Federal Court Cour fédérale

Date: 20180507

Docket: T-796-17

Citation: 2018 FC 476

Ottawa, Ontario, May 7, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BALRAJ SHOAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the decision of the Governor in Council [GIC], dated May 4, 2017 and promulgated by Order in Council, PC 2017-456 [Decision], to terminate the Applicant's appointment as a member of the Canadian Radio-television and Telecommunications Commission [CRTC] for cause.

II. BACKGROUND

[2] The Applicant was appointed as the CRTC Commissioner for Ontario by the GIC in June 2013. His appointment was effective July 3, 2013 and was to last for five years: PC 2013-809, as amended by PC 2013-838. Pursuant to s 3(2) of the *Canadian Radio-television and Telecommunications Commission Act*, RSC 1985, c C-22 [*CRTC Act*], he was to hold office "during good behaviour."

[3] This is the second time the termination of the Applicant's appointment has been before this Court. In *Shoan v Canada (Attorney General)*, 2017 FC 426 at para 135 [*Shoan #1*], Justice Strickland reviewed the Applicant's first termination for cause, dated June 23, 2016, and held that she was not able to determine, based on the record before her, whether the GIC had afforded the Applicant sufficient procedural fairness when terminating his appointment. Justice Strickland allowed the application for judicial review and quashed the GIC's decision. The effect was to reinstate the Applicant to his position when *Shoan #1* was rendered on April 28, 2017.

[4] Justice Strickland's reasons in *Shoan #1* formed part of the record before the GIC in the Decision under review in this application. Justice Strickland laid out the background to her decision as follows:

> [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*")).

[5] As explained in *Shoan #1*, the Applicant's first termination for cause was based on four concerns the Minister of Canadian Heritage [Minister] had disclosed in a letter to the Applicant [Minister's Letter], and accompanying summary, dated February 26, 2016: negative public statements the Applicant had made about the CRTC; the release of confidential information by the Applicant; inappropriate contact the Applicant had with CRTC stakeholders; and, the effect of the Applicant's actions on the internal operations of the CRTC. Justice Strickland was unable to conclude what reliance, if any, was placed by the GIC on a report finding a complaint of harassment laid against the Applicant had merit [Harassment Report] and related concerns. In *Shoan v Canada (Attorney General)*, 2016 FC 1003, a decision subsequent to the Applicant's first termination, Justice Zinn found the Harassment Report to be deeply flawed, and determined the related confidentiality concerns did not justify a confidentiality order by the Court. Justice Strickland also held she was unable to understand 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. As a result, Justice Strickland concluded that the Applicant was "potentially" denied procedural fairness and she allowed the application for judicial review. See *Shoan #1*, above, at para 142.

[6] On May 4, 2017, six days after Justice Strickland's decision in *Shoan #1*, and without the Minister communicating with the Applicant during the intervening period, the GIC terminated the Applicant's appointment for cause for a second time. In the Decision, the GIC listed two separate grounds for the Applicant's termination: inappropriate contact with CRTC stakeholders

and a lack of recognition of and disregard for the impact of that contact on the reputation and integrity of the CRTC; and, the Applicant's refusal to respect internal CRTC processes and practices for meeting its obligations under the *Access to Information Act*, RSC 1985, c A-1 [*Access to Information Act*] and his negative public statements about the CRTC. In the Minister's Letter, and supporting summary, these grounds had been previously disclosed to the Applicant.

[7] With respect to the first ground, the Minister's Letter expressed concerns that the Applicant had inappropriate contact with CRTC stakeholders in July and August 2015. The Minister said that, on these occasions, the Applicant met alone with CRTC stakeholders whose applications were before the CRTC, and he did so without following CRTC practices. The Applicant's public tweet about one meeting raised concerns from an affected party that he had inappropriately met *ex parte* with another party to an application then before the CRTC. The other meeting raised similar concerns about perceptions of fairness and neutrality.

[8] With respect to the finding that the Applicant made negative public statements about the CRTC, the Minister's Letter noted that in April 2015, the Applicant promoted a personal statement, via his Twitter account, about a judicial review application he commenced against the CRTC. The Minister was of the opinion that the statement was critical of the CRTC and its Chairperson, and led to negative media attention about the CRTC. In October 2015, the Applicant again promoted a personal statement, via his Twitter account, relating to a subsequent legal challenge he commenced against the CRTC. Again, the Minister found the statement was critical of the CRTC and it led to negative media attention. The Minister also noted the Applicant

did not respect internal processes and procedures designed to allow the CRTC to meet its statutory requirements under the *Access to Information Act.*

III. DECISION UNDER REVIEW

[9] The Decision reads in full 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;
>
> 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;
>
> 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, the submissions made by Raj Shoan on March 14, 2016 and the material enclosed with those submissions;
>
> Whereas, in light of the September 2, 2016 decision of Mr. Justice Zinn of the Federal Court in the matter of Shoan v. Canada (Attorney General), docket T-668-15, the Governor in Council has excluded from consideration the report into the complaint of harassment filed against Raj Shoan on March 17, 2015 and the sole grounds on which the Governor in Council relies set out below;
>
> Whereas the Governor in Council has concluded that Raj Shoan's actions with respect to inappropriate contact with CRTC stakeholders and his lack of recognition of and disregard for the impact of that contact on the reputation and integrity of the CRTC (the inappropriate contact ground) 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;
>
> And whereas, independent of the inappropriate contact ground, the Governor in Council has concluded that Raj Shoan's responses related to his refusal to respect internal CRTC processes and practices for meeting its obligations under the *Access to Information Act* and his negative public statements about the CRTC 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;
>
> 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 Canadian Radio-television and Telecommunications Commission for the Ontario region, effective May 5, 2017.

IV. ISSUES

[10] The Applicant submits that the following issues arise in this application:

1. Did the process adopted by the GIC to terminate the Applicant's appointment a second time breach the duty of fairness owed to him?
2. Is the GIC's Decision to terminate the Applicant's appointment unreasonable?
3. What is the appropriate remedy?

V. STANDARD OF REVIEW

[11] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[12] The Applicant submits that questions of procedural fairness are not subject to the standard of review analysis. Instead, a reviewing court determines the level of fairness required and whether the procedure followed was fair. See *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74 [*Moreau-Bérubé*]. The Respondent argues issues of procedural fairness are reviewable on the correctness standard. The Respondent notes the nature and extent of the duty of procedural fairness is variable, and the content is to be decided in the specific context of each case. See *Wsanec School Board v British Columbia*, 2017 FCA 210 at paras 22-23, *Gupta v Canada*, 2017 FCA 211 at paras 29-30.

[13] While the distinction may be relevant in particular circumstances, it is not clear to me how the Applicant's submission differs from conventional correctness review. Since *Moreau-Bérubé*, "developments in the common law principles of judicial review" have clarified that procedural issues are reviewed under the standard of correctness. See *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*], and *Mission Institution v Khela*, 2014 SCC 24 at para 79. Admittedly, the Federal Court of Appeal has described the standard of review on procedural issues as "currently unsettled" and catalogued instances where some deference

was afforded to decision-makers on procedural points. See *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 67-71. Here, however, the issues of whether the Applicant received adequate notice and an opportunity to be heard are issues of procedural fairness that do not suggest a margin of deference is required and will be reviewed for correctness. No deference is owed to the decision-maker when applying the correctness standard. Rather, a reviewing court will undertake its own analysis and if it disagrees with the decision-maker, the court will substitute its view of the correct answer. See *Dunsmuir*, above, at para 50.

[14] In *Shoan #1*, above, at para 35, Justice Strickland held that the GIC's decision to terminate the Applicant's appointment for cause was reviewable under the reasonableness standard. The parties also agree that the reasonableness standard should apply here. See *Wedge v Canada (Attorney General)*, (1997), 4 Admin LR (3d) 153 at para 29 (FCTD) [*Wedge*], and *Dunsmuir*, above, at para 53. I see no reason to disturb this holding. The GIC's decision to terminate the Applicant's appointment for cause will therefore be reviewed for reasonableness.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[16] The following provisions of the *CRTC Act* are relevant in this application:

Commission established	**Établissement**
3 (1) There is established a commission, to be known as the Canadian Radio-television and Telecommunications Commission, consisting of not more than 13 members, to be appointed by the Governor in Council.	3 (1) Est constitué le Conseil de la radiodiffusion et des télécommunications canadiennes, composé d'au plus treize membres, nommés par le gouverneur en conseil.
Tenure	**Mandat**
(2) 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 Governor in Council for cause.	(2) La durée maximale du mandat est de cinq ans pour tous les conseillers. Ceux-ci occupent leur poste à titre inamovible, sous réserve de révocation motivée de la part du gouverneur en conseil.

VII. ARGUMENT

A. *Applicant*

(1) Procedural Fairness

[17] The Applicant submits that the process employed in the Minister's recommendation to the GIC and the Decision fell short of the level of fairness he was owed as a "good behaviour" appointee serving on a quasi-judicial administrative tribunal. He says that the Minister and the GIC failed to engage in an individual assessment, did not fairly and transparently articulate the

reasons for the Decision, and did not provide a meeting to discuss the allegations against him or explain why such a meeting was unnecessary.

[18] The Applicant points to the foundational cases on procedural fairness to establish that the GIC owed him a duty of fairness when deciding to terminate his appointment. There is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653. This duty "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*], quoting *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 682.

[19] The Applicant notes that the Supreme Court of Canada has identified the importance of the decision to the individual or individuals affected as a relevant factor in determining the level and content of the duty of fairness. See *Baker*, above, at para 25. When an individual's profession or employment is at stake, a high degree of fairness is required. See *Kane v University of British Columbia*, [1980] 1 SCR 1105 at 1113. The Applicant submits that these concerns are heightened in the context of his appointment to a quasi-judicial tribunal and because his termination for a second time is a unique circumstance that has had a profound personal and professional impact on him.

[20] The Applicant submits that, while a duty of fairness is owed to both "at pleasure" and "good behaviour" appointees, the scope of fairness owed is not identical in each case. See

Dunsmuir, above, at paras 115-16. In *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras 86-98, the Supreme Court also recognized that GIC appointees are entitled to good faith before they are sanctioned. The Applicant says that officials appointed during good behaviour are owed greater procedural protection than officials appointed at pleasure. See *Vennat v Canada (Attorney General)*, 2006 FC 1008 at para 105 [*Vennat*]. In the context of judges appointed during "good behaviour," this enhanced procedural protection flows from the necessity of judicial independence. See *Keen v Canada (Attorney General)*, 2009 FC 353 at paras 46-47 [*Keen*]. In comparison, at pleasure appointments have been described as "intrinsically precarious": *Pelletier v Canada (Attorney General)*, 2008 FCA 1 at para 33, quoted in *Keen*, above, at para 48.

[21] Since the *CRTC Act* does not lay out a scheme for the removal of members, the GIC has discretion over how to meet the duty of fairness. Nevertheless, the GIC is obliged "to give the affected party a real opportunity to respond to the reasons" for dissatisfaction: *Vennat*, above, at para 80. The duty to provide sufficient procedural fairness rests with the GIC, and it is not the Applicant's responsibility to request procedural safeguards. See *Vennat*, above, at para 186. The Applicant says that, despite this requirement, his requests for safeguards were ignored, even after Justice Strickland's decision in *Shoan #1*.

(a) *Individualized Inquiry*

[22] The Applicant also submits that he was denied the individualized inquiry he was entitled to because he was given no notice before his second termination and therefore could not know the specific case he had to meet.

