request to the Auditor General for the documents. By letter of the following day the Office of the Auditor General provided the working papers related to his expenses but refused access to other requested documents. On December 11, 1997 the Deputy Clerk wrote to Mr. Weatherill acknowledging that he would need more time to prepare and proposed a meeting on December 17 or 18, 1997. Further, that she would try to obtain some of the requested documents directly from other government agencies, that she had been asked to conclude her report by Christmas and that Mr. Weatherill would be afforded an opportunity to respond in writing to her report.

[69] Various correspondence and telephone conversations were exchanged and held, including a letter from Mr. Weatherill's counsel on December 14, 1997 advising that the process was contrary to s 69 of the *Judges Act* and would not result in a fair and impartial hearing and that he was still not in receipt of information he had required as to the comparisons that were the basis of the Auditor General's report. Ultimately, no further information was provided and there were no further meetings between the Deputy Clerk and Mr. Weatherill or his counsel. The Deputy Clerk delivered a copy of her report to Mr. Weatherill on December 24, 1997, a covering letter advised that any written reply would be submitted to the GIC by January 16, 1998. Mr. Weatherill made no submissions but brought an application for judicial review seeking an order preventing the GIC from considering the question of his removal in the absence of an inquiry under s 69 of the *Judges Act* and sought an interim injunction in that regard. The injunction was denied on January 23, 1998 (see *Weatherill 1998*). The Privy Council decided that the process would continue while that decision was under appeal and advised Mr. Weatherill that he must make any submissions by January 28, 1998. Mr. Weatherill's counsel requested the process be stopped pending the hearing of the appeal, scheduled for February 2, 1998, and reminded the Privy Council that Mr. Weatherill had still not been provided with all of the documents required to respond to the report. The Privy Council refused to stop the process and, on January 27, 1998, made the removal order.

[70] On judicial review, Mr. Weatherill argued that he could not be removed from office without an inquiry under section 69 of the *Judges Act* and that there had been a denial of fundamental justice in the procedure that led up to the removal order. Justice Sharlow concluded that s 69(1) applies only at the discretion of the Minister of Justice. Further, that the removal of

a person from an office held during good behaviour cannot be done without affording that person procedural protection, however, that a full hearing, with examination and cross-examination of witnesses and full disclosure of documents was not essential to the fair exercise of the power of removal (at para 87).

[71] Mr. Weatherill also argued that he was denied procedural fairness because there was a reasonable apprehension of bias demonstrated by press reports that members of Parliament had applauded when it was announced that proceedings to effect his removal from office were intended, and, that he should have been given better access to the documents relied on by the Auditor General and more time to respond to the Deputy Clerk's report. Justice Sharlow did not accept that the press reports were sufficient to establish a reasonable apprehension of bias nor that Mr. Weatherill was denied a fair opportunity to respond to the allegations against him or was unfairly treated, finding that he had been afforded substantially the same information and opportunity to be heard as in *Wedge*. Justice Sharlow also did not accept that Mr. Weatherill's decision to make no submissions was due to a lack of time or knowledge and that the GIC did not act unfairly in refusing further delay after the refusal at first instance of the interim injunction (at para 96).

[72] The third decision in this series is *Vennat*, decided by Justice Noël in 2006. He allowed the application, quashing the decision of the GIC on the basis of a failure of procedural fairness. There, Mr. Vennat had been appointed as President and Chief Executive Officer of the Business Development Bank of Canada ("BDC") by Order-in-Council. His appointment was for a five year term, during good behaviour, pursuant to s 6(2) of the *Business Development Bank of*

Canada Act, SC 1995 c 28. In February 2004, the Superior Court of Quebec issued its decision in *Beaudoin v Banque de développement du Canada*, [2004] JQ No 705 (CS Que) ("*Beaudoin*") which contained harsh comments about the BDC and Mr. Vennat, who was a witness at the hearing. On February 18, 2004 the Board of Directors of the BDC issued a press release stating that it had decided not to appeal the decision and maintained full confidence in Mr. Vennat. On February 23, 2004 Mr. Vennat wrote to the Prime Minister of Canada advising that he was very concerned about newspaper reports that the government was preparing to make decisions about his future. If true, he requested the opportunity to be fairly heard, with due process, in the presence of the Chairman and counsel at a meeting where the Clerk of the Privy Council and the Deputy Minister of Justice would participate, before any decision and any announcement was made. In response, on the following day, the Minister of Industry sent Mr. Vennat a letter informing him that upon review of the *Beaudoin* decision and its findings as to Mr. Vennat's conduct and the role he had played in the matter, serious questions had been raised regarding whether there were valid grounds justifying the termination of his appointment and advising him that, by way of an Order-in-Council adopted earlier that day, he was suspended without pay. He was given until March 1, 2004 to produce written reasons explaining why the GIC should not terminate his appointment for cause.

[73] On February 25, 2004 Mr. Vennat wrote to the Minister of Industry asking for the grounds of the allegations and requesting a meeting before the Clerk of the Privy Council Office and the Deputy Minister of Justice. The Minister of Industry responded by letter the following day and informed Mr. Vennat that the *Beaudoin* decision raised serious questions about his conduct and role in that matter and drew his attention to paragraphs 597, 651 and 653 of that

decision, also asking that he comment on eleven other paragraphs but noting that this was not an exhaustive list of all of the paragraphs of concern and that Mr. Vennat must provide a global and comprehensive response to the decision as a whole. The Minister of Industry agreed to meet with Mr. Vennat and advised that the recommendation that she would make to the GIC would be based on the *Beaudoin* decision, explanations provided by Mr. Vennat during the meeting and on Mr. Vennat's written submissions.

[74] On February 29, 2004 Mr. Vennat's counsel wrote to the Minister of Industry pointing out the unreasonableness of the time limit prescribed for the written submissions and noted that only a first draft could be prepared by then. The letter also pointed out that the *Beaudoin* decision was 1745 paragraphs, over 210 pages in length and that the facts and evidence upon which it was based comprised of 32 days of hearing, 35 witnesses, more than 300 exhibits and approximately 8000 pages of transcripts.

[75] A meeting of no more than two hours was held on March 1, 2004 during which Mr. Vennat discussed a six page letter that gave his version of the facts regarding various aspects of the *Beaudoin* decision and part of a preliminary memorandum which had been prepared to send to the Minister of Industry with the letter. By letter of March 10, 2004 sent to the Minister of Industry and copied to the Minister of Justice, Mr. Vennat proposed that he be given the opportunity to defend himself before an impartial and independent tribunal by reference of the matter to an inquiry convened pursuant to s 69 of the *Judges Act*. On March 12, 2004 the Minister of Industry wrote to Mr. Vennat and informed him of his dismissal. The letter stated that the *Beaudoin* decision and Mr. Vennat's written and oral submissions had been considered

but that the GIC determined that she had lost confidence in him as President of BDC and that his conduct in relation to the issues contemplated in the reasons of the *Beaudoin* decision was incompatible with his continued appointment. Attached was an Order-in-Council adopted earlier that day to that effect.

[76] In determining the duty of fairness, Justice Noël first conducted an analysis in accordance with the *Baker* factors. He concluded that the process of the adoption of Orders-in-Council is very different than the process leading to a judicial decision, it is a non-judicial and non-formalistic procedure (at para 77) and, as such, the nature of the decision gives rise to procedural safeguards that are "somewhat flexible, intended to enable the interested party to have a real opportunity to be heard" (at para 78). However, that in the absence of a legislated procedure for dismissal, the GIC is still required to give the affected party a "real opportunity" to respond to the reasons for the employer's dissatisfaction (at para 80).

[77] While acknowledging that the GIC's obligation to give reasons should not be the same as the obligation imposed on judicial or quasi-judicial tribunals, Justice Noël stated that, nevertheless there was an obligation to do so and that the reasons given to Mr. Vennat by the GIC were insufficient as there was nothing in the dismissal order or in the letter which could be characterized as analysis or reasoning and no mention had been made to the position submitted by Mr. Vennat or why his written and oral arguments had been dismissed:

> 95 This is not a matter of imposing requirements for judicial or quasi-judicial reasons on the Governor in Council but rather of asking the Governor in Council to explain the reasons for the removal. The decision, without being reasoned in great detail, must convey a certain reasoning taking into account the submissions made by the applicant in his preliminary memorandum (Exhibit

> MV-15). The decision must summarily explain why the arguments submitted were dismissed. The letter could have contained this information. These requirements are certainly not excessive when the fate, the reputation and the career of an individual is being decided, with the knowledge that the decision will inevitably receive a great deal of media attention.

[78] Justice Noël addressed the removal mechanisms instituted in other federal laws for persons appointed during good behaviour and, having gone through these examples, held that the concept of holding office during good behaviour is not, in and of itself, enough to substantiate finding an automatic and clearly defined acknowledgment of specific procedural safeguards. However, that Parliament's use of the term "during good behaviour" was not insignificant and was an important indication of its intention to give such appointees "enhanced procedural safeguards" (at para 105) as did the absence of a right of appeal and the foreseeable impact of the GIC's decision on Mr. Vennat's right to work and his reputation.

[79] As to the procedural choices of the decision-maker, Justice Noël found that it would not be appropriate to impose a procedure similar to the one provided under s 69 of the *Judges Act* (citing *Weatherill 1999* at para 82) and that the GIC is free to decide whether or not to use such mechanisms (at para 130).

[80] Justice Noël then addressed the question of whether Mr. Vennat was entitled to a personalized inquiry. He determined that this was necessary and that the obligation had not been observed. He noted that *Wedge* and *Weatherill 1999* illustrated that the GIC, in an employee-employer relationship, normally conducts a personalized inquiry into the facts even if these facts appear to have been established generally in a fact finding report, and the employee has a right to

respond. In *Wedge* the second and third reports contemplated *Wedge* personally and he could have responded to them. Similarly, in *Weatherill 1999*, the second report contemplated Mr. Weatherill and he had the opportunity to present his position and point out inaccuracies in the record. However, that Mr. Vennat did not have a similar opportunity (at para 166).

[81] Further, Mr. Vennat had strenuously contested the truthfulness of certain facts relied upon in the *Beaudoin* decision, offered to submit witnesses and evidence contradicting those facts, formally requested an inquiry and submitted that the evidence established that he had an exemplary professional record and an untainted reputation prior to the *Beaudoin* decision. Justice Noël found that these were circumstances that would play a role in justifying a more elaborate inquiry as did the complexity of the matter (at paras 168-169). The facts in *Beaudoin* implicated numerous persons who contradicted each other at the lengthy and complex hearing. The GIC ought to have conducted a specific analysis of Mr. Vennat's conduct which could only come from a serious inquiry and personalized review of the facts. To rebut the presumption of facts presented by the *Beaudoin* decision, Mr. Vennat should have been permitted to present evidence by affidavit, interviews or counter-evidence in the context of that personalized inquiry. He could not, in less than eight days, review all of the relevant evidence in order to do so. Justice Noël found that the factual situation and the type of investigation conducted did not reflect a high standard of justice, resulting in a breach of procedural fairness (at paras 169-174).

