Date: 20060824

Docket: T-611-04

Citation: 2006 FC 1008

Ottawa, Ontario, August 24, 2006

Present: The Honourable Mr. Justice Simon Noël

BETWEEN:

MICHEL VENNAT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

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REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review based on section 18.1 of the *Federal Courts Act*, R.S., 1985, c. F-7 (FCA) against two Orders of the Governor in Council regarding the applicant Michel Vennat (applicant or Mr. Vennat).

[2] The two Orders in Council (the Orders in Council) at issue are the following:

- An Order in Council dated February 24, 2004, bearing number P.C. 2004-147 (suspension without pay order), suspending the applicant without pay from his duties as President and Chief Executive Officer of the Business Development Bank of Canada (BDC) until further notice (MV-10);

- An Order in Council dated March 12, 2004, bearing number P.C. 2004-225 (dismissal order), made pursuant to subsection 6(2) of the *Business Development Bank of Canada Act* , 1995, c. 28 (BDC Act), terminating the appointment of Mr. Vennat as President and Chief Executive Officer of the BDC (Exhibit MV-21).

[3] Mr. Vennat is asking the Court to make *certiorari* orders quashing or setting aside the Orders in Council, as well as an order confirming the full force and effect of the Order in Council for the applicant's appointment, dated July 31, 2000, bearing number P.C. 2000-1278 (Appointment Order) (Exhibit MV-2).

II. The suspension without pay order

[4] Although this application for judicial review appears to contemplate two distinct decisions, it would, in my opinion, be appropriate to deal with them as a single decision. That is what Hugessen J. stated in his order dated January 20, 2006:

> [TRANSLATION]
>
> [3] Mr. Vennat alleged that the orders constituted a single decision . . .
>
> [4] In my opinion, the Court should authorize Mr. Vennat to contest the two orders in a single application for judicial review. In my view, it is obvious that the orders constitute one continuous decision. These two orders were published by only one decision-making organization, that is, the Governor General in Council. The Suspension Order and the Dismissal Order concern the same facts, and Mr. Vennat is seeking the same relief. It is obvious that the two orders concern one situation, that is, the role played by Mr. Vennat in the dismissal of François Beaudoin. In addition, it would be a waste of time and resources to require two distinct applications for judicial review in this case. In short, the Court shall order that this application for judicial review concern both orders of the Governor General in Council. . . .
>
> [References omitted.]

I share the opinion of Hugessen J. The two Orders in Council are inextricably linked and they need not be addressed separately, as the applicant acknowledged before Hugessen J.

[5] This application for judicial review will require a detailed analysis of the issue of whether the duty to act fairly was observed in the applicant's case. A preliminary decision does not generally give rise to the application of a duty to act fairly (*Knight v. Indian Head School Div. No. 19*, [1990] 1 S.C.R. 653, at page 670). The suspension without pay order is a preliminary decision, and the dismissal order is the final decision. Bearing that in mind, the suspension without pay order is still a relevant factor in the factual framework in determining whether the applicant was treated in compliance with the duty to act fairly.

III. Issues

[6] The issues are the following:

1. What is the nature of the duty to act fairly applicable when dismissing a person appointed to hold office during good behaviour as President and Chief Executive Officer of the BDC?

2. Was the duty to act fairly observed in the applicant's case?

3. In the affirmative,
   (a) What is the appropriate standard of review for the decisions of the Governor in Council in this case?
   (b) Should the Orders in Council be upheld considering this standard of review?

IV. Answer to the questions at issue

[7] For the reasons that follow, it is my opinion that the applicable procedural safeguards were not respected as regards the applicant. The application for judicial review is allowed, and questions 3(a) and 3(b) need not be answered considering my answer to questions 1 and 2.

V. Facts and procedural background

A. *Mr. Beaudoin's departure and Mr. Vennat's arrival*

[8] François Beaudoin (Mr. Beaudoin) had been President and Chief Executive Officer of the BDC from January 27, 1993 to October 1, 1999.

[9] On June 4, 1998, the applicant was appointed as Chairperson of the BDC's Board of Directors during pleasure for a three-year mandate, as appears from the Order of the Governor in Council bearing number P.C. 1998-985 (Exhibit MV-1).

[10] During 1999, disputes within the BDC would lead to Mr. Beaudoin's departure. On September 15, 1999, a transaction providing for the payment of Mr. Beaudoin's pension was made between Mr. Beaudoin and the BDC (the transaction). This transaction was approved by the Governor in Council on September 17, 1999. Mr. Beaudoin continued his duties until October 1, 1999.

[11] On July 31, 2000, the applicant was appointed President and Chief Executive Officer of the BDC for a five-year mandate beginning on August 15, 2000, as appears in the Appointment Order. At that time he replaced Bernie Schroder, the person that had been appointed to act following Mr. Beaudoin's departure.

[12] On November 3, 2000, following difficulties relating to the performance of the transaction, Mr. Beaudoin filed a motion to homologate the transaction (Exhibit MV-17, sub-tab 3) in the Superior Court of Quebec. On December 8, 2000, the BDC asked that the transaction be annulled and that the motion be dismissed. Moreover, it drafted a counterclaim against Mr. Beaudoin (Exhibit MV-17, sub-tab 5).

[13] On February 6, 2004, Mr. Justice André Denis of the Superior Court of Quebec made a decision in the matter of *Beaudoin v. Banque de développement du Canada*, [2004] J.Q. No. 705, homologating the transaction and ordering the BDC to comply with it. The judgment also offset some of the sums due from Mr. Beaudoin to the BDC. The judgment contains harsh remarks about the BDC and the applicant, who was a witness at the hearing. That decision is final, as the parties chose not to appeal it.

B. ***The exchange of correspondence between the Minister of Industry and the Chairperson of the Board of Directors of the BDC***

[14] In a letter dated February 9, 2004, the Minister of Industry, Lucienne Robillard (the Minister of Industry) wrote the following to Cedric E. Ritchie (Mr. Ritchie), then Chairperson of the BDC's Board of Directors (Exhibit MV-6):

> Dear Mr. Ritchie,
>
> Last Friday, Justice Denis of the Quebec Superior Court rendered his decision in the case of François Beaudoin vs Development Bank of Canada.
>
> Like many Canadians, I am concerned by the conclusions expressed and the fact findings by Justice Denis in his decision.
>
> As Minister responsible for the BDC before Parliament, and to allow me to report to Canadians, I would like to be informed of what the BDC intends to do following the Court's decision and, more particularly, if the BDC will appeal the decision. I would also like to be informed of any other decisions and actions the BDC intends to take as a result of the Court's decision.

[15] Mr. Ritchie responded to the Minister of Industry in a letter dated February 18, 2004, (Exhibit MV-7), which reads as follows:

> Dear Minister,
>
> On February 9th, you wrote me concerning the decision in the case of François Beaudoin vs Development Bank of Canada.
>
> After careful discussion, the Board has decided not to appeal the decision for the reasons mentioned in the attached draft press release. The Board has also confirmed its full confidence in the management of the Bank, and specifically its President and Chief Executive Officer, Mr. Michel Vennat.
>
> The Board is of the opinion that no further action is required as a result of the court's decision.

[16] The press release attached to the letter reads as follows (press release dated February 18, 2004) (Exhibit MV-8):

BDC BOARD OF DIRECTORS DECIDES NOT TO APPEAL COURT DECISION - BOARD FULLY SUPPORTS BDC MANAGEMENT

Montréal, February 18, 2004 – At a meeting held earlier today, the Business Development Bank of Canada's (BDC) Board of Directors (Board) has decided not to appeal the February 6th Superior Court of Québec's decision in the matter involving BDC and its former President, Mr. François Beaudoin.

In coming to this decision, the Board considered two separate legal opinions: (i) the advice of the Honourable Claude Bisson, retired Chief Justice of the Court of Appeal of Québec, in his capacity as independent counsel to the Board, and (ii) the advice of Raynold Langlois in his capacity as outside counsel to BDC.

Although the legal advice received from both counsels was to the effect that the decision is flawed in many respects and that an appeal was recommended, the Board decided not to pursue the matter.

The Board Chairman, Cedric E. Ritchie, said: "The Board in conjunction with Bank management has decided to close this chapter in the best interest of our employees and our clients, and get on with what BDC does best – serve the needs of Canadian entrepreneurs."

The Board's decision is the result of a profound and thoughtful analysis. The Board believes that all legal actions undertaken by BDC in this case were solely governed by sound principles of governance and the protection of its assets.

At its meeting this morning, the Board unanimously reiterated its full confidence in the management of the Bank, and specifically its President and Chief Executive Officer, Michel Vennat. It noted that since his appointment as head of the Bank in August 2000, Mr. Vennat implemented a number of initiatives to strengthen BDC governance and ethics. The Board also observed that the performance of BDC has been outstanding in all respects since Mr. Vennat took office, making it even more relevant to the aspirations and development of businesses in Canada.

Mr. Ritchie added: "The Board understands that this has been a trying time for BDC's employees and clients. Furthermore, the Board fully supports the Management of BDC".

The Business Development Bank of Canada is a financial institution wholly owned by the Government of Canada. BDC plays a leadership role in delivering financial, investment and consulting services to Canadian small businesses, with a particular focus on the technology and export sectors of the economy.

C. *The requests for meetings and the suspension without pay*

[17] Mr. Vennat then sent to the Prime Minister of Canada, Mr. Paul Martin, a letter dated February 23, 2004 (letter to the Prime Minister), asking the government to observe the procedural fairness owed to him (Exhibit MV-9):

> Dear Prime Minister,
>
> I am very concerned in reading newspaper reports to the effect that your government is preparing to make decisions about my future without giving me the opportunity to be heard. I am not even aware of what allegations have been made about me.
>
> If these stories are true, I am hereby requesting the opportunity to be heard fairly, with due process, in the presence of our Chairman and counsel, at a meeting where the Clerk of the Privy Council and the Deputy Minister of Justice would participate, before any decision and any announcement is made.

[18] On February 24, 2004, the Minister of Industry sent the applicant a letter reading as follows (letter dated February 24, 2004) (Exhibit MV-10):

> [TRANSLATION]
>
> Sir,
>
> The government has carefully reviewed the decision by Mr. Justice Denis of the Superior Court in the matter of Beaudoin v. Banque de développement du Canada, made on February 6 of this year.
>
> Following that review and taking into account the comments and findings made by Mr. Justice Denis with regard to your conduct and the role that you played in this matter, serious questions were raised regarding whether there are valid grounds justifying the termination of your appointment as President and Chief Executive Officer of the BDC.
>
> In view of the foregoing, I hereby inform you that earlier today an Order was adopted by the Governor in Council having the immediate effect of suspending you without pay from your duties as President and Chief Executive Officer of the BDC. Please find attached a copy of the Order in Council in question.
>
> I also inform you that you have until next Monday, March 1 at 4:00 p.m. to produce written reasons explaining why, in your opinion, the Governor in Council should not terminate for cause your duties as President and Chief Executive Officer of the BDC. I would appreciate it if you would send your written submissions to my office.
>
> Sincerely yours . . .

[19] The suspension without pay order is attached to the letter.

[20] On February 25, 2004, the applicant wrote to the Minister of Industry (letter dated February 25, 2004) asking for the grounds for the allegations and requesting a meeting before counsel, the Clerk of the Privy Council Office and the Deputy Minister of Justice. The letter included as an attachment a press release entitled [TRANSLATION] "Michel Vennat: unjust decision" (Exhibit MV-11).

[21] In a letter dated February 26, 2004, the Minister of Industry responded to the applicant (letter dated February 26, 2004) (Exhibit MV-12). The letter reads as follows:

> [TRANSLATION]
>
> Sir,
>
> I acknowledge receipt of your letter dated February 25, 2004, in reply to my letter dated February 24, 2004, informing you *inter alia* of the decision by the Governor General in Council to suspend you, without pay, from your duties as President of the Business Development Bank of Canada, until further notice.
>
> I understand in part from your letter that you would like to know more specifically what allegations have been made against you.
>
> I would first like to refer to my letter dated February 24, in which I pointed out that the comments and findings made by Mr. Justice Denis raise serious questions regarding your conduct and the role that you played in that matter. That said, and in response to your letter of yesterday, I am providing you with the following additional information to assist you in preparing your written reasons.
>
> First, and foremost, I draw your attention to paragraphs 597, 651 and 653 of the decision, which read as follows:
>
> > [597] In fact, the entire operation reinforces the impartial observer's impression that a vendetta was orchestrated by the BDC against Mr. Beaudoin. . . .
> >
> > [651] The vicious if not malicious manner in which he was treated in this whole matter certainly reinforced his beliefs.
> >
> > [653] They acted as though they wanted to break him and ruin his career. This entire affair leaves a profound sense of injustice . . .
>
> As well as commenting on the paragraphs that I just cited, please also comment on the following paragraphs of the decision by Mr. Justice Denis: 490, 499, 555, 576, 580, 608, 609, 613, 614, 640 and 1614.

> I would add that the list of the above-mentioned paragraphs is not an exhaustive list of all the paragraphs concerning you or relating to the BDC, its employees and agents and, in essence, you must provide a global response to this judicial decision as a whole and not just to the cited paragraphs.
>
> In elaborating your written reasons, it will be important that you comment not only on your personal role, but also on aspects of the conduct and behaviour of the Bank and its agents, for whom you may legitimately be held responsible. Furthermore, please ensure that your reasons are supported by objective and relevant facts and data.
>
> You have also asked me to meet with you in the presence of your legal counsel, the Clerk of the Privy Council and the Deputy Minister of Justice. I agree to meet with you and I may be accompanied by representatives of the Privy Council and the Justice Minister.
>
> Note that this meeting does not in any way substitute the request that I made to you to submit to me in writing, before March 1, 2004, at 4:00 p.m., the reasons for which, in your opinion, the Governor General in Council should not terminate your duties. The explanations that you provide verbally during our meeting should be included in your written reasons.
>
> The recommendation that I will make to the Governor General in Council will be based on the decision by Mr. Justice Denis, on the explanations provided during our meeting and on your written reasons. The Governor General in Council will consider it all when she decides whether or not you will continue in your position.
>
> My office will contact you in the hours that follow to determine the place, date and time of the meeting.
>
> Sincerely yours . . .
>
> [Emphasis added.]

In short, the letter dated February 26, 2004, informed the applicant that there were two components of the allegations against him, namely:

- His conduct and his credibility at the hearing in *Beaudoin v. Banque de développement du Canada*, above (personal component);

- His actions, in performing his duties as President and Chief Executive Office in particular [TRANSLATION] "in relation to the issues contemplated in the reasons of the decision in the matter of Beaudoin" [the letter specifies a series of paragraphs from the judgment] and with respect to "the aspects of the conduct and behaviour of the bank and its agents for whom [Mr. Vennat] may legitimately be held responsible" (corporate component).