[23] The Applicant says that the Minister made no independent investigation into the facts presented to the GIC. Conceptually, the Applicant submits that the right to a personalized inquiry more properly engages his right to be heard, as it implicates elements of inquisition and analysis that require consultation with the individual affected by a decision. Regardless, this inquiry must be conducted with a degree of autonomy which results in more than a review and "must, in short, make it possible to shed light on the specific conduct of the person affected": *Vennat*, above, at para 178. The Applicant says that the obligation to conduct a personalized inquiry continues "even if [the] facts appear to have been established generally in a fact-finding report, and the employee has a right to respond": *Vennat*, above, at para 166. He says that the complexity of the issues surrounding his dismissal and the unreliability of the information provided to the Minister demanded a personal inquiry of the sort illustrated by *Wedge*, above, and *Weatherill v Canada (Attorney General)*, [1999] 4 FCR 107.

[24] The Applicant also submits that the personalized inquiry he was owed required consideration of, and an explanation for, why his position about his participatory rights was dismissed. He says this did not occur. In *Keen*, Justice Hughes held that the applicant had been appointed at pleasure. However, if she had been appointed on good behaviour as she alleged, the Minister of Natural Resources' failure "to enter into further dialogue or hold some form of independent inquiry [would have] demonstrate[d] a clear lack of fairness." See *Keen*, above, at para 57. The Applicant notes that, after he responded to the Minister's Letter, the Minister conducted no further dialogue with him before his first or second termination.

[25] The Applicant also says that the record demonstrates that, at least with respect to the allegation that his conduct had led to the improper release of confidential information, the Minister conducted no independent inquiry into the facts. The Minister's Letter cited three instances that gave rise to this concern: the release of personal information of an individual as part of the Applicant's application for judicial review of the Harassment Report; documents that the Attorney General claimed were subject to solicitor-client privilege filed in the Federal Court of Appeal as part of the Applicant's application for judicial review of the CRTC Chairperson's panel assignments; and the disclosure of personal information by the Applicant that had led to a complaint against the CRTC under the *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*]. The Applicant notes that these allegations were in the materials placed before the GIC for both of his terminations. He says that any investigation would have revealed to the Minister that the allegations were unfounded. In *Shoan v Canada (Attorney General)*, 2016 FC 1003 at para 149, Justice Zinn concluded that nothing in the matter justified a confidentiality order. The Applicant also says that he provided the Minister with the Federal Court of Appeal's order rejecting the Attorney General's argument that the Applicant breached solicitor-client privilege. Also, the Applicant's own investigation into the *Privacy Act* complaint, conducted after Justice Strickland's decision in *Shoan #1* was rendered, led to the CRTC Senior General Counsel confirming to him that the Office of the Privacy Commissioner had concluded that the complaint was "not well-founded." The Applicant submits that this instance in particular shows that the Minister did not conduct an individualized inquiry to independently determine the validity of the complaint before it was placed before the GIC and that she had a closed mind regarding his possible innocence.

[26] The Applicant also notes that the Order in Council containing the Decision refers to three grounds to justify his termination but it does not articulate what information was relied on in making the Decision. Only the Harassment Report is specifically referred to as excluded. In these circumstances, the Applicant says that he is left guessing which allegations the GIC relied on when making the Decision.

[27] The Applicant submits that the haste with which he was removed from his position for a second time indicates that the Minister and the GIC operated with a closed mind and he could not have altered the Decision. Factors indicating the Minister's closed mind include: the Minister's failure to speak with him before his first termination; the complete lack of opportunity to change or affect his second termination; the Minister's disregard for concerns the Applicant raised about procedural fairness, discrimination and potential bigotry; and the lack of further inquiry into a record derived from an unfair and deficient process. The Applicant says this process failed to provide the level of fairness required to remove him from his appointment as a good behaviour appointee.

(b) *Clear and Transparent Reasons*

[28] The Applicant submits that the Minister and the GIC failed to provide him with clear and transparent reasons. The Applicant says he was provided with a summary of allegations that were provided to the Minister, but he was not given an indication as to whether his responses were considered, or to what extent they were considered. The Applicant states that when he made requests for safeguards in the process he was ignored, including when he asked to meet

with the Minister, and when he raised concerns respecting conduct at the CRTC that had impacted his ability to fulfill his duties.

[29] The Applicant also notes that, following *Shoan #1,* he was not provided information as to how or whether the GIC would engage further in the decision-making process. He was left unaware of the process undertaken.

(c) *Opportunity to be Heard*

[30] The Applicant says he was deprived of an opportunity to be heard because he was not offered a meeting with the Minister or her staff prior to the Decision, and he was not advised why the Minister or the GIC deemed such a meeting unnecessary. The Applicant argues that the Court has been clear that he was entitled to such a meeting to ensure procedural fairness or, at least, he was entitled to know why such a meeting was deemed unnecessary. In *Shoan #1,* above, at para 123, Justice Strickland held that

> … if the Minister was of the opinion that the matters raised by the Applicant in his [March 14, 2016] 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.

The Applicant argues he was deprived of an opportunity to be heard, which makes the GIC's decision procedurally unfair.

[31] The Applicant submits there were significant facts he would have discussed in a meeting with the Minister that were relevant to the GIC's Decision, including his assertion that the lack of collegiality within the CRTC was not attributable to his actions. He argues these items are in addition to the matters raised during the administrative investigation and in his March 14, 2016 [Response] and June 14, 2016 letters.

(2) Reasonableness

[32] The Applicant submits the Decision is unreasonable because it is based upon a wrong principle in respect of "good behaviour" and the threshold of "cause" was made perversely without regard to the evidence. He argues a contextual approach must be applied. In *Wedge,* above, at para 30, the Court held that

> In order to determine whether a holder of public officer 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.

See also *Wedge,* above, at para 32.

[33] In the employment context, the Supreme Court of Canada has held a "contextual approach" is required to determine whether misconduct warrants summary dismissal of an employee, including an examination of the circumstances surrounding the conduct, as well as its nature or degree. The principle of proportionality must underlie the approach. See *McKinley v BC Tel,* 2001 SCC 38 at paras 34 and 53. The Applicant maintains that, considering the nature of

his employment, and the quasi-judicial duties that he held, the GIC was required to undertake a contextual analysis. Any decision must be proportionate to the alleged misconduct.

[34] The Applicant argues that the Court's finding in *Shoan #1,* above, which addressed whether the GIC's first decision to terminate the Applicant was reasonable, should not be relied upon here because Justice Strickland's assessment is *obiter dicta,* and not binding, and because the Court's comments include errors of fact. The Applicant submits the following findings were errors of fact: the Applicant did not follow CRTC practices, or consult with CRTC counsel; Shomi was a party to an application before the CRTC; and Shomi's activity was a matter under consideration by the CRTC.

[35] The Applicant argues that the record relied upon by the GIC is unreliable because it was the result of a process described by Justice Strickland in *Shoan #1* as procedurally unfair. In addition, no steps were taken by the GIC, between April 28, 2017, when Justice Strickland's decision in *Shoan #1* was issued, and May 4, 2017, the date of the GIC's Decision, to re-assess the context or remedy the procedural flaws. He argues that any decision based upon the record is therefore unreasonable.

[36] The Applicant also argues the Decision is made without regard to the material he presented. The Applicant points out that he raised concerns about inaccurate information contained in the Minister's Letter in his March 14, 2016 Response, but no response or inquiry was conducted by the Minister. He argues that the Minister's concerns with respect to public statements made by the Applicant, his contact with stakeholders, and concerns about the internal

operations of the CRTC, are inaccurate, speculative and cannot form the basis of a rational finding of cause for termination in the circumstances. The Applicant submits it is unreasonable to conclude that any of these grounds justify cause for dismissal.

[37] With respect to public statements, the Applicant states there was no evidence before the GIC that the Applicant's two impugned statements had an impact on public or stakeholder confidence. He argues that "none" of the media articles included with the Minister's Letter challenge the CRTC's ability to fulfill its mandate. He maintains that the impugned statements were in respect of judicial proceedings, and were not critical of the CRTC. Rather, he spoke of perceived changes in the decision-making process that, in his view, made vulnerable the independence of the CRTC Commissioners.

[38] With respect to contact with CRTC stakeholders, the Applicant argues he was open about the meetings and followed both CRTC protocols and the guidelines of the Conflict of Interest and Ethics Commissioner. In the case of Mr. Byrne, of Byrnes Communications, the Applicant obtained confirmation in writing that an open file before the CRTC would not be discussed at the meeting, and he met with Mr. Byrne in his capacity as a consultant for other radio operators; the meeting was "unrelated" to Mr. Byrne's interests as a radio broadcaster. With respect to the Applicant's meeting with a representative of Shomi, he argues that when the meeting was held there was no active application before the CRTC that involved Shomi, and therefore no potential conflict existed for the meeting. The Applicant also states that, because Shomi was an unregulated service and operated pursuant to an exemption order under the *Broadcasting Act*, SC 1991, c 11, it was a separate legal entity from the carriers subject to the application noted by the

Minister. He argues that CRTC decisions form part of the GIC record, and none of the applications were examined by the Commissioners in any respect. The applications in question were returned to the applicants, unexamined, because of changes in circumstances and facts.

[39] With respect to internal operations of the CRTC, the Applicant maintains he never refused to respond to a request under the *Access to Information Act*. On August 10, 2015 the CRTC received a request for "All emails, memos, attachments exchanged between the CEO, Secretary General, and Commissioners regarding travel, hospitality and conference expense allocations for Commissioners related to fiscal year 2015-2016. Timeframe June 1, 2014 – June 30, 2015." The Applicant stated his intention to satisfy the request pending the resolution of certain legal concerns. He argues his concerns with respect to the fair disclosure of the materials requested, and the decision-making process associated with the request, were valid.

[40] The Applicant argues that if there were legitimate concerns held by the Minister and the GIC, the concerns must be considered in the full context of his behaviour, and the importance of this employment to him. None of the concerns expressed strike at the core of the employment relationship. The decision must provide a proportionate response, and not exceed a rational or logical consequence.

(3) Remedy

[41] The Applicant seeks an Order quashing and setting aside the Decision of the GIC, and declaring that Orders in Council P.C. 2013-809 and P.C. 2013-838, dated June 13 and 21, 2013, remain fully in force. The Applicant also seeks an Order declaring that he is entitled to an order

from the GIC that accounts for his lost service time as Commissioner and provides for an additional term as Ontario Commissioner for a commensurate period according to the same terms and conditions of his initial terms. The Applicant also seeks costs on a solicitor-client basis, and such further and other relief as this Court deems just.

B. *Respondent*

(1) Procedural Fairness

[42] The Respondent recognizes that procedural fairness is owed to a GIC appointee who holds office during good behaviour and who is facing termination for misconduct. The Respondent argues the process that led to the May 4, 2017 termination of the Applicant's appointment was procedurally fair. The Applicant was afforded adequate notice of the allegations against him, he was given a meaningful opportunity to respond, and he was afforded a fair and impartial decision, which allows him to understand the basis for it. The Respondent also submits that the GIC addressed the procedural concerns raised by Justice Strickland in *Shoan #1* by excluding from consideration the grounds to which those procedural concerns related.

[43] To establish the context of the duty of fairness owed to the Applicant, the Respondent points to cases where the Court has reviewed terminations of GIC appointees. The Court has recognized that the GIC "has significant leeway in determining what means will achieve the procedural fairness objective": *Vennat,* above, at para 148. The GIC is not required to "follow complex, costly procedures that are incompatible with that body's nature": *Pelletier v Canada*,

2005 FC 1545 at para 86. Termination cases are not adjudicative processes to which full, formal, court-like procedures apply: *Wedge*, above, at para 24. The content of the duty of fairness is at the "lower level" and is 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": *Shoan #1*, above, at paras 59 and 91.

(a) *Notice*

[44] The Respondent acknowledges the Applicant was entitled to notice, including to be informed of the sanction being considered against him, the possibility of removal, and adequate information setting out the grounds upon which it was believed that he lacked good behaviour. The Respondent maintains the GIC process met these procedural requirements.

[45] The Respondent relies on Justice Strickland's findings in *Shoan #1* to argue that, as was found in that decision, the Applicant was afforded more than adequate notice of the allegations against him. See *Shoan #1*, above, at paras 92 and 99. To the extent that an individualized process was required, the GIC met this requirement, because "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": *Shoan #1*, above, at para 111.