[82] Justice Noël also explained what he contemplated by the term "personalized" inquiry which must make it possible to shed light on the specific conduct of the person affected:

> 178 With respect to the term "personalized" used to describe the inquiry, it means that the inquiry leading to the removal must

> contemplate the person(s) facing the removal procedure. This does not exclude the possibility that several persons be contemplated by the same personalized inquiry, as long as the inquiry targets the individual actions of each of these persons and they have the right to a personalized response. The inquiry must, in short, make it possible to shed light on the specific conduct of the person affected.
>
> 179 The choice that I made to use the expression "personalized inquiry" is based in part on the nature of the proceeding that must be followed. In my opinion, it would be wrong to say that the Governor in Council was only bound to conduct a simple review regarding the applicant's conduct, considering the complexity of the matter. The procedure followed in *Wedge* and *Weatherill* was not a simple review. Instead, an independent investigation of the facts was carried out by the decision-maker, and that investigation was personalized. On the other hand, my choice to use the expression "personalized inquiry" is based on the respondent's own choice of vocabulary. On several occasions the respondent uses the term [TRANSLATION] "inquiry" ["enquête"] in his memorandum, which confirms that it is an appropriate expression in the circumstances (respondent's memorandum, paragraphs 70 and 85 to 88).

[83] Justice Noël also remarked as to the requirement of fair play and transparency that the GIC is bound by (at para 185) and found that three factors in that case showed that the decision-maker had an inappropriate attitude, inconsistent with transparency and fair play, being that it was the applicant who was demanding that the procedural safeguards be observed, while the decision-maker should have taken it upon herself to offer these safeguards to the applicant and explain the decisional framework to him (at para 186); the applicant was unaware of the burden imposed on him by the GIC (at para 187); and, that the letters in which Mr. Vennat expressed his concerns after reading the article in the newspaper *La Presse* and asking that the procedure of s 69 of the *Judges Act* be followed went unanswered, yet they were a means by which Mr. Vennat was making requests concerning the decision-making process and there was nothing to prevent the Minister of Industry or the Privy Council Office from responding to these requests

(at para 188). Justice Noël found that the attitude betrayed by the decision-maker's acts and omissions were not analogous to the work of the GIC's delegates in *Wedge* and *Weatherill 1999*. He concluded that the GIC did not deal with Mr. Vennat in a transparent manner, in accordance with fair play (at para 190).

[84] Justice Noël also conducted an analysis of the procedural safeguards pursuant to *Knight* and found that Mr. Vennat had been informed of the reasons for the GIC's dissatisfaction and was aware of the substance of the reasons for the allegations. However, that his right to respond was only observed in part. In the absence of a personalized inquiry, Mr. Vennat could not have meaningfully responded to the reasons for dissatisfaction considering the complexity of the matter and the relatively brief period of time to prepare his submissions which affected the quality of his right to respond. To respond meaningfully Mr. Vennat and his counsel should have had detailed knowledge of the facts surrounding the hearing in *Beaudoin* but Mr. Vennat was simply a witness in that matter. Therefore, he could not have had detailed knowledge of the direct and indirect remarks made in that decision regarding him and the evidence on which those remarks were based (at para 203). Another factor was the absence of Mr. Ritchie, the Chairperson of the BDC's Board of Directors at the time the *Beaudoin* decision was rendered, at the meeting of March 1, 2004 as requested by Mr. Vennat. Mr. Ritchie could have spoken to the decision not to appeal the *Beaudoin* decision and the Board of Director's vote of confidence in Mr. Vennat, his absence also affected the quality of Mr. Vennat's right to respond (at paras 206-207). Further, the standard applied by the GIC was very strict and improper. In conclusion, Justice Noël found that:

> [215] The applicable procedural safeguards are the following. First, the applicant was entitled to the safeguards recognized in

> *Knight v. Indian Head School Div. No. 19*, above, at page 683, namely the right to know the reason(s) for dissatisfaction as well as the right to respond to the reasons for dissatisfaction. These safeguards are the most basic form of the duty to act fairly. Further, my analysis led me to find that the applicant was entitled to enhanced procedural safeguards, namely, the right to a personalized inquiry into the facts by the decision-maker and the right to respond as well as the right to a decision with sufficient reasons. On a broader scale, I believe that the applicant was entitled to participate in a transparent forum and to deal with a decision-maker who played fair.
>
> [216] Finally, my analysis of the evidence indicated to me that some of the procedural safeguards had not been observed as regards the applicant. That applies to the obligation to conduct a personalized inquiry, the right to have a true opportunity to respond to that inquiry and the right to a decision with sufficient reasons. Further, it appeared to me in light of the evidence that the applicant only had a very limited right to respond to the reasons for dissatisfaction. Another significant element vitiating the procedure was the application of too onerous a burden drawn from a Supreme Court decision that did not apply in the circumstances. The Governor in Council required that Mr. Vennat establish that the remarks of the judge in *Beaudoin v. Banque de développement du Canada*, above, were fatally incorrect, tainted by fraud or dishonesty; or that he bring forth new evidence that had not previously been available to the judge. That burden was certainly not appropriate and was not known by Mr. Vennat. It was therefore not possible for Mr. Vennat to reverse the simple presumption of facts that rested on him as a result of the decision in *Beaudoin v. Banque de développement du Canada*, above.

[85] Finally, and most recently, is *Keen*, decided by Justice Hughes in 2009. Justice Hughes was reviewing the decision by the GIC to terminate Ms. Keen from the position of President of the Canadian Nuclear Safety Commission ("Commission"). Ms. Keen had been appointed for a period of five years during good behaviour as a permanent member of the Commission pursuant to s 10 of the *Nuclear Safety and Control Act*, SC 1997, c 9 ("*Nuclear Safety Act*"). Her appointment as President, however, was not stated as being during good behaviour and the *Nuclear Safety Act* was silent on that point.

[86] Ms. Keen was dismissed as President, but not as a member, in connection with a delay by the Commission in facilitating the return to operation of a nuclear facility that provided nuclear isotopes used in the diagnosis and treatment of certain medical conditions. On December 27, 2007, the Minister of Natural Resources wrote to Ms. Keen expressing deep concern with respect to the actions of the Commission in that regard.

[87] Ms. Keen responded on January 8, 2008 by an eight page letter to which was attached a twenty seven page detailed narrative of the events and actions in question including her assertion that the Minister of Natural Resources' letter did not contain a single allegation of personal misconduct on her part or even any allegation that her actions fell below expected performance standards.

[88] The Minister of Natural Resources did not reply to Ms. Keen's letter and instead, on January 15, 2008 the GIC, on recommendation of the Minister of Natural Resources, issued an Order-in-Council terminating her designation as President but without affecting her status as a full-time permanent member of the Commission. That Order-in-Council is set out in the decision and while brief, states the reasons for Ms. Keen's termination being that the extended shutdown of the Chalk River Nuclear Research Universal Reactor and interruption in the world supply of medical isotopes resulted in a serious threat to the health of Canadians and others and that Ms. Keen, as President, had failed to take the necessary initiative to address the crisis in a timely fashion and failed to demonstrate the leadership expected by the GIC. The Order-in-Council stated that Ms. Keen's submissions had been carefully considered but that Ms. Keen no longer enjoyed the confidence of the GIC as President of the Commission.

[89] Justice Hughes discussed the distinctions between appointments made "at pleasure" and those that are made "during good behaviour". He noted that the appointment of Ms. Keen, or any other member of the Commission, was set out in s 10(5) of the *Nuclear Safety Act* as being during good behaviour. The President was designated by the GIC according to ss 10(3) and 10(4) of the *Nuclear Safety Act* from the group of permanent full-time members. The *Nuclear Safety Act* was silent as to whether the President was acting during good behaviour or at pleasure. Justice Hughes noted that Ms. Keen was not terminated as a member therefore, from that point of view, neither the Minister of Natural Resources nor the GIC had criticized her behaviour:

> 54 The *Act* is silent as to the designation of Ms. Keen or any other member, as President. Is that designation "*during good behaviour*" or is it "*at pleasure*"? If that designation was "*at pleasure*" the evidence shows that Ms. Keen was afforded the procedural fairness contemplated by *Dunsmuir* at paragraphs 115-116, *supra*. The Minister, by his letter of December 27, 2007, gave Ms. Keen notice of his intention to recommend termination of her designation as President and gave her an opportunity to make submissions. Ms. Keen made those submissions in her letter of January 8, 2008. The Minister did not respond to that letter however the Order in Council dated January 15, 2008 states that "*...the Governor in Council has carefully considered the submission*".
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> 55 As stated by Dickson J. for the Supreme Court of Canada in *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.) at page 115 at g-h, the Court cannot enquire into the validity of such a recital in an Order in Council.
>
> 56 I am, therefore, satisfied that, if the designation of Ms. *Keen* as President of the Commission was "*at pleasure*", then the requirements of procedural fairness have been satisfied and the dismissal cannot be set aside.
>
> 57 On the other hand, if the designation of Ms. Keen as President was "*during good behaviour*", it is quite clear that neither the Minister nor the Governor in Council have provided Ms. Keen adequate information setting out the grounds upon which it was believed that she lacked good behaviour. Ms. Keen's letter of January 8 2008 adequately rebuts any suggestion of lack of

> good behaviour. The failure of the Minister to enter into further dialogue or hold some form of independent inquiry demonstrates a clear lack of fairness. Further, if it was believed by the Minister of Governor in Council that Ms. Keen lacked "*good behaviour*" as President why keep her on as a member when there is a clear statutory requirement of good behaviour for a member.

[90] The remainder of the decision concerned the determination as to whether Ms. Keen's appointment as President was during good behaviour and, having concluded that it was at pleasure, Justice Hughes held that the circumstances of her termination as President were sufficient to satisfy the requirements of procedural fairness.

[91] Based on the foregoing, in my view, the content of the duty of fairness owed to the Applicant in the context of this matter was comprised of: notice to the extent that he was informed of the basis of the Minister's concerns and that his appointment was potentially at risk; an opportunity to meaningfully respond and to present his case fully and fairly; and, to receive a fair and impartial decision allowing him to understand the basis for it.

(2) Application of the content of the duty of fairness

(a) Notice

[92] In my view, the Applicant was afforded more than adequate notice of the allegations against him.

[93] Formal notice was provided to the Applicant by way of the Minister's Letter. As noted above, in that letter the Minister advised the Applicant that she was writing to express her

concerns about his capacity to serve as a Commissioner of the CRTC. She stated that certain incidents had been brought to her attention which suggested to her that the Applicant had not carried out his duties ethically and responsibly and that his conduct had impaired the capacity of the CRTC to carry out its functions and the confidence of the public and stakeholders in its capacity to do so.

