Court File No. T-1228-22

FEDERAL COURT

B E T W E E N:

KAGUSTHAN ARIARATNAM

Applicant

-and-

CANADIAN SECURITY INTELLIGENCE SERVICE

Respondent

APPLICATION RECORD

Volume 2 of 3

Applicant's Memorandum of Fact and Law

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PART I – STATEMENT OF FACT

A. Overview

1. This is an application for judicial review of the Canadian Human Rights Commission's ("**CHRC**" or "**Commission**") decision not to deal with the Applicant's human rights complaint under s. 41(1)(d) of the *Canadian Human Rights Act*[1] ("***CHRA***") on the basis that the National Security and Intelligence Review Agency ("**NSIRA**") "has addressed or could have addressed the allegations of discrimination overall."

2. In December 2016, the Applicant, a security guard, was told his site access clearance application to work at Parliament was cancelled. After fruitless attempts to find out who had cancelled his application and why, the Applicant submitted a complaint to NSIRA to try to discover this information. No human rights issues were raised or addressed at NSIRA since the Applicant did not yet know what had happened, and, regardless, NSIRA cannot provide binding remedies. NSIRA uncovered that the Canadian Security Intelligence Service ("**CSIS**") had shared mental health information with the House of Commons and the House of Commons had cancelled the application.

3. Now with the knowledge of what had transpired, the Applicant filed a CHRC complaint alleging CSIS discriminated against him by sharing the mental health information. The Applicant also, separately, alleged that CSIS had forcibly misdiagnosed him with a mental disability, based on events completely unrelated to the site clearance application events.

4. The Commission dismissed the complaint under s. 41(1)(d) of the *CHRA* in a procedurally unfair process. Notably the Commission initially produced a report for decision that was patently flawed in its failure to consider the Applicant's

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[1] *Canadian Human Rights Act*, RSC 1985, c H-6, s 41(1)(d).

submissions. The Applicant made submissions in response to this report, and the Commission subsequently acknowledge the report was seriously flawed and produced a supplementary report. However, the flawed report was put before the final decision maker, and the Applicant's response to that report was excluded.

5. The Decision was also unreasonable because of six justificatory failures, each of which is sufficient on its own to render the decision unreasonable:

    a. The Decision fails to grapple with any of the Applicant's seven central arguments made in its response to the supplementary report;

    b. The Decision fails to justify its departure from the binding Supreme Court precedent of *Figliola*[2] and *Penner*;[3]

    c. The Decision fails to account for the evidence before it, including an email in which the Applicant provided the reasons why he did not raise human rights issues before NSIRA;

    d. The Decision is not transparent and intelligible since it is two sentences long, containing only of a list of documents reviewed and a bare conclusion;

    e. The Decision is not based on internally coherent reasoning since the reports are rife with internal contradictions and illogical inferences; and

    f. The Decision does not explain why the outcome best reflects the legislative intent of the *CHRA*.

6. The Applicant respectfully requests that the Decision be set aside and sent back to a new decision maker for redetermination in a manner that properly justifies the decision. This should include reasons that demonstrate consideration of the Applicant's submissions, binding precedent, and the legislative intent of the *CHRA*.

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[2] *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422.
[3] *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125.

B. Background

i) Forced Recruitment as Child Soldier

7. The Applicant was born in Sri Lanka. While he was still a child, the Liberation Tigers of Tamil Eelam ("**LTTE**") forcibly recruited him to work as an Intelligence Officer. In 1995, the Applicant escaped and surrendered to Sri Lankan security forces and provided them with intelligence from the LTTE. In September 1997, the Sri Lankan military released the Applicant, and he moved to Canada. Canada granted the Applicant refugee status in April 1998, and he cut all ties with the Sri Lankan military.[4]

ii) Work as CSIS Informant & Forced Misdiagnosis

8. In the summer of 2000, a CSIS official, who identified herself as Lezli Kirsch, visited the Applicant at his apartment in Montreal. The Applicant told Ms. Kirsch about his past, including that he was forced to work for the LTTE. For the next three years, the Applicant met with Ms. Kirsch weekly and provided her with intelligence information.[5]