[46] The Respondent argues that the meaning the Applicant seeks to give to the term "individualized" is not what Justice Noël meant by the term in *Vennat*, above. In that case, the

Court found the GIC process was unfair because it relied on the findings of a collateral process that was not "personal" to the applicant. See *Vennat,* above, at paras 13, 29, 136, 143 and 168. In this case, the Respondent maintains the process followed by the GIC was personalized to the Applicant. The concerns set out in the Minister's Letter and the supporting documentation were personalized to the Applicant. The process undertaken by the GIC was designed to shed light on the Applicant's conduct and was aimed at deciding whether the Applicant should be removed.

(b) *Opportunity to be Heard*

[47] The Respondent also acknowledges that the Applicant was entitled to a fair hearing, including a meaningful opportunity to respond to the allegations against him, and to influence the decision-maker. The decision-maker had an obligation to consider his evidence and submissions before coming to a decision. The Respondent argues that the Minister and the GIC met these requirements.

[48] The Respondent points out that the Applicant was represented by legal counsel who provided a comprehensive written response to the allegations against him. The Applicant put forward his version of the events at issue and made submissions on how the decision-maker should interpret his conduct. The Respondent argues this was not a case that was so complex that the decision-maker could not fully appreciate the facts or the Applicant's responding submissions without additional oral submissions. The Applicant accepted the process set out in the Minister's Letter; he did not make a complaint that he was being deprived of a meaningful opportunity to be heard, and he did not advise the Minister that his written Response dated March 14, 2016 was incomplete.

[49] The Respondent argues that procedural fairness in this case did not require an oral hearing, or a face-to-face meeting. The Respondent points to *Shoan #1*, above, at para 121, where Justice Strickland noted the Applicant did not request a formal hearing, and he did not explicitly express the view that a meeting with the Minister was a necessary requirement of procedural fairness in this matter. The Respondent argues that an oral hearing was not necessary to ensure the Applicant had a meaningful opportunity to be heard.

[50] The Respondent submits that the Applicant's reliance on *Keen*, above, is misplaced. The Respondent argues that Justice Hughes' statement in *Keen*, where it is noted he would have concluded that the failure to "enter into further dialogue" with the applicant violated procedural fairness, if he had found that she enjoyed tenure "during good behaviour" rather than "at pleasure," was made in the context of the Court having found that "neither the Minister nor the GIC have provided Ms. Keen adequate information setting out the grounds upon which it was believed that she lacked good behaviour": *Keen*, above, at para 57.

(c) *Fair and Impartial Decision*

[51] The Respondent also agrees that the Applicant was entitled to a fair and impartial decision that would allow him to understand the basis for it. The Respondent again relies on Justice Strickland's decision in *Shoan #1* where the Court held that the context of decision-making by the GIC does not require detailed reasons for removing an appointee for cause: see *Shoan #1*, above, at para 141. The Respondent argues the Decision confirms that the GIC "carefully considered" the Applicant's responding evidence and submissions before coming to a

decision. The validity of such recitals in an Order in Council is not to be questioned. See, *Keen*, above, at para 55.

[52] The Respondent submits that in response to the procedural fairness concerns identified by Justice Strickland in *Shoan #1*, and in response to the Applicant's responding evidence and submissions, the GIC excluded three prior grounds from consideration. The GIC did not rely on the Harassment Report filed against the Applicant, or concerns that had been raised about the Applicant's contribution to the decline of collegiality in the CRTC, or concerns that the Applicant improperly released confidential information.

[53] The Respondent argues it was not a breach of procedural fairness that a face-to-face meeting was not offered to the Applicant. It was open to the GIC to address the issues raised by the Applicant in his written response by providing better written reasons and by narrowing the basis of the Decision by excluding those aspects about which the Applicant had complained. Contrary to the Applicant's submission, the Respondent argues Justice Strickland did not conclude that a face-to-face meeting was necessary. Rather, Justice Strickland noted a face-to-face meeting was one of the ways in which the decision-maker could advise the Applicant why some of his submissions were being rejected, which the Respondent argues means, in effect, oral reasons. See *Shoan #1*, above, at para 124.

[54] The Respondent argues that if this Court can conclude that the Decision was arrived at fairly and that it was reasonable with reference to the result, the written reasons and the record, then the absence of oral reasons delivered during a face-to-face meeting is not a procedural error.

[55] The Respondent also submits there is no merit to the Applicant's submission that he was entitled to an oral hearing so that he could provide additional evidence or submissions. Justice Strickland did not find the Applicant was entitled to a meeting to provide additional evidence or submissions.

(2) Reasonableness

[56] The Respondent argues that the GIC's Decision deserves a high level of deference. In determining whether "cause" exists, the GIC is "entitled to assess whether the conduct of the applicant was consistent with the terms of his appointment to that office, including, in its judgement whether his conduct could undermine public confidence in the federal institution with which he had been appointed to serve": *Wedge*, above, at para 32. In establishing what constitutes "cause" justifying removal of a public office-holder, the Applicant's conduct must be assessed in light of the nature of the position to which he was appointed. The Applicant's service as a public office-holder was one of privilege and involved "public trust and confidence." See *Wedge*, above, at para 33.

[57] The Respondent submits that the Applicant's affidavit, sworn on July 3, 2017, and the affidavit of Andrea Mullin, sworn on June 30, 2017, improperly rely upon material not before the GIC when it made its decision. The Respondent has brought a motion to strike out these affidavits at the hearing of this application.

[58] The Respondent argues that the two grounds upon which the Decision was based are each sufficient on their own to justify the termination. With respect to the first ground, the GIC held

that the Applicant had inappropriate contact with CRTC stakeholders and a lack of recognition of, and disregard for, the impact of that contact on the reputation and integrity of the CRTC. The Respondent points to the Court's decision in *Shoan #1*, where Justice Strickland held, in *obiter*, that the Applicant's inappropriate contact with CRTC stakeholders and his lack of recognition of and disregard for the impact of that contact on the reputation and integrity of the CRTC was "very troubling" and constituted cause for dismissal. See *Shoan #1*, above, at para 144.

[59] On two occasions the Applicant met alone with stakeholders who had interests involved in pending matters before the CRTC. On July 29, 2015, the Applicant met with a senior representative of Shomi, whose service was the subject of an application before the CRTC at the time. The Applicant also sent out a public tweet about the meeting afterwards, leading a party to the application to express concerns about the appearance of bias or of actual bias. On August 17, 2015, the Applicant met with the owner of Byrnes Communications. At the time, the CRTC was conducting a public consultation process into market capacity and the appropriateness of issuing a call for applications to serve the Burlington radio market. The consultation process was conducted because Byrnes Communications had submitted an application for a new radio station license to serve that market, and the company had made submissions supporting a call for applications.

[60] The Respondent submits that it was reasonable for the GIC to conclude that the Applicant's two meetings were inappropriate and risked damage to the reputation and integrity of the CRTC. The Respondent also submits it was reasonable for the GIC to conclude that the Applicant's failure to abide by practices and procedures concerning *ex parte* meetings with

stakeholders with pending applications before the CRTC risked undermining public confidence in the CRTC.

[61] With respect to the second ground for the Applicant's termination, the Respondent argues it was reasonable for the GIC to conclude that the Applicant's conduct relating to his obligations under the *Access to Information Act*, and his negative public statements about the CRTC, also justified dismissal for cause. The Respondent again points to *Shoan #1*, where Justice Strickland held that the Applicant's response to an access to information request and his failure to follow internal CRTC processes intended to address such a request was a basis for dismissal for cause. See *Shoan #1*, above, at para 158. The Respondent argues that the Applicant's unfounded assertions of unethical conduct and conflict of interest by CRTC staff and the CRTC Chairperson as a basis for refusing to follow internal processes and procedures designed to allow the CRTC to meet its statutory obligations under the *Access to Information Act*, created a potential legal liability for the CRTC.

[62] The Respondent also states that the Applicant's public statements about judicial review applications he had commenced against the CRTC were critical of the CRTC and its Chairperson, which led to negative media attention, and risked damaging public confidence in the CRTC. The Applicant twice issued negative statements against the CRTC. First, in April 2015, the Applicant issued, via his Twitter account, a four-paragraph public statement that identified himself as a CRTC Commissioner in order to publicize a judicial review application he had commenced against the CRTC. The Applicant stated his "hope is that the judicial review will result in an objective assessment of the issues and a strong rebuke against a culture of control

and the quashing of dissent within the CRTC." Second, in October 2015, the Applicant issued a statement relating to his application for judicial review to the Federal Court of Appeal, where he challenged three decisions of the Chairperson of the CTRC, and argued the Chairperson did not have the authority to establish panels of CTRC Commissioners to hear the matters before it. The Applicant wrote he was concerned about "unilateral decision-making…in contravention of existing CRTC by-laws."

[63] The Respondent submits it was reasonable for the GIC to conclude that the Applicant's public accusation that the CRTC Chairperson was breaking the law, and his statement implying that CRTC governance was not fair, damaged and risked damaging public confidence in the CRTC. The Respondent points to media articles to confirm this.

(3) Remedy

[64] The Respondent seeks an Order dismissing the application with costs to the Respondent.

[65] The Respondent states that in the event the Court grants the application, the proper remedy is to set aside the Decision, without reinstatement. The Court does not have jurisdiction to alter the terms of the Order in Council made on June 13, 2013, appointing the Applicant for a 5-year term by extending the length of his term beyond the period set out therein, or to order the GIC to issue a new Order in Council appointing him to a new term.

VIII. ANALYSIS

A. *Redetermination – Justice Strickland's Judgment*

[66] The Applicant's appointment as a Commissioner of the CRTC was originally terminated by a decision of the GIC dated June 23, 2016. That GIC decision was judicially reviewed by Justice Strickland in *Shoan #1* wherein she allowed the application and concluded her analysis with these words:

> [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.

[67] The Decision of May 4, 2017 that has now come before me for review is the GIC's redetermination response to Justice Strickland's decision of April 28, 2017. Although Justice Strickland did not set out any specific directions as to how the GIC should proceed, in my view, it is clear from her reasons and findings that the GIC was not required by her order to abandon the whole process that had led to the first termination or, necessarily, to allow or require further submissions, whether written or oral.

[68] I say this because, when Justice Strickland says in her conclusion that "the record does not permit me to determine that the Applicant was afforded procedural fairness," she is referring to a specific set of issues that were set out clearly in the body of her reasons:

> [122] The Applicant's Response is also, with one exception, nonspecific 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.

…

[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.

[Emphasis added.]

[69] The Applicant says that Justice Strickland quashed the June 23, 2016 decision in its entirety, so that the GIC was obliged to re-process and reconsider his entire case and allow him to make further submissions. However, Justice Strickland merely says in *Shoan #1* that the "application for judicial review is granted." It is true that, in her reasons and discussion on the appropriate remedy, she appears to reject the Respondent's request that the decision not be quashed: "Accordingly, I see no benefit in suspending my decision to quash the decision of the GIC as proposed by the Respondent": *Shoan #1*, above, at para 164.

[70] However, even if the Court accepts that it was Justice Strickland's intention to "quash" the June 23, 2016 decision, Justice Strickland did not direct that, if the GIC wished to terminate the Applicant on grounds that were not contaminated by the problematic grounds she had identified in her reasons, the process of termination had to commenced anew, or that the Applicant had to be permitted a face-to-face meeting or an opportunity to make further submissions on all points and issues he had already addressed in his previous Response of March 14, 2016. In fact, I think it is fair to say that Justice Strickland left it to the GIC to determine how best to handle the redetermination while, at the same time, providing findings and observations that the GIC could reasonably take into account in deciding how to proceed in a procedurally fair and reasonable manner. The GIC, in effect, decided that, given Justice Strickland's findings and reasons, no further discussions or submissions were required in order to effect a redetermination of the Applicant's case and a second termination of his appointment. The grounds cited in the May 4, 2017 Decision were not found to have been handled in a procedurally unfair manner by Justice Strickland and were not unreasonable when Justice Strickland's decision is read as a whole. From the perspective of the present application,

the fundamental issue before me is whether the GIC's approach to redetermination was procedurally fair and/or reasonable. In my view, for the reasons that follow, it was. The Applicant asserted in oral argument before me that Justice Strickland's findings and statements were based upon processes and a record that was found to be unfair; he says that Justice Strickland's findings impact the entirety of the process that led to the June 23, 2016 decision. In my view, a reading of Justice Strickland's judgment makes it clear that this is not, in fact, the case.