[94] The Minister stated that she was writing to share her concerns, to inform the Applicant of the information upon which her concerns were based, and to allow the Applicant an opportunity to provide the Minister with any submissions the Applicant believed the Minister should consider before she took any further action. The Minister stated that the Applicant should know that she was considering whether to recommend to the GIC that the Applicant's appointment as a Commissioner be terminated.

[95] The Minister stated that the Applicant had been appointed as a Commissioner to perform his duties in the public interest, in a manner that is beyond reproach, and to uphold the highest ethical standards - all so that public confidence and trust in the integrity, objectivity and impartiality of the CRTC were conserved and enhanced. Those expectations included acting with integrity, in a collegial manner and fostering public respect for and confidence in the CRTC. They were communicated to the Applicant on several occasions, both before and after his appointment. The Minister stated that she understood that the Applicant's role as a Commissioner and the need to maintain his independence in decision-making could, at times, lead to disagreements over decisions reached by the CRTC, which was his right. However, he also had a responsibility to support the CRTC, its Chairperson and his fellow Commissioners in a

collegial manner, especially in the public domain. The Minister stated her concern that the Applicant's behaviour not only disparaged the work of the Chairperson but affected the integrity of the CRTC, including its staff.

[96] The Minister stated that her concerns fell into four categories, which she listed and described:

> My first concern arises from your negative public statements about the CRTC. In April 2015, using your Twitter account, you promoted links to your personal statement about a judicial review application that you have commenced against the CRTC. Your statement was critical of the CRTC and its Chair, and led to negative media attention about the CRTC. My predecessor, the Honourable Shelly Glover, wrote to you indicating her concern with the manner in which you had used social media and, particularly, the degree to which your actions prejudice the ongoing operation, credibility and reputation of the CRTC. In October 2015, you again tweeted a link to your personal statement relating to a subsequent legal challenge that you commenced. This statement too was critical of the CRTC and which led again to negative media attention about the CRTC.
>
> Such statements appear to me to be inconsistent with the principle of collegiality and calculated to incite public criticism of the CRTC. Your actions have led various media outlets to publish numerous articles highlighting problems you perceive at the CRTC and to question whether it is able to fulfil its mandate. My particular concern is that your actions are having a harmful effect on the integrity of the CRTC and the public's trust in the effective functioning of the CRTC.
>
> My second concern involves the release of confidential information. Documents that you filed with the Federal Court last April unnecessarily and unacceptably included personal information about an individual who had brought forward a harassment complaint against you. Documents that you filed with the Federal Court of Appeal in October included information subject to solicitor-client privilege. The Attorney General of Canada has had to seek confidentiality orders in both instances to remove the information from the public record. Also, the disclosure of personal information by you has led to a complaint under the *Privacy Act* against the CRTC.

Your disclosure of confidential information was not in accordance with internal policies and procedures within the CRTC and across the government. These policies and procedures are intended to promote a workplace in which complainants do not fear coming forward and to foster the communication of legal advice.

My third concern involves inappropriate contact with CRTC stakeholders. As you are well aware, the CRTC has practices to carefully manage *ex parte* contacts to protect the perception of fairness and neutrality and to ensure that such contacts do not jeopardize the reputation and integrity of the CRTC. In July and August 2015 you met alone with CRTC stakeholders whose applications were before the CRTC. You did so without following practices at the CRTC. Indeed, your public tweet about one meeting raised concerns from an affected party that you had inappropriately met *ex parte* with another party to an application then before the CRTC. The other meeting, particularly given the surrounding circumstances detailed in the attached, similarly raises concerns about perceptions of fairness and neutrality.

My fourth concern is the effect of your actions on the internal operations of the CRTC. For example, you made unfounded assertions of unethical conduct or a conflict of interest by staff and the Chair as a basis for not respecting internal processes and procedures designed to allow the CRTC to meet the statutory requirements of the *Access to Information Act*. Internal processes and procedures have been established by the Chair as Deputy Head to minimize institutional risks and ensure that statutory timelines are met. Not meeting statutory requirements constitutes liability for the organization and its effective functioning.

Finally, these concerns build on earlier ones about actions that have had a negative impact on the CRTC's internal well-being. An independent third-party investigation into allegations of harassment made against you by an employee of the CRTC found that the complaint had merit and listed five findings of harassment. You were found to have harassed an employee in a manner that included undermining her credibility with her superiors and staff, humiliating her in front of her colleagues and subjecting other CRTC staff to your aggressive behaviour.

On July 17, 2015, my predecessor wrote to you indicating that, in her opinion, you had brought no new evidence that was contrary to the conclusions of the report. At that time, she told you

> that all information related to this matter remained under active consideration and encouraged you to conduct your affairs in a professional and respectful manner. It is of particular concern that your conduct continues to show a lack of respect for the principles of collegiality, that you have publically disparaged the CRTC including the manner in which the Chairperson exercises his authority, and that you continue to challenge senior staff whose advice and view support those of the Chairperson.
>
> Taken together, these incidents call into question your capacity to serve as a Commissioner of the CRTC. There is evidence from which to infer that your conduct has had a negative impact on the collegiality necessary for a good working relationship among staff and members of the CRTC as well as a negative impact on the public confidence and trust in the objectivity and impartiality of the Commission, all of which tends to undermine the effective functioning of the CRTC. Of particular concern is that many of the incidents occurred after you had been expressly urged by my predecessor to conduct your affairs in a professional and respectful manner.

[97] The Minister asked that the Applicant provide any written representations that he believed should be taken into account before a decision was made regarding his continued role as a Commissioner of the CRTC by March 14, 2016 and stated that any such submission would be carefully considered before she decided whether or not to make any recommendation to the GIC.

[98] Further, attached to the Minister's Letter was the seven page Summary which provided background information into the expected standards of conduct of a Commissioner and provided detailed descriptions of the incidents at issue being the negative public statements, the disclosure of confidential information, inappropriate stakeholder contact and the negative impact on the internal operation and well-being of the CRTC. Each description referenced related documents and where these were located within the approximately 1200 pages of appended documentation.

[99] The content of procedural fairness owed to the Applicant required that he be given notice of and the basis for the allegations against him. Given the foregoing, there is no doubt in my mind that this aspect of the duty owed to the Applicant was met. The Minister advised the Applicant of the sanction that she was considering, being removal from his position as a Commissioner of the CRTC, and why she was considering this. The Minister's concerns were fully identified and the basis for them described in detail and the documentation upon which they were based were provided. Therefore, the Applicant was also fully apprised of the case he had to meet. As to the Applicant's assertion that the concerns raised initially by the prior Minister were "stale-dated", this has no merit.

[100] The Applicant asserts, however, that by reason of the nature of his position and the fact that it was held during good behaviour and was terminated for cause, he was denied procedural fairness because he was not afforded an individualized inquiry into the allegations, as described in *Vennat*, and the right to respond to that inquiry.

[101] In my view, to the extent that *Vennat* requires a personalized inquiry, the Applicant was afforded one in this case. This, essentially, comprises an aspect of the notice requirement as it serves to alert the Applicant to the Minister's concerns so that the Applicant can know the case against him and respond accordingly.

[102] It must also be recalled that in *Vennat* the allegations arose from the harsh comments about Mr. Vennat by the judge who decided *Beaudoin*, a decision in which Mr. Vennat was not a party, but merely a witness. The notice of the Minister's concerns as provided to Mr. Vennat

referred exclusively to that decision. It cited various paragraphs of concern and sought a global response. Mr. Vennat pointed out that the trial had been heard over 32 days, 35 witnesses had given evidence, more than 300 exhibits had been entered, that the decision itself was over 210 pages and 1745 paragraphs in length and that there were approximately 8000 pages of hearing transcripts. As a witness and not a party to that action, Mr. Vennat had not had the opportunity at trial to address the matters for which he had been criticized. Further, in that circumstance, it would take more time than the Minister had permitted in order for him to provide a meaningful response. Justice Noël also noted that Mr. Vennat had requested that he be permitted to have the then Chairperson of the BDC's Board of Directors give evidence, which would have been significant to explain why the *Beaudoin* decision had not been appealed and why the Board of Directors had expressed its continued confidence in Mr. Vennat subsequent to that decision. And, significantly, he recognized that it was the complexity of the matter, specifically the *Beaudoin* decision and its distance from Mr. Vennat that, mandated the "personalized" inquiry.

[103] In my view, this is clearly distinguishable from the present matter. Here the Minister set out in detail her concerns with the conduct of the Applicant. These concerns were with his conduct in the context of his role as a Commissioner of the CRTC. The particulars of that conduct were identified and documented. They were individualized and particular to the Applicant and did not arise from a complex action in which he was not a party as was the situation in *Vennat.*

[104] The Applicant also suggests that this particularized inquiry required an independent report into the underlying facts and that this is demonstrated by *Wedge*, *Weatherill 1999* and

Vennat. In that regard, I note that in *Wedge* the applicant was initially given notice of the allegations against him by letter from a representative of the Privy Council who also advised that she would, together with the Chairperson of the VAB, be reviewing the applicant's conduct and providing a report. As in this matter, the letter outlined in detail the allegations giving rise to the concern regarding Mr. Wedge's suitability to remain in office. It also enclosed a copy of an earlier investigation report and offered a meeting between the representatives and Mr. Wedge to hear his comments with respect to whether his alleged conduct was consistent with good behaviour. The meeting was held, Mr. Wedge expressed his concerns including possible bias by the representatives, the reliability of the evidence provided in the investigation report and general objections to the manner in which the investigation was being conducted. The report was subsequently prepared by the representatives and was provided to Mr. Wedge and the GIC. The applicant was provided with an opportunity to respond to the report in writing, which he did.

[105] As described above, this Court did not accept that Mr. Wedge had been denied procedural fairness as he was provided with notice, was apprised in detail of the allegations against him and was offered the ability to respond orally and in writing to the investigation report and to the final report. The Court also found that procedural fairness was not breached by relying on materials prepared by staff, including the final report prepared by the Privy Council representative and the Chair of the VAB:

> 26 In the present case, the Governor in Council, after its review of the Bloodworth-Whalen Report and the submissions of the applicant in response, upon the recommendation of the Minister of Veterans Affairs, decided to terminate the applicant's appointment pursuant to s-s.4(4) of the *Act*. By so doing, the Governor in Council did not improperly delegate its decision-making authority to its subordinates. By its nature, the Governor in Council, a collective body of Ministers, is required to rely on the

> advice of staff and of individual Ministers to assist in reaching decisions on the wide range of issues for which it is responsible. The procedural propriety of such reliance on staff as a source of advice was recognized by the Supreme Court of Canada in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, in which Mr. Justice Estey stated as follows:
>
> > The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The Executive Branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature.