[22] On February 29, 2004, the applicant's counsel wrote to the Minister of Industry, referring to the unreasonableness of the time period given to respond to the grounds for the allegations and pointing out that only [TRANSLATION] "a first draft" of the applicant's response could be submitted in that time (Exhibit MV-13). The letter reads as follows:

> [TRANSLATION]
>
> Madam Minister,
>
> Your letter dated February 26, 2004, addressed to our client, Michel Vennat, O.C., Q.C., was referred to us for review and response.
>
> First, we must thank you for having accepted, in principle, the meeting requested.
>
> On another note, we have reviewed the additional information that you provided to Mr. Vennat regarding the paragraphs of Mr. Justice Denis' decision that you wanted Mr. Vennat to comment on specifically. We are working on it and we believe that at Monday's meeting we shall be able to provide you with a first draft of the written reasons as to why Mr. Vennat considers that the Governor in Council should not terminate his duties as President and Chief Executive Officer of the BDC on the basis of Mr. Justice Denis' decision.
>
> You understand, however, that the amount of time that was given to Mr. Vennat to do so is such that it is unreasonable to expect that we can do a thorough job in that time – for us it will involve a careful review of not only the judgment of 1745 paragraphs over 210 pages, but of the facts and the evidence on which it is based (32 days of hearing/35 witnesses, more than 300 exhibits, approximately 8000 pages of transcript).

> That is why, when you ask us to "*provide a global response to this judicial decision as a whole and not just to the cited paragraphs*" and "*reasons . . . supported by objective and relevant facts and data*", that at the end of our meeting on Monday we may subsequently give you additional written information if it is necessary to review all of the evidence (since we were not the solicitors of record at trial).
>
> Sincerely yours . . .
>
> [Emphasis in original.]

D. *The meeting and the production of documents*

[23] On March 1, 2004, a meeting was held in Ottawa (meeting of March 1, 2004). The applicant, accompanied by his counsel, the Minister of Industry, the Clerk of the Privy Council as well as Pierre Legault, general in-house counsel at the Department of Industry, were present. The substance of that meeting was established only by the applicant's affidavit, as the respondent chose not to file an affidavit.

[24] At the meeting, the applicant in essence says that he explained the substance of a six-page letter, dated March 1, 2004, addressed to the Minister of Industry (letter dated March 1, 2004) (Exhibit MV-14). This letter gives the applicant's version of the facts regarding various aspects of the matter of *Beaudoin v. Banque de développement du Canada*, above. Moreover, his counsel reviewed some parts of the preliminary memorandum that they had prepared to be sent to the Minister of Industry (preliminary memorandum) (Exhibit MV-15) at the same time as the letter.

[25] The Clerk of the Privy Council asked Mr. Vennat and his counsel whether it would be possible to obtain a copy of the legal opinions. It was then stated that the BDC had advised the applicant that it would not waive solicitor-client privilege and that, for that reason, the applicant could not disclose a copy of the legal opinions to the Minister of Industry. The Minister of Industry had also asked, near the end of the meeting, whether she could have a copy of certain documents, including the minutes of the proceedings of the Board of Directors with regard to *Beaudoin v. Banque de développement du Canada,* above, to which the applicant agreed. The applicant and his counsel asked the Minister of Industry if she wanted to have a copy of the exhibits and the transcripts of hearing of *Beaudoin v. Banque de développement du Canada,* above. The applicant invited the Minister of Industry to obtain statements from certain third parties in order to establish that the judgment was unfounded. The Minister of Industry responded that it was not necessary. The applicant indicated that he was ready to provide additional information or to respond to any other questions.

[26] On March 2, 2004, the applicant's counsel prepared the documentation requested by the Minister of Industry and sent it to her (Exhibits MV-16 and MV-17). Counsel agree that the meeting lasted no more than two hours.

E. *The applicant's additional requests*

[27] On March 3, 2004, the remarks of [TRANSLATION] "a source close to Paul Martin" were reported in Vincent Marissal's political column (article from the newspaper *La Presse*) (Exhibit MV-18):

> [TRANSLATION]
>
> I really cannot see how those two [the applicant and Marc Lefrançois, President of Via Rail] can get out of it, knowing the allegations against them, there is nothing they can say that would convince the Prime Minister to leave them in their positions.

[28] The applicant's counsel then sent a letter, dated March 4, 2004 (letter dated March 4, 2004), to the Minister of Industry (Exhibit MV-19). That letter refers to the article from the newspaper *La Presse*, expresses the applicant's concerns and seeks the Minister of Industry's reassurance:

> [TRANSLATION]
>
> Madam Minister,
>
> Further to our meeting of Monday, March 1, 2004, and our letter dated Tuesday, March 2, 2004, sending you the additional documents, we wish to call your attention to a highly disturbing situation.
>
> In an article that appeared in *La Presse* on Wednesday, March 3, 2004, entitled "The Apprentice" sauce Paul Martin …, journalist Vincent Marissal reports the following remarks of a source close to Paul Martin:
>
> > I really cannot see how those two (*) can get out of it, knowing the allegations against them, there is nothing they can say that would convince the Prime Minister to leave them in their positions.
> >
> > (*) referring to Michel Vennat and Marc Lefrançois
>
> This source seems to indicate that the decision has been, for all practical purposes, already made. This hardly reflects the duty to act in observing the rules of natural justice and procedural fairness (regarding which we have made specific submissions to you).
>
> Michel Vennat made a great deal of effort to meet the deadline that was imposed on him. We believe that you had an open mind at our meeting and that you were listening to Michel Vennat's position. We hope that this exercise was not in vain for him or for you, in light of the foregoing.

> You would agree that to be judged and condemned like this, in public, without any other form of hearing (Vincent Marissal talks about the Prime Minister giving Michel Vennat and Marc Lefrançois [TRANSLATION] "*a professional death sentence*" to have an effect on the polls) is appalling to the fair and equitable. Especially when Michel Vennat, out of respect to you and his position as President and Chief Executive Officer of the BDC, has to date refused to debate the matter publicly, thereby respecting the review process that you have begun.
>
> Michel Vennat must be assured that the rules of natural justice and procedural fairness are truly observed.
>
> Sincerely yours . . .
>
> [Emphasis in original.]

[29] On March 10, 2004, in a letter sent to the Minister of Industry, copied to the Minister of Justice, Irwin Cotler (letter dated March 10, 2004), the applicant's counsel proposed that the Minister of Justice refer the matter to the Judicial Council for an inquiry to be held regarding the applicant's possible removal, in accordance with section 69 of the *Judges Act*, R.S., 1985, c. J-1 (Exhibit MV-20). The letter reads as follows:

> [TRANSLATION]
>
> **RE: MICHEL VENNAT, O.C., Q.C.**
>
> Madam Minister,
>
> Further to our meeting of Monday, March 1, 2004, and our letters of Tuesday, March 2, 2004, sending you the additional documents, and of Thursday, March 4, 2004, sharing our concerns with you regarding the observance of the rules of natural justice and procedural fairness, we would like to bring to your attention an additional matter for reflection.
>
> Although we are confident that you will make a recommendation observing Michel Vennat's rights as set out in his letter and our memorandum of March 1, 2004, if there should be a degree of discomfort following your analysis, or if you are confronted with contrary views, there is then the following alternative.
>
> The source of the problem is the judgment in Beaudoin. Michel Vennat wholeheartedly disagrees with the judge's position toward him, which he considers to be totally unfounded and unenforceable. We believe that we established this for you based on the evidence and the principles that apply in such cases. This should be enough to reinstate Michel Vennat to his duties immediately.
>
> If, notwithstanding the foregoing, the government still had doubts, we should remember that our justice system is designed in such a way that the recognized manner to challenge an unfounded judgment is to appeal it before the Court of Appeal.

> However, since Michel Vennat was not personally a party to the proceedings between Mr. Beaudoin and the BDC, he did not have the right to appeal the judgment in order to challenge its merits even if it targeted him personally. Only the BDC could go to appeal, on its own or on ministerial order. The BDC decided not to do so for business reasons. The government, which had the power to instruct the BDC to go to appeal, did not do so. As the time period for the appeal has expired, we note that this is no longer a viable solution.
>
> However, the BDC clearly expressed its disagreement with the judgment, and its Board of Directors, which by law directs and manages the business and affairs of the BDC, unanimously reiterated its support for its President and Chief Executive Officer, Michel Vennat.
>
> Michel Vennat must therefore be given the opportunity to defend himself before an impartial and independent tribunal whose decision is not dependant on political pressure, influenced by the polls, and/or by media hype, but rather is respectful of the rights of the parties including the rights of Michel Vennat. This forum exists. It is a matter of referring the case to the Canadian Judicial Council ("Council") in accordance with the Judges Act (R.S.C 1985, c. J-1). A specific provision of that Act, section 69, authorizes the Minister of Justice to address the Council to conduct an inquiry on the reasons for the removal raised in respect of a person appointed to hold office during good behaviour under a federal law. That is Michel Vennat's case.
>
> It is clear that in any event, Michel Vennat must be reinstated immediately to resume his duties since, even if the matter is referred to the Council, this must be parallel to a reinstatement in order to, first, respect the referral to the Council and, second, to not prejudge its recommendation. That would establish that the government is respecting individual human rights.
>
> Sincerely yours . . .

F. *The decision and the application for judicial review*

[30] A certificate from the Clerk of the Privy Council (an appendix is attached thereto) dated April 20, 2005, had been submitted to the Court pursuant to section 39 of the *Canada Evidence Act*, R.S. 1985, c. C-5 (Exhibit MV-32). The certificate indicates that two documents cannot be disclosed because they contain confidential information of the Privy Council. The appendix states that document #1 involves the suspension without pay order. The appendix states moreover that document #2 is a submission proposing the Minister of Industry's recommendation to the Governor in Council in March 2004 (the date and the title are not specified), regarding the end of Mr. Vennat's mandate. The certificate and the appendix do not reveal anything else regarding the substance of document #2.

[31] On March 12, 2004, the Minister of Industry wrote the applicant to inform him of the adoption of the dismissal order (dismissal letter) (Exhibit MV-21):

> [TRANSLATION]
>
> Sir,
>
> The government has carefully reviewed the decision made by Mr. Justice Denis of the Superior Court of Quebec in *François Beaudoin v. Banque de développement du Canada* (BDC), on February 6 of this year. The government has also reviewed the written submissions and the documents that you provided to me on March 1 and 2, 2004. It has also considered your oral submissions of March 1, 2004.
>
> The Governor in Council determined that she lost confidence in you as President of the Business Development Bank of Canada and that your conduct in relation to the issues contemplated in the reasons of the decision in the matter of Beaudoin is incompatible with your continued appointment.
>
> In light of the foregoing, I hereby inform you that an Order was adopted by the Governor in Council earlier today, having the immediate effect of terminating your duties as President and Chief Executive Officer of the BDC. Please find attached a copy of the Order in Council in question.
>
> Sincerely yours . . .

[32] The dismissal order, attached to the letter, reads as follows:

> Whereas, by Order in Council P.C. 2000-1278 of July 31, 2000, Michel Vennat was appointed President of the Business Development Bank of Canada, to hold office during good behaviour for a term of five years, effective August 15, 2000;
>
> Whereas on February 6, 2004, the Honourable Justice André Denis of the Superior Court of Québec issued his reasons for judgment in François Beaudoin v. Banque de développement du Canada, in which he commented adversely on the conduct of Michel Vennat;
>
> Whereas, by Order in Council P.C. 2004-147 of February 24, 2004, Michel Vennat was suspended, without pay, from his duties as President of the Business Development Bank of Canada until further notice;
>
> Whereas on February 24, 2004, Michel Vennat was informed by the Government of Canada of its concerns respecting his conduct as described in the reasons for judgment in François Beaudoin v. Banque de développement du Canada, and was invited to make submissions in response before March 1, 2004;
>
> Whereas on March 1, 2004 and March 2, 2004, Michel Vennat made submissions orally and in writing;
>
> And whereas the Governor in Council, having considered the reasons for judgment in François Beaudoin v. Banque de développement du Canada and the submissions received from Michel Vennat in response,

> (a) has lost confidence in Michel Vennat as President of the Business Development Bank of Canada, and
>
> (b) is of the opinion that the conduct of Michel Vennat in respect of the matters addressed in the reasons for judgment in François Beaudoin v. Banque de développement du Canada is incompatible with his continued appointment as President of the Business Development Bank of Canada;
>
> Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, hereby terminates the appointment of Michel Vennat as President of the Business Development Bank of Canada, made by Order in Council P.C. 2000-1278 of July 31, 2000.

[33] On March 25, 2004, the applicant filed this application for judicial review before the Federal Court.

[34] The hearing of the application began in Montréal on June 27 and 28, 2006, in accordance with the order of the court administrator dated June 9, 2006. Based on the complexity of the issues in play and the length of the oral arguments, the hearing continued on July 4 and 5, with the parties' consent. The undersigned heard the parties' submissions on the motions to strike and to remove certain evidence as well as on procedural and substantive issues.

VI. Analysis – Motions to strike and to remove certain evidence

(1) Respondent's motion to strike and to remove certain evidence

[35] On December 12, 2005, the respondent introduced a motion to obtain directions from the Court regarding section 302 of the *Federal Courts Rules*, SOR/98-106 (Rules) (first part) and to expunge certain evidence from the applicant's record (second part). The motion was amended on June 27, 2006, but its substance is essentially the same as it was originally.

(a) First part

[36] As stated above, Hugessen J. determined in his order dated January 20, 2006, that the suspension without pay order and the dismissal order were " a single decision" to be addressed in a single application for judicial review. Therefore, only the second part of the motion remains to be addressed since Hugessen J. ordered that the application for judicial review bears on both Orders in Council (paragraph 4 of the order and page 4 "Notwithstanding section 302 of the Rules, the applicant is authorized to institute this proceeding").

[37] In the same order, Hugessen J. decided to leave the task of deciding the second part of the respondent's motion to the judge responsible for hearing the application for judicial review.

(b) Second part

[38] The respondent is asking for the removal of the affidavit of Denis Désautels, former Auditor General of Canada (applicant's record, tab 3), Exhibits MV-22, MV-30, MV-31 and MV-33, as well as the paragraphs of the applicant's affidavit that are based on that evidence. He submits that this evidence in the applicant's record, and the paragraphs relating thereto, amount to new evidence that was not or could not have been before the Governor in Council when the decisions contemplated by the application for judicial review were made (ground A).

[39] The respondent is also seeking to have struck certain paragraphs containing information that was not or could not have been before the decision-maker when the decision was made (ground B).

[40] Further, the respondent is seeking to have other paragraphs struck from the applicant's affidavit on the basis that they are allegations of law, opinion or commentary regarding evidence that is self-explanatory (ground C).

[41] Finally, the respondent is seeking to have paragraphs 83 to 244 of the applicant's affidavit struck in their entirety, on the ground that they repeat the applicant's arguments before the Governor in Council (ground D).

[42] I am dealing separately with each of the grounds, and there are corresponding appendices listing the paragraphs for which the motion to strike is granted (see Appendices A, B and C). The portion of the motion to strike based on ground D is not granted.