9. In August 2003, LTTE supporters made death threats against the Applicant and his family. The next day, the Applicant went for an x-ray for a sinusitis condition. After the x-ray, the Applicant realized that it might be a bad idea for someone to have a record of his facial structure because of the death threats and his intelligence work. He asked the technician to delete the x-ray, but she refused.[6]

10. The Applicant called the police to ask for assistance. He explained his history to them, including his involvement with CSIS, but they did not believe him. The Applicant showed the police Ms. Kirsch's card, but when they called Ms. Kirsch, she lied and denied the Applicant's involvement with CSIS. She instructed the police to

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[4] NSIRA Report, paras 21-23 & 58, **Application Record ("AR") Vol 1, Tab 3E(ii), pp 67-68 & 74**.
[5] Complaint Form, p 1, para 4; p 2, paras 1-4, **AR Vol 1, Tab 3D, pp 46-47**.
[6] Complaint Form, p 2, para 5, **AR Vol 1, Tab 3D, p 47**.

take the Applicant to a psychiatric hospital. They kept the Applicant there for two weeks, falsely diagnosing him with bipolar disorder. He was only released on the condition that he take anti-psychotic medications and attend follow up appointments at the hospital.[7]

11. The Applicant continued working as an informant for CSIS, but in December 2004, the Applicant stopped attending the appointments. Because of this, in January 2005, the Montreal police took him to the hospital, where he was detained until April and misdiagnosed with chronic paranoid schizophrenia.[8]

iii) Unexplained Denial of Security Clearance

12. In June 2009, the Applicant became a Canadian citizen.[9] From October 2015 to April 2017, the Applicant worked for Iron Horse Security and Investigations ("**Iron Horse**") as a security guard.[10]

13. Iron Horse had a contract with the Parliamentary Protective Service ("**PPS**"), to provide security guards to work on Parliament Hill. In 2016, Iron Horse indicated that it wanted the Applicant to work as one of the contracted security guards for PPS, so, on their instruction, the Applicant went to the PPS building to have his fingerprints taken and fill in the forms for a site access clearance request.[11]

14. In December 2016, Haroon Atmar, Director of Communications and Scheduling Manager at Iron Horse, informed the Applicant that he did not receive site access clearance. However, Mr. Atmar could not tell the Applicant why he did not receive the clearance or who had denied his clearance.[12]

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[7] Complaint Form, p 2, para 5; p 3, paras 1-2; **AR Vol 1, Tab 3D, pp 47-48**.
[8] Complaint Form, p 3, paras 4-5, **AR Vol 1, Tab 3D, p 48**.
[9] NSIRA Report, para 23, **AR Vol 1, Tab 3E(ii), p 68**.
[10] Letter from Applicant to SIRC (Dec 20, 2017), para 1, **AR Vol 1, Tab 3F(i), p 85**; NSIRA Report, para 37, **AR Vol 1, Tab 3E(ii), p 70**.
[11] Letter from Applicant to SIRC (Dec 20, 2017), para 2, **AR Vol 1, Tab 3F(i), p 85**.
[12] Letter from Applicant to CSIS (Dec 5, 2016), **AR Vol 1, Tab 3F(ii), p 87**.

C. CHRC and NSIRA Complaints

i) SIRC/NSIRA Complaint

15. On December 5, 2016, the Applicant wrote to the CSIS director requesting information about the denial of his security clearance, which he believed, at the time, had been denied by CSIS.[13]

16. On March 10, 2017, the CSIS director responded that CSIS had not denied the Applicant's security clearance. Rather, "the requesting organization cancelled their request". CSIS did not tell the Applicant who cancelled his application or why it was cancelled.[14]

17. Because of this, on December 20, 2017, the Applicant filed a complaint with the Security Intelligence Review Committee ("**SIRC**"), under s. 41 of the *Canadian Security Intelligence Service Act* ("***CSIS Act***"), complaining that the CSIS Director did not provide a satisfactory answer to his request for information. Specifically, the Applicant complained that "I still do not know who cancelled my application or why it was cancelled", and "I wanted to find out why my security clearance was cancelled and who cancelled it".[15]

18. Due to legislative changes, the complaint was continued before the National Security and Intelligence Review Agency ("**NSIRA**").

ii) Initial CHRC Complaint

19. On January 26, 2018, the Applicant filed a complaint with the Canadian Human Rights Commission against CSIS, the House of Commons ("**HOC**"), PPS, Iron Horse, and the RCMP.