[106] Further, that through his written submissions, Mr. Wedge was able to respond to the final report by outlining his criticisms and concerns as he saw fit and that this afforded him with a full and fair opportunity to present his comments to the GIC prior to its decision being made.

[107] Thus, in *Wedge*, the procedure followed was very much like the procedure affected in this matter. The differences being that, because there were two reports, there were two opportunities to respond in writing, which is not the case here, and there was also an opportunity to meet with the authors of the final report.

[108] Similarly, in *Weatherill 1999*, the GIC made its decision after being provided with a report prepared by the Deputy Clerk. In that case the notice of the allegations was contained in a letter from the Deputy Clerk, which also advised that she would be preparing a report for the GIC, invited the applicant to respond and offered a meeting with Mr. Weatherill. The

Deputy Clerk met with Mr. Weatherill's counsel and arranged a meeting with another office for purposes of information gathering. Various correspondence were exchanged, the report was submitted and Mr. Weatherill was provided with an opportunity to respond but he declined to do so on the basis that he had been afforded insufficient time and information. As noted above, the Court in that case concluded that there had not been a breach of procedural fairness in those circumstances.

[109] In *Keen* the preliminary question was whether Ms. Keen's appointment as President of the Commission was at pleasure or during good behaviour. Justice Hughes ultimately concluded she held the position at pleasure and, therefore, that a letter from the Minister of Natural Resources notifying Ms. Keen of his concerns and that he was considering making a recommendation to the GIC that her designation as President be terminated, and, the opportunity afforded to her to provide a written response, satisfied the requirements of procedural fairness. However, Justice Hughes also stated that had her appointment been during good behaviour, the letter from the Minister of Natural Resources and the decision of the GIC had not provided her with adequate information, setting out the grounds on which it was believed that she lacked good behaviour, and that her letter in response had adequately rebutted any such suggestion. Further, that the failure of the Minister of Natural Resources to enter into further dialogue or hold some sort of independent inquiry demonstrated a clear lack of fairness.

[110] In my view, *Keen* suggests that something more than bare notice and an opportunity to respond in writing are required in circumstances such as this where the appointment being terminated is held during good behaviour. However, it must also be viewed in the context of its

particular circumstances. There it appears that no underlying report in any form was generated and dismissal as President, which position was held at pleasure, but not being dismissed as a member, which position was held during good behaviour, appeared contradictory and was unexplained.

[111] Based on these decisions, I am not persuaded that in this case procedural fairness necessarily required that a third party report be generated and submitted to the GIC. In *Vennat* Justice Noël stated that, in that case, it would have been wrong to say that the GIC was only bound to conduct a simple review regarding Mr. Vennat's conduct considering the complexity of that matter. Further, that the procedure followed in *Wedge* and *Weatherill 1999* was not a simple review but an independent investigation of the facts carried out by the decision-maker which investigation was personalized (at para 179). Here, like *Wedge* and *Weatherill 1999*, there was an independent investigation, or review, of the facts carried out by the Minister which was personalized and enabled the Applicant to know, in detail, the basis of the Minister's concerns. This was not bare notice and was appropriate to the administrative process and the decision being contemplated. Accordingly, I cannot conclude that the Applicant was denied procedural fairness in this regard.

(b) Opportunity to be heard

[112] In the absence of any legislated requirements in the *CRTC Act* or otherwise as to the process to be followed if termination of a Commissioner is being considered by the GIC, it was open to the GIC to determine its own process. And, as noted in *Baker*, the flexible nature of the

duty of procedural fairness recognizes that meaningful participation can occur in different ways in different situations (at para 33).

[113] In this regard, it is clear that the Minister was not required to refer the matter to an inquiry by way of the *Judges Act* (*Weatherill 1999* at para 82; *Vennat* at para 130). Further, as the contemplated termination was not similar in nature to an adjudicative process, a formal hearing was not required (*Baker* at paras 23 and 33; *Vennat* at para 130; *Wedge* at para 24).

[114] The Applicant was afforded an opportunity to respond in writing to the Minister's concerns, which he did on March 14, 2016.

[115] The Applicant's Response did not request a formal oral hearing. He stated that he welcomed the opportunity to provide clarification concerning his conduct as a Commissioner "as well as discuss the conduct of others which requires your urgent attention and oversight". In this regard, the Applicant stated that, since the Minister's appointment, the Applicant's office had reached out to the Minister's office repeatedly to arrange an in-person meeting to discuss the Applicant's concerns "with the proper function of the CRTC" but his efforts had been unsuccessful. No documentation was provided in the Applicant's Response in support of this assertion, which appears to be directed more at the operation of the CRTC than with responding to the concerns about the Applicant's conduct. Citing *Potter*, which the Applicant purports stands for the proposition that a high degree of good faith is owed to GIC appointees prior to sanctioning, the Applicant also stated that he remained prepared to discuss these matters with the Minister and that he has a "[K]een interest to meet with you [the Minister] in-person, with or

without counsel present". The letter then responds to each of the concerns listed in the Minister's Letter.

[116] With respect to the allegation of the release of confidential information, the Applicant stated that he did not agree that his conduct violated internal policies and procedures, that there had been no such finding in the judicial proceedings, that no concern in this regard had been raised prior to October 19, 2015 and concluded that the Applicant "is prepared to address these concerns further, but would ask that additional particulars be provided in order that he may do so". He also stated that he had no knowledge of any complaint under the *Privacy Act*, RSC 1985 c P 21, against the CRTC and asked that he be provided with details of the complaint and that he would be pleased to address the circumstances of which insofar as they pertain to his conduct and responsibilities.

[117] As to inappropriate contact with CRTC stakeholders, the Applicant provided his justification of events in detail and concluded that he remained prepared to discuss this matter to address any potential concerns.

[118] As to the Harassment Report, the Applicant stated that he strongly disagreed with the findings and that the resultant decision by the Chairperson and the underlying process was currently under judicial review. Therefore, it would be premature to rely on those findings. And "…if there are other concerns in respect of Commissioner Shoan's actions and their impact on internal CRTC operations, I would ask that you provide further particulars in order that he [the Applicant] may fully address them".

[119] In response to the concerns about collegiality, the Applicant stated that he could not be held solely accountable for any deterioration of the workplace environment and that the behaviour of others ought to also be considered. In that regard he referenced the "evidence" raised in each of his judicial review applications related to the Chairperson's actions and decisions, and listed what was described as that evidence. The Applicant urged the Minister to consider the totality of the circumstances that may be contributing to the decline of collegiality at the CRTC. The Applicant further noted that the suggestion of the former Minister contained in her letter of July 17, 2015, that the Chairperson undertake a workplace assessment to address the issues that may be contributing to what appeared to be a toxic work environment, had not been undertaken. Rather, that the Chairperson fixed his efforts on removing the Applicant's critical voice from the CRTC. The Applicant also asserted that the Chairperson had exhibited a hostile, negative animus towards him.

[120] In his concluding remarks, the Applicant again stated his view that it would be premature for the GIC to make a decision on his appointment prior to the judicial reviews that he had commenced being determined by the Court as the underlying facts and context of each proceeding were inextricably connected to a substantial number of the concerns raised in the Minister's Letter as well as the allegations raised by the Chairperson. And, if the Minister chose to proceed, then the Applicant would vigorously contest the action including seeking judicial review and a stay. Finally, that he remained prepared to discuss these matters further "at your [the Minister's] discretion and leisure".

[121] Based on the foregoing, it is clear that the Applicant in response to the Minister's Letter did not request or express a need for a formal hearing. Nor does it explicitly express the view that a meeting with the Minister was a necessary requirement of procedural fairness in this matter. However, his response does make it clear that such a meeting would be desirable.

[122] The Applicant's Response is also, with one exception, non specific in identifying further information that he deemed necessary to permit him to respond fully. For example, he requested additional particulars to permit him to address the allegation of the release of confidential information. Yet the Minister's Letter and the Summary were very specific and the Applicant does not suggest what further information he required to address the concern. And while the actual complaint against the CRTC made to the Office of the Privacy Commissioner pursuant to the *Privacy Act* appears not to be in the record, it seems clear from the record that the *Privacy Act* complaint is related to the personal information of the complainant which was filed by the Applicant in his application for judicial review of the harassment decision.

[123] That said, I am of the view that if the Minister was of the opinion that the matters raised by the Applicant in his Response did not warrant a meeting with her or her officials or further inquiry into the matters alleged, such as the Applicant's assertion that the lack of collegiality was not attributable in whole to his actions, that the Chairperson exhibited a hostile, negative animus towards him, and, that it would be premature for the GIC to proceed prior to a decision on judicial review concerning the Harassment Report being rendered by this Court, then the duty of procedural fairness required her to advise the Applicant of this and, at least on a summary basis, why she reached that conclusion. In *Vennat*, *Wedge* and *Weatherill 1999*, meetings, although in

different factual circumstances, were afforded to the applicants. In *Vennat*, a meeting was held in the presence of the Minister of Industry, the Clerk of the Privy Council and the general in-house counsel at the Department of Industry. In *Weatherill 1999*, a meeting was held in the presence of the Deputy Clerk. And, in *Wedge*, a meeting was held in the presence of a representative of the Privy Council Office and the Chairperson of the VAB.

[124] For the reasons that follow, the failure to provide the Applicant with such a meeting or to otherwise respond to the issues raised in his Response led to a potential breach in procedural fairness as it cannot be determined, from the record, if he received a fair and impartial decision.

(c) Fair and impartial decision

[125] In that regard, the Applicant's application for judicial review of the harassment decision had been heard by this Court on June 21, 2016. It is undisputed that Justice Zinn advised the parties that his decision could be expected in September of 2016. The Respondent argues that the GIC cannot be precluded from removing an appointee for cause simply because an application for judicial review has been filed. Indeed, in *Weatherill 1999* this Court found that there had not been a denial of procedural fairness when the GIC refused to further delay its decision after an injunction had been denied and an appeal was pending (at para 96). I would also point out, when a decision to remove an appointee has been made, that the person concerned has the option of seeking a stay of that decision while the application for judicial review is pending. The Applicant did so in this case, however, the stay was denied for the reasons set out by Justice Mactavish.

[126] Accordingly, I am not convinced that the GIC acted unfairly by continuing with the decision-making process while Justice Zinn's decision was under reserve. However, while it was open to the GIC to proceed, significant consequences arise from its decision to do so. This is because, subsequent to the GIC's decision to remove the Applicant from his appointment, this Court quashed the Chairperson's decision concerning the alleged harassment on the basis that the Harassment Report was flawed. This is problematic in the context of the GIC's decision because the finding of the Harassment Investigator was referred to in the Minister's Letter and the Summary, which underlie and form the basis of the GIC's decision.