(i) Ground A

[43] Generally, at the judicial review stage, only evidence relied on in the decision under review must be considered (see *Smith v. Canada*, 2001 FCA 86). Such is the case because the purpose of the application for judicial review "is not to determine whether or not the decision of the Tribunal in question was correct in absolute terms but rather to determine whether the Tribunal was correct based on the record before it" (*Chopra v. Canada (Treasury Board)*, [1999] F.C.J. No. 835, at paragraph 5).

[44] Exceptionally, the Court may receive documents that did not exist at the time of the application for judicial review, when issues of procedural fairness or jurisdiction are involved (*McFadyen v. Canada (Attorney General)*, 2005 FCA 360, at paragraphs 14 and 15; *Ontario Association of Architects v. Association of Architectural Technologists of Ontario*, [2003] 1 F.C. 331, at paragraph 30 (F.C.A.)). Issues of that nature are involved in this case.

[45] However, to be admitted on an exceptional basis, the evidence that was not available to the decision-maker must serve to establish that there was a breach of procedural fairness, and not that the applicant was correct on the merits. If this rule is not observed, the applicant could indirectly introduce new evidence on the merits, thereby making the application for judicial review a hearing *de novo*. In other words, it would be sufficient to raise procedural fairness to transform an application for judicial review into a hearing *de novo*.

[46] In this case, the affidavit of Denis Désautels as well as Exhibits MV-22 (DVD containing the transcripts and exhibits of the hearing – I note that the Governor in Council refused to review them), MV-30 (personal notes by certain witnesses at the hearing), MV-31 (investigation report by the Syndic de l'Ordre des comptables regarding the role of KPMG, dated January 28, 2005) and MV-33 (order to appear and certification by the Clerk of the Privy Council filed for the purposes of the proceeding initiated by the applicant against the respondent in Superior Court) have no relevance to the issues of procedural fairness. Those exhibits are intended to establish that the applicant should prevail on the merits and were not in the respondent's possession during the suspension without pay process and the applicant's removal. Further, Exhibit MV-33 contains proceedings associated with a remedy taken in Superior Court of Québec, and not with this proceeding. Those exhibits must therefore be expunged from the record.

[47] The respondent wanted the paragraphs of the applicant's affidavit relating to these exhibits to be struck for the same reason, in the interest of justice. I agree with the respondent on this point. Appendix A indicates which paragraphs must be struck accordingly. However, I thought it better not to strike the paragraphs referring to extracts from the decision in *Beaudoin v. Banque de développement du Canada*, above, since that decision was submitted to the Governor in Council when she adopted the Orders in Council.

(ii) Ground B

[48] The respondent considers that the Court should strike the paragraphs containing information that was not or could not have been found before the decision-maker at the time the decision was made.

[49] For reasons that are analogous with the reasons raised in my decision regarding ground A, I do not believe that these paragraphs should appear in the applicant's affidavit. Accordingly, the respondent's motion is granted in part on that basis, and certain paragraphs of the applicant's affidavit are ordered struck, in accordance with Appendix B of this decision. Essentially, they are facts that the Governor in Council could not have known when the Orders in Council were adopted. Here again, the passages reproduced in the applicant's affidavit which are drawn from *Beaudoin v. Banque de développement du Canada,* above, are not struck.

(iii) Ground C

[50] The respondent also contends that certain paragraphs of the applicant's affidavit are allegations of law, opinion or commentary regarding evidence. I agree in part with the respondent. Subsection 81(1) of the Rules is very clear: the contents of affidavits must be confined to the facts. Further, it is acknowledged that an affidavit cannot be used in Federal Court to present additional arguments by one of the parties. Otherwise, the parties could use affidavits to bypass subsection 70(4) of the Rules, which provides that a memorandum of fact and law cannot in principle exceed 30 pages, unless otherwise ordered by the Court. Accordingly, the elements that are opinion, allegations of law, or commentary must be struck from the applicant's affidavit (see Appendix C).

(iv) Ground D

[51] Furthermore, the respondent is asking that paragraphs 83 to 244 be struck out entirely, on the ground that they repeat the applicant's arguments before the Governor in Council or rather because they comment on documents that are self-explanatory. Except for the paragraphs already struck for the reasons given above (in relation to the expunged Exhibits MV-22, MV-30, MV-31 and MV-33 or constituting allegations of law, opinion or commentary), I do not believe that paragraphs 83 to 244 must be struck in their entirety since they do not necessarily repeat that which was submitted to the Governor in Council. Indeed, they provide an explanation of the substance of the submissions in order to enlighten the Court for the purposes of the judicial review. These paragraphs are of some use in understanding this matter, which is very complex and voluminous. The striking out of all of paragraphs 83 to 244 of the applicant's affidavit is therefore not granted.

(2) **Applicant's motion to strike**

[52] On June 21, 2006, the applicant filed a motion based on section 221, seeking to strike out certain paragraphs of the respondent's reply record. The motion has three parts:

- The applicant considers that the judgment in *Beaudoin v. Banque de développement du Canada,* above, cannot be enforced against him before the Federal Court and that the respondent cannot use the facts stated therein in his submissions (first part);
- The applicant considers that certain paragraphs of the respondent's memorandum relied on facts not supported by the evidence or that directly contradicted the evidence (second part);

- Other paragraphs of the respondent's memorandum are based, in the applicant's view, on incorrect references (third part).

[53] Alternatively, the applicant is asking that the Court not assign any weight to the paragraphs based on facts drawn from the judgment, facts not introduced into evidence or facts whose references are erroneous.

[54] For his part, the respondent is of the opinion that the applicant's motion cannot be based on section 221of the Rules since this section only contemplates pleadings filed in the context of a proceeding brought by way of action. The respondent adds that a memorandum of fact and law is not a pleading that can be struck out in accordance with section 221.

[55] In principle, section 221 does not apply in the context of an application for judicial review (*Canada (Attorney General) v. Association des professionnels et professionnelles de la Vidéo du Québec*, 2003 FCA 304, at paragraph 1; *Grandville Shipping Co. v. Pegasus Lines Ltd., S.A.*, [1994] F.C.J. No. 2036 (F.C.T.D.) at paragraph 2). However, in exceptional circumstances a judge can intervene on the basis of his or her inherent power, or apply section 221 by analogy, relying on section 4 (*Pfeiffer v. Canada (Superintendent of Bankruptcy)*, 2004 FCA 192). The judge may even strike out parts of a memorandum of fact and law if such a measure is deemed necessary. In *Canadian Broadcasting Corp. v. Taylor*, [2001] F.C.J. No. 76, at paragraphs 3 to 6, Prothonotary Morneau writes the following, referring to *Pharmacia Inc. v. Canada (Minister of National Health and Welfare)*, [1994] F.C.J. No. 1629 (F.C.A.):

> ¶ 3 Even though the Applicant's motion does not refer expressly to the inherent jurisdiction of this Court, it seems to me that it must be addressed under that jurisdiction, as applied by Strayer J.A. in *Bull (David) Laboratories (Canada) Inc. v. Pharmacia Inc. et al.* (1994), 176 N.R. 48, at pages 54-5 ("*Pharmacia*"). I believe that the principles stated therein apply to this case, even though here the Applicant is seeking to have the Intervenor's memorandum struck out only in part, and not to have the entire memorandum struck out. I would even say that Pharmacia applies here particularly and therefore *a fortiori*, since the motion seeks to strike out only a few paragraphs of a document.
>
> ¶ 4 In *Pharmacia*, Strayer J.A. allowed a motion to strike out to be made in a judicial review proceeding only in exceptional cases. At pages 54-5, the Court said:
>
> > This is not to say that there is no jurisdiction in this court inherent or through rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. . . . Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegation in the notice of motion.
>
> . . .
>
> ¶ 6 In the instant case, the aspects that the Applicant is seeking to have corrected by making this motion are not, in the circumstances, aspects that, even in the event that the Applicant might be correct, may be seen as so incorrect or unacceptable that we should intervene in the process of an application for judicial review (see the comments of Strayer J.A. in *Pharmacia*, above, at pages 54-5). Any motion to strike out that is made in the course of an application for judicial review must be an exception, so that one of the primary objectives of such an application, which is to hear the application on the merits as quickly as possible, may be met.
>
> [Emphasis added.]

[56] I agree with Strayer J.A. and Prothonotary Morneau. The Court must take into account that the wording of the Rules do not provide for striking out pleadings except in the context of proceedings by way of action (see section 169). The spirit of the Rules is also important, and one must bear in mind that the judges have inherent powers. Further, section 4 states that the Court may fill in shortcomings in the Rules by making an analogy to other Rules. In short, it is a balancing act.

[57] As stated earlier, the applicant's motion has three parts. I will address the second and third parts together.

(a) ***First part***

[58] First, the applicant considers that the judgment in *Beaudoin v. Banque de développement du Canada*, above, is not enforceable against him and that the respondent cannot in his submissions use the facts referred to therein. The judgment was the basis of the Orders adopted by the Governor in Council.

[59] As I shall explain hereunder, the judgment in that matter is sufficient to establish a simple presumption of the facts found therein, even if Mr. Vennat reserved the right to contest it within the inherent limits of the forum in which he found himself (I address that aspect at paragraphs 138 to 144 of this decision). Although that judgment is not enforceable against Mr. Vennat as such, it can legitimately be used by the employer for the purposes of an inquiry, provided that the applicant, having the appropriate tools, is afforded the opportunity to rebut the presumption.

[60] Further, the respondent may properly use the judgment to present his position. The applicant adduced the judgment into evidence as Exhibit MV-5 (applicant's affidavit, paragraph 19). The respondent did not have to file it into evidence once again, since the applicant had done so.

[61] This part of the applicant's motion should therefore not be granted, as the respondent is fully entitled to base his arguments on the facts of *Beaudoin v. Banque de développement du Canada*, above.

(b) ***Second and third part***

[62] Second, the applicant considers that certain paragraphs of the respondent's memorandum allege facts that are not supported by the evidence or that are directly contrary to the evidence. Other paragraphs of the memorandum are based on incorrect references.

[63] I believe that it suffices to say that at this stage, I need not strike specific paragraphs of the respondent's memorandum, and that it is only a matter of assigning to these paragraphs the probative value that they should have, based on the evidence.

[64] The second and third parts of the applicant's motion are therefore granted in part.

VII. Analysis – Principal application– Procedural issues

[65] The applicant was appointed to the position of President and Chief Executive Officer of the BDC by the Appointment Order dated July 31, 2000. That Order in Council was adopted pursuant to subsection 6(2) of the *BDC Act*, which reads as follows:

6. (2) Notwithstanding subsection 105(5) of the *Financial Administration Act*, the President is to be appointed by the Governor in Council to hold office during good behaviour for a term that the Governor in Council considers appropriate and may be removed for cause.	6. (2) Par dérogation au paragraphe 105(5) de la Loi sur la gestion des finances publiques, le gouverneur en conseil nomme à titre inamovible le président pour le mandat qu'il estime indiqué, sous réserve de révocation motivée.

It is therefore a position that may be characterized as a public duty, where removal must be “for cause” (“révocation motivée”).

[66] In the context of an employee-employer relationship, the Supreme Court has established that the existence of a duty to act fairly resulting from the common law must be assessed in light of three factors (the nature of the decision, the relationship between the employer and the employee and the impact of the decision on the employee). The Supreme Court also decided that legislation or a contract may alter or neutralize such a duty (*Knight v. Indian Head School Div. No. 19*, above, pages 669 to 682).

[67] In this case, both parties acknowledge the existence of the duty of procedural fairness. This common position of the parties seems fair to me in light of the tests in *Knight v. Indian Head School Div. No. 19*, above.

[68] The issue that remains to be decided is therefore: What is the nature or the substance of the duty to act fairly? It must also be determined whether the procedural safeguards inherent to that duty were observed in regards to the applicant.

[69] The applicant considers that the applicable safeguards are relatively elaborate considering the case law, and he submits that they were not observed in his case. The respondent, on the other hand, argues that the procedure followed as regards the applicant observed the procedural safeguards elaborated by the courts.

[70] In *Knight v. Indian Head School Div. No. 19*, above, at page 682, L'Heureux-Dubé J. explains from the outset, in her analysis regarding the nature of the duty to act fairly, that the concept of procedural fairness is a variable concept:

> Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.
>
> . . .
>
> The approach to be adopted by a court in deciding if the duty to act fairly was complied with is thus close to empiric. Pépin and Ouellette, Principes de [page683] contentieux administratif, at p. 249, quote the following colourful comment of an English judge to the effect that "from time to time . . . lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognize"
>
> [References omitted.]

[71] *Knight v. Indian Head School Div. No. 19*, above, nevertheless gives a theoretical framework for assessing the nature of the duty to act fairly. At page 682, L'Heureux-Dubé J. cites a passage from *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 and points out a passage from a decision by the Privy Council:

> In *Nicholson*, above, at pages 326-27, Laskin C.J. adopts the following passage from the decision of the Privy Council in *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660, a New Zealand appeal where Lord Morris of Borth-y-Gest, writing for the majority, held at p. 679:
>
> > Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All. E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.
>
> [Emphasis in the original of Knight *v. Indian Head School Div. No. 19*, above]

[72] Later, at page 683, L'Heureux-Dubé J. explains that the concept of fairness is not purely subjective. At the end of her analysis, she determines that the minimal content of the duty of procedural fairness involved in a dismissal by an administrative body consists in notifying the employee of the reasons for the dissatisfaction and giving the employee the opportunity to be heard (see paragraphs 191 to 212 of this decision). There must be a word of caution on that point. In *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, above, at page 128, the Supreme Court of Canada decided that those safeguards were sufficient in cases where the employee could only be dismissed for cause (see *Knight v. Indian Head School Div. No. 19*, above, at page 683). However, I believe that L'Heureux-Dubé J. gave a series of detailed tests in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, to guide in the assessment of the substance of the duty to act fairly. I can only rely on those tests. *Baker* is an update of *Knight*, although the ruling in *Knight* remains relevant (see paragraphs 191 to 212 of this decision). In the case at hand, it would therefore be wrong to import the safeguards applied in the specific context of *Nicholson* without considering the possibility that there could be other safeguards that apply, as the Supreme Court of Canada subsequently formulated tests for adapting the substance of the duty to act fairly to the circumstances of each case.

[73] At page 837 of *Baker v. Canada (Minister of Citizenship and Immigration)*, above, L'Heureux-Dubé J. explains the idea underlying the analysis of the applicable tests, which is consistent with the comments that she made in *Knight v. Indian Head School Div. No. 19*, above:

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

[74] L'Heureux-Dubé J. then embarked on an analysis of the relevant factors to evaluate the nature of the duty to act fairly, which are the following:

1. The nature of the decision being made and process followed in making it;
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. The importance of the decision to the individual or individuals affected;
4. The legitimate expectations of the person challenging the decision;
5. The choices of procedure made by the agency itself.

[75] Then, the Court reiterates at pages 840 and 841 that the detailed analysis of the factors must not preclude the judge from adopting a global view:

> These principles all help a court determine whether the procedures that were followed [page841] respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.
>
> [Emphasis added.]