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[13] Letter from Applicant to CSIS (Dec 5, 2016), **AR Vol 1, Tab 3F(ii), p 87**.
[14] Letter from CSIS to Applicant (Mar 10, 2017), **AR Vol 1, Tab 3F(iii), p 88**.
[15] Letter from Applicant to SIRC (Dec 20, 2017), paras 2, 7 & 8, **AR Vol 1, Tab 3F(i), pp 85-86**.

20. On July 10, 2018, Jennifer Deavy, a CHRC Human Rights Analyst, emailed the Applicant. She informed him that the complaint against Iron Horse fell under provincial jurisdiction. She also encouraged the Applicant to continue the SIRC complaint and stated that the CHRC's inquiry regarding the other respondents would be closed until the Applicant had obtained more information from the SIRC proceedings. She invited the Applicant to contact the CHRC to further the matter after he obtained more information from SIRC.

iii) Updated CHRC Complaint

21. The NSIRA hearing was held on July 18, 2019. During this hearing, the CSIS witness testified that CSIS shared information about the Applicant's mental health with the HOC and PPS.[16] The Applicant was unaware of this sharing of information prior to hearing this testimony.[17]

22. After receiving the NSIRA hearing transcripts in November 2019, the Applicant contacted the Commission to inform of the developments. He spoke on the phone with CHRC Human Rights Analyst Diego Hotte-Porras. During that call, Mr. Hotte-Porras and the Applicant agreed that his complaint form should be edited to reflect the newly discovered information.

23. On February 7, 2020, Mr. Hotte-Porras emailed the Applicant a link to edit his complaint form, and Applicant edited his complaint to allege

    a. CSIS discriminated against the Applicant on the basis of mental disability, national origin, and ethnic origin by sharing mental health information from two briefs prepared for Citizenship and Immigration Canada in 2006 and 2009 ("**CIC Brief Allegations**");[18] and

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[16] NSIRA Report, para 60 & section H, "Findings", **AR Vol 1, Tab 3E(ii), pp 74-75**.
[17] Letter from N Pope to CHRC re s. 41(1)(d) questions (Feb 26, 2021), question (c), **AR Vol 1, Tab 2C, p 29**.
[18] Complaint Form, p 5, para 2, **AR Vol 1, Tab 3D, p 49**.

b. CSIS discriminated against the Applicant by wrongfully diagnosing him with bipolar disorder and chronic paranoid schizophrenia and medicating him against his will ("**Misdiagnosis Allegations**").[19]

24. The complaint also included separate allegations against the House of Commons and Parliamentary Protective Services. The Commission split these allegations off into separate files, and those matters have since been resolved.

iv) NSIRA Final Report Confirms CSIS Information Sharing

25. On December 9, 2020, the Applicant received NSIRA's final report ("**NSIRA Report**"). The report confirmed the CSIS witness's testimony that on June 21, 2016, one or more CSIS representatives met with two representatives from the HOC and PPS, and CSIS shared information about the Applicant's mental health.[20] Then, on June 28, 2016, because of this information, the HOC and PPS advised CSIS that it was cancelling the May 31, 2016, site access clearance application.[21]

26. The NSIRA Report found that CSIS shared information from two distinct sources:

    a. Open source information from social media and legal proceedings,[22] and

    b. Two classified CSIS briefs prepared for Citizenship and Immigration Canada in 2006 and 2009, containing information about the Applicant's mental health ("**CIC Briefs**").[23]

27. The NSIRA Report concluded that CSIS's sharing of information from the two CIC Briefs "would not have been approved by management".[24]

28. The NSIRA report did not address any human rights issues. It did not address the question of whether CSIS's improper sharing of information constituted

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[19] Complaint Form, pp 2-5, **AR Vol 1, Tab 3D, pp 47-49**.
[20] NSIRA Report, paras 40, 41 & 44, **AR Vol 1, Tab 3E(ii), p 71**.
[21] NSIRA Report, para 47, **AR Vol 1, Tab 3E(ii), p 72**.
[22] NSIRA Report, para 41, **AR Vol 1, Tab 3E(ii), p 71**.
[23] NSIRA Report, para 44, **AR Vol 1, Tab 3E(ii), p 71**.
[24] NSIRA Report, paras 46, 60 & section H "Findings", **AR Vol 1, Tab 3E(ii), pp 72, 74 & 75**.

discrimination. Nor did it address any issues related to CSIS's involvement in wrongfully diagnosing the Applicant with bipolar disorder and chronic paranoid schizophrenia and medicating him against his will.