[127] Justice Zinn quashed the Chairperson's harassment decision because he found, based on the evidence before him, that the third party Harassment Investigator had a closed mind, had exceeded her mandate and to an extent had vilified the Applicant. The Harassment Report included statements from the Chairperson as to the Applicant's behaviour, including that he had tried to intimidate and had damaged his relationships with key people at the CRTC, and, had made the working environment toxic. Justice Zinn found that while the views of the Chairperson may have been accurate, they went far beyond what was to be decided by the Harassment Investigator. And, given the Chairperson's views of the Applicant as expressed to the Harassment Investigator as a witness to the investigation, the Chairperson's involvement in the final decision was also procedurally unfair as it was impossible to see how in those circumstances, consciously or unconsciously, the Chairperson could make a decision about the Harassment Report fairly. Justice Zinn found that the entire report and corrective actions were suspect and unreliable. However, that it was not his role, and he did not make any finding, as to whether there had been harassment arising from the complaint.

[128] The difficulty that now arises in the matter before me is that it is not discernable from the record to what extent the GIC relied on the flawed Harassment Report in reaching its decision. The Minister set out in her letter four categories of concern, and added that these "build on" earlier ones about actions that have had a negative impact on the CRTC's internal well-being. She then referred to the Harassment Report. She also referenced the July 17, 2015 letter of her predecessor, indicating that the Applicant had brought no new evidence that was contrary to the conclusions of the Harassment Report, and that it was of particular concern that his conduct continued to show a lack of respect for the principles of collegiality. She concluded that "taken together, these incidents called into question his [the Applicant's] capacity to serve as a Commissioner of the CRTC".

[129] While the Harassment Report may not have been determinative of the GIC's decision, in the absence of even a summary meeting with the Minister at which this could have been addressed, or a reply to the Applicant's Response explaining that Justice Zinn's decision with respect to the Harassment Report, positive or negative, was not necessary for the purposes of the Minister's recommendation and for the GIC in reaching its decision given the other evidence, or, reasons in the GIC's decision addressing this point, I would simply be speculating as to whether the Applicant received a fair and impartial decision as a result of the GIC's decision to terminate his appointment prior to the issuance of Justice Zinn's decision. Similarly, I would be speculating as to the weight that was afforded to the Harassment Report and, therefore, as to the reasonableness of the GIC's decision.

[130] Further, another concern raised by the Minister's Letter was the release of confidential information by the Applicant's public filing of documents in this Court without taking steps to protect the confidentiality of that information. In particular, personal information about the complainant in the harassment complaint. The Minister stated that the Applicant had not requested that the filed information be treated as confidential and did not give notice to the individual or the Respondent of his intent to disclose the information.

[131] At the judicial review of the harassment decision Justice Zinn rescinded the confidentiality order on the basis that, had the matter stayed internal to the CRTC, it was the master of its own process. However, when the decision became subject to judicial review, the Court controls its own process and the public interest in an open and accessible court must be the prime consideration. Justice Zinn was of the view that, in the matter before him, nothing suggested that the identities of the complainant, the alleged harasser or witnesses justified a confidentiality order.

[132] As the GIC made its decision to terminate the Applicant's appointment in advance of Justice Zinn's finding in this regard, his finding was not part of the GIC's considerations and, again, there is no way of knowing how much weight the GIC placed on this confidentiality concern, as this is not reflected in its reasons or elsewhere. It may be that the GIC's decision would have been the same, as there remains a question of the Applicant's good judgment in not taking steps, as a precautionary measure, to protect the personal information, given, for example, that the Guidelines on Formal Harassment Conflict Resolution Mechanisms state that it is the responsibility of all those who are involved in an informal conflict resolution or harassment

investigation process to ensure that they respect the principle of confidentiality. However, it is not possible to ascertain this.

[133] That said, in my view, the Applicant's submission that the GIC's decision was intended as a collateral attack on the judicial review proceeding before Justice Zinn is not supported by the record as the Minister's Letter also sets out concerns that are not related to the Harassment Report. Nor does the Applicant offer any evidence in support of this assertion.

[134] Finally, and also related to the Harassment Report, is the question of what consideration the GIC gave to the Applicant's assertions that he alone was not responsible for the toxic workplace environment at the CRTC. The Harassment Investigator references the Chairperson's comment that the Applicant was the cause of a toxic workplace environment. The Applicant's Response asserted that he could not be held solely accountable for any deterioration in the workplace environment and urged the Minister to consider the totality of the circumstances that might be contributing to the decline of collegiality at the CRTC. Further, that a July 17, 2015 suggestion of the former Minister that a workplace assessment to address the issues that might be contributing to what appeared to be a toxic work environment had never been undertaken. However, it is not possible to determine from the record or the reasons what consideration was given to the Applicant's submissions in his Response to that concern. That is, what significance or reliance was afforded to the Minister's collegiality concern originating from the Harassment Report, both as regards to the Harassment Report itself and in considering that concern together with the other concerns stated in the Minister's Letter.

[135] For the reasons set out above, the result of the GIC making its decision in advance of the rendering of Justice Zinn's decision on judicial review, which ultimately quashed the decision of the Chairperson of the CRTC accepting the recommendation of the Harassment Investigator, is that it is not possible to determine, from the record before me, whether the Applicant was afforded a fair hearing and procedural fairness.

[136] Given my finding above, it is perhaps unnecessary to address the Applicant's further submissions that the decision was procedurally unfair based on his allegation that the Minister and/or GIC had a closed mind and the insufficiency of reasons. However, given the circumstances, it is prudent to do so. In that regard, I note that in *Pelletier 2008*, the Federal Court of Appeal was considering a removal by a second Order-in-Council, the first having been quashed for procedural unfairness (at paras 1 and 6; *Pelletier 2005* at paras 94-96), of the former Chairman of the Board of Directors of VIA Rail Canada Inc., who held the position at pleasure. The Federal Court of Appeal confirmed that when removing a person appointed at pleasure, for whatever reasons, the government's termination did not require the necessity of showing cause and that minimal procedural protections were required, being the right to be informed of the basis of the concerns and the right to be heard (at paras 42, 43-45).

[137] However, there the applicant also argued that the decision-maker had a closed mind and, therefore, that he had been denied procedural fairness. The Federal Court of Appeal stated that:

> [59] The decision making process in this case is very particular and turns aside from the beaten track. We are here in the heart of the political sphere, which is a sphere that courts, aside from the minimal procedural fairness requirements described above, avoid interfering in.

> [60] At issue in this case is a Cabinet decision. This decision, by its very nature, is collective and the decision making process is secret. This raises a number of questions. To whom do we apply the closed mind test? Cabinet? The appropriate Minister? Where do we look for evidence to prove or disprove the allegations? In the present case, I accept that the appropriate Minister's state of mind is the most significant to consider, although this is not to say it is necessarily determinate.
>
> [61] The decision of the appropriate Minister is already made at the time the person concerned is informed of it. However, the decision is not final and it must be approved by Cabinet. In other words, the appropriate Minister has already formed an opinion when he gives the person concerned the opportunity to be heard. A Minister does not venture into a process to terminate someone unless he is convinced that there is a basis for the termination.
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> [62] The hearing can be informal, as long as the person concerned is permitted to attempt to change the mind of the Minister. The Minister, no matter how well founded the explanations of the person concerned, is not required to change his decision, or to explain why he refuses to change his decision. It is on this basis that any comparison with *Newfoundland Telephone Co.*, *supra*, where there was an inquiry, a notice of hearing and a formal hearing, is distinguishable.

[138] I would also note that in *Keen*, again an at pleasure appointment, Justice Hughes noted that the subject Order-in-Council stated that "…the Governor in Council has carefully considered the submission" and:

> [55] As stated by Dickson J. for the Supreme Court of Canada in *Thornes's Hardware Limited v. The Queen*, [1983] 1 S.C.R. 106 at page 115 at g-h, the Court cannot enquire into the validity of such a recital in an Order in Council.

[139] Further, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 ("*Newfoundland Nurses*"), which post dates this Court's decision in *Vennat*, the Supreme Court of Canada stated:

> [20] Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were always required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).
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> [21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to *Baker* and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
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> [22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[140] Further, in *Peace Valley*, in the context of the GIC's decision that the significant adverse environmental impacts that the Minister of the Environment determined would likely result from the construction of a clean energy project in British Columbia were justified in the circumstances, Justice Manson stated:

> [63] There is a presumption that the Minister considered the JRP and all relevant information in making his recommendations to the GIC. It is only reasonable that the JRP Report before the Minister and all other relevant information considered by the Minister can be imputed to have been considered by the GIC (*Woolaston v*

> *Canada (Manpower and Immigration)*, [1973] SCR 102; *Leo Pharma Inc v Canada (Attorney General)*, 2007 FC 306 at para 41; most recently articulated in *Thamotharampillai v Canada (Citizenship & Immigration)*, 2011 FC 438 at para 14).
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> [64] Moreover, I do not consider the Order in Council to be exhaustive in indicating what was considered by the GIC. The entire Record should be reviewed to determine if the decision was unreasonable, and should be read together in the context of the evidence and the process to serve the purpose of showing whether the result falls within a range of reasonable, possible outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 15, 18)…

[141] Thus, to the extent that the Applicant is suggesting that the absence of further reasons in the Order-in-Council was a breach of procedural fairness, I do not agree. As stated in *Newfoundland Nurses*, the sufficiency of reasons is not a stand-alone basis upon which to quash a decision and the reasons must be read together with the outcome and serve the purpose of showing whether the decision falls into the defensible *Dunsmuir* range (at paras 14-15). I am also not convinced that the GIC, when rendering an Order-in-Council to remove an appointee for cause, is necessarily required to provide detailed reasons. The context of the decision-making by the GIC simply does not support such a requirement.

[142] That said, and as discussed above, in this matter the brevity of the reasons precludes the Court from understanding how much reliance, if any, was placed by the GIC on the Harassment Report, which Justice Zinn found to be deeply flawed, and the related confidentiality concern, and whether or not Justice Zinn's decision would have affected the GIC's decision. While alone this would not amount to a reviewable error it must be viewed in combination with the fact that the Applicant was not afforded a meeting with the Minister during which the extent of the Minister's reliance on the challenged Harassment Report could have been addressed. Nor is this

clear from the record before me. Because I am unable to determine from the record or the GIC's reasons what reliance the GIC placed on the Harassment Report and the related decision of the Chairperson, or, on the confidentiality concern and whether Justice Zinn's rescinding of the confidentiality order would have impacted the GIC's decision, or, what consideration the Minister and the GIC gave to the Applicant's assertion that he alone was not responsible for the lack of collegiality in the CRTC, I have concluded that the Applicant was potentially denied procedural fairness. Further, if reliance by the GIC on the Harassment Report, and related concerns of confidentiality and collegiality, was determinative, then the GIC's decision was unreasonable. It is for that reason that I find it necessary to return this matter to the GIC for re-consideration.