[71] Having referred to the particular set of issues that prevented her from concluding that the June 23, 2016 decision was fair and reasonable, Justice Strickland also explains what she means by "potential" procedural unfairness. She says 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": *Shoan #1*, above, at para 143. Justice Strickland explains this further in her assessment of the reasonableness of the June 23, 2016 decision of the GIC:

> [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.
>
> [Emphasis added.]

[72] In short, Justice Strickland makes it clear, in my view, that there was nothing procedurally unfair or unreasonable about the June 23, 2016 decision of the GIC provided the GIC would have come to the same conclusions on termination without reference to what she refers to collectively as the "Harassment Report and related concerns." This is why she says in para 165 of her reasons that "I am aware that the GIC's decision on redetermination may well be the same."

[73] The Decision of May 4, 2017 that has now come before me for review is the GIC's response to the decision of Justice Strickland and the issues and questions that she raised. In effect, the GIC's answer is that the decision to terminate the Applicant would be the same if the problematic grounds identified by Justice Strickland are left out of account and the GIC relies upon the grounds found in the June 23, 2016 decision that Justice Strickland did not find to be "potentially" procedurally unfair or unreasonable.

[74] I am not, in hearing or deciding the present application, reviewing, reconsidering or hearing an appeal of Justice Strickland's decision. The Applicant himself seeks to rely on Justice Strickland's decision where it assists his case, but also asks the Court to discount the decision where it does not favour him because what she had to say is entirely *obiter* and/or is unreasonable. The Applicant wants me to go back and review the whole process that has led to his termination, consider new evidence that was not before the GIC, and reach different conclusions from those reached by Justice Strickland concerning the grounds that she said were handled in a procedurally fair and reasonable way.

[75] It is not uncommon in judicial review decisions to return matters for reconsideration subject to directions and guidance from the Court. One way of looking at Justice Strickland's decision is that she found the June 13, 2016 decision of the GIC was both procedurally fair and reasonable provided the GIC would have come to the same conclusions on termination without reference to the "Harassment Report and related concerns." This required the GIC to consider this question, and the Decision of May 4, 2017 answers the question by removing the grounds that the Court found problematic. The Applicant had already been given the requisite notice and a fair opportunity to respond to the non-objectionable grounds that form the basis of the May 4, 2017 Decision. Justice Strickland refers to what the GIC was required to do as a "redetermination": "I am aware that the GIC's decision on redetermination may well be the same…."

[76] Justice Strickland made no finding that the June 23, 2016 decision of the GIC was either procedurally unfair or unreasonable; all she said was that it was "potentially" so, depending upon the basis for the decision. The contingencies upon which "potential" unfairness and unreasonableness depended were removed by the GIC's Decision of May 4, 2017 which, upon reconsideration, left the objectionable grounds out of account and based the Decision upon the non-objectionable grounds.

[77] In deciding how to proceed with the redetermination, I don't think it can be said that the GIC acted in a procedurally unfair or unreasonable way by taking into account the findings and conclusions of the Court as part of its redetermination, even if, strictly speaking, some of those findings and conclusions are *obiter*. Redetermination was required because the June 23, 2016

decision was only "potentially" unfair and unreasonable. All that was necessary to remove the potential unfairness and unreasonableness was clarification on whether the GIC would also terminate the Applicant without reliance on the objectionable grounds. But my decision does not turn on whether Justice Strickland's findings and guidance were, strictly speaking, *obiter* or not. Justice Strickland's decision is extremely thorough and careful about the points of concern and the evidence, authorities and arguments put forward by the Applicant. The GIC was not required to disregard findings and comments of the Court simply because, from a legal perspective, those findings and comments might be regarded as *obiter*. The GIC is required to act fairly and reasonably. In my view, on the facts of this case, and given the thorough and meticulous way that Justice Strickland addressed the issues of procedural fairness and reasonableness with regard to the non-objectionable grounds for termination, the GIC acted fairly and reasonably by making it clear that, upon further reconsideration of the non-objectionable grounds, it chose to terminate the Applicant's appointment. This was not procedurally unfair because, as Justice Strickland found and as my own review confirms, the Applicant was given full notice of those non-objectionable grounds and provided a full response in this written submissions in which he did not raise some of the objections he is now raising before me.

B. *Grounds Raised in this Application*

(1) Meeting Required

[78] The Applicant says that, in reconsidering his case, the GIC was not entitled to rely upon the old record, but had to consider his case afresh and, as part of that new process, the Applicant was entitled to an opportunity to respond and to be heard.

[79] In making this assertion, the Applicant says that Justice Strickland found that he was entitled to a face-to-face meeting with the Minister to deal with the concerns he had raised, thus indicating that he regards Justice Strickland's findings and direction as being relevant to whether the process of redetermination was fair and reasonable. However, the Applicant is mischaracterizing what Justice Strickland said about the need for a meeting.

[80] What Justice Strickland said on point is as follows:

> [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, nonspecific 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.
>
> [Emphasis added.]

[81] As Justice Strickland makes clear in these paragraphs, the need for a meeting to achieve procedural fairness depends upon the grounds relied upon by the GIC. Once again, the failure to hold a face-to-face meeting is only "potentially" unfair, and it only becomes unfair if the GIC is relying upon the grounds that are not used to justify termination in the May 4, 2017 Decision. Justice Strickland did not say that a face-to-face meeting was procedurally required if the decision to terminate the Applicant was based upon the non-objectionable grounds. The May 4, 2017 Decision under review before me was based upon the non-objectionable grounds articulated by Justice Strickland. It is true that Justice Strickland does not specifically address the "negative public statement" ground, which forms part of the second ground for his termination in the Decision before me, but my own review suggests that this ground is also unobjectionable because it is not contaminated by the "Harassment Report and related concerns" that Justice Strickland felt gave rise to "potential" procedural unfairness and unreasonableness.

[82] In the present application, I am only looking at the possible need for a new process – and a meeting in particular – to deal fairly and reasonably with the two separate and distinct grounds

cited in the May 4, 2017 Decision. In this regard, after reviewing the record before me, I conclude that the Applicant was given ample notice of these grounds and a fair and adequate opportunity to respond in full in writing, and his submissions were taken into account in making the Decision.

(2) Procedural Unfairness – Generally

[83] The Applicant has, essentially, raised and argued before me the same grounds and authorities for procedural unfairness that he raised and argued before Justice Strickland. In addition, he has argued that the Minister's failure to proceed with a second termination without further input from him was also procedurally unfair.

[84] It has to be born in mind that the May 4, 2017 Decision before me only cites two reasons for termination:

(a) Inappropriate contact with CRTC stakeholders and lack of recognition of and disregard for the impact of that contact on the reputation and integrity of the CRTC are fundamentally incompatible with the Applicant's position as a Commissioner so that he no longer enjoys the confidence of the GIC to be a Commissioner; and

(b) Independent of the inappropriate contact ground, the GIC has concluded that the Applicant's response related to his refusal to respect internal CRTC processes and practices for meeting his obligations under the *Access to Information Act* and his negative public statements about the CRTC are fundamentally incompatible with his position and he no longer enjoys the confidence of the GIC to be a Commissioner of the CRTC.

[85] The Decision is clear that the Applicant was terminated for cause on these two independent grounds, that either ground will suffice, and that no other ground is relied upon. In this application, I do not see the Applicant taking issue with this interpretation of the Decision. Yet he raises a series of issues and arguments that, in my view, are not relevant to these grounds

and that allege unfairness and unreasonableness for grounds that are not relied upon in the Decision. I can only assess procedural fairness and reasonableness from the perspective of the two grounds that were relied upon by the GIC in making the May 4, 2017 Decision.

[86] The "inappropriate contact" ground was also a ground for termination in the June 23, 2016 decision, but it was unclear in that decision whether the GIC would have terminated the Applicant on this ground alone. I don't see the Applicant asserting in the present application that the grounds relied upon in the May 4, 2017 Decision are not stand-alone grounds, or that they cannot be used as possible grounds for termination if they are detached from the grounds that Justice Strickland found to be objectionable, although he does say that they have to be considered in the context of his conduct generally and balanced, in particular, against the importance of his CRTC appointment for his life, reputation and livelihood.

[87] As regards notice of the non-objectionable grounds, Justice Strickland found that the Applicant "was afforded more than adequate notice of the allegations against him" – *Shoan #1*, above, at para 92 – and she provided a lengthy and careful analysis as to why this was the case, which included a detailed comparison with the authorities cited by the Applicant.

[88] It is clear, in my view, that Justice Strickland's concerns about procedural fairness, or the opportunity to be heard issue, were not related to the independent grounds that form the basis for the May 4, 2017 Decision under review.

[89] Another way of putting this is that the Applicant was given appropriate notification and an opportunity to be heard on these two grounds – as part of the process that led to the June 23, 2016 decision – which have become the basis for the May 4, 2017 Decision. In my view and as Justice Strickland found, the Applicant accepted the process set out in the Minister's Letter and, as far as the grounds that became the basis for the May 4, 2017 Decision are concerned, I see no reason why oral submissions were also required for the full response which the Applicant provided in writing on March 14, 2016, on how any of the further submissions that the Applicant now wishes to make on this ground could not have been made in that Response.

(3) Reasonableness of Decision

[90] The same can be said for Justice Strickland's reasonableness finding:

> [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.
>
> [Emphasis added.]

[91] It is now clear that, in the May 4, 2017 Decision, the "inappropriate contact" and "refusal to respect internal CRTC processes and practices for meeting [the GIC's] obligations under the *Access to Information Act*" were considered as separate grounds for termination so that, given the GIC's broad discretion and the high level of deference it attracts, I cannot say the Decision

was unreasonable. I will address the evidence on these points below, but as I pointed out above, Justice Strickland does not specifically mention the "negative public statement" ground; it is my view, however, that the GIC was right to assume that Justice Strickland had taken no objection to this ground, and in my view the Applicant had adequate notice and a fair opportunity to address this ground by way of his Response of March 14, 2016.

(4) The Present Application

[92] It is not my role in the present application to review or re-assess Justice Strickland's analysis and findings with regard to the grounds for termination cited in the June 23, 2016 decision. In my view, the question before the Court in this application is whether it was procedurally fair and/or reasonable for the GIC to effect the May 4, 2017 termination by noting Justice Strickland's analysis and findings, removing the objectionable grounds, and basing its Decision on the non-objectionable grounds without going through the whole process again, or without allowing the Applicant to make further submissions and/or a face-to-face meeting to explain his position orally.

[93] In my view, it was neither procedurally unfair nor unreasonable for the GIC to take this approach. Justice Strickland conducted a lengthy and meticulous analysis of the situation of which the GIC reasonably took note. Justice Strickland did not say that reconsideration required the GIC to begin the whole process again or to seek further input from the Applicant, whether orally or in writing. Justice Strickland endorsed the procedural fairness and reasonableness of the June 23, 2016 decision subject to "potential" problems related to grounds that were removed from the May 4, 2017 Decision. The GIC was fixed with re-determining the June 23, 2016

decision that was only "potentially" problematic if the objectionable grounds were used as a basis for terminating the Applicant. The GIC made it clear in the May 4, 207 Decision that the Applicant's termination was not based upon the objectionable grounds.