[76] Considering the decisions by the Supreme Court, the approach that I must follow in this case consists in analyzing the factors established by the Supreme Court with a view to elaborating the procedural safeguards to which the applicant is entitled, all the while bearing in mind the premise underlying the factors proposed by L'Heureux-Dubé J. This approach is a means of identifying the failures to observe the duty to act fairly, if there are any. Then, I will address the minimum procedural safeguards conferred to persons appointed to office during good behaviour and I will determine whether they were observed. At the end of the analysis, by adopting a global view of this matter, it will be determined whether the duty to act fairly was observed.

A. *Analysis in accordance with the factors in Baker*

(1) <u>The nature of the decision being made and process followed in making it</u>

(a) *A non-judicial and non-formalistic procedure*

[77] This first factor implies assessing "the closeness of the administrative process to the judicial process" (*Baker v. Canada (Minister of Citizenship and Immigration),* above, at page 838). There is no doubt that in this case, the process of the adoption of Orders by the Governor in Council is very different than the process leading to a judicial decision. It is a non-judicial and non-formalistic procedure.

[78] This principle must underlie my analysis of the nature of the duty to act fairly. The nature of the decisions contemplated by this application for judicial review gives rise to procedural safeguards that are somewhat flexible, intended to enable the interested party to have a real opportunity to be heard.

(**b)** ***The Governor in Council, master of the procedure***

[79] Furthermore, the respondent considers that the absence of procedural guidelines confirms that the Governor in Council has a very broad discretion in determining the approach to follow. In fact, there is no dismissal procedure provided by any legislation, the only guidance regarding the procedure to follow comes from the precedents drawn from the case law.

[80] For the time being, it is enough to state that the absence of legislation regarding procedure does not really affect the nature of the duty to act fairly. At the very most, it is an indication that Parliament wanted to give some latitude to the Governor in Council (I will elaborate on this aspect at paragraphs 127 to 132 of this decision). The Governor in Council nevertheless has the obligation, despite the discretion given to her, to give the affected party a real opportunity to respond to the reasons for the employer's dissatisfaction (see paragraphs 197 to 212 of this decision).

(2) The nature of the statutory scheme and the terms of the law

(a) *The wording of subsection 6(2) of the BDC Act and the "for cause" requirement drawn from the case law*

[81] The *BDC Act* gives little indication regarding the procedural safeguards applicable when the President and Chief Executive Officer of the Crown corporation is removed.

[82] The applicant considers that the "for cause" requirement (in French, "révocation motivée") justifies the application of stricter procedural safeguards than those for persons appointed to hold office during pleasure. Moreover, the applicant contends that the French wording of subsection 6(2) of the *BDC Act* imposes on the Governor in Council an obligation to give written reasons for her decision. In the alternative, he submits that even if that were not the interpretation to be given to subsection 6(2), there would nevertheless have to be a determination that there was an obligation to give reasons as a result of *Baker v. Canada (Minister of Citizenship and Immigration)*, above.

[83] Even if there is an apparent ambiguity resulting from the discrepancy existing between the French version and the English version of the Act, I do not think it necessary to engage in a long interpretative exercise. In fact, it appears, as the applicant submitted, that even if the Governor in Council was not obligated to give reasons for her decision by law, it would in any event be required as a result of *Baker v. Canada (Minister of Citizenship and Immigration)*, above.

[84] In that case, L'Heureux-Dubé J. conducted an extensive analysis of the obligation to give reasons for administrative decisions. At page 848, she determines:

> It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are [page820] required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.
>
> [Emphasis added.]

[85] In this case, there is no doubt that reasons were necessary, for two reasons.

[86] First, the decision to remove the President and Chief Executive Officer of the BDC is of very important significance to that person (see paragraphs 119 to 124 of this decision, where I address this aspect distinctly); it follows that this person would be entitled to know the reasons with some precision.

[87] The requirement for reasons is also justified by the fact that the President and Chief Executive Officer of the BDC is appointed to hold office during good behaviour. As the respondent acknowledges, a cause for removal is necessary in such cases. I fail to see how a judge, in the context of a judicial review, would be able to assess the sufficiency or the merits of the reasons if the person affected was not duly notified of them.

[88] In my opinion, the Governor in Council's obligation to give reasons was only summarily fulfilled as regards the applicant, as appears from the Order in Council and the letter dated March 12, 2004 (see paragraphs 31 and 32 of this decision).

[89] The reasons set out in the dismissal order and in the letter are as follows:

1. The loss of confidence;

2. The applicant's conduct in respect of the matters addressed in the reasons for judgment in *Beaudoin v. Banque de développement du Canada* is incompatible with his continued appointment.

[90] The courts tend to consider that such reasons are insufficient. Referring to several decisions, Professor Garant aptly summarizes the evolution of the requirement for reasons in his book *Droit administratif*, 5th ed., Cowansville, Éditions Yvon Blais, 2004, at pages 825 to 832. He explains certain principles for assessing the sufficiency of reasons, at pages 829 and 830:

> [TRANSLATION]
>
> The Federal Court of Appeal confirms that this obligation does not suggest that the details of the decision be disclosed in minute detail.
>
> . . .
>
> This reasoning can be expressed in general terms in accordance with the administrative nature of the decisions and the extent of the decision-maker's discretionary power. It can be brief without being incomplete or capricious; the decision may be "brief and technical . . . without being 'bereft of reasons'"
>
> Nevertheless, an administrative tribunal cannot simply write that the evidence is insufficient. . . . The reasoning must be "sufficient and intelligible", even if it is somewhat convoluted and if the decision must be considered as a whole; a decision will be considered intelligible if the decision-maker, considering all of the evidence in assessing the facts, develops a logical reasoning using the facts at issue.
>
> . . .
>
> A decision that does not involve any analysis of the evidence will be considered as being without reasons.
>
> . . .
>
> When a court dismisses inconsistent evidence outright, it must "give at least some reasons for that choice".
>
> [References omitted.]

[91] Even though useful for clarification, these guidelines need not necessarily be strictly applied to the Governor in Council when she decides to dismiss a public office holder appointed during good behaviour. The respondent directed the Court's attention to the following passage from the decision in *Knight v. Indian Head School Div. No. 19*, above, at page 685:

> In the same vein, the duty to give reasons need not involve a full and complete disclosure by the administrative body of all of its reasons for dismissing the employee, but rather the communication of the broad grounds revealing the general substance of the reason for dismissal.
>
> [Reference omitted.]

[92] The Governor in Council's obligation to give reasons should not be the same as the obligation imposed on judicial or quasi-judicial tribunals. That said, there is nevertheless an obligation to give reasons, namely, the obligation to inform the affected individual of the reasons for the removal while considering the position that this person submitted. In this case, the reasons given to the applicant by the Governor in Council do not appear to me to fulfil that obligation to adequately inform the applicant of the reasons for the decisions. I have no other choice, under such circumstances, but to find that the Governor in Council's obligation to give reasons for the decision was breached in this case.

[93] In fact, there is nothing in the dismissal order or in the letter which could be characterized as analysis or reasoning, and the reasons do not make any mention of the position submitted by the applicant. The reader sees nothing other than findings in the Order in Council and the letter, namely the loss of confidence and the determination that the applicant's conduct is incompatible with his continued appointment. There should have been at least some degree of reasoning or analysis. The applicant was not informed of the reasons for dismissing the written and oral arguments submitted.

[94] The letter contained two types of allegations, as stated earlier, namely personal allegations on the one hand and corporate allegations on the other (see paragraph 21 of this decision). Yet, we cannot infer from the dismissal order or the dismissal letter which one led to the applicant's removal. The applicant, in light of these documents, does not know whether he was dismissed because of personal misconduct, corporate misconduct, or both. It is true that both of these elements are interdependent to a certain degree, but the decision is so vague that it makes no distinction between the reasons for dissatisfaction. What led to the applicant's removal? Was it the applicant's conduct as a witness? Was it rather his professional conduct in carrying out his duties? Was it a dismissal based on the allegations targeting the BDC as a whole? In the case of the second hypothesis, what are the specific facts alleged against the applicant serving as a basis for the decision? The decision in *Beaudoin v. Banque de développement du Canada*, above, reported numerous facts which could have conceivably led to the removal. Which facts are alleged against the applicant? Were some allegations dismissed? There is nothing to shed light on the choice made by the Governor in Council and to help us understand what significance was assigned to the various arguments presented.

[95] This is not a matter of imposing requirements for judicial or quasi-judicial reasons on the Governor in Council but rather of asking the Governor in Council to explain the reasons for the removal. The decision, without being reasoned in great detail, must convey a certain reasoning taking into account the submissions made by the applicant in his preliminary memorandum (Exhibit MV-15). The decision must summarily explain why the arguments submitted were dismissed. The letter could have contained this information. These requirements are certainly not excessive when the fate, the reputation and the career of an individual is being decided, with the knowledge that the decision will inevitably receive a great deal of media attention.

(b) ***The notion of holding office during good behaviour: a variable concept which does not afford a basis for inferring that specific procedural safeguards apply thereto***

[96] The President and Chief Executive Officer of the BDC is appointed to hold office during good behaviour (*BDC Act*, subsection 6(2)).

[97] Several other federal agencies have internal office holders appointed during good behaviour. The Governor in Council has the power, under several statutes, to appoint a certain number of persons to hold office during good behaviour. It would be worthwhile, by way of contrast, to briefly review the removal mechanisms existing in federal law for persons appointed to hold office during good behaviour.

[98] In the case of administrative tribunals, the legislative regime varies but the members are as a general rule appointed during good behaviour and reasons must be given for their removal. In certain cases, the statute provides for an inquiry and reporting process which may include a remedial recommendation. For example, the members of the Veterans Review and Appeal Board are appointed to hold office during good behaviour and the law provides that the Chairperson of the Tribunal may recommend to the Minister of Veterans Affairs that an inquiry be held, which could lead to the removal of the member (*Veterans Review and Appeal Board Act*, 1995, c. 18, sections 5, 42 and 43). A similar procedure is provided in the case of members of the Canadian Human Rights Tribunal (*Canadian Human Rights Act*, R.S., 1985, c. H-6, section 48.3). The inquiry process may also be provided for in a regulatory instrument. For example, subsection 165.21(2) of the *National Defense Act*, R.C. 1985, c. N-5, provides that military judges hold office during good behaviour for a term of five years but may be removed by the Governor in Council for cause on the recommendation of an Inquiry Committee established under section 101.14 of the *Queen's Regulations and Orders for the Canadian Forces* (in *R. v. Corporal R.P. Joseph*, 2005 CM 41, Chief Military Judge Dutil found that the limited term of military judges is unconstitutional but recognized the validity of the inquiry procedure established by the regulations). The law sometimes has a specific provision providing that the inquiry procedure provided by law does not affect any right or power of the Governor in Council (see for example, for members of the Immigration and Refugee Board, except members of the Immigration Division, section 186 of the *Immigration and Refugee Protection Act*, 2001, c. 27 – the inquiry process is set out in sections 178-186).

[99] Some specific statutes provide for appointments to hold office during good behaviour for directors of Crown corporations, yet without providing any specific procedure for removal. Such is the case, for example, for directors sitting on the Canadian Broadcasting Corporation's Board of Directors (*Broadcasting Act*, 1991, c. 11, subsection 36(3)).

[100] Certain strategic positions have specific protection: the removal procedure must be initiated by one or both of the Houses. The Ethics Commissioner, for example, may be subject to removal for cause on address of the House of Commons (*Parliament of Canada Act*, R.S., 1985, c. P-1, subsection 72.02(1)). The Auditor General also enjoys special status considering the nature of his duties: he cannot be removed except on address of the Senate and the House of Commons (*Auditor General Act*, R.S., 1985, c. A-17). That is also the case for the Privacy Commissioner (*Privacy Act*, R.S., 1985, c. P-21, subsection 53(2)), the Information Commissioner (*Access to Information Act*, R.S. 1985, c. A-1, subsection 54(2)), the Commissioner of Official Languages (*Official Languages Act*, R.S., 1985, c. 31 (4th Supp.), subsection 49(2)) and the Public Sector Integrity Commissioner (*Public Servants Disclosure Protection Act*, 2005, c. 46, subsection 39(2)). In the case of the Superintendent of Bankruptcy, the dismissal order is simply laid before each House of Parliament (*Office of the Superintendent of Financial Institutions Act*, R.S., 1985, c. 18 (3rd Supp.), subsection 5(3)).

[101] The prothonotaries of the Federal Court are also appointed by the Governor in Council to hold office during good behaviour, but may be removed for cause ("révocation motivée") (FCA, paragraph 12(7)), and no specific procedure is provided for their removal.

[102] Finally, in the case of superior court judges, there is a detailed removal procedure provided for in sections 63 to 66 and 71 of the *Judges Act*, R.S.C. 1985, c. J-1 (Judges Act). The principle of judicial independence, repeatedly recognized by the courts, guarantees them a degree of independence that no other office holder enjoys.

[103] These examples help to illustrate that there is more than one type of office held during good behaviour. In fact, there is a very extensive range of offices whose holders are appointed during good behaviour and there is not the same degree of procedural protection in every case. It would therefore be incorrect to assign too much significance to the expression "to hold office during good behaviour" found in the legislation.

[104] In my opinion, the procedural safeguards benefiting these persons vary according to the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, above, and the statements of the Supreme Court in *Knight v. Indian Head School Div. No. 19*, above. In other words, the nature of the duty to act fairly depends on a comprehensive analysis, and not on a secular legal category whose importance has indeed been put into perspective in *Knight v. Indian Head School Div. No. 19*, above, pages 670 to 676. The applicant is not wrong to argue that holding office during good behaviour under the terms of the *BDC Act* is based historically on judges' holding office during good behaviour, but I believe that this is a relatively minor aspect of the debate, considering the variety of removal procedures existing in federal law and the evolution of the concept of holding office during good behaviour.

[105] To summarize, the concept of holding office during good behaviour is not in itself enough to substantiate finding an automatic and clearly defined acknowledgement of specific procedural safeguards. That said, Parliament's use of the term: "during good behaviour" is not insignificant. It is certainly an important indication of its intention to give the President and Chief Executive Officer of the BDC enhanced procedural safeguards. This becomes clear on analyzing the status of the BDC within the federal system and the purpose assigned to it.

(c) *The status and the purpose of the BDC: Enhanced procedural safeguards*

[106] Both parties insisted a very great deal during their arguments on the importance of the status and the purpose of the BDC. The BDC administers in excess of five billion dollars in assets and is responsible for granting commercial loans to small and medium-sized businesses and for injecting venture capital (see Exhibit MV-5, page 88, paragraphs 685 and 686). The press release dated February 18, 2004, contains a relevant passage regarding the BDC's role:

> The Business Development Bank of Canada is a financial institution wholly owned by the Government of Canada. BDC plays a leadership role in delivering financial, investment and consulting services to Canadian small businesses, with a particular focus on the technology and export sectors of the economy.