Issue 3: Was the GIC's decision to terminate the Applicant's appointment unreasonable?

[143] Having found that the Applicant was denied procedural fairness, I need not address this issue. However, in the interest of completeness, I would observe that it is also apparent from the record that it is possible the GIC could have reached the same result if the Harassment Report and related concerns were not determinative factors in its decision-making.

[144] For example, the Applicant's conduct pertaining to inappropriate contact with CRTC stakeholders is very troubling. The Minister's Letter states that, as known to the Applicant, the CRTC has practices to carefully manage *ex parte* contacts to protect the perception of fairness and neutrality and to ensure that such contacts do not jeopardise the reputation and integrity of the CRTC. Further, that in July and August 2015 the Applicant met alone with stakeholders whose applications were before the CRTC and without following CRTC practices. His public

tweet about one of these meetings raised concerns from an affected party, the other meeting similarly raised concerns about the perception of fairness and neutrality.

[145] The Summary elaborates on this concern. It notes that the Applicant received at least two briefings on appropriate stakeholder contact. In that regard, reference is made to an attached email dated June 27, 2013 from the Chairperson to the Applicant discussing meeting requests. The Chairperson suggested checking with Christianne Laizner, CRTC's Senior Legal Counsel, before accepting meetings as making the wrong call could result in the invalidating of decisions, litigation costs, reputational costs, exclusion from panels, etc. Further, if a meeting was held there should be a clear record generated of what was discussed and meetings should be held in a business setting, meaning boardrooms not restaurants, and to the extent possible should not be held alone. Also referenced and attached is a power point presentation prepared by Christianne Laizner which, amongst other things, listed the risks associated with such meetings and the considerations when deciding whether to hold a meeting, including that there should be no real or perceived conflict in attending. Further, to always check with Senior General Counsel and the relevant Executive Directors to determine whether accepting the meeting invitation creates a real or perceived conflict and how or if the risk can be mitigated. Additionally, to ask staff to conduct internal research for any files that involve or may involve the requestor, ask if other Commissioners have received the same meeting request, and invite a CRTC employee to be present at the meeting. The power point also states that meetings should also be confirmed in writing and directions in that regard are set out. The power point concludes with the statement that appearance is just as important as reality during public hearings.

[146] On July 29, 2015 the Applicant met alone with a senior Shomi representative. The Summary states that at the time Shomi was a party to an application before the CRTC. Following that meeting the Applicant tweeted that he had a terrific lunch with David Asch of Shomi and that he was looking forward to seeing if/how Shomi's national launch appeals to Canadians. The Summary notes that Shomi subsequently retweeted the post. On September 1, 2015 the CRTC received a letter from the Public Interest Advocacy Centre ("PIAC") stating that it was an applicant in Commission File 2015-0379-8, Part I Application, Shomi Compliance with the Telecommunications Act and with a Digital Media Exemption Order. The letter stated that PIAC had recently become aware of the tweet, which it reproduced. It stated that, based on the tweet, it appeared that the Applicant had dined with David Asch, Senior Vice President and General Manager of Shomi, and that the two discussed the national launch of Shomi, something which was a matter of contention in the PIAC Part I Application and, as far as PIAC knew, its Part I Application regarding Shomi's service was still before the CRTC. The letter went on to discuss the duty of fairness owed to the parties by the CRTC and asked that the CRTC disclose whether the Applicant is a member of the panel deciding PIAC's application and, if so, that he recuse himself.

[147] The Chairperson raised this with the Applicant by email of September 10, 2015 noting the link to the CRTC's website by which PIAC's application could be publically accessed. As to the Applicant's alleged understanding that PIAC's application had been returned, the Chairperson stated that he had been advised by staff that the Applicant was specifically informed on May 28, 2015 that the application had not been returned and that the file was ongoing, referencing an attached email (which is not included in the record). The Chairperson also

referenced the CRTC practices on *ex parte* meetings and sought a response from the Applicant by end of business that day. The Applicant responded by saying that he was out of the office and would not have time to review the documents or consult with his legal counsel and suggested that the matter be dealt with the following week. The Chairperson replied that the PIAC matter was extremely important as it went to the integrity of the institution and sought a reply by noon on Monday, September 14, 2015, including on whether or not the Applicant intended to recuse himself.

[148] In response, the Applicant stated that:

> I find the tones [*sic*] of your emails to be threatening and quite aggressive. The demanding nature of these emails is inappropriate, particularly as you presently find yourself in Federal Court against me to defend your actions as Chairman and in the midst of separate investigations by the Conflict of Interest and Ethics Commissioner, the Public Sector Integrity Commissioner and the Information Commissioner. I would suggest that you take a step back and re-assess your entire approach to this matter.
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> As I have said, I will consult with my legal counsel and respond once I have received the support I require. As an independent Governor-in-Council appointee, I will not be bullied by you: you have no management authority over me.

[149] As an aside, I note that the Conflict of Interest and Ethics Commissioner, by letter of September 17, 2015 informed the Chairperson that his participation in an Access to Information ("ATIP") request did not appear to give rise to a conflict of interest as alleged by the Applicant. Further, on October 24, 2016 the Federal Court of Appeal in *Shoan FCA* dismissed the Applicant's challenge, based on an alleged lack of authority, to three decisions of the Chairperson to establish panels. The record contains nothing pertaining to the Office of the Information Commissioner or the Office of the Public Sector Integrity Commissioner.

[150] On September 15, 2015 the Applicant sent an email advising that he had reviewed the PIAC application and its request for his recusal, which the Applicant refused noting, amongst other things, that he had paid for the lunch personally and that there had been no discussions of the PIAC application. Further, that the PIAC application dealt with the legal integration of legislation and an exemption order and "the fact that I had an introductory lunch with Mr. Asch does not impact the legal analysis or discussion of the application in any way". Further, that since the application had been filed, the facts had changed such that it no longer encompassed Shomi's activity "as such, the basis of PIAC's application appears to be questionable; I'm somewhat surprised the application is still in-house and has not been returned to PIAC. We no longer have the ability to grant PIAC the relief it is seeking".

[151] The Summary also describes an August 17, 2015 meeting between the Applicant and Mr. Chris Byrne, the owner of Byrnes Communications. It states that at the time of the meeting an application involving Byrnes Communications was before the CRTC. Attached email correspondence indicated that on August 7, 2015 Mr. Byrne contacted the Applicant indicating that he wished to discuss the "call for comments on Burlington" process which closed on February 27 and why the process was taking so long as well as an FM license. In reply the Applicant, copying his assistant, stated he would get an update from staff on the Burlington Call for Comments and asked his assistant to coordinate his availability. On August 13, 2015 a staff reply was received indicating that the response for Byrnes Communications was that the application was under consideration by the CRTC and that the CRTC could not fetter any potential action by saying more, the internal answer for the Applicant was that the issue would

go to a BCM in the near future and from an analytical perspective it was on track, timing was dependant on agendas etc.

[152] On August 17, 2015 the Applicant sent an email to Mr. Byrne indicating that because the Burlington application was currently before the CRTC he would not be able to discuss it at the meeting that day. In response, Mr. Byrne stated that he understood and just wanted to know why it was taking so long. Later that morning the Applicant sent an internal email, marked high priority, to an economic analyst at the CRTC concerning the market assessment for Hamilton/Burlington and asking follow up questions. On that same date the Applicant met alone with Mr. Byrne for lunch.

[153] On October 21, 2015 the CRTC issued Broadcasting Decision CRTC 2015-472 concerning its findings regarding market capacity and the appropriateness of issuing a call for radio applications to serve the Hamilton/Burlington, Ontario radio market in which it concluded that the market could not sustain any additional commercial radio stations at that time. Accordingly, that the CRTC would not issue a call for applications for new stations to serve that market and would return the application originally filed by Byrnes Communications Inc. for a broadcasting license to operate a commercial radio station to serve Burlington, which it had announced it had received in December 2015. The news release of the CRTC indicates that it had received numerous interventions supporting a call for applications, including from Byrnes Communications, as well as interventions in opposition, to which Byrnes Communications had replied collectively, all of which were described. It also noted and attached the dissenting opinion by the Applicant. This stated that the Applicant was not arguing that the CRTC had

committed an egregious error of law or policy but that the majority decision did a disservice to the residents of Burlington. The Applicant then posted a message concerning his dissent on his personal Twitter account and included a link to his dissent.

[154] Subsequently, the Chairperson sent an email to the Applicant raising the issue of his lunch meeting alone with Mr. Byrne. The Applicant confirmed the meeting but took the position that the proper processes had been followed as he had sent a note to see if there were any in-house applications that he should avoid discussing and at the lunch meeting other matters were discussed. Further, that the CRTC was not considering the merits of the Burlington application, only a market assessment was being considered. And, even if the CRTC had decided that the market could sustain a new application, because at least one other broadcaster had indicated it was prepared to file an application it was likely that a separate public process would have been required to consider the merits of the applications. Accordingly, "[T]here was no Commission consideration of Byrnes' application, per se." The email went on to state that the Chairperson's continuous attempts to discredit the Applicant were unbecoming.

[155] As indicated in the Summary, the Applicant's right to and reasons for his dissent were not at issue. Rather, the concern was with the Applicant's failure to accept that *ex parte* contact with stakeholders must be carefully managed as it potentially exposes the CRTC to legal challenges and may raise serious concerns about its integrity and reputation, as demonstrated by the PIAC response to the Applicant's lunch meeting with Shomi. These meetings invited the concern of a reasonable apprehension of bias. The Summary states that:

> As Mr. Shoan is well aware, the perception of fairness and neutrality, the underlying concept of trust in public institutions, is

> required in the administrative decision-making process of the CRTC. Mr. Shoan's failure to adhere to internal process and procedures, established to minimize such institutional risks, constitutes a liability for the organization, and is impairing the integrity and reputation of the CRTC as evidenced by the reaction by stakeholders.

[156] The Applicant asserts in his written submissions in this application for judicial review that only two of many stakeholder meetings were impugned and that he followed CRTC protocols and the guidelines of the Conflict of Interest and Ethics Commissioner in both instances. As to the meeting with Mr. Byrne, per protocol, he confirmed in writing that an open file would not be discussed and in the Shomi matter there was no open application before the CRTC involving that entity and, as such, no potential conflict existed. Further, that even if this had not been the case, given the nature of the two meetings and that only two meetings are at issue this does not amount to "cause" for termination. When appearing before me the Applicant also argued that the above described meeting protocol amounted to only suggestions or a recommendation and were not a regulatory compliance requirement or a binding rule or policy.