[94] In the present application, the Applicant has asserted procedural unfairness and unreasonableness for termination grounds that were not used in the May 4, 2017 Decision. For example, the Applicant says that the record demonstrates that, at least with respect to the allegation that his conduct that led to the improper release of confidential information, the Minister conducted no independent inquiry into the facts. The Minister's Letter cited three instances that gave rise to this concern: the release of personal information of an individual as part of the Applicant's application for judicial review of the harassment decision; documents that the Attorney General claimed were subject to solicitor-client privilege filed in the Federal Court of Appeal as part of the Applicant's application for judicial review of the CRTC Chairperson's panel assignments; and the disclosure of personal information by the Applicant that had led to a complaint against the CRTC under the *Privacy Act.* The Applicant notes that these allegations were in the materials placed before the GIC for both of his terminations. These are grounds that were cited by the GIC in the Applicant's first termination, but they are not grounds relied on in the Decision under review. In my view, these disclosure concerns are different from, and should not be conflated with, concerns about "inappropriate contact" or the Applicant's "refusal to respect internal CRTC processes and practices for meeting its obligations under the *Access to Information Act*," or his "negative public statements." The Applicant also says that he provided the Minister with the Federal Court of Appeal's order rejecting the Attorney General's argument that the Applicant breached solicitor-client privilege. Also, the Applicant's own investigation

into the *Privacy Act* complaint, conducted after Justice Strickland's decision was rendered, led to the CRTC Senior General Counsel confirming to him that the Office of the Privacy Commissioner had concluded that the complaint was "not well-founded." The Applicant submits that this instance in particular shows that the Minister did not conduct an individualized inquiry to independently determine the validity of the complaint before it was placed before the GIC and that she had a closed mind regarding his possible innocence. Once again, however, I don't see that this is relevant to, or demonstrates, procedural unfairness or unreasonableness with regards to the independent grounds for termination cited in the May 4, 2017 Decision under review.

[95] Also, the Applicant submits there were significant facts he would have discussed in a meeting with the Minister that were relevant to the GIC's Decision, including his assertion that the lack of collegiality within the CRTC was not attributable to his actions. He argues these items are in addition to the matters raised during the administrative investigation and in his March 14, 2016 Response and June 14, 2016 letter. Once again, however, the lack of collegiality was not, in my view, a ground for termination in the May 4, 2017 Decision and is not inextricably connected to the independent grounds that are cited in that Decision.

(5) Grounds Used in the May 4, 2017 Decision

(a) *Public Statements*

[96] When it comes to the grounds that are cited in the May 4, 2017 Decision, the Applicant's position is best captured by his written submissions:

Public Statements

102. There was no evidence whatsoever before the GIC that the impugned statements had any impact on public or stakeholder confidence, either real or potential, in the work of the CRTC. Shoan's two statements did not seek "incite criticism", and did not question the CRTC's ability to fulfill its mandate. In fact, none of the media articles included with the Minister's February 26, 2016 letter impugn the CRTC's ability to fulfill its mandate.

103. Notably, the Minister did not criticize or take issue with the fact that Shoan commenced the related proceedings. Shoan was, of course, entitled to do so. In any event, the alleged concerns of the Minister relate to only the two statements, each of which contained only information found on the record of open court proceedings.

104. The statements issued by Shoan in April 2015 and October 2015, in respect of judicial proceedings commenced, were not critical of the CRTC; rather, he spoke of perceived changes in the decision-making process that, in his view, made vulnerable the independence of Commissioners. The statements also provide the reasons for his decision to commence those proceedings, rather than leaving it to public or industry speculation. The statements were discreet, and he did not engage the media at all. He did not provide any interviews or subsequent comment to media, despite requests to do so. Shoan's evidence to the Minister, as well, was that he proceeded with the applications, as he was lawfully entitled to, only as a last resort when the CRTC Chairperson refused to discuss the matter.

105. Contrary to the Minister's statement in her letter, there was absolutely no evidence that Shoan lacked collegiality or that he had "calculated to incite public criticism of the CRTC". No such finding was made in *Shoan #1*; Strickland made no finding respecting the public statements Shoan had issued. Conversely, a review of Shoan's Twitter feed disclose clear respect for and interest in the CRTC as an institution throughout his 789 published tweets at the time. Shoan did not criticize the Chairperson, personally, in the statements; rather, he only referred to concerns raised in his court filings about the scope of authority exercised. Moreover, it is apparent on the record that Shoan spoke positively of the Commission's role in furthering the public interest and how industry and the regulator could work together to achieve that end.

[Emphasis in original.]

[97] The Applicant's gloss and rationalization of his own public statements, and his disagreement with the GIC's conclusions, are not grounds for procedural unfairness or unreasonableness, and all of these arguments either were, or could have been, addressed in his June 14, 2016 Response.

[98] On the record before me, I think there are reasonable grounds for concluding that the Applicant's public statements about the judicial review applications he initiated against the CRTC amounted to an attack on the integrity of the CRTC and its Chairperson that he now seeks to characterize as legitimate criticism aimed at protecting the standing of the CRTC. The fact is that, in April 2015, through his Twitter account, he sought to draw attention to his judicial review applications and made it clear that his purpose was to seek "a strong rebuke against a culture of contact and the quashing of dissent within the CRTC." See Respondent's Record, Volume 2, Tab 28, p 757.

[99] He followed this up with another statement in October 2015 in which he accused the Chairperson of the CRTC of "unilateral decision-making" that was "in contravention of existing CRTC by-laws." His purpose was clearly to communicate that the governance structure of the CRTC was not "fair, balanced and independent" in the way that he thought it ought to be. See Respondent's Record, Volume 1, Tab 5, p 237. It is one thing to make these comments internally to colleagues, but to go public with them introduces a very different dimension and purpose.

[100] It was, in my view, entirely reasonable for the GIC to read these public statements as attacks on the integrity of the CRTC and its Chairperson, and there are media articles, which

formed part of the record before the GIC, that confirm that they were interpreted as such. *The Globe and Mail* reported on October 23, 2015 that

> A rift at Canada's broadcast and telecom regulator has again spilled over into the legal system, raising questions about how efficiently and fairly the commission can make public policy decisions.
>
> Raj Shoan, the commissioner for Ontario for the Canadian Radio-television and Telecommunications Commission (CRTC), has commenced a legal action arguing that chairman Jean-Pierre Blais has overstepped his authority by naming panels of commissioners to consider and rule on telecom files.
>
> …
>
> In a notice of application and affidavit with exhibits filed Thursday with the Federal Court of Appeal in Ottawa, Mr. Shoan argued that in September, the chairman improperly appointed panels of three commissioners - rather than the full slate of nine commissioners - to determine three issues before the CRTC.
>
> …
>
> Mr. Shoan said in his affidavit that by appointing smaller panels, Mr. Blais was unilaterally preventing certain commissioners from voting on various matters. In a September e-mail to his colleagues soliciting their support, Mr. Shoan wrote, "the Chairperson is declaring to each of us that, in his view, he can, at any time, take your vote away from you." No other commissioners ' are publicly supporting Mr. Shoan in his legal action.
>
> …
>
> In a public statement Friday, Mr. Shoan said he launched the case because he believes the CRTC's "default decision-making process is one of a 'council of equals,"', and that the chairman is jeopardizing the independence of individual commissioners.

[101] Clearly, the Applicant was understood to be attacking the culture of the CRTC and the Chairperson in particular for, in effect, removing the power of individual Commissioners, and this, in turn was understood to raise questions "about how efficiently and fairly the commission

can make public policy decisions." This goes directly to the CRTC's integrity and public reputation.

[102] An article in the *Financial Post* on October 23, 2016 confirms this impression:

> An outspoken regional commissioner at Canada's telecom watchdog is alleging that Chairman Jean-Pierre Blais has violated some of the bylaws that govern the commission, court documents show.
>
> …
>
> Blais has "erred in law and/or exceeded his jurisdiction by unilaterally convening and naming three panels," the court documents say, arguing that the law doesn't give the chairman the power to initiate proceedings without consulting the entire commission. Shoan is asking the court to overturn the appointments.
>
> This is the latest salvo in an ongoing clash between Blais and Shoan, who has repeatedly questioned Blais' leadership and has said the consolidation of power under the chairman is a threat to the integrity of the CRTC.

[103] Once again, the intent of the Applicant to discredit the Chairperson through accusations that he is acting illegally is clear and is understood as such by the media, as is the implication that the CRTC's integrity is also questionable as a result.

[104] It is noteworthy that in an email dated August 28, 2015 to the Chairperson, the Applicant asserted categorically that "I have launched a judicial review of your decision-making which has received substantial media coverage." So the Applicant, by his own words, demonstrates that the media had taken full notice of his attacks on the CRTC and its Chairperson. The Applicant knew the game he was playing and, given his professional background and significant

accomplishments, he must have been aware that he was communicating to the public a message that strongly suggested a lack of integrity and professionalism within the CRTC.

[105] It is also noteworthy that the Federal Court of Appeal dismissed the Applicant's judicial review applications on these issues from the bench and found them "sufficiently lacking in merit to warrant an increased award of costs" against the Applicant. So the Applicant went public with accusations of law breaking at the CRTC that were soundly dismissed and disapproved of by the Federal Court of Appeal. There can be nothing unreasonable, then, in the GIC concluding that the Applicant had made "negative public statements about the CRTC" that are "fundamentally incompatible with his position…." For the Applicant to now assert before me that his statements "were not critical of the CRTC" and "were discreet, and he did not engage the media at all" is not convincing.

(b) *Internal Operations of the CRTC*

[106] On this issue, the Applicant now asserts as follows:

> Internal Operations of the CRTC
>
> 110. Shoan never refused to respond to the ATIP request noted by the Minister. He stated his intention to satisfy the request pending the resolution of certain legal concerns. Given his concerns, he chose to seek guidance available to him under applicable legislation from the relevant Commissioner. Furthermore, this request to the Information Commissioner followed on the heels of a workplace investigation that Justice Zinn subsequently described as a "witch hunt" and followed another ATIP request which involved an unknown staff disclosure that resulted [sic] libelous media articles written about Shoan. Shoan's concerns with respect to the ATIP process were valid.
>
> 111. To the extent that there were any challenges within the CRTC environment, there <u>was no reasonable basis</u> whatsoever for

> the GIC to conclude that Shoan was liable. In light of Justice Zinn's decision, such a finding cannot be reasonable. While the May 5, 2017 decision excludes from consideration the report into the complaint of harassment against Shoan, the decision would seem to still rely upon an allegation that he is responsible for a negative internal environment within the CRTC.
>
> 112. Shoan also requested in his response to Minister Joly that any further concerns related to his conduct and the internal operations of the CRTC, to the extent that any existed, be provided to him. He received no further particulars.
>
> 113. Even if there were legitimate concerns held by the Minister and GIC, those concerns must be considered in the full context of Shoan's behavior, and the importance of this employment to him. None of the concerns expressed, even if properly considered, strike at the core of the employment relationship. Further. the decision must provide a proportionate response, and not exceed a rational or logical consequence. The disproportionate nature of the GIC's finding of "cause" in the circumstances is highlighted by the Minister's refusal to take any action on the concerns raised by Shoan in respect of alleged harassment and misconduct by another Commissioner.
>
> [Emphasis in original.]