D. Section 41(1) Proceedings

i) Section 41(1)(b) Submissions

29. On February 20, 2020, the Commission notified the parties that it would prepare a section 40/41 report to determine whether the complaint should not be dealt with because it may be dealt with under another federal law, namely the *National Security and Intelligence Review Agency Act*.[25] The Commission invited the parties to provide their positions on the issues, which they did between February and March 2020.

30. However, the Commission did not prepare a section 40/41 report.

31. On October 7, 2020, the Commission notified the parties that the file had been selected to be either deferred or referred to NSIRA (the email and attached notice stated both – it is unclear whether "deferred" is a typo) as part of a decision making pilot project. The Commission invited the parties to provide any new information.

32. Because of this, on October 8, the Applicant wrote to the NSIRA Registrar requesting NSIRA provide the Commission with a copy of the NSIRA Report. On October 16, 2020, the NSIRA Registrar responded that the report was in a redaction phase, and the Applicant would receive a copy as soon as it becomes available.

33. On October 16, 2020, the Applicant emailed the Commission to inform the Commission that the NSIRA Report was in redaction phase. The Applicant asked the Commission for an extension of time until the release of the report to provide information in response to the October 7, 2020, notice from the Commission.[26]

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[25] *National Security and Intelligence Review Agency Act X*, SC 2019, c 13, s 2.
[26] Email from Applicant to CHRC (Oct 16, 2022), **AR Vol 1, Tab 3G(i), pp 97-98**.

34. In this same email, the Applicant stated that he needed to bring a complaint before both NSIRA and the CHRC because if he did not first obtain information through NSIRA, it would be impossible to know what happened in order to seek redress at the CHRC. In eleven numbered paragraphs, the Applicant outlined the differences in the proceedings and the reasons why both were needed, including that

    a. The Applicant had repeatedly attempted to obtain information from CSIS under the *Access to Information Act*,[27] and the *Privacy Act*,[28] and all had failed because CSIS used the *Security of Canada Information Disclosure Act*,[29] to refuse to disclose information;

    b. Only NSIRA has access to all information held by CSIS, no matter how highly classified the information may be; CHRC does not have that access;

    c. NSIRA does not have the ability to provide redress for human rights violations; and

    d. NSIRA can only make "non-binding recommendations".[30]

ii) Section 41(1)(d) Questions

35. On January 28, 2021, the Commission invited the parties to respond to a list of questions they posed to decide whether the Commission should refuse to deal with the complaint under s. 41(1)(d) of the *CHRA* on the basis that the allegations of discrimination "have been or could have been" addressed through another process.[31]

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[27] *Access to Information Act*, RSC 1985, c A-1.
[28] *Privacy Act*, RSC 1985, c P-21.
[29] *Security of Canada Information Disclosure Act*, SC 2015, c 20, s 2.
[30] Email from Applicant to CHRC (Oct 16, 2022), **AR Vol 1, Tab 3G(i), pp 97-98**; *see National Security and Intelligence Review Agency Act X*, SC 2019, c 13, s 2, s 29.
[31] Letter from CHRC to Applicant re s. 41(1)(d) (Jan 28, 2021), **AR Vol 1, Tab 2A, pp 21-22**.