[157] In my view, the Applicant's submission fails to recognize or acknowledge that the concern is the real or perceived apprehension of bias that his *ex parte* meetings give rise to. This concern was abundantly demonstrated by the response of PIAC to the Applicant's meeting with Shomi. It matters not that Shomi was not the applicant, the point is that Shomi's proposed activity was a matter under consideration by the CRTC in an application before it. Moreover, in the PIAC application the fact that the Applicant refused to recuse himself from the panel dealing with the subject application further demonstrates his lack of understanding of this concern. Indeed, the striking of that panel was the basis of one of his challenges to the Chairperson's

authority in the application for judicial review to the Federal Court of Appeal. As to the meeting with Mr. Byrne, contrary to his submissions, the Applicant did not comply with the CRTC internal processes. It is true that he determined from staff that an application involving Byrnes Communications was under consideration by the CRTC. This should have triggered the Applicant to either refuse the meeting or, at least, consult with internal counsel to determine if the meeting should proceed, and if so, that it be held in-house with all necessary risk mitigation. Again, whether only a market assessment was in play at that stage, rather than the actual Byrnes Communications application, was not the issue. It was the perception of fairness and neutrality.

[158] Given its broad discretion (*Wedge* at paras 32-33) the GIC could reasonably find that the Applicant's lack of recognition and/or disregard of concern about *ex parte* communications, and its impact on the integrity of the CRTC, was a basis for dismissal with cause. I would similarly conclude with respect to the Applicant's response to the ATIP request and the internal processes intended to address such requests. However, these incidents cannot be viewed in isolation. Because the Applicant was potentially denied procedural fairness, and, because it cannot be determined from the record or the GIC's reasons how much reliance was placed on the Harassment Report and related concerns, I cannot determine whether the GIC's decision was reasonable.

Issue 4: Remedy

[159] In the context of remedy in this matter, the quashing of the GIC's decision to remove the Applicant for cause would presumably result in the Applicant resuming his appointment.

[160] There is a legitimate concern that the Applicant's disregard of processes intended to protect the integrity of the CRTC displays a lack of sound judgment. It is also apparent that the relationship between the Applicant and the Chairperson is fraught. The Applicant challenged the Chairperson's authority on many occasions and was of the view that because the *CRTC Act* named all appointed Commissioners as members, they were equals, and that the Chairperson's designated additional responsibilities did not elevate him beyond his status as a member. For example, he stated in an email to all Commissioners, which was reported by the media, that:

> In essence, by naming Panels without regard for existing, legally constituted by-laws of the Commission, the Chairperson is declaring to each of us that, in his view, he can, at any time, take your vote away from you. He is declaring that he alone can decide which Commissioners decide for the rest of us without our input. He is establishing a culture at the Commission wherein ingratiating yourself to the Chairperson in order to be placed on a favourable Panel becomes the *modus operandi*. He is transforming the Commission's governance such that all major decisions run through the Office of the Chairperson and dissident Commissioners are ostracized.

[161] He then referenced the by-laws which he felt supported his view and concluded "I beg you to stand with me to oppose the decisions to strike these Panels - through whatever mechanism or forum is deemed best. I will be contacting each of you to discuss the matter further". Although the Federal Court of Appeal subsequently made it clear in its decision that the Applicant's challenge to the Chairperson's authority to constitute the panels was without merit, it is uncertain that this will cause the Applicant to change his approach in general to the Chairperson, the work of the CRTC and his role within it.

[162] In the context of the stay, while Justice Mactavish found that the Applicant had established a serious issue, she was not satisfied that he had established irreparable harm. In that

regard, she found that any harm to the Applicant's reputation resulting from the GIC's loss of confidence in his ability to discharge his responsibilities as a Commissioner of the CRTC would not be undone if he were reinstated to his position pending the hearing of this application for judicial review. And, when considering the balance of convenience:

> [51] Finally, there is a strong public interest in ensuring the effective functioning and well-being of the CRTC. Without making any finding as to who is at fault, it is clear that the relationship between Mr. Shoan and the CRTC Chairperson and certain other staff members has become very difficult. Reinstating Mr. Shoan to his position on an interim basis would undoubtedly have a negative impact on the collegiality required for the effective operation of the CRTC.

[163] When appearing before me the Respondent submitted that if I found the GIC's decision to be procedurally unfair then I should consider an alternate remedy to the quashing of the GIC's decision as sought by the Applicant. Specifically, that the Court could set aside the Order-in-Council but suspend the order for an initial period of 30 days, subject to renewal by motion, to permit the GIC the opportunity to consider whether to commence a new process. The Respondent cites the Federal Court of Appeal's decision in *Pelletier 2008* at paragraphs 6 to 13 in support of this application. However, that decision does not suggest that such a remedy was ordered.

[164] Further, even if the GIC were to effect a new process that process would presumably also require a new Order-in-Council reflecting the outcome of the revised process. Accordingly, I see no benefit in suspending my decision to quash the decision of the GIC as proposed by the Respondent.

[165] Having found that the record does not permit me to determine that the Applicant was afforded procedural fairness, this application for judicial review is granted. I am aware that the GIC's decision on redetermination may well be the same but, based on the record before me, I am unable to determine that this is inevitable.

Costs

[166] Although the Applicant offered to provide written submissions on costs, this is unnecessary. In my view, this is not a case where an award of costs to either party is appropriate.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. There shall be no order as to costs;
3. Those portions of the Affidavit of Balraj Shoan, sworn on July 4, 2016, as served and filed, shall be struck out as described in Appendix A of this decision. The Applicant shall, within 7 days of the date of this decision, file and serve a replacement, duly redacted, affidavit.

"Cecily Y. Strickland"
Judge

Appendix "A"

The following portions of the Shoan Affidavit were challenged as inadmissible by the Respondent:

Paragraphs 6 to 8, paragraph 9	The Respondent submits that these contain inadmissible opinion and argument rather than facts. The Applicant submits that the statements made in these paragraphs contain background information to assist the Court in understanding the issues relevant to the judicial review and are relevant. In my view, these paragraphs are not admissible as they contain opinion and argument. For example, in paragraph 6, the Applicant states that during his time as a Commissioner he observed changes - "some subtle, others far more alarming - had been made to the governance structure of the CRTC. Those changes threatened, in a meaningful way, the ability of all Commissioners to operate in an independent manner and to comprehensively serve the regions they represented. I challenged the authority to implement these changes. I questioned their purpose". In the following paragraph the Applicant states his purpose and intention in requiring answers to his "legitimate inquiries" and his view that the independence of Commissioners had been degraded. In paragraph 8 he asserts that because he stated an intention to pursue a complaint against a senior staff member for refusing to answer his questions he was accused of workplace harassment. This goes beyond background material. It was open to the Applicant to set out the factual backdrop to the harassment complaint and resultant judicial review as well as his challenge to the authority of the Chairperson and related application for judicial review, as a factual description of events, which to an extent, he did in paragraphs 10 and 11 of his affidavit, albeit with additional commentary. However, paragraphs 6 to 8, and in part paragraph 9, contain the Applicant's opinions and his explanations for his actions. The latter could have been placed before the Minister in response to her letter of February 26, 2016. When appearing before me the Respondent no longer took issue with paragraph 9. Paragraphs 6, 7 and 8 are struck in whole.
Exhibits D and E, referenced in paragraph 13 and related paragraphs 46-56 and 63-65 of the	Exhibit D is a letter dated June 14, 2016 from the Applicant to the Minister. Therein the Applicant states that the purpose of his letter is to bring to the Minister's attention allegations of harassment by another Commissioner of the CRTC which allegations were brought to the Applicant's attention on an anonymous basis by persons other than the alleged victim. The Applicant states that he has no legal ability to

Shoan Affidavit	ascertain the "facts" that he sets out but his hope is that the Minister can verify the substance of the allegations. The Applicant states that it is his understanding that a harassment investigation was conducted following the filing of a complaint but that he is not clear that the investigation was ever conducted, that the victim has recently retired having received a "rumoured substantial settlement", that there was no indication of sanction of the Commissioner involved, and, his concern that the Chairperson did not bring the investigation to the attention of the Minister to seek sanction. On the basis of these "facts" the Applicant urges the Minister to take action. He then refers to his allegations of bias and bigotry contained in his application of judicial review brought in relation to the Harassment Report concerning his actions and states that there were inconsistencies in the treatment of the two complaints and suggests that this is the result of the inappropriate exercise of discretion of the Chairperson, and that such decision-making jeopardizes the integrity of the CRTC. The Applicant urges the Minister to examine the nature of decision-making at the CRTC in this regard and to determine whether it meets the standard expected of the GIC. Exhibit E is the reply of the Acting Chief of Staff of the Minister to the Applicant dated June 21, 2016. This acknowledges his letter of June 14, 2016. It indicates that the Chairperson had been provided with the Applicant's letter, as he is mandated to ensure a harassment-free workplace under his authority as the deputy head of the CRTC, and states that if the Applicant has evidence of inappropriate conduct or harassing behaviour in the workplace that he should provide that information directly to the Chairperson. The Respondent submits that these letters are not relevant to the Minister's concerns about the Applicant's own conduct. Further, that they were not considered by the GIC and are therefore not admissible on judicial review. The Applicant submits that Exhibits D and E contain background information which is important to the contextual analysis required of this Court in determining the judicial review before it, which includes how the Minister or GIC responded to similar allegations of harassment. Further, that this information goes directly to the Minister's closed mind and potential breach of procedural fairness in dealing with the Applicant. Exhibit D is dated June 14, 2016. Thus, it postdates the March 14, 2016 Applicant's Response to the Minister's Letter which was dated February 26, 2016. It does not present itself as a further submission in response or request that it be considered by the Minister in that context. It was received by the Minister prior to the GIC rendering its decision on June 23, 2016, although the record does not indicate when the Minister

	made her recommendation and forwarded it to the GIC. To the extent that Exhibit D purports to bring an alleged complaint of harassment by another Commissioner to the attention of the Minister, it is not relevant to this application for judicial review. The Minister was addressing and the GIC was considering the allegations of harassment by the Applicant as part of their concerns with his conduct. Thus, it is those actions that were at issue before them, not the alleged actions of another Commissioner. Further, the facts of every complaint will differ and it is not reasonable to assume that sanction will arise and will be the same in each case. And, as the letters were not forwarded to the GIC, they did not factor into its decision and, accordingly, cannot be considered by this Court in its review of the reasonableness of the decision. Moreover, the Applicant does not state precisely when the alleged concerns about the actions of another Commissioner came to his attention. His letter dated June 14, 2016, Exhibit D, states that allegations of inappropriate conduct by another Commissioner were brought to his attention "over the past year". The Applicant's Response, dated March 14, 2016, makes no reference to the allegations contained in Exhibit D. However, he does assert that he cannot be held solely accountable for the deterioration of the workplace environment and that the behaviour of others ought to be considered. In that regard, he refers to examples of the Chairperson's alleged actions and urged the Minister to consider the totality of the circumstances that may be contributing to a decline of collegiality at the CRTC. The Applicant also refers to an attached letter from the prior Minister to him, dated July 17, 2015, which advised him that, in relation to the harassment complaint against him, the Minister would not, at that time, be making a recommendation to the GIC regarding his termination but that all information related to the matter remained under active consideration. The letter also states that the Minister had proposed to the Chairperson that, under his authority as the deputy head of the CRTC, he undertake a workplace assessment to address the issues that may be contributing to what appeared to be a toxic work environment so as to restore a healthy environment and to prevent harassment from continuing. The Applicant's Response asserted that the assessment was never undertaken, rather that the Chairperson had fixed his efforts on removing the Applicant's critical voice from the CRTC. The Applicant suggested that the assessment should be done by an independent party and stated that it remained his concern that the Chairperson had exhibited a hostile, negative animus towards him. Thus, Exhibits D and E, are relevant to the question of procedural fairness raised by the Applicant in that they raise the question of the level of investigation conducted into the allegations against the