[107] The applicant submitted that appointments to hold office during good behaviour are meant to ensure that some of those holding offices of importance to the public service have a certain degree of independence, to shelter them from political interference. The respondent argued that the importance of the institution implies that the person managing it must be held responsible for its proper operation and that this person must assume responsibility for the errors made at the BDC. The respondent also argued that the President and Chief Executive Officer of the BDC is appointed to hold office during good behaviour in order to protect the public, not the office holder. In my opinion, neither party is incorrect.

[108] In my view, the President and Chief Executive Officer of the BDC may certainly be held responsible, to a certain extent, for what occurs within the agency that he is overseeing. However, that does not have any bearing on the procedural safeguards which must be offered to the office holder.

[109] The appointment to hold office during good behaviour at the head of a Crown corporation is an exceptional regime and the purpose of this regime is the one described by the applicant, i.e. the relative independence of the office holder. That independence also has a public aspect in the sense that its purpose is to enable the President and Chief Executive Officer of the BDC to act in the public interest.

[110] Subsection 105(5) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (FAA) provides that as a general rule, each officer-director of a parent Crown corporation shall be appointed to hold office during pleasure. The appointment of the President and Chief Executive Officer of the BDC is an exception to that rule (*BDC Act*, subsection 6(2)). In my opinion, that is a sign that Parliament wanted that person to have discretion, to a certain extent, in carrying out his or her duties, in the interest of the office holder as well as in the interest of the public. Otherwise, the Act would have provided that the Governor in Council appoint the President and Chief Executive Officer to hold office during pleasure.

[111] After a brief overview, I have been able to identify three federal corporations whose chief executive officers are appointed to hold office during good behaviour and who can be removed for valid reasons at the initiative of the Governor in Council. These are the Canadian Broadcasting Corporation (*Broadcasting Act*, 1991, c. 11, subsection 36(3)), the Bank of Canada (*Bank of Canada Act*, R.S., 1985, c. B-2, subsection 6(3)) and the BDC. In all three cases, they are corporations that Parliament wanted to shelter, to a certain extent, from political interference.

[112] The presidents of several other corporations are appointed during pleasure, such as Export Development Canada (*Export Development Act*, R.S. 1985, c. E-20, subsection 8(1)), the Canada Mortgage and Housing Corporation (*Canada Mortgage and Housing Corporation Act*, R.S. 1985, c. C-7, subsection 7(1)) and the Canada Post Corporation (*Canada Post Corporation Act*, R.S. 1985, c. C-10., subsection 8(1)). The respective mandates of these corporations are very important, but Parliament chose nevertheless not to appoint their directors during good behavior. I must recognize this distinction that Parliament chose to make.

[113] Furthermore, it is understandable that the President and CEO of the BDC would have special status as compared to other presidents of Crown corporations, given the purpose of the BDC, described at section 4 of the *BDC Act*:

4. (1) The purpose of the Bank is to support Canadian entrepreneurship by providing financial and management services and by issuing securities or otherwise raising funds or capital in support of those services.	4. (1) La Banque a pour mission de soutenir l'esprit d'entreprise au Canada en offrant des services financiers et de gestion et en émettant des valeurs mobilières ou en réunissant de quelque autre façon des fonds et des capitaux pour appuyer ces services.
(2) In carrying out its activities, the Bank must give particular consideration to the needs of small and medium-sized enterprises.	(2) Dans la poursuite de sa mission, la Banque attache une importance particulière aux besoins des petites et des moyennes entreprises.

[114] The relative independence conferred on the President of the BDC is meant to ensure that the holder of this office can carry it out in the public interest. In that respect, the office of the President and Chief Executive Officer of the BDC has a public dimension which is closely connected to the protection extended to the individual. The individual's protection goes hand-in-hand with the public's protection.

[115] The public must have confidence in the agency and its President and Chief Executive Officer. Aside from carrying out its duties in the public interest, the institution must project the image that it is working in the public interest. That would not be the case in a situation where the public believed, correctly or not, that the President and Chief Executive Officer of the BDC was very vulnerable vis-à-vis the Governor in Council and was therefore more preoccupied by political interests than by the public interest. That said, Parliament did not choose to give total independence to this person (like the kind of independence that judges have), or to give him/her independence close to it (like the independence given to the Public Service Integrity Commissioner or to the Auditor General).

[116] All of these considerations relating to the status and the role of the BDC and to the security of tenure of its President and Chief Executive Officer confirm that he must benefit from enhanced procedural safeguards.

(d) ***The absence of a right to appeal confirms that enhanced procedural safeguards must be recognized***

[117] In the matter of *Baker v. Canada (Minister of Citizenship and Immigration),* above, at paragraph 24, L'Heureux-Dubé J. recognized that the absence of a right to appeal is a relevant test in determining the substance of the duty to act fairly.

[118] The fact that the applicant does not have a right to appeal is an additional factor confirming in my opinion that Parliament meant to extend procedural safeguards to the President and Chief Executive Officer in the event of removal.

(3) The importance of the decision to the individual affected

[119] The more important a decision is to the person affected, the stricter the applicable procedural safeguards will be (*Baker v. Canada (Minister of Citizenship and Immigration)*, above, page 839).

[120] On this point, it is well established in the case law that a person's right to work gives rise to certain strict procedural safeguards. In *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at page 1106, Dickson J. writes that ". . . A high standard of justice is required when the right to continue in one's profession or employment is at stake." It is a first relevant factor in assessing the importance of the decision for the applicant.

[121] The importance of the decision for the affected person cannot be assessed without taking into consideration the impact of the decision on the reputation of that person. The Supreme Court emphasized the importance of preserving a person's reputation in a situation involving defamation. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paragraph 108, Cory J. writes:

> Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.
>
> [Emphasis added.]

[122] Although Cory J.'s remarks were written in the context of an action in defamation, I believe that the importance of an individual's reputation is well established in the case law (see in particular *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, at paragraph 43, where the Court recognizes that the freedom of speech may be limited by the right to reputation). When the reputation of a person can be jeopardized by an administrative decision, the administrative process must necessarily take that into account.

[123] In this case, the applicant's reputation was certainly tainted to some extent by the decision in *Beaudoin v. Banque de développement du Canada*, above. The Governor in Council's Orders were just as significant despite this, because of their foreseeable impact on Mr. Vennat's reputation.

[124] In short, the foreseeable impact of the Governor in Council's Orders on the applicant's right to work and his right to a reputation is an additional indication that the situation called for the application of enhanced procedural safeguards.

(4) The legitimate expectations

[125] At pages 839 and 840 of *Baker v. Canada (Minister of Citizenship and Immigration)*, above, L'Heureux-Dubé J. explains the significance of the legitimate expectations factor on the obligation of fairness:

> [T]he legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights . . . As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness . . . Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded . . . Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[126] In this case, the applicant expressed in different ways to the decision-maker his expectations regarding the procedure. They need not be addressed since I do so elsewhere in this decision. I shall simply list them:

1. The applicant considers that he was entitled to a reasoned decision (see paragraphs 81 to 95 of this decision);
2. The applicant believes that he was entitled to a personalized inquiry (see paragraphs 133 to 174 of this decision);
3. The applicant considers that he should have been entitled to call witnesses since, so he claims, there was an attempt to enforce a judgment against him (see paragraphs 145 to 148 of this decision);

4. The applicant considers that he should have had [TRANSLATION] “the opportunity to defend himself before an impartial and independent tribunal whose decision is not dependant on political pressure, influenced by the polls, and/or by media hype, but rather respectful of the rights of the parties including the rights of Michel Vennat” (letter dated March 10, 2004) (see paragraphs 180 to 184 of this decision);
5. The applicant considers that he was entitled to a response to the letters he sent on March 4 and March 10, 2004 (see paragraphs 185 to 190 of this decision);
6. The applicant is of the opinion that he was entitled to particulars regarding the reasons for the Governor in Council’s dissatisfaction, as he had requested them in the letter dated February 25 (see paragraphs 194 to 196 of this decision);
7. The applicant submits that he was entitled to be heard, as he indicated in his letter to the Prime Minister (see paragraphs 197 to 212 of this decision);
8. The applicant considers that he should have been entitled to more time to respond to the reasons for dissatisfaction and to make his submissions (see paragraphs 201 to 205 of this decision);
9. The applicant believes that it was legitimate to request Mr. Ritchie be present at the meeting of March 1, 2004 (see paragraphs 206 and 207 of this decision).

(5) The procedural choices of the decision-making body

(a) *A non-judicial and non-formalistic procedure*

[127] The respondent, in his arguments as well as in his memorandum, emphasized the argument to the effect that the Governor in Council is the master of her procedure and that inflexible administrative rules cannot be imposed on her because of her institutional constraints.

[128] The applicant did not dispute this argument, but contended that the existence of the procedure for the optional inquiry by the Judicial Council, provided under section 69 of the *Judges Act*, is an indication of Parliament's intention to protect persons appointed to hold office during good behaviour against the Governor in Council's arbitrariness.

[129] I appreciate the respondent's argument, considering the very special nature of the Governor in Council's decisions and the fact that there is no legislation defining the power to remove the President and Chief Executive Officer of the BDC. The Governor in Council is not obliged to judicialize this procedure.

[130] In particular, I do not believe that it would be appropriate to impose a procedure similar to the one provided under section 69 of the *Judges Act*, since it is optional when a person appointed to hold office during good behaviour is removed. This is apparent on the face of the section, as Sharlow J. confirmed in *Weatherill v. Canada (Attorney General)*, [1999] 4 F.C. 107, at paragraph 82. I also reviewed the adjudication in *Dingwall v. Canada (Attorney General)* (January 19, 2006), Toronto (adjudication award), which is a unique case (applicant's additional authorities, tab 2). In my opinion, the cases where the Governor in Council decides to refer a matter to an arbitrator, or to use the procedure under section 69 of the *Judges Act*, are particular cases where the Governor in Council has decided to make the process more formal. That does not have the effect of binding the Governor in Council in the future. The Governor in Council is free to decide whether or not to use such mechanisms.

[131] This does not mean that the Governor in Council can deviate substantially from the guidelines that she herself drew up when she decides not to use one of these "external assessment" mechanisms. It would in fact be contrary to the duty to act fairly if there were disparity in the treatment of two individuals in similar situations, unless that unfairness were justified by the circumstances of the case, in light of the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, above, as well as the comments of the Supreme Court in *Knight v. Indian Head School Div. No. 19*, above. The case law has created a number of procedural guidelines.

[132] It is in this context, that in my opinion, I should address whether the Governor in Council had an obligation to conduct a personalized inquiry into the facts on which she intended to rely to remove the applicant from his position at the BDC. If such an obligation exists, it is necessary to determine whether the applicant had a right to respond to the findings of the personalized inquiry (I explain my choice to use the expression "personalized inquiry" at paragraphs 175 to 179).

(b) *The Governor in Council's obligation to conduct a personalized inquiry and the right to respond*

[133] At the hearing, the applicant submitted that the Governor in Council had the obligation to investigate his conduct despite the gravity of the judge's remarks about him. The respondent argued that the Governor in Council did not have such an obligation, as the judgment in *Beaudoin v. Banque de développement du Canada*, above, was in itself, in his opinion, a complete report on Mr. Vennat's conduct at the hearing and in the context of his duties at the BDC. According to the respondent, the Governor in Council's obligation to investigate was limited to the meeting, reading the judgment, reading the additional documents submitted by the applicant and reading his preliminary memorandum, as well as the recommendation by the Minister of Industry. Was that sufficient considering *Baker v. Canada (Minister of Citizenship and Immigration)*, above, and the case law involving facts which are in some respects analogous to the facts of this matter?

[134] To assess the extent of the Governor in Council's obligation to investigate in this case, we must first determine the exact role that the decision in *Beaudoin v. Banque de développement du Canada,* above, could legitimately play in this case. Then it will be a matter of analyzing the case law to determine whether the Governor in Council had the obligation to conduct a personalized inquiry. Finally, were such an obligation to exist, I would have to verify if it had been fulfilled.

(i) *The use of the judgment in Beaudoin v. Banque de développement du Canada*

[135] The Governor in Council's decision was based on the issuance of the decision in *Beaudoin v. Banque de développement du Canada,* above. As appears from the letter of the Minister of Industry dated February 24, 2004, this decision was the basis for the Governor in Council's reasons for dissatisfaction.

[136] The applicant argued that the Governor in Council could not use the judge's remarks in *Beaudoin v. Banque de développement du Canada,* above, to remove him, since these remarks were incidental and were not part of the reasons for judgment. He adds that under the *Code of Civil Procedure,* R.S.Q., c. C-25, there were no procedural means available to him to appeal or dispute the decision. In the alternative, he argued that if the Governor in Council wanted to enforce the outcome of a judgment against him, he should have a corresponding right to respond, including the right to examine and cross-examine witnesses.

[137] I will first address the principal argument, then the alternative argument.

(i.1) The judgment creates a simple presumption of facts

[138] The respondent is of the opinion that the enforceability of the judgment is a moot point since the Governor in Council did not enforce the judgment against the applicant in the legal sense of the term. In his opinion, the judgment must simply be considered as the source of the Governor in Council's reasons for dissatisfaction.

[139] On this point, I agree with the respondent: the judgment was not used to enforce a judicial finding against the applicant, subject to my comments later on regarding the incorrect standard of proof applied by the Governor in Council (see paragraphs 208 to 212 of this decision). The circumstances of this matter must be distinguished from a case where, for example, the guilt of a person has been established in a criminal matter (such as *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, Local 79, [2003] 3 S.C.R. 77). In such a case, it is impossible, in a civil matter, to call that finding into question. In *Vennat v. Canada (Procureur Général)*, [2005] J.Q. No. 3772, at paragraph 52 (a judgment that deals with a series of motions made by the applicant in his action for damages in the Quebec Superior Court), Émery J. properly summarized the case law on this issue:

> [TRANSLATION]
>
> [C]ertain guidelines emerge from the outset. The Denis judgment is not a "significant juridical fact" in this case. In the best case scenario for the Attorney General, it appears that this judgment can only give rise to a simple presumption of the truthfulness of the facts involving Mr. Vennat. As it is not a significant juridical fact as in the case in the matter of *Ali* and that of the *City of Toronto*, the applicant will be granted leave to file any evidence tending to contradict the findings of Denis J. regarding him.
>
> [References omitted.]

[140] To me it seems normal that an employer, whatever employer it may be, would bring disciplinary proceedings against an employee who had an inappropriate attitude in Court, or whose conduct was reprehensible in the performance of his duties. When such remarks come from superior court judge who has had privileged access to abundant evidence, the remarks are of particular significance, even if those remarks do not amount to a juridical fact. I note the judge's remarks regarding the conduct of several witnesses at the hearing, including the applicant, as well as the cautionary notes in the judgment (see, in particular, the sections entitled [TRANSLATION] "Warning" and "The testimony", at paragraphs 23 to 39 of the decision). The employer cannot disregard such remarks, nor take them as proved.

[141] The respondent relied on *Lawyers Title Insurance Corporation v. Michalakopoulos*, [2004] J.Q. No 10724 (Mongeon J.). This matter seems relevant in that it will help me illustrate my thought.