[107] The record before me shows that the Applicant made unfounded assertions of unethical conduct and conflict of interest by the CRTC and the Chairperson. He appears to have done this as a rationale for not complying with internal processes and procedures that were necessary so that the CRTC could meet its statutory obligations under the *Access to Information Act*. In fact, he questioned the Chairperson's discretion to decide which documents should be disclosed, even though this discretion is clearly established in the governing legislation and was pointed out to the Applicant in an email from the Chairperson dated August 27, 2015:

> It has come to my attention that you have not yet complied with a request to provide documents regarding Access to Information Request A-2015-00021 by 24 August 2015. This request was made in the normal course of business using the institution's standard

> practices and procedures for requests made under the *Access to Information Act* (ATIP).
>
> Let me remind you that in accordance with the *Access to Information Act* […] it is the responsibility of the ATIP Office to review all records received in response to a requester, determine the relevancy of the records and to determine exemptions and exclusions as per the Act. Where there is discretion to be exercised under the Act, by law it must be exercised in accordance with the Act by the designated official under the Act. In such cases the advice of the ATIP office is provided to the decision-maker.
>
> Moreover, as indicated in section 6.2 of the attached Policy on Access to Information […], ATIP legislation falls under my accountabilities as Deputy Head. It is my responsibility to monitor compliance with this Policy as it relates to the administration of the *Access to Information Act*. Please note as well that under section 67.1(1)(c) of the *Access to Information Act*, it is an offence to conceal a record.
>
> I trust that you will provide the records requested by close of business tomorrow, an extension of the deadline which was granted to you and communicated on 26 August 2015.

[108] The Applicant's response was to make the following accusations, which he acknowledges in his email of August 28, 2015:

> The avoidance of a conflict of interest or any appearance or apprehension of bias falls under the general ambit of procedural law and the principles of natural justice. In an email to ATIP staff on August 24, 2015, I stated the following:
>
> > I am concerned that the following individuals are in a direct conflict of interest when assessing the disclosure of my information: the Chairperson (Jean-Pierre Blais), the Secretary-General (John Traversy), The Direct of Financial Services (Jim Stefaik), Senior General Counsel (Christianne Laizner) and General Counsel, Telecommunications (Daniel Roussy). As such, who will be making the decision to disclose? **How can I be assured it will be fair and equitable?** [bold mine]

[109] Clearly, then, the Applicant had made "responses related to his refusal to respect internal CRTC processes and practices for meeting [CRTC] obligations under the *Access to Information Act*" that were "fundamentally incompatible with his position…." What is more, this refusal created potential legal problems for the CRTC and jeopardized its ability to function. Yet the Applicant now argues before me that the Decision "is made entirely without regard, and was unresponsive, to [the material before it], at least with respect to the materials presented by Shoan. As a result, there is no rational explanation for the GIC's decision."

[110] Understandably, the Applicant takes a different view of the nature and impact of his actions. However, this is not, in my view, given the broad discretion that the GIC must be allowed, sufficient to render the Decision of the GIC unreasonable on these issues.

(c) *Contact with Stakeholders*

[111] On this ground of termination, the Applicant now argues as follows:

> Contact with Stakeholders
>
> 106. It is important to acknowledge that there are no CRTC decisions associated with the processes in question and none of the applications were examined by Commissioners in any respect. The applications in question were returned to the applicants, un-examined, due to changes in circumstances and facts. As such, there are no legal CRTC decisions to which the GIC can point to as illustrative of a flawed CRTC decision due to the Applicant's actions.
>
> 107. Only <u>two</u> of the many stakeholder meetings Shoan conducted during his appointment, and prior to the Minister's termination, were impugned in the most recent termination. Consulting with stakeholders was a key part of Shoan's role as Regional Commissioner for Ontario. Shoan was open and transparent about these meetings, and followed both CRTC protocols and the guidelines of the Conflict of Interest and Ethics

> Commissioner in place for such meetings. He further relied upon his legal training in the exercise of his judgment.
>
> 108. In the case of Mr. Byrne, as was established CRTC protocol, Shoan obtained confirmation in writing that an open file before the Commission would not be discussed at the meeting. Despite intimations to the contrary, any internal inquiry by Shoan with respect to the status of the file noted by the Minister was related to Commissioner deliberations scheduled for later in that week, and unrelated to his meeting with Mr. Byrne. Further, as indicated in his email exchange with Blais, Shoan met with Mr. Byrne in Mr. Byrne's capacity as a consultant for other radio operators and the meeting was unrelated to Mr. Byrnes' interests as radio broadcaster.
>
> 109. In the case of Shomi, no active application before the Commission involved that legal entity and, as such, no potential conflict existed for the meeting. Additionally, Shomi was an unregulated service and operated under an exemption order under the *Broadcasting Act*. It was a separate legal entity from the carriers subject to the application noted by the Minister. As well, such meetings were not unusual for Commissioners, as evidenced by the meeting records of other Commissioners provided by Shoan.
>
> [Emphasis in original.]

[112] After my full review of the record on this issue, I can add little to Justice Strickland's thorough analysis. She found the Applicant's actions in this regard as "very troubling." Her conclusions are as follows:

> [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.
>
> [Emphasis added.]

[113] Once again, it is understandable that the Applicant now seeks to assert his own interpretation of the import of his actions, and I am not saying that the Applicant's point of view is negligible, but I cannot say that, given the broad discretion that the GIC must be allowed in these matters, it was unreasonable in its assessment that the Applicant's contact was inappropriate and, on the facts of this case, was a threat to the integrity and reputation of the CRTC.

(d) *Conclusions*

[114] In examining these specific grounds, Justice Strickland concluded:

> [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.

[115] I come to a similar conclusion with regard to the same and other grounds as they appear in the May 4, 2017 Decision, where they are not "potentially" contaminated by the objectionable grounds that appeared in the June 23, 2016 decision.

(6) Applicant's Additional Arguments

[116] For completeness sake, and recognizing that this will lead to some repetition, I wish to make my assessment of some of the Applicant's more important assertions as clear as possible.

(a) *Procedural Fairness*

[117] The Applicant argues that before he was terminated for a second time, he had a right to be heard and should have been given a real opportunity to respond to the reasons for the GIC's dissatisfaction.

[118] As he argued before Justice Strickland with regards to the first termination, the Applicant submits:

> In particular, the Minister/GIC failed to engage in an individual assessment to act fairly and transparently to articulate the reasons for its decision and to provide [him] with a meeting to discuss the allegations and the matters raised by him (or provide any reason as to why this was deemed unnecessary).

[119] The Applicant's arguments and authorities, and what was owed to him under the general duty of fairness, were dealt with fully by Justice Strickland in her analysis, which makes it clear that the Applicant was not denied procedural fairness with regards to the unobjectionable grounds that are the basis of the May 4, 2017 Decision before me.

[120] As explained by Justice Strickland at para 142 of *Shoan #1*, above, the "potential" breach of procedural fairness relates to:

> [W]hat 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 […]

[121] In the May 4, 2017 Decision, it is clear that no reliance is placed upon the objectionable factors that Justice Strickland thought could "potentially" lead to unfairness if a meeting was not held.

[122] After reviewing the record as a whole, including Justice Strickland's findings, my conclusion is that the Applicant has not established before me that, because no face-to-face meeting took place before the Decision was made, he was denied procedural fairness. The Applicant had already been given an adequate opportunity to respond in full to the grounds of his May 4, 2017 termination in his Response of March 14, 2016.

[123] The Applicant also complains that "no notice was given to the Applicant prior to the second termination" so that he was "unaware of the specific case made against him and unable to respond directly to those concerns."

[124] As with the right to be heard, the full record, including Justice Strickland's analysis, makes it clear that, with regards to the grounds for termination cited in the May 4, 2017 Decision, the Applicant had already been given adequate notice and time to respond, as part of the process that led to the first termination and that he raised no objection on these grounds. As

the May 4, 2017 Decision specifically states, the Applicant's submissions on the termination grounds were "carefully considered." There is no reason to question this assurance.

[125] The Applicant says that he was "never provided adequate information about the exact grounds upon which it was believed that he lacked good behaviour, and was deprived of any opportunity to discuss and clarify the grounds being considered."

[126] As Justice Strickland pointed out, and as my own review has confirmed, the grounds of termination cited in the May 4, 2017 Decision had been fully articulated to the Applicant in the process that led to the June 23, 2016 decision. Justice Strickland acknowledged that if the objectionable grounds were removed, the "GIC's decision on redetermination may well be the same […]" *Shoan #1*, above, at para 165. As the application before Justice Strickland and the present application make clear, the Applicant has a very clear understanding of the basis for the grounds cited in the May 4, 2017 Decision and has dealt with them in considerable detail.

[127] The Applicant uses the GIC's failure to meet and speak with him before making the May 4, 2017 Decision as the basis for arguing the GIC and the Minister had a closed mind:

> 70. Simply put, the GIC proceeded hastily to remove Shoan from his position *within days* of his return to his position. It did so [w]ithout regard to the procedural fairness owed to Shoan in the circumstances, the damage that could result to Shoan personally or the process articulated by this Court in *Shoan #1*.
>
> 71. It is Shoan's submission that the Minister and/or GIC did so precisely because its mind was made up, and it operated with a *closed mind*. It proceeded swiftly and with a clearly deficient "process" for the singular purpose of removing Shoan from his position. The actions speak for themselves: Shoan did not stand a chance to alter the GIC's decision.

> 72. In assessing whether a closed mind existed, it is usually the Minister's state of mind that is most significant. In this case, *inter alia*, the Minister:
>
> a) failed and/or refused to meet or speak Shoan prior to his first termination;
>
> b) made no efforts to provide Shoan with any ability to change or affect the termination decision prior to his May 4, 2017 termination, notwithstanding procedural requirements articulated by this Court;
>
> c) wholly disregarded or ignored information and concerns provided by Shoan in correspondence, including concerns respecting procedural unfairness, discrimination and potential bigotry; and
>
> d) chose instead, almost immediately, to terminate Shoan's position without any further inquiry or examination and in full reliance on a record derived from an unfair and deficient process.
>
> 73. Consequently, the Minister's actions prior to the termination of Shoan's appointment "stopped short" of the procedural fairness owed to a "good behaviour" appointee. A "high standard of justice" required more.
>
> [footnotes omitted, emphasis in original]

[128] Once again, the Applicant refers to the "procedural requirements articulated by this Court" to support his argument for procedural unfairness. Justice Strickland found, as regards the non-objectionable grounds for the June 23, 2016 decision – termination grounds that were also relied upon for the May 4, 2017 Decision under review – that the Applicant had been afforded sufficient procedural fairness and such grounds were a reasonable basis for termination. My own review brings me to the same conclusion. Assuming that the GIC intended to terminate the Applicant on the non-objectionable grounds, then no face-to-face meeting was required. Nor is the haste in making the Decision surprising. All the work necessary to decide whether the

Applicant should be terminated on non-objectionable grounds had already been done and the GIC had clear guidance from the Court that those grounds could be acceptable provided they were not tarnished by intermingling with objectionable grounds. Most of the Applicant's evidence and argument for a "closed mind" go to grounds that were referred to in the June 23, 2016 decision but were not part of the May 4, 2017 Decision. For example, the Applicant had made it clear that he disagrees with the "inappropriate contact" ground but, in my view, the Applicant has not raised sufficient evidence to support a conclusion that the Minister or the GIC had a closed mind *on this ground*. Likewise the "refusal to respect" and "negative public statements" grounds.

[129] The Applicant has not established that the Minister or the GIC had a closed mind. The GIC was guided by Justice Strickland's decision to determine what was required of it to complete a fair and reasonable redetermination. Given the obvious breakdown in the relationship and loss of confidence in the Applicant by the Minister and GIC, it is to be expected that a redetermination needed to be dealt with as quickly as possible. This is not evidence of a closed mind. It is evidence that the GIC had to move quickly in order to remove internecine conflict that was damaging to the public reputation and integrity of the CRTC. The GIC was clearly obligated to control this kind of damage fairly and reasonably, but with the utmost alacrity.

[130] I agree with the Applicant that his own personal and professional reputation, and the full context of his actions, had to be part of any termination decision, but if the GIC reasonably perceived that the way the Applicant was conducting his disagreements at the CRTC was causing damage to the CRTC in the eyes of stakeholders and/or the public generally, then it seems to me

that it is the integrity and the reputation of the CRTC that must be given precedence, and that steps must be taken to swiftly re-establish order. As I have mentioned above, I think the Minister and the GIC had reasonable grounds to believe that the Applicant's actions had undermined, and would continue to undermine, the integrity and reputation of the CRTC. That being the case, speedy action was inevitable, provided it could be taken in a procedurally fair way and was based upon reasonable ground. My review of the record leads me to the conclusion that this is what happened in the present case.