	Applicant, including the extent of his role in the breakdown in collegiality. Accordingly, reference to them in paragraph 12 shall not be struck out nor shall they be removed as exhibits to the Shoan Affidavit. That said, paragraphs 46 to 56 of the Shoan Affidavit go far beyond mere description of his June 14, 2016 letter (Exhibit D), which speaks for itself, and provides new evidence by way of the Applicant's explanations as to events that he asserts led up to his writing of that letter. Accordingly, these paragraphs are not admissible and are struck out. Paragraphs 63 to 65 address the Minister's reply of June 14, 2016 (Exhibit E), the Applicant's reaction to it and his conclusions drawn from it. In my view, these paragraphs are also inadmissible and, to the extent that the Applicant is arguing that the lack of action or meaningful response to his June 14, 2016 letter is indicative of a refusal by the Minister to consider concerns raised by him, this properly should have been contained in his legal argument. Paragraphs 63, 64 and 65 are struck out.
Paragraphs 14 to 27	These describe the Minister's Letter of February 26, 2016. I agree with the Respondent that while this is unnecessary, paragraphs 14 to 20 do not stray beyond description of that correspondence. However, the same cannot be said for paragraphs 21 to 27. Therein the Applicant sets out his interpretation of and concerns with the Minister's Letter, his opinions including that "[S]he clearly was operating under the mistaken belief that every action I had taken was designed to impugn the CRTC rather than in defence of it", that her letter was one-sided and that "[A]t the outset, the discussion was framed with an obvious bias from the very beginning" and sets out the reasons why the Applicant asserts that the Minister had a closed mind and states that "…it was apparent to me the full extent of the campaign of misinformation that the Chairperson was attempting to spread…". This is not fact, it is opinion and argument and, as the Respondent points out, contains rebuttal evidence or arguments that could have been raised in the submissions made to the GIC. I do not agree with the Applicant's submission that the paragraphs do not advance opinions or argument but rather contain a series of the Applicant's "observations", and, in any event, subjective observations of the Applicant have no place in this sort of affidavit. Paragraphs 21, 22, 23, 24, 25, 26 and 27 are struck out.
Paragraphs 28-45	The Respondent submits that, with the exception of the first sentence of paragraph 41 and the whole of paragraph 44, these paragraphs purport to summarize the contents of the Applicant's Response and to record how the Applicant felt, which is not relevant. The Applicant submits that these paragraphs are relevant and provide background information to facilitate the Court's understanding of the facts. And, as there is no issue as to relevancy, prejudice or controversy, there is no reason for the

	content of those paragraphs to be struck out. In my view, while the Applicant's description of his response was unnecessary, as the letter speaks for itself, it was open to the Applicant to factually describe its content. Again, however, the Applicant goes beyond this stating, for example, in paragraph 28 that he and his counsel "took great pains to address the issues set forth in Ms. Joly's February 26, 2016 in a fair, balanced and reasonable manner" and paraphrasing the content of his submissions, occasionally with a lack of accuracy. Accordingly, the first sentence of paragraph 28; the last two and a half sentences of paragraph 30; second sentence of paragraph 33; the last two sentences of paragraph 37; the second and third bullets of paragraph 38; all words following "The Chairperson ignored direct request for independent legal advice" in the first bullet of paragraph 41; paragraph 45 are inadmissible in whole as they are nothing more than the Applicant's commentary about how he felt after he sent his letter and why.
Paragraphs 57 to 62 and Exhibits G and H	The Respondent submits that these paragraphs pertain to the hearing of the judicial review application before Justice Zinn. And, while the basic facts are relevant to the Applicant's allegation that the GIC decision was a collateral attack on the proceeding before Justice Zinn, the paragraphs are objectionable because the facts are interwoven with gloss, explanation and comment. The Respondent states that they are inadmissible other than with certain specified exceptions. As to paragraphs 60 and 62 and the media articles appended as Exhibit H, this is inadmissible hearsay and the articles were not a part of the record before the GIC and are not relevant. The Applicant submits that these paragraphs do not contain opinions and arguments but again consist of a series of observations of the Applicant that are relevant and provide background information to facilitate the Court's understanding of the facts. They also speak to the rescission of the confidentiality order, confidentiality being among the GIC's apparent considerations in deciding to terminate the Applicant, as well as the timing of the GIC's decision and the issue of collateral attack. I agree with the Respondent that the basic facts pertaining to the judicial review heard by Justice Zinn are admissible. This would include the date of that hearing, that Justice Zinn presided and advised the parties at the hearing that he would reserve his decision which would be delivered in September 2016, and, the rescission of the confidentiality order. Accordingly, the wording of paragraph 57 will be limited to "The date of June 21, 2016 was … the date of the hearing for my first judicial review application." When appearing before me the Respondent advised this it no longer took issue with paragraphs 58 to 62. While Exhibit G, the order rescinding the confidentiality order is admissible, the media reports contained in Exhibit H were not before the GIC, are not relevant and are not admissible.

Paragraphs 66 to 71	These paragraphs purport to describe the June 23, 2016 letter received by counsel for the Applicant from the Privy Council Office appending the Order-in-Council terminating his appointment, a copy of which was attached as Exhibit I and the Applicant's views and response to the termination. For example, in paragraph 68 the Applicant states his opinion that, in his view as a lawyer, the GIC had not demonstrated that it met the test applicable for the removal of a GIC appointee, and, in paragraph 70 the Applicant sets out his suspicions as to the timing of his termination. Again, and despite the Applicant's characterization of this latter information as "observations" made by the Applicant and as essential background information, I agree with the Respondent that the basic facts are admissible but that the remainder of the paragraphs are largely inadmissible as containing opinion and arguments. Accordingly, paragraphs 68, 70 and 71 are struck in whole, at the hearing before me the Respondent advised that it no longer took issue with paragraph 66.
Paragraphs 72 to 78	The Respondent submits that these are inadmissible because of a lack of relevance and because they contain opinion and argument. These paragraphs speak to the alleged impact of the GIC's decision on the Applicant, which the Respondent submits is not relevant to the legality of the GIC's order as this is not an action for damages. The Applicant acknowledges that these paragraphs speak primarily to the matters in issue in the prior stay motion, the affidavit also being filed in support of that proceeding. In my view, these paragraphs are inadmissible. The impact of dismissal pertains to the content of procedural fairness owed, however, the termination of the Applicant's appointment is apparent from the record and its impact is addressed in argument with respect to the procedural fairness issue. Further, the paragraphs clearly contain argument and opinion rather than facts on the record before the GIC. Accordingly, paragraphs 72, 73, 74, 75, 76, 77 and 78 are struck out in whole.
Paragraphs 79 to 82	The Respondent submits that these paragraphs are inadmissible because they are not relevant and because they contain opinion and argument. These paragraphs are described as the "conclusion" in the Shoan Affidavit. The Applicant describes these as observations of the Applicant which are essential to provide background to the Court and that these "facts" relate to the process conducted by the Minister and the GIC and issues of procedural fairness raised in the Notice of Application. Again, in my view these paragraphs contain the Applicant's opinion and argument including his opinion that the Minister had a closed mind and that by law, he was entitled to know the standard of "good behaviour" to be met prior to termination and urging the Court to set aside the GIC's decision. These paragraphs are wholly inadmissible and, accordingly, paragraphs 79, 80, 81 and 82, are struck out.

Memorandum of Fact and Law	As to the related provisions of the Applicant's written submissions contained in his Memorandum of Fact and Law, while the Respondent seeks to similarly have these struck out, in my view, as they are not pleadings but comprise only of argument, it is not necessary to strike the impugned paragraphs (also see *Assn of Universities and Colleges* at para 26; *Delios* at para 45; *Duyvenbode* at paras 2-3). The Court is aware that the underlying paragraphs of the Shoan Affidavit upon which they are based have been struck out and will consider the arguments on that basis.

Summary of Strike Outs

Paragraph	**To now read as follows**
Para 6	6. [ ]
Para 7	7. [ ]
Para 8	8. [ ]
Para 21	21. [ ]
Para 22	22. [ ]
Para 23	23. [ ]
Para 24	24. [ ]
Para 25	25. [ ]
Para 26	26. [ ]
Para 27	27. [ ]
Para 28	28. [ ] "I responded on March 14, 2016…"
Para 30	"In terms of the specific tweets…I contested her conclusion that they incited criticism of the CRTC". [ ]
Para 33	"With respect to my use of Twitter and collegiality with my Commissioner colleagues…in that regard". [ ]
Para 37	"Ms. Joly arguments….may be found at Exhibit "F". [ ]
Para 38	Second bullet = [ ] Third bullet = [ ]
Para 41	First bullet = "The Chairperson ignored direct requests for independent legal advice". [ ]
Para 45	45. [ ]
Para 46	46. [ ]
Para 47	47. [ ]
Para 48	48. [ ]

Para 49	49. [ ]
Para 50	50. [ ]
Para 51	51. [ ]
Para 52	52. [ ]
Para 53	53. [ ]
Para 54	54. [ ]
Para 55	55. [ ]
Para 56	56. [ ]
Para 57	57. “The date of June 21, 2016 was [ ] the date of the hearing for my first judicial review application.” [ ]
Exhibit “H”	Struck out in whole
Para 63	63. [ ]
Para 64	64. [ ]
Para 65	65. [ ]
Para 68	68. [ ]
Para 70	70. [ ]
Para 71	71. [ ]
Para 72	72. [ ]
Para 73	73. [ ]
Para 74	74. [ ]
Para 75	75. [ ]
Para 76	76. [ ]
Para 77	77. [ ]
Para 78	78. [ ]
Para 79	79. [ ]

Para 80	80. [ ]
Para 81	81. [ ]
Para 82	82. [ ]

FEDERAL COURT

SOLICITORS OF RECORD

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