[142] In that matter, the plaintiff was relying *inter alia* on the remarks made by a judge concerning a lawyer's conduct to establish the lawyer's civil liability. Mongeon J. found, at paragraph 150, that the reasons for judgment were a set of juridical facts admissible into evidence which created a simple presumption of facts, [TRANSLATION] "essentially rebuttable".

[143] That statement can be applied in this case, by adapting it. The decision in *Beaudoin v. Banque de développement du Canada,* above, did not change the applicant's legal situation. The proceeding involved the homologation of the transaction between the BDC and Mr. Beaudoin, as well as the BDC's counterclaim. Mr. Vennat was not the person contemplated in the legal proceeding and he had no right to speak therein except as a witness, in his capacity as President and Chief Executive Officer of the BDC. The facts of the judgment therefore cannot be set up, *stricto sensu*, against the applicant.

[144] However, in my opinion the employer would be entitled to assign more probative value to the remarks of a well-informed superior court judge than, for example, anonymous allegations made by an informant or isolated client complaints. This does not mean, however, that the employer does not have to respect the duty to act fairly. In *Lawyers Title Insurance Corporation v. Michalakopoulos*, above, Mr. Michalakopoulos was heard as a defence witness, had the opportunity to submit his evidence, to cross-examine the other parties' witnesses and to make his submissions. In short, he had the opportunity to argue his point of view. Similarly, Mr. Vennat should have the right to argue his point of view against the presumption against him, while taking into consideration the limits inherent to the particular forum in which he is participating and all of the factors of *Baker v. Canada (Minister of Citizenship and Immigration),* above.

(i.2) The applicant does not have the right to examine and cross-examine witnesses

[145] The applicant considers that insofar that the comments of the judge in *Beaudoin v. Banque de développement du Canada,* above, were made after a hearing where the parties had the right to examine and cross-examine witnesses, he should have a corresponding right before the Governor in Council.

[146] If I were to accept the applicant's argument that an administrative decision-maker who brings in before her the remarks of a judge must also bring in the procedural safeguards existing before the judge, it would have the effect of judicializing a proceeding which is not judicial by nature. It would be inappropriate to impose such an obligation, indeed specifically rejected by Sharlow J. in *Weatherill v. Canada (Attorney General),* above, at paragraph 87. The decision-making process applicable to the removal of a person appointed to hold office during good behaviour can be non-judicial and non-formalistic (see paragraphs 77, 78 and 127 to 132 of this decision).

[147] The applicant wanted certain persons to be able to file written statements corroborating his version of the facts, such as, for example, John Manley, who was the Minister of Industry during the second half of the 1990s, former Deputy Ministers of Industry, members of the BDC Board of Directors, Mr. Ritchie, certain officers of the BDC, representatives of the Clerk of the Privy Council Office, the Office of the Auditor General, and the KPMG accounting firm as well as BDC counsel.

[148] This type of procedure appears to be consistent with the type of inquiry which the Governor in Council should have conducted, while testimonial evidence is more consistent with the judicial process. However, the Governor in Council was entitled to agree or disagree with the written submissions, subject to her obligation to conduct a personalized inquiry (see paragraphs 165 to 174 of this decision). The Governor in Council has significant leeway in determining what means will achieve the procedural fairness objective.

(ii) *The case law*

[149] Two decisions are relevant in assessing the inquiry that the Governor in Council was bound to conduct, if she had such an obligation. They are *Wedge v. Canada (Attorney General)*, [1997] F.C.J. No. 872 (F.C.) (Mackay J.) and *Weatherill v. Canada (Attorney General)*, above.

[150] I would stress that my objective is not to say that Mr. Vennat is entitled, in principle, to the same procedural safeguards as Messrs. Wedge and Weatherill, but rather to use these two decisions as an example. It would be wrong to consider that all appointments to hold office during good behaviour fall into one homogenous category of employment having specific procedural safeguards (see paragraphs 96 to 105 of this decision). However, there is nothing that would justify giving Mr. Vennat fewer rights than Messrs. Wedge and Weatherill in terms of his right to benefit from an inquiry, considering the factors in the case law relating to the duty to act fairly (see paragraph 74 of this decision).

(ii.1) *Wedge v. Canada (Attorney General)*

[151] In this first case, Mr. Wedge was removed, on October 27, 1994, from his position as a member of the Veterans Appeal Boards (VAB). The procedure followed by the Governor in Council can be summarized as follows.

[152] Around May or June 1993, Mr. Wedge learned that the Royal Canadian Mounted Police (RCMP) was investigating allegations that he had been involved in irregularities that took place during the provincial elections in March 1993 in Prince Edward Island (P.E.I.). In December 1993, the RCMP determined that there was no evidence that the offences had been committed (first report). No charge was laid.

[153] On May 2, 1994, Margaret Bloodworth of the Privy Council Office sent the applicant a letter reporting a concern regarding his capacity to continue to sit on the VAB. According to the letter, the applicant had allegedly aided and abetted three individuals in voting in the P.E.I. election, knowing that those individuals did not have the right to vote. The letter stated that the Clerk of the Privy Council had asked Ms. Bloodworth and Twila Whalen, President of the VAB, to examine the applicant's conduct and to prepare a report. An investigative report prepared by private investigators on behalf of the Minister of Justice was attached to the letter (second report). This report set out "in detail", in Mackay J.'s opinion, the allegations that had given rise to the concern. Moreover, the letter expressed a certain openness, inviting the applicant to "comment on the accuracy of the facts included in the investigation report [at a later meeting]".

[154] On May 9, 1994, a meeting took place. The applicant and his counsel attended, as well as Ms. Bloodworth and Ms. Whalen. In September 1994, the review by Ms. Bloodworth and Ms. Whalen ended. In a letter dated September 19, 1994, the applicant received a copy of the report prepared by Ms. Bloodworth and Ms. Whalen (third report) and was invited to respond to it, by making written submissions which would be sent to the Governor in Council. On October 6, 1994, Mr. Wedge sent his submissions to the Governor in Council.

[155] The two reports were then sent to the Governor in Council, who chose to remove the applicant, on the recommendation of the Minister of Veterans Affairs.

(ii.2) ***Weatherill v. Canada (Attorney General)***

[156] This decision by Sharlow J. deals with the Governor in Council's removal, on January 27, 1998, of John Frederick William Weatherill (Mr. Weatherill) from his position as President of the Canada Industrial Relations Board. The procedure followed in this matter may be summarized as follows.

[157] In April 1997, the Minister of Labour asked the Office of the Auditor General to review the travel expenses, allowances and benefits paid to the applicant and to other members of the Canada Labour Relations Board.

[158] At the beginning of October 1997, the applicant received a draft of the chapter of the Auditor General's Report contemplating him personally. This draft stated that Mr. Weatherill's pattern of expenditures on travel and hospitality was not reasonable. The applicant was invited to point out any inaccuracies in the draft chapter before October 17, 1997, and he was given the opportunity to meet the auditors if he so desired. On October 9, Mr. Weatherill asked for more time to respond. The deadline was extended to October 20, 1997. The applicant responded in writing.

[159] The Auditor General prepared a report on the issue, and a copy was sent to the applicant on November 7, 1997 (report #1). The report included the applicant's written response.

[160] On December 2, 1997, Nicole Jauvin, Deputy Clerk of the Privy Council Office, wrote to Mr. Weatherill to tell him that the Governor in Council would determine, in light of the report, whether there were reasons justifying his removal. The letter indicated that Ms. Jauvin would examine the issue and prepare a report. The letter also offered Mr. Weatherill the opportunity to meet with Ms. Jauvin to give her his remarks and relevant additional information, if necessary.

[161] Dennis Hefferson, counsel acting on behalf of Mr. Weatherill, met with Ms. Jauvin on December 5, 1997. At that time, Mr. Hefferson argued that there was insufficient time to respond and that he wanted to have access to the working documents used to prepare the Auditor General's report. There were several exchanges during December between Mr. Hefferson, Ms. Jauvin and, on one occasion, representatives of the Auditor General. Mr. Hefferson had access to some information but did not have access to other information. Mr. Henderson was given additional time to prepare himself and a meeting was scheduled for December 17 or 18, 1997. Around mid-December, Ms. Jauvin sent Mr. Hefferson additional information. On December 14, Mr. Hefferson wrote to Ms. Jauvin, telling her that the procedure provided under section 69 of the *Judges Act* had not been followed. On December 16, 1997, Ms. Jauvin responded to Mr. Hefferson, indicating that she did not share his opinion regarding section 69 of the *Judges Act*. She reiterated that she wanted a meeting to take place on December 17 or 18, 1997. Also on December 16, Mr. Hefferson wrote once again to Ms. Jauvin, telling her that he did not have any information enabling him to respond adequately and reiterated his position regarding section 69 of the *Judges Act*.

[162] There were then conference calls between Mr. Hefferson and counsel from the Privy Council Office; there was continued disagreement regarding the application of section 69 of the *Judges Act*.

[163] Ms. Jauvin completed her report (report #2), and a copy was sent to Mr. Weatherill on December 24, 1997. The letter states that the report would be sent to the Governor in Council. Mr. Weatherill was given until January 16, 1998, to send a response, which would be given to the Governor in Council. The applicant did not avail himself of this offer.

[164] On January 7, 1998, Mr. Weatherill sought an order from the Federal Court preventing the Governor in Council from considering the question of removal in the absence of an inquiry under section 69 of the *Judges Act*. The application was dismissed on January 23, 1998. Mr. Weatherill appealed the decision on January 26. That day, the Privy Council Office once again gave Mr. Weatherill the opportunity to send it written submissions, this time before January 28, 1998. On January 28, 1998, Mr. Weatherill's application for an interim injunction until the hearing of the appeal before the Federal Court of Appeal was dismissed. On January 29, 1998, Mr. Weatherill received a new letter informing him that the process was following its course. The same day, a dismissal order was adopted. The appeal before the Federal Court of Appeal was therefore moot, but Mr. Weatherill nevertheless applied for a judicial review of the decision.

(iii) *Findings regarding the obligation to conduct a personalized inquiry and the right to respond*

[165] For the following reasons, it is my opinion that in this case the Governor in Council had an obligation to conduct a personalized inquiry, and that this obligation was not observed.

[166] The two matters above illustrate that the Governor in Council, in the context of an employer- employee relationship, normally conducts a personalized inquiry into the facts even if those facts appear to have been established generally in a fact-finding report, and the employee has a right to respond. In *Wedge*, the second and third reports contemplated Mr. Wedge personally, and he could have responded to them. Similarly, in *Weatherill*, report #2 contemplated Mr. Weatherill, and he had the opportunity to argue his point of view and to point out inaccuracies in the record before the decision was made by the Governor in Council. The applicant did not have that chance.

[167] Even if the judge's remarks in *Beaudoin v. Banque de développement du Canada*, above, should have significant weight in the eyes of an employer (see paragraphs 138 to 144 of this decision), I do not think that this means that the employee loses the right to a personalized inquiry by the Governor in Council. Such an inquiry should have been conducted by the Governor in Council.

[168] Further, it appears to me that the applicant's formal request for an inquiry should have prompted a different reaction from the Governor in Council. The evidence establishes that the applicant had an exemplary professional record and an untainted reputation before the judgment in *Beaudoin v. Banque de développement du Canada*, above. The applicant, who did not have a right to appeal, strenuously contested the truthfulness of certain facts relied on in the judgment (letter dated March 1, 2004 and a preliminary memorandum). Further, the applicant offered to submit witnesses and evidence to the Governor in Council contradicting certain facts of the judgment, and he formally requested, in his letter dated March 10, 2004, that an inquiry be held pursuant to section 69 of the *Judges Act*. Even though that does not give rise to an obligation for the Governor in Council to hear witnesses (see sections 145 to 148 of this decision) or trigger the application of the procedure under section 69 of the *Judges Act* (see paragraph 130 of this decision), it seems to me that these requests, as well as the applicant's denial of the facts alleged, are circumstances which would play a role in justifying a more elaborate inquiry.

[169] The complexity of the matter justified such an inquiry. As I explained earlier, the reasons for dissatisfaction with the applicant consisted of two components (see paragraph 21 of this decision). The corporate component, in particular, was extraordinarily complex. The facts of the matter implicated numerous players who contradicted each other at the hearing. The judgment in *Beaudoin v. Banque de développement du Canada*, above, was issued following more than two months of hearings. Thirty-five witnesses were heard and the judgment has 1745 paragraphs. Approximately 8000 pages of transcript were filed (*Beaudoin v. Banque de développement du Canada*, above, at paragraph 25). In order to make an enlightened decision regarding the allegations

directed against the applicant, the Governor in Council ought to have proceeded to a specific analysis of the applicant's conduct, which could only come from a serious inquiry and a personalized review of the facts. Further, the position of the BDC's Board of Directors and its expression of unanimous confidence in Mr. Vennat had to be taken into account.

[170] According to the circumstances of this case, procedural fairness required that a personalized inquiry be conducted before proceeding with the applicant's removal, even if the judgment created a simple presumption of facts (see paragraphs 138 to 144 of this decision). For the applicant to properly attempt to reverse the presumption, the decision-maker should have allowed him to present his evidence by affidavit, interviews or counter-evidence in the context of that personalized inquiry. The applicant could not, in less than eight days, review all of the relevant evidence in order to rebut the presumption. That time period was clearly insufficient (see paragraphs 201 to 205 of this decision). The fact that the position held by Mr. Vennat was a public office does not have the effect of compromising Mr. Vennat's right. The factual situation described in this case, and the type of investigation conducted, do not reflect a high standard of justice, considering the significant impact of the decision on the applicant's career and reputation. This is a breach of procedural fairness.

[171] The respondent submits that at the meeting of March 1, 2004, the applicant was entitled to dispute the inaccurate facts alleged against him, if there were any. The respondent considers that this gave the applicant direct access to the person holding the power to make a recommendation to the Governor in Council, namely the Minister of Industry. According to the respondent, that procedure was more favourable for the applicant than a personalized inquiry, and could substitute it.

[172] In my opinion, this argument cannot succeed for two reasons. First, the applicant's right to respond to the reasons for dissatisfaction (see paragraphs 197 to 212 of this decision) must, in my opinion, be assessed by taking into account the complexity of the facts submitted to the judge in *Beaudoin v. Banque de développement du Canada,* above, as well as the time available to the applicant. Further, the right to respond to the employer's reasons for dissatisfaction does not extinguish the right to a personalized inquiry when such a right exists. This inquiry, in itself, is the only safeguard enabling the decision-maker to make an enlightened decision, with full knowledge of the case, in cases where the person is appointed to hold office during good behaviour and can only be removed for cause ("révocation motivée").

[173] There is nothing in this case that would suggest that the Governor in Council conducted a personalized inquiry. To the contrary, a review of applicant's affidavit, the dismissal order, the dismissal letter and the letter dated February 26, 2004, confirms that the Minister of Industry simply reviewed and heard the applicant's submissions and read the judgment in *Beaudoin v. Banque de développement du Canada,* above, before making his recommendation. In that situation, how could the Governor in Council properly appreciate the applicant's actions and make a decision accordingly? The record is silent on that point.