[131] Finally, on the duty of fairness, the Applicant also argues as follows:

> 78. Similarly, no steps were taken to provide Shoan with a meeting with the Minister or her staff prior to the GIC's May 4, 2017 decision, and he was never advised by the Minister or anyone that the GIC deemed such a meeting to be unnecessary for any reason. In fact, the only correspondence provided to him in respect of his appointment was the notice of his termination.
>
> 79. This Court has been clear that Shoan was entitled to such a meeting to ensure procedural fairness. In the least, he was entitled to know the reason why such a meeting was deemed unnecessary in this case. The Court stated in *Shoan #1*:
>
> > ...if the Minister was of the opinion that the matters raised by the Applicant in his [March 14, 2016] Response did not warrant a meeting with her or her officials or further inquiry into the matters alleged...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.
>
> 80. This is consistent with the process illustrated in each *Vennat*, *Wedge* and *Weatherhill*. This is a key distinguishing feature between the level of procedural fairness owed to a "good behaviour" appointee and an "at pleasure" appointee. Otherwise, the procedural fairness in each circumstance becomes largely indistinguishable.

> 81. Further, as identified above, there were significant facts that Shoan would have discussed in such a meeting that were relevant to the GIC's decision. These items are in addition to the matters raised during the administrative investigation and in his March 14, 2016 and June 14, 2016 letters, including, *inter alia*, his assertion that the lack of collegiality within the CRTC was not attributable to his actions.
>
> 82. Rather than provide Shoan a meeting to review either the allegations against him, Shoan's March 14, 2016 response or the serious claims that Shoan had raised regarding inappropriate conduct at the CRTC (or provide an explanation about why this was deemed unnecessary), the GIC chose to wholly disregard the required process articulated by this Court only days before its decision. In doing so, it deprived Shoan of an opportunity to be heard, and resulted in a blatant violation of Shoan's entitlement to procedural fairness.

[132] I have referred to these issues above, but I think it is worth pointing out that, although the quotation from Justice Strickland's judgment is taken out of context by the Applicant, he once again clearly signals that it is appropriate to acknowledge and rely upon Justice Strickland's conclusions as a guide to what was required to achieve procedural fairness in the Decision under review.

[133] As I have set out above, it is my view that Justice Strickland's concerns only relate to specific issues that do not encompass the "inappropriate contact" ground or, in my view, the "refusal to respect… and …negative public statements…" ground, that are the basis for the May 4, 2017 Decision.

[134] As I have pointed out above, Justice Strickland did not say that the GIC had to begin the whole process again in order to achieve a procedurally fair redetermination or stipulate any process that was required of the GIC to render redetermination procedurally fair and reasonable.

In fact, she makes it clear, in my view, that, if the objectionable grounds are removed, so that they are not part of the termination decision then "the GIC's decision on redetermination may well be the same […]": *Shoan #1*, above, at para 165.

[135] Once again, Justice Strickland's decision did not find the June 23, 2016 decision was procedurally unfair or unreasonable; rather, she held the decision was only "potentially" procedurally unfair and/or unreasonable, depending upon whether or not the GIC was relying upon the objectionable grounds in terminating the Applicant. Based on the record before Justice Strickland, it was not possible for her to determine whether there was any such reliance. That is why, upon redetermination, she noted the decision to dismiss "may well be the same […]": *Shoan #1*, above, at para 165.

[136] The Applicant now says that "there were significant facts that [he] would have discussed in such a meeting that were relevant to the GIC's decision." However, the Applicant does not explain what possible new input he could have provided on the grounds cited in the May 4, 2017 Decision that he had not been given a full opportunity to provide as part of the process that led to the June 23, 2016 decision.

[137] In my view, then, the GIC's process for dealing with the May 4, 2017 termination was not procedurally unfair on this basis.

(b) *Reasonableness*

[138] The Applicant says that, for various reasons, the GIC erred in finding that cause existed to justify the termination of his appointment.

(i) Good Behaviour

[139] On this issue, the Applicant makes the following written submissions:

> 83. Additionally, the GIC's decision to terminate Shoan's appointment was based upon a wrong principle in respect of "good behaviour" and the threshold of "cause", and was made perversely without regard to the evidence before it.
>
> 84. Shoan's appointment was made "during good behaviour" pursuant to subsection 3(2) of the *Canadian Radio-television and Telecommunications Commission Act* (CRTC Act):
>
> 3(2) 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 Governor in Council for cause.
>
> 85. In determining whether "cause" for termination of an appointment exists: the GIC must examine the conduct of the individual to assess whether it is consistent with the terms of appointment to the office, including, *inter alia*, whether the alleged conduct undermines public confidence in the federal institution.
>
> 86. The GIC must satisfy a high threshold before establishing the existence of "cause" for termination. The decision cannot be arbitrary.
>
> 87. There are few cases dealing with "cause" for termination of individuals appointed "during good behaviour", and neither "cause" nor "good behavior" are defined under the CRTC Act. In *Shoan #1*, Justice Strickland reviews the GIC's June 23, 2016 decision to terminate Shoan's appointment at paragraphs 143 to 158; however, it is of no assistance to the Court in the present application for the following reasons:
>
> a) the paragraphs contain only *obiter dicta* and are not binding;

> b) The Court's *obiter* includes errors of fact which were clear on the face of the tribunal record, including that:
>
> a. Shoan did not follow CRTC practices:
>
> b. Shoan did not consult with CRTC legal counsel;
>
> c. Shomi was party to an application before the CRTC;
>
> d. Shomi's activity was a matter under consideration by the CRTC; and
>
> e. any conclusion in respect of reasonableness in that case would have necessarily been based on information and conclusions derived from a procedurally unfair process with a flawed record.
>
> [references omitted.]

[140] I agree with the Applicant that the GIC was obliged to examine his conduct to assess whether it is consistent with the terms of his appointment to office, including, *inter alia*, whether the alleged conduct undermines public confidence in the CRTC.

[141] As the Decision makes clear, the GIC was clearly of the view that, on both grounds cited, the Applicant's conduct was incompatible with his position as a Commissioner, and I think the full record shows that, on both grounds, the GIC felt that the Applicant's conduct posed a significant threat to the reputation and integrity of the CRTC.

[142] The Applicant disagrees, but Parliament has granted the CRTC a broad discretion to remove a CRTC Commissioner for cause. In *Wedge*, above, Justice MacKay, had the following to say on point:

> 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.

[143] Considerable deference is owed to the GIC in these matters because, as Justice Joyal pointed out in *Weatherill v Canada (Attorney General)*, [1998] FCJ No 58, we are dealing with the Crown prerogative and "[i]nto this field of ultimate prerogative authority, which I venture to suggest has legitimate constitutional roots, the judicial arm must move gingerly and diffidently" (at para 28).

[144] I have already referred above to the evidence on the record that goes to the GIC's concerns about the impact of the Applicant's conduct upon the reputation and integrity at CRTC, and I do not see how the Court can say that, in all the relevant circumstances, the GIC's assessment that his behaviour was cause for termination was not reasonably open to it.

(ii) Finding of Cause Unreasonable

[145] The Applicant makes the further following points in written submissions:

> 93. The record relied upon by the GIC in its May 4, 2017 was the result of a process described by this Court as potentially procedurally unfair. No steps were taken by the GIC between April

> 28, 2017 and May 4, 2017 to re-assess the context or remedy the procedural flaws.
>
> 94. Accordingly, the record relied upon by the GIC is unreliable, and any decision based upon it is necessarily unreasonable.

[146] As I have set out previously, the May 4, 2017 Decision was a direct response to Justice Strickland's findings on "potential" unfairness and unreasonableness:

> [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.

[147] The GIC responded to the "potential" unfairness and unreasonableness issue by removing the objectionable grounds from its Decision of May 4, 2017. Hence, the procedural and substantive flaws were removed when the GIC made it clear that the two grounds cited in the May 4, 2017 Decision were distinct and independent grounds for termination.

[148] Obviously, the GIC felt that either ground rendered the relationship with the Applicant unworkable and detrimental to the integrity and reputation (perceived or otherwise) of the CRTC. Having reviewed the evidence on these two grounds as set out above, and given the broad discretion of the GIC to decide these matters, it would not be appropriate for the Court to intervene on the facts of this case and grant the Applicant the relief he seeks.

(7) Evidentiary Issues

[149] The Respondent asks the Court for:

> (a) An Order striking the following paragraphs and exhibits from the Affidavit of Balraj Shoan sworn July 3, 2017 (First Shoan Affidavit):
>
> > the third sentence of paragraph 2, paragraphs 7-15, the first half of paragraph 16 up to and including the words "an open dialogue", paragraphs 18-19, the balance of paragraph 20 after the second sentence, paragraphs 21-23, the balance of paragraph 25 after the first sentence, paragraphs 26-30, paragraphs 32-33, paragraph 35, paragraphs 37-99, and the balance of paragraph100 after the first sentence; and Exhibits B, E, G, I, J, K, L, M and N;
>
> (b) an Order striking the Affidavit of Andrea Mullin sworn June 30, 2017 (Mullin Affidavit), in its entirety;
>
> (c) an Order striking the Affidavit of Balraj Shoan sworn on February 9, 2018 (Second Shoan Affidavit), in its entirety;
>
> (d) an Order striking the following paragraphs from the Applicant's memorandum of fact and law dated February 12, 2018:
>
> > The first sentence of paragraph 12, paragraphs 19, 23, 24, 64, 65, 66, 67, 68, 81, and the last sentence of paragraph 100, and paragraphs 106, 108, 109;
>
> …

[150] The Respondent argues that:

> 2. … portions of the First Shoan Affidavit, the entirety of the Mullin Affidavit, the entirety of the Second Shoan Affidavit and portions of the Memorandum are inadmissible on the basis that they contain opinion and argument; irrelevant material; gloss and provide explanation of the material that was before the GIC when it rendered its decision; and/or evidence that was not before the GIC when it made its decision.

[151] The Applicant opposes the Respondent's motion on the following basis:

> 4. The underlying application relates to the GIC's decision to improperly terminate the Applicant's appointment as Regional Commissioner of the CRTC on May 4, 2017, allegedly for cause. The GIC's decision was issued within mere days of this Court's April 28, 2017 decision quashing the GIC's earlier decision to terminate the Applicant's appointment, allegedly for cause, dated June 23, 2016. In its April 28, 2017 decision, this Court expressed concern with the fact that the government refused to meet with Commissioner Shoan prior to making its decision, and mandated that the Applicant was entitled to such a meeting to provide clarification to address the GIC's stated concerns and/or explain why the GIC did not deem it necessary to address the Applicant's concerns.
>
> 5. Such a meeting would have enabled the Applicant to understand the particular concerns of the Minister, the extent to which the evidence initially provided by him addressed those concerns and to provide additional evidence to resolve specific remaining issues. The meeting would also have allowed the GIC to explain why it did not feel it necessary to address the Applicant's concerns.
>
> 6. Accordingly, the affidavit evidence and the Memorandum submitted by the Applicant are proper on the following basis:
>
> (i) The impugned portions of the First Shoan Affidavit, the entire Mullin Affidavit, the entire Second Shoan Affidavit and impugned portions of the Memorandum contain important background information about the main issues of the judicial review in question. The evaluation of whether the GIC's decision to terminate the Applicant's appointment a second time was unreasonable is a contextual evaluation, which requires an understanding of how the CRTC operated, the Applicant's interactions with the Minister of Heritage, Minister Melanie Joly ("Minister"), and how the GIC responded to allegations of improper conduct by CRTC Commissioners.
>
> (ii) The contested portions in the First Shoan Affidavit, the entirety of the Mullin Affidavit, the entirety Second Shoan Affidavit and portions of the Memorandum are relevant. Specifically, the impugned paragraphs relate to issues concerning procedural fairness and the reasonableness of the GIC's decision, as outlined in the Notice of Application. In particular, the evidence includes facts that Shoan would have

disclosed if he had been afforded the meeting with the Minister, *as required*, and advised of the extent to which evidence provided earlier did not fully address the Minister's alleged concerns.