[174] It seems to me that a high standard of justice requires the decision-maker to do more than read the judgment, review and hear the applicant's submissions. It appears to me that a personalized inquiry is a key element in ensuring that high standard of justice in the circumnstances of this case.

(iv) *Meaning of the expression "personalized inquiry" ["enquête personalisée"]*

[175] Finally, certain clarifications are in order regarding my choice of vocabulary. That will help explain what should be understood by the expression "personalized inquiry" ["enquête personalisée"].

[176] In *Wedge*, the judge uses the term "investigation" to describe the first and second report and uses the expression "review" ("examen" in French) for the third report. In *Weatherill*, Sharlow J. refers to a "review" giving rise to report #1, even though it is a report by the Auditor General. She describes the process that led to report #2 without using a generic term to describe the decision-making process.

[177] I use the term "inquiry" ["enquête"], relying on the definition given in *Le Petit Robert*, 1992, "enquête":

> [TRANSLATION]
>
> . . Public Law. *Administrative inquiry*, procedure through which the administration gathers information, verifies certain facts, before making a decision …

An inquiry suggests a degree of autonomy in researching information, which is not necessarily the case with a review ["examen"] (*Le Petit Robert*, 1992, "examen"):

> [TRANSLATION]
>
> Consider. Study carefully.

[178] With respect to the term “personalized” used to describe the inquiry, it means that the inquiry leading to the removal must contemplate the person(s) facing the removal procedure. This does not exclude the possibility that several persons be contemplated by the same personalized inquiry, as long as the inquiry targets the individual actions of each of these persons and they have the right to a personalized response. The inquiry must, in short, make it possible to shed light on the specific conduct of the person affected.

[179] The choice that I made to use the expression “personalized inquiry” is based in part on the nature of the proceeding that must be followed. In my opinion, it would be wrong to say that the Governor in Council was only bound to conduct a simple review regarding the applicant’s conduct, considering the complexity of the matter. The procedure followed in *Wedge* and *Weatherill* was not a simple review. Instead, an independent investigation of the facts was carried out by the decision-maker, and that investigation was personalized. On the other hand, my choice to use the expression “personalized inquiry” is based on the respondent’s own choice of vocabulary. On several occasions the respondent uses the term [TRANSLATION]”inquiry” [“enquête”] in his memorandum, which confirms that it is an appropriate expression in the circumstances (respondent’s memorandum, paragraphs 70 and 85 to 88).

(c) ***The nature of the duties performed: the Governor in Council can be somewhat predisposed in factual situations in the context of an employer-employee relationship***

[180] The applicant considers that because several branches of the Canadian government were apparently involved in *Beaudoin v. Banque de développement du Canada*, above, (Auditor General of Canada, Prime Minister's Office, Privy Council Office, Minister of Industry), he should have been entitled to be heard by an independent and impartial decision-maker. The applicant does not state what forum, other than the Judicial Council, could offer him the same safeguards.

[181] The respondent submits for his part that in certain cases, necessity must prevail over the requirements of natural justice. In other words, the respondent believes that the Governor in Council was the only forum authorized to decide by law, and that the implication of certain branches of the government in *Beaudoin v. Banque de développement du Canada*, above, would not prevent her from exercising her power of removal. Further, he is of the opinion that it was normal that the Minister of Industry and the Governor in Council were not absolutely impartial considering the circumstances. In labour law, says the respondent, it is normal that the employer who has been advised of the employee's conduct would have an opinion since it was precisely for that reason that the disciplinary process was initiated.

[182] According to the Supreme Court, the duty of impartiality may vary in order to reflect the context of a decision-maker's activities and the nature of its functions (*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, at paragraph 31). In the context of an employer-employee relationship, it is normal that the decision-maker would be predisposed even before offering the employee an opportunity to respond to the reasons for dissatisfaction. This does not mean, however, that the decision-maker is unable to make a clear and enlightened decision. In fact, this predisposition is the starting point of the entire procedure, and the Supreme Court implicitly recognizes this in *Knight v. Indian Head School Div. No. 19*, at page 680, when it writes:

> The purpose of those two procedural safeguards are, however, inherently different. The duty to act fairly aims at insuring that the procedure followed by the appellant Board in reaching its decision to terminate the respondent's employment was fair to the respondent, i.e., that it gave him the opportunity to try and change the appellant Board's mind.
>
> [Emphasis added.]

However, the employer who is predisposed must offer the employee a real opportunity to contest the merits of the allegations and the employer must take the employee's position into account before making the final decision.

[183] In this case, it was entirely normal that the Governor in Council would be somewhat predisposed in regard to the applicant, as a result of the nature of the procedure. There is therefore no need to recognize that the applicant is entitled to a decision-maker free of any predisposition. The predisposition of the decision-maker in this case is explained by the nature of the duties performed and to me does not appear to breach the applicant's rights.

[184] The applicant pointed out that his suspension without pay establishes a clear predisposition on the part of the decision-maker, going beyond the predisposition resulting from the nature of the procedure. He contends that a suspension without pay is exceptional (*Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, at paragraphs 60 to 72). Although I share the applicant's opinion on this point, I do not think that this preliminary sanction should be interpreted as a sign of bias so significant that it would compromise the decision-maker's ability to make a decision in what concerns the applicant's rights.

(d) ***The right to fair play and transparency***

[185] Even if the Governor in Council is not bound to a duty of impartiality in the context of an employer-employee relationship, she is nonetheless bound to an obligation of play fair, of transparency. This is inherent to the very idea of natural justice (*Baker v. Canada (Minister of Citizenship and Immigration)*, above, at page 849; *Knight v. Indian Head School Div. No. 19*, above, at page 682). The evidence indicates that these obligations were not observed and that the procedure followed was not consistent with the "high standard of justice" referred to by Dickson J. in *Kane v. Board of Governors of the University of British Columbia*, above, at page 1106. In my opinion, three elements show that the decision-maker had an inappropriate attitude, inconsistent with transparency and fair play. These elements may appear to be of minor importance, but I believe that in this case it is symptomatic of the flawed procedure.

[186] First, the evidence establishes that, at all times, it was the applicant who was demanding that the procedural safeguards be observed, while the decision-maker should have taken it upon herself to offer these safeguards to the applicant and explain the decisional framework to him. It was not until after the applicant sent a letter to the Prime Minister that he was offered, in the letter dated February 24, 2004, the opportunity to assert in writing his right to respond to the reasons for dissatisfaction. Moreover, the Minister of Industry did not offer to meet with the applicant, instead the applicant had to request that a meeting be held. One wonders whether the applicant would have had the chance to meet with the Minister of Industry if he had not requested it. It seems to me that if the Governor in Council is the master of her procedure, it is her responsibility to put it into operation and not the applicant's responsibility to beg for it. This is at least the approach that was observed in *Wedge* and *Weatherill*, above. That alone is not necessarily fatal, but could be an element that is inconsistent with fair play and transparency.

[187] Second, it seems to me that when the rules of procedure are unknown by the person bound by them, they can hardly be qualified as transparent. Thus, the applicant was unaware of the burden imposed on him by the Governor in Council, as I explain below (see paragraphs 208 to 212 of this decision).

[188] The third element involves the letters sent by the applicant dated March 4 and March 10, 2004. These included the letter in which Mr. Vennat expressed his concerns after reading the article in the newspaper *La Presse*, and the letter asking that the procedure of section 69 of the *Judges Act* be followed. These letters went unanswered whereas Mr. Vennat was duly making requests in what concerns the decision-making process. There was nothing to prevent the Minister of Industry or the Privy Council Office from responding to these requests. The Privy Council Office could have, as in *Weatherill* (paragraph 39 of the decision) told the applicant that it did not intend to apply section 69 of the *Judges Act*. The Minister of Industry could have reassured the applicant when the request was made. The only response received by the applicant was the dismissal letter dated March 12, 2004.

[189] The attitude betrayed by the decision-maker's acts and omissions in this case is not analogous to the work of the Governor in Council's delegates in *Wedge* and *Weatherill*, above. In *Wedge*, Ms. Bloodworth made the initiative to contact the affected party to alert him to the reasons for dissatisfaction. The reports were sent diligently. In *Weatherill*, it seems that the conduct of Ms. Jauvin and the Privy Council Office personnel was exemplary, based on the Sharlow J.'s description of it. Mr. Weatherill was even offered the opportunity to meet with the representatives of the Auditor General, the agency that prepared the report about him. The exchanges between Ms. Jauvin and Mr. Weatherill's counsel, Mr. Hefferson, were prompt. Ms. Jauvin responded diligently to his letters. Additional time was given when requested. Mr. Weatherill had even been advised that the process would follow its course after his motion for an interim injunction was dismissed. It does not appear to me that this kind of diligent, professional conduct was observed in regard to Mr. Vennat.

[190] To summarize, it is my opinion that the Governor in Council did not deal with the applicant in a transparent manner, in accordance with fair play.

B. ***Analysis of the procedural safeguards according to Knight***

[191] Aside from the above-mentioned procedural safeguards, the applicant was also entitled to the procedural safeguards recognized in *Knight v. Indian Head School Div. No. 19*, above, at page 683, as the respondent admits:

> . . . [T]he Saskatchewan Court of Appeal found that the basic requirements of the duty to act fairly are the giving of reasons for the dismissal and a hearing, adding that the content will vary according to the circumstances of each case. . . notice of the reasons for the appellant Board's dissatisfaction with the respondent's employment and affording him an opportunity to be heard would be sufficient . . .

[192] The case law has consistently regarded these procedural safeguards as a minimum (see *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, at paragraph 22; *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311, at paragraph 27; *Reglin v. Creston (Town*), [2004] B.C.J. No. 1218 (B.C.S.C.), at paragraphs 43 and 46; *Woodley v. Yellowknife Education District No. 1*, 2000 NWTSC 30 (N.W.T.S.C.), au paragraph 22; *Charles v. Université de Montréal*, (February 14, 1990), Montréal, 500-05-012566-897 (Qc. Sup. Ct.), at pages 18 and 20).

[193] I shall address in the following paragraphs the issue of whether the safeguards were observed in regard to the applicant.

(1) The right to be informed of the reasons for the employer's dissatisfaction

[194] The applicant was informed of the reasons for the Governor in Council's dissatisfaction in a letter dated February 26, 2004, which was in response to the applicant's request for particulars dated February 25, 2004. These reasons had two components (personal and corporate), as I mentioned earlier (see paragraph 21 of this decision).

[195] These reasons could certainly have been more specific, but I do not believe that it amounted to a breach of the duty to act fairly. The letter dated February 26, 2004, refers to several specific paragraphs of the decision in *Beaudoin v. Banque de développement du Canada,* above. The applicant could have prepared a list of the allegations against him based on that letter and meaningfully responded to them. In this case, all of the exchanges between the parties, the applicant's experience and his prior knowledge of part of the facts of the decision in *Beaudoin v. Banque de développement du Canada,* above, are circumstances that suggest to me that he had sufficient knowledge of the grounds for the allegations to make meaningful submissions to the Governor in Council and her representative.

[196] The applicant was aware of the substance of the reasons for the allegations (*Weatherill v. Canada (Attorney General),* above, at paragraph 94), and that is all that is required by the duty to act fairly since the duty to act fairly does not seek to achieve "procedural perfection" (*Knight v. Indian Head School Div. No. 19,* above, at page 685).

(2) <u>The applicant's right to respond was only observed in part</u>

[197] In this case, the applicant responded to the reasons for dissatisfaction in several different ways:

1. He submitted the letter dated March 1, 2004, containing part of his version of the facts;
2. A preliminary memorandum of approximately 30 pages was given to the Minister of Industry on March 1, 2004;
3. He had the opportunity to meet with the Minister of Industry for about two hours according to both parties, with the Clerk of the Privy Council and Pierre Legault, general in-house counsel at the Department of Industry;
4. He sent to the Minister of Industry the letter dated March 2, 2004, with several additional documents attached thereto;

[198] The respondent emphasized the fact that in the letter dated March 4, 2004, the applicant's counsel recognized that the Minister of Industry had, in his view, an open mind. According to the respondent, it was an admission that established that the applicant's right to respond had been observed. In my opinion, whether or not the applicant and his counsel wrote or believed that the decision-maker had an open mind does not suggest that the decision-maker did in fact have an open mind or that the applicant's right to respond had been respected.

[199] Several factors lead me to believe that, to the contrary, the applicant's right to respond was not truly observed, including the duration of the meeting of March 1, 2004, the very short period of time that the applicant had to prepare for it, Mr. Ritchie's absence from this meeting and the standard applied. I will now address each of these factors.

(a) ***The duration of the meeting and failure to conduct a personalized inquiry***

[200] First, as a reminder, the meeting attended by the applicant was about two hours long, as the counsel of both parties agreed. The duration of the meeting in itself is certainly not problematic, since like a pleading, such a meeting should not serve to repeat what has been submitted to the decision-maker in writing. It should serve to respond to the decision-maker's questions, to draw his or her attention to the important details and to set out in general the point of view of the affected party. However, in the absence of a personalized inquiry (see paragraphs 165 to 174 of this decision), I do not believe that the applicant could have meaningfully responded to the reasons for dissatisfaction considering the complexity of the matter (see paragraph 169 of this decision).

(b) ***The timeframe for the decision making process was very brief***

[201] Further, the applicant only had a relatively brief period of time to prepare his submissions. In fact, Mr. Vennat had to make his written and oral submissions within a period of one week (at the most eight days, namely from February 24 to March 2, 2004, therefore only six business days). As an example, in *Wedge*, Ms. Bloodworth's involvement in the inquiry was spread out over several months (from the beginning of May 1994 to mid-September1994), and Mr. Wedge had additional time to make his written submissions (until October 6, 1994). In *Weatherill*, Ms. Jauvin had been involved for about 20 days (December 2, 1997 to December 24, 1997) and Mr. Weatherill had more than a month of additional time to submit his version of the facts (until January 28, 1998).

[202] The fact that the Minister of Industry's time-frame was limited does not in itself amount to a breach of the duty to act fairly. As the respondent pointed out, the applicant's counsel stated in his letter dated March 2, 2004, that he had had the opportunity to [TRANSLATION] "set out the reasons why there was no valid reason to end Michel Vennat's mandate as President and Chief Executive Officer of the BDC". It was normal, in that context, that the Minister would then move to the decision-making phase.

[203] However, the relatively brief period of time that the applicant had is relevant in assessing the quality of the applicant's right to respond, taking into account the complexity of the matter (see paragraph 169 of this decision). To respond meaningfully to the employer's reasons for dissatisfaction, the applicant and his counsel should have had a very detailed knowledge of the facts surrounding the hearing in *Beaudoin v. Banque de développement du Canada*, above. Yet, the applicant was simply a witness in that matter, and even if he had been familiar with the many facts of the judgment, he could not have detailed knowledge of the direct and indirect remarks made by Denis J. regarding him and the evidence on which these remarks were based.

[204] Even though the applicant and his counsel were successful in doing quality work despite the very tight time constraints, I do not think that it would be fair to penalize the applicant because he made an effort to observe the very strict requirements imposed by the decision-maker. The applicant's counsel pointed out in his letter dated March 2, 2004, that he went to the [TRANSLATION] "bottom line" in his submissions, given the complexity of the matter. The same caveat is made in his letter dated February 29, 2004. It seems that the applicant always wanted to make detailed submissions but gave up when the Minister of Industry told him that she did not want the transcripts of hearing in *Beaudoin v. Banque de développement du Canada*, above. That is understandable because at the time Mr. Vennat was in a vulnerable and subordinate position.

[205] In short, without faulting the Minister of Industry for not having granted an additional period of time to the applicant (he had not formally requested it and he said in his letter of March 2, 2004, that the Minister had given him the [TRANSLATION] "time necessary"), I must bear in mind that the applicant had a very brief period of time to respond. I have already compared the applicant's situation with the situation of the affected parties in *Weatherill* and *Wedge* above, and I consider that these comparisons are relevant in assessing the period of time given to the applicant. The respondent claimed at the hearing that the suspension without pay created a situation of urgency and therefore it was necessary to proceed in an expedient manner. In my opinion, it would be unjust to allow the Governor in Council to limit the applicant's right to respond on the basis that the situation is one of urgency, a situation she herself created.

(c) ***The absence of Mr. Ritchie***

[206] The applicant wanted Mr. Ritchie to be present at the meeting of March 1, 2004, as he had requested in his letter to the Prime Minister (applicant's affidavit, paragraphs 54 and 55; respondent's memorandum, paragraph 83). In my opinion, that request was entirely legitimate considering the corporate component of the reasons for dissatisfaction (see paragraph 21 of this decision), the Board of Directors' decision not to appeal the judgment and the Board of Directors' unanimous confidence in Mr. Vennat voiced in the press release dated February 18, 2004. In fact, under subsection 7(1) of the *BDC Act*, it is the Board of Directors that manages the matters of the Corporation:

7. (1) The Board shall direct and manage the business and affairs of the Bank.	7. (1) Le conseil dirige et gère les affaires tant commerciales qu'internes de la Banque.

[207] Mr. Ritchie was not the Chairperson of the BDC's Board of Directors at the time when the facts alleged against the applicant took place. However, the Board of Directors reiterated its confidence in Mr. Vennat and it would have been expected that Mr. Ritchie would explain before the Minister of Industry why the Board of Directors acted in such a way, despite the seriousness of the judge's remarks in regard to Mr. Vennat in *Beaudoin v. Banque de développement du Canada*, above. It seems to me that for the purposes of the personalized inquiry, it would have been important to have Mr. Ritchie's point of view before making a final decision regarding Mr. Vennat, especially if the decision-maker intended to accept the corporate allegations against the applicant. Without making it a procedural requirement, I believe that it is a factor worthy of note in assessing the quality of the applicant's right to respond.

(d) ***The standard applied***

[208] Finally the standard applied by the Governor in Council was not the proper one.

[209] At paragraph 140 of his memorandum, the respondent explains that the applicant had to submit very strong evidence in order to change the Governor in Council's opinion:

> [TRANSLATION]
>
> [140] It was also not patently unreasonable for the Governor in Council to determine that the remarks in the Denis judgment regarding the applicant's conduct were fatally incorrect, tainted by fraud or dishonesty; or that they brought new evidence that had not previously been available to Denis J. in regard to the actions of the applicant or the BDC.

[210] As the respondent acknowledged at the hearing, this standard is drawn from *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, above, at paragraph 52, where the judge is discussing the application of the doctrine of abuse of process to prevent the relitigation of determinations made against a person in an earlier proceeding:

> . . . It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, above, at paragraph 80.
>
> [Emphasis added.]

Paragraph 87 of the respondent's memorandum confirms that the Governor in Council applied a very strict standard in regard to the applicant:

> [TRANSLATION]
>
> [87] She [the Governor in Council] did not have to act as a Court of Appeal, or to revisit the three months of hearing preceding the Denis judgment. She could receive and consider the remarks in the Denis judgment regarding the conduct of the applicant and the BDC and determine, in light of the applicant's explanations, whether the Denis judgment remarks relating to the applicant's conduct were so unfounded that, despite the remarks:
>
> (a) she could continue to have confidence in the applicant; and
>
> (b) she could determine that the applicant's conduct was compatible with his continued appointment;
>
> [Emphasis added.]

Paragraph 80 of the respondent's memorandum appears to contradict paragraphs 87 and 140 but confirms that the standard applied was very strict. The relevant passage of paragraph 80 reads as follows:

> [TRANSLATION]
>
> [80] The aim of the exercise was not to establish that the Denis judgment was incorrect and patently unreasonable. That letter informed the applicant that his conduct, as related in the Denis Judgment, raised serious questions regarding whether there were valid grounds to remove him and that his version of the facts was wanted before the decision was finalized.
>
> [Emphasis added.]

However, the respondent said at the hearing that the standard applied was the standard in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.),* above, confirming at the same time that a very strict standard was applied in regard to Mr. Vennat.

[211] In my opinion, the standard in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.),* above, does not apply in this case. It is only appropriate when it is a matter of relitigating a decision in a new forum. For the reasons mentioned earlier, the remarks of the judge in *Beaudoin v. Banque de développement du Canada,* above, could not be set up legally against the applicant (see paragraphs 138 to 144 of this decision). Mr. Vennat, contrary to the party in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.),* above, was not charged or found guilty in a criminal proceeding. It was a fatal error in law to impose on the applicant a burden of proof practically impossible to rebut based on a precedent in the case law which does not apply. Further, there is nothing in the record to indicate that the applicant was aware of the burden placed on him: that is an additional factor establishing that the procedure applied was not of the required transparency. In this context, it seems to me that the applicant's right to respond was certainly strongly affected, as well as his ability to change the employer's mind.

[212] To summarize, the duty to act fairly certainly obliged the Governor in Council to give the applicant a real opportunity to respond to the reasons for dissatisfaction, and not only a right to a limited response against very elaborate allegations which could not be refuted without relying on a careful analysis of volumes of evidence. Further, the burden applied in regard to the applicant was incorrect, which amounts to a serious error vitiating the entire procedure.

C. ***Finding as to the Governor in Council's duty to act fairly***

[213] As the Attorney General acknowledged, the Governor in Council had the duty to act fairly in regard to the applicant. The substance of that duty must be appreciated in accordance with the nature of the decision and the applicable legislative regime, the importance of the decision for the applicant and his legitimate expectations, all the while taking into account the procedural choices made by the Governor in Council.

[214] This approach led me to observe, first, that the removal of the President and Chief Executive Officer of the BDC must be effected in a framework that need not be judicial or formalistic. The Governor in Council is master of the procedure as a general rule. Further, my analysis enabled me to ascertain that the removal of the President and Chief Executive Officer of the BDC, in the particular circumstances of this case, was subject to a series of enhanced procedural safeguards.

[215] The applicable procedural safeguards are the following. First, the applicant was entitled to the safeguards recognized in *Knight v. Indian Head School Div. No. 19*, above, at page 683, namely the right to know the reason(s) for dissatisfaction as well as the right to respond to the reasons for dissatisfaction. These safeguards are the most basic form of the duty to act fairly. Further, my analysis led me to find that the applicant was entitled to enhanced procedural safeguards, namely, the right to a personalized inquiry into the facts by the decision-maker and the right to respond as well as the right to a decision with sufficient reasons. On a broader scale, I believe that the applicant was entitled to participate in a transparent forum and to deal with a decision-maker who played fair.

[216] Finally, my analysis of the evidence indicated to me that some of the procedural safeguards had not been observed as regards the applicant. That applies to the obligation to conduct a personalized inquiry, the right to have a true opportunity to respond to that inquiry and the right to a decision with sufficient reasons. Further, it appeared to me in light of the evidence that the applicant only had a very limited right to respond to the reasons for dissatisfaction. Another significant element vitiating the procedure was the application of too onerous a burden drawn from a Supreme Court decision that did not apply in the circumstances. The Governor in Council required that Mr. Vennat establish that the remarks of the judge in *Beaudoin v. Banque de développement du Canada*, above, were fatally incorrect, tainted by fraud or dishonesty; or that he bring forth new evidence that had not previously been available to the judge. That burden was certainly not appropriate and was not known by Mr. Vennat. It was therefore not possible for Mr. Vennat to reverse the simple presumption of facts that rested on him as a result of the decision in *Beaudoin v. Banque de développement du Canada*, above.

VIII. Analysis – Principal application– Substantive issues

[217] Considering the failures to observe procedural fairness that I identified, there is no need to respond to questions 3(a) and 3(b) (see paragraph 6 of this decision), since these issues relate to the merits of the Governor in Council's decision.

IX. The costs

[218] Considering my answers to the questions at issue, costs are awarded to the applicant. The applicant is seeking costs on a solicitor-client basis but did not establish or submit convincing evidence of reprehensible conduct on the part of Governor in Council, her representatives or her counsel to justify such an exceptional measure (*Mackin v. New Brunswick (Department of Finance)*, [2002] 1 S.C.R. 405, at paragraph 86).

[219] Bearing in mind the discretion that I have under section 400 of the Rules (in particular paragraphs (3)(*c*) and (3)(*g*)), I award costs in accordance with the highest number of units provided in Column IV of the Tariff B.

X. Conclusion

[220] This decision does not bear on the issue of whether the applicant's removal was justified. It does not in any way challenge the legal validity of the decision in *Beaudoin v. Banque de développement du Canada,* above. It does not make any determination regarding the applicant's conduct, either at the hearing in the case cited or in the performance of his duties as President and Chief Executive Officer of the BDC. The decision does not address the BDC's administration of any specific matter, or the merits of the final decision by Denis J. in *Beaudoin v. Banque de développement du Canada,* above. The scope of this decision is limited: it is only a matter of defining and applying the duty to act fairly in regard to the applicant.

[221] In short, it is my opinion that the applicant was not treated fairly considering all of the circumstances and the applicable case law. The President and Chief Executive Officer of the BDC must be relatively independent so that he or she is able to act in the public interest. The procedural framework which permits such independence to be achieved was not observed in regard to the applicant. In fact, the applicant was not given the right to meaningfully respond to the reasons for dissatisfaction of the Governor in Council, or the right to be the subject of a personalized inquiry and to respond to the result of that inquiry. Moreover, the decision regarding him was not sufficiently reasoned. The duty to act fairly requires, in an employee-employer relationship, a high standard of justice and the observance of transparency and fair play. It is the sum of the factors – not any of them taken in isolation – that are mentioned in this decision that have led me to determine that the duty to act fairly was not observed in regard to the applicant. I do not see how I could determine otherwise, considering all of the circumstances.

[222] I attempted to adopt a clear and systematic analysis and application of the duty to act fairly, while remaining within the guidelines established by the case law. I was careful to consider all of the relevant circumstances. I must say that despite that effort, this decision was very complex because of the lack of statutory, regulatory and quasi-regulatory guidelines addressing the removal of public office holders. In the absence of more solid, certain and foreseeable points of reference, I had to apply on the case law.

[223] There is a risk that similar situations will arise again in the future and the absence of guidelines makes the law less foreseeable, efficient and certain.

JUDGMENT

THE COURT ORDERS:

- The respondent's motion to strike is allowed in part. Documents MV-22, MV-30, MV-31 and MV-33, as well as the affidavit of Denis Désautels, are struck from the record;
- The paragraphs of the applicant's affidavit listed in Appendices A, B and C are struck (except for the specified passages);
- The applicant's motion to strike is allowed in part;
- The application for judicial review is allowed;
- The Governor in Council's Orders dated February 24, 2004 and March 12, 2004 (bearing numbers P.C. 2004-225 and P.C. 2004-147) are quashed and the matter is referred back to the Governor in Council;
- The applicant is awarded costs in accordance with the highest number of units provided in Column IV of the Tariff B.

"Simon Noël"

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

Appendix A

Paragraphs of the applicant's affidavit which are ordered to be struck on the ground that they are related to the affidavit of Denis Désautels or to Exhibits MV-22, MV-30, MV-31, MV-33:

- **102(g), 107, 108, 110, 115, 135, 136, 137, 141, 142, 146, 155, 157, 158, 164 (with the exception of paragraph (b),which is incorporated into Exhibit MV-15, page 12), 165, 171, 177, 183, 214, 218 (a) and (d), 252, 253, 256, 257, 258, 261, 267, 270, 272 to 274, 285, 286, 288, 289, 294, 297, 299, 300, 307, 310 (with the exception of the passage from the judgment), 313, 315 to 320 (with the exception of the passage from the judgment), 321, 322, 324, 327, 329 and 339 to 343.**

Appendix B

Paragraphs of the applicant's affidavit which are ordered to be struck on the ground that they contain information which was not or could not have been before the decision-maker at the time the decision was made:

- **102b), (c), (d), (e) and (f), 113, 118, 119, 122, 156, 160, 173, 177, 188, 210, 216, 217, 235 (ii) and (iii);**

- **Paragraphs 245 to 347 are also struck to the extent that they have not already been struck in Appendix A. I note that the applicant admits at paragraph 247 of his affidavit that this part of his argument (paragraphs 245 to 347) was not before the Governor in Council considering the limited time given to him. However, the parts of the paragraphs containing passages from the judgment are not struck (as an example, paragraphs 310, 312, 326, etc.).**

Appendix C

Paragraphs of the applicant's affidavit which are ordered to be struck on the ground that they contain allegations of law, opinion or commentary regarding evidence that is self-explanatory:

- **20, 21, 22, 23, 24, 26, 34, 44 (except to note that the applicant said he had four working days to prepare and submit his preliminary memorandum), 45, 52, 64, 66, 68, 72 to 76, 78, 79, 80 to 84, 87 (except the passage from the judgment), 88, 89, 100, 101, 103, 120, 128, 133, 138, 139, 152, 161, 170, 174, 178, 190, 200, 212, 219, 220, 221, 222, 239, 244, 348, 349, 351 to 353, 355, 356, 358, 359, 361 to 364.**

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-611-04
STYLE OF CAUSE:	Michel Vennat v. AGC
PLACE OF HEARING:	Montréal
DATE OF HEARING:	June 27 and 28, 2006, and July 4 and 5, 2006
REASONS FOR JUDGMENT:	The Honourable Mr. Justice Simon Noël
DATED:	August 24, 2006

APPEARANCES:

Louis P. Bélanger Patrick Girard	FOR THE APPLICANT(S)
Nathalie Mercier-Filteau Martine Tremblay Alexandre Brousseau-Wery	FOR THE RESPONDENT(S)

SOLICITORS OF RECORD:

Louis P. Bélanger Patrick Girard	FOR THE APPLICANT(S)
Nathalie Mercier-Filteau Martine Tremblay Alexandre Brousseau-Wery	FOR THE RESPONDENT(S)

Georges J. Pollack*	FOR THE PRIVY COUNCIL OFFICE

* Mr. Pollack was only present for half a day, the morning of the 27th.