(iii) The Applicant further submits that his exchanges with the Minister disclose a 'closed mind', such that the required threshold for procedural fairness was not met. The impugned affidavit evidence and the Memorandum are relevant to this allegation insofar as they identify information and evidence, often publicly available, that was ignored or not sought out by the Minister during her investigation. This 'closed mind' is entirely relevant to a consideration 'of the issues in this judicial review.

(iv) The contested portions in the First Shoan Affidavit, the entire Mullin Affidavit, the entire Second Shoan Affidavit and impugned portions of the Memorandum highlight the absence of probative evidence before the GIC when it decided to terminate the Applicant's appointment a second time *within six (6) days* of this Court setting aside the GIC's original decision to terminate his appointment. The GIC owed the Applicant a fair hearing and procedural fairness by providing him an opportunity to be heard. The requirement to meet with the Applicant after he provided his initial response in writing was a component of the procedural fairness owed to the Applicant. If the Applicant would have been provided with such an opportunity, he would have provided this additional information, including important context that was necessary to understand and evaluate his conduct, the conduct of his Commissioner colleagues and the operational challenges of the CRTC.

7. Furthermore, the Respondent had an opportunity to cross-examine the Applicant on his affidavit evidence, or to file contradictory evidence (if available), but it chose not to.

[152] A great deal of the Applicant's evidence is linked to his assertion that Justice Strickland mandated that he was entitled to a face-to-face meeting before a termination decision could be made and that procedural fairness required that he be allowed to make further submissions. The Applicant also attempts in this application to rely, in part, upon the objectionable grounds in the

June 23, 2016 decision that Justice Strickland found gave rise to a "potential" breach of procedural fairness, as at least a partial justification for quashing the May 4, 2017 Decision that was not based upon those grounds.

[153] To begin with, I have already found that, in relation to the May 4, 2017 grounds for termination, Justice Strickland did not mandate that "the Applicant was entitled to … a meeting to provide clarification to address the GIC's stated concerns and/or explain why the GIC did not deem it necessary to address the Applicant's concerns."

[154] In other words, the Applicant was only denied procedural fairness – and a meeting was only necessary – if the GIC terminated the Applicant by relying "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 GIC gave to the Applicant's assertion that he alone was not responsible for the lack of collegiality at the CRTC […]….": *Shoan #1*, above, at para 142. In my view, Justice Strickland is clear that, depending upon the answer to these issues, the Applicant was only "potentially denied procedural fairness" because he was not afforded a meeting. The May 4, 2017 Decision is not based upon any of these "potentially" unfair grounds. Nor did Justice Strickland "mandate" that a meeting was required as part of any redetermination. She accepted and allowed for the fact that "the GIC's decision on redetermination may well be the same [...]" (*Shoan #1*, above, at para 165) and left it to the GIC to decide the process required to deal with a redetermination.

[155] Consequently, in my view, the only evidence that is relevant to the May 4, 2017 Decision is evidence related to the grounds used (and both are separate and distinct reasons for termination) to terminate the Applicant at that time. Those are grounds that, in my view, did not require a meeting to effect procedural fairness and reasonableness because the Applicant had already been provided with a full and fair opportunity to address them as part of the June 23, 2016 termination, which Response was appropriately before the GIC when it made the May 4, 2017 Decision.

[156] As I have already pointed out, the issues before me in this application really boil down to whether it was fair and reasonable for the GIC to effect the second May 4, 2017 termination in the way that it did. I do not see that this requires me to review and decide all issues raised by the Applicant as though I am considering the entire termination process *de novo*, or to review evidence that was not before the GIC when it made the May 4, 2017 Decision.

[157] Against this background, and after consideration of the written and oral presentations of counsel, I will address each of the Respondent's objections to the Applicant's new evidence in turn.

(a) *The Applicant's Affidavit of July 3, 2017*

(a) **Paragraph 2 (third sentence)**: I agree with the Respondent that this reference to race and age is irrelevant to the issues before the Court. The Applicant has not shown how any allegation based upon race or age can be connected to the grounds that were the basis of the May 4, 2017 Decision under review or how they might have resulted in procedural unfairness. The information is also inadmissible as background material because it does

not assist the Court to better understand the issues under review. This sentence is inadmissible.

(b) **Paragraphs 7-15 and Exhibit B**: Any submission that the Applicant wished to make about the legal status of the CRTC, the appropriate behaviour of CRTC Commissioners, the relationship between the Chairperson and other Commissioners, the qualities of the ideal candidate, and the results of previous litigation is opinion and argument and, where it isn't, is either not relevant to the grounds for the May 4, 2017 Decision or could have been addressed by the Applicant in his Response to the GIC dated March 14, 2016. This material is inadmissible in this application.

(c) **Paragraph 16 (first half up to and including the words "an open dialogue")**: I agree with the Respondent that this material is gloss and spin and is inadmissible.

(d) **Paragraphs 18-19 and Exhibit E**: I agree with the Respondent that paragraphs 18-19 are, essentially, gloss, opinion and argument, and Exhibit E was not before the GIC. With respect to procedural fairness (closed mind), the Applicant has provided no basis for a case that the GIC had a closed mind in relation to the grounds stated in the May 4, 2017 Decision that is under review. His closed mind arguments and the need for a meeting goes to grounds that were not used in the May 4, 2017 Decision under review. These materials are inadmissible.

(e) **The balance of paragraph 20 after the second sentence; and paragraphs 21-23**: These paragraphs attempt to summarize and put gloss and spin on the Applicant's March 14, 2016 Response to the Minister. That letter was before the GIC and it is now before the Court. These materials are either inadmissible and/or unnecessary. The Court

can read the March 14, 2016 Response for itself. And, once again, the Applicant has not shown how his "closed mind" allegations are, given Justice Strickland's findings, related or relevant to the termination grounds cited in the May 4, 2017 Decision. These materials are inadmissible.

(f) **The balance of paragraph 25 after the first sentence, and Exhibit G**: As the Respondent points out, Exhibit G was written to the Minister after May 4, 2017 when the decision under review was rendered. It does not go to the issues before me or address how, given Justice Strickland's findings, it goes to whether the GIC had a closed mind on the specific grounds that are the basis of the May 4, 2017 Decision. The balance of paragraph 25 after the first sentence, and Exhibit G are inadmissible

(g) **Paragraphs 26-30**: Once again, these paragraphs are an attempt to summarize and gloss the Applicant's Response of March 14, 2016 and are inadmissible and/or unnecessary.

(h) **Paragraphs 32-33**: These paragraphs contain information that is not relevant to the issues before me in this application and are inadmissible.

(i) **Paragraph 35**: This paragraph is an unnecessary summary of the Decision that is presently before me which speaks for itself and requires no summary. Any dispute about what the Decision says is a matter for argument. This paragraph is inadmissible.

(j) **Paragraphs 37-98 and Exhibits I, J, L, L, M, and N**: Through these materials, the Applicant plays the role of an advocate rather than a witness. He provides his own subjective summaries of portions of the record and, in particular, attempts to supplement submissions he made to the Minister in his March 14, 2016 Response without any

attempt to explain why he could not have made these submissions at the material times. At this late point in the proceedings, the Applicant cannot attempt to bolster his case before the reviewing Court in this way. The Applicant says that these materials are related to the "Court's conclusion that a meeting with the Applicant was necessary to ensure procedural fairness." I have already found that this was not the Court's finding with regards to the grounds cited in the May 4, 2017 Decision under review for which Justice Strickland found no procedural unfairness. Paragraphs 37-98 and Exhibits I, J, L, L, M, and N are inadmissible.

(k) **Paragraph 99**: The Applicant's feelings and subjective expectation are not relevant to the issues before the Court. This paragraph is inadmissible.

(l) **The balance of paragraph 100 after the first sentence**: This is opinion and argument and is inadmissible.

(b) *The Affidavit of Andrea Mullin of June 30, 2017*

[158] This affidavit must be struck in its entirety because it is another attempt to bolster this application with evidence that was either not before the GIC, or evidence that should have been part of the Applicant's March 14, 2016 Response to the Minister.

[159] The Applicant says, once again, that this evidence goes to the "Court's conclusion that a meeting with the Applicant was necessary to ensure procedural fairness," but this was not the Court's conclusion with regard to the grounds cited in the May 4, 2017 Decision. The Applicant

was given a procedurally fair opportunity to respond to these grounds, and he is now attempting to bolster his submissions following his termination.

(c) *The Applicant's Affidavit of February 19, 2018*

[160] This affidavit and exhibits deal with the *Privacy Act* complaint. This issue is not related to the grounds of termination in the May 4, 2017 Decision, and is irrelevant to the application. This evidence is inadmissible.

[161] Apart from these exclusions, I have admitted and considered all of the Applicant's evidence in reaching my conclusions.

C. *References to Inadmissible Evidence in Applicant's Memorandum of Fact and Law*

[162] As the Respondent points out, the inadmissibility of the evidence referred to above is related to the Applicant's attempts in his written and oral arguments to bring before the Court additional facts and arguments he would have provided to the Minister if he had been allowed a face-to-face meeting. As I have made clear in my reasons, the grounds used for termination in the May 4, 2017 Decision did not require a meeting with the Minister in order to achieve procedural fairness and reach a reasonable decision. Consequently, the arguments based upon this evidence, as found in paragraphs 23, 24, 81 and the last sentences of paragraph 100 are based upon inadmissible evidence and can be given no weight.

[163] For the same reasons, this evidence cannot be used to substantiate the Applicant's arguments that the May 4, 2017 Decision was unreasonable. The Applicant has not established before me that this evidence could not have been part of his March 14, 2016 Response. This means that the assertions and arguments made by the Applicant in paragraphs 106, 108, and 109 of his Memorandum have no evidentiary basis and are not properly before the Court.

[164] As I have pointed out in my reasons, the Applicant attempts to rely upon grounds for termination that were not part of the May 4, 2017 Decision and he seeks to introduce evidence on those grounds to challenge the whole redetermination process. In my view, then, the arguments raised by the Applicant, and the evidence used to support them, in paragraphs 64, 65, 66, 67 and 68 of the Applicant's Memorandum are not properly before the Court.

D. *Conclusions*

[165] In my view, the Applicant has misread Justice Strickland's judgment and has mischaracterized what was required of the GIC to effect the redetermination of his case. He has not established that the grounds cited for termination in the May 4, 2017 Decision were not dealt with in a procedurally fair or reasonable way or that the Minister or the GIC were required to consider further submissions, whether in writing or oral.

[166] The Applicant has also attempted, as part of this application, to introduce grounds for unfairness and unreasonableness that are not, in my view, relevant to the redetermination process because those grounds were not relied upon by the GIC in its May 4, 2017 Decision to terminate the Applicant for cause.

[167] My conclusions are that, given Justice Strickland's findings and guidance, and the process that had already been followed with respect to the first termination decision, a redetermination on all grounds raised by the Applicant was not required and the GIC relied upon grounds the Applicant had already been given a fair opportunity to address. Those grounds were a reasonable basis for termination of the Applicant's appointment.

[168] For understandable reasons, the Applicant disagrees with the Decision but, given the evidentiary record and the broad discretion afforded to the GIC in these matters, such disagreement does not, in my view, give rise to a reviewable error in this case.

JUDGMENT IN T-796-17

THIS COURT'S JUDGMENT is that

1. The application is dismissed with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-796-17
STYLE OF CAUSE:	BALRAJ SHOAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 10, 2018
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	MAY 7, 2018

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