36. On February 26, 2021, the Applicant provided answers to these questions, including that

    a. The NSIRA complaint dealt only with a narrow issue concerning inadequate provision of information by CSIS;[32]

    b. The NSIRA complaint did not address the issues in the CHRC complaint, nor did it address any other human rights issues;[33]

    c. The Applicant was unable to raise the issue about whether CSIS's sharing of information was discriminatory because he was not aware of the possibility that CSIS might have shared this information until the NSIRA hearing on July 18, 2019, and this fact was not on confirmed until the Applicant received the NSIRA final report on December 9, 2020;[34]

    d. NSIRA cannot order damages to a complainant nor issue any binding orders to remedy wrongdoing nor prevent it from happening in the future.[35]

iii) Flawed Initial Section 41(1)(d) Report

37. On February 15, 2022, the Commission sent a Report for Decision ("**Initial Report**") to the parties, which was prepared by Human Rights Officer Jennifer Huber, without considering the Applicant's submissions.[36] The Initial Report recommended that the Commission not deal with the Complaint.[37]

38. On February 17, 2022, Applicant's counsel wrote to the Commission informing that the Initial Report had been made on the basis of an incomplete record and the

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[32] Letter from N Pope to CHRC re s. 41(1)(d) questions (Feb 26, 2021), question (e)(i), **AR Vol 1, Tab 2C, p 30**.
[33] Letter from N Pope to CHRC re s. 41(1)(d) questions (Feb 26, 2021), question (b), **AR Vol 1, Tab 2C, pp 28-29**.
[34] Letter from N Pope to CHRC re s. 41(1)(d) questions (Feb 26, 2021), question (c), **AR Vol 1, Tab 2C, p 29**.
[35] Letter from N Pope to CHRC re s. 41(1)(d) questions (Feb 26, 2021), question (e)(ii), **AR Vol 1, Tab 2C, p 31**; *see National Security and Intelligence Review Agency Act X*, SC 2019, c 13, s 2, s 29.
[36] Initial Report (Feb 15, 2022), para 23, **AR Vol 1, Tab 3E, p 55**.
[37] Initial Report (Feb 15, 2022), **AR Vol 1, Tab 3E, p 51**.

mistaken belief that no submissions had been received on the s. 41(1)(d) issue.[38] The Applicant also made submissions as to why the complaint should not be dismissed.[39]

iv) Supplementary Section 41(1)(d) Report

39. On March 16, 2022, the Commission sent the parties a Supplementary Report for Decision ("**Supplementary Report**"), acknowledging that the Initial Report was flawed since contrary to the Initial Report, the parties had provided submissions on the s. 41(1)(d) issue, and those submissions had not been considered in the Initial Report.[40]

40. The Supplementary Report was prepared by the same Human Rights Officer as the Initial Report, Ms. Huber. Ms. Huber again recommended the Commission not deal with the complaint because "the other overall procedure has addressed the allegation of discrimination overall."[41] The Supplementary Report made this recommendation on the basis that the human rights issues in the complaint "have been, or could have been" dealt with through NSIRA.[42]

41. The Supplementary Report's analysis consisted of four propositions as premises for the report's conclusion. The four premises, each of which are false, are as follows:

    a. The Applicant admitted in the October 16, 2022, email that the complaints were the same.[43]

       The Supplementary Report cherry-picked a quote from the Applicant's October 16, 2020, email that he "sought to file the same complaint simultaneously", while ignoring the rest of the email, the main point of which

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[38] Letter from N Pope to CHRC re Initial Report (Feb 17, 2022), Sections I-III, **AR Vol 1, Tab 2E, pp 37-39**.
[39] Letter from N Pope to CHRC re Initial Report (Feb 17, 2022), Section IV, **AR Vol 1, Tab 2E, pp 39-40**.
[40] Supplementary Report (Mar 16, 2022), para 5, **AR Vol 1, Tab 3F, p 78**.
[41] Supplementary Report (Mar 16, 2022), para 37, **AR Vol 1, Tab 3F, p 84**.
[42] Supplementary Report (Mar 16, 2022), para 36, **AR Vol 1, Tab 3F, p 84**.
[43] Supplementary Report (Mar 16, 2022), para 30, **AR Vol 1, Tab 3F, p 83**.

was to emphasize the differences between the two proceedings and the reasons why neither would be adequate on their own.[44]

b. The CIC Brief Allegations had been considered by NSIRA.[45]

The Supplementary Report illogically concluded that "the issue of the sharing of [the CIC Brief] information was considered during the NSIRA hearing" on the basis that NSIRA "was aware the respondent had shared information concerning the complainant's mental health". This conclusion was illogical since awareness of a fact does not mean that a person considered the legal consequences of that fact.

c. The Misdiagnosis Allegations could have been dealt with by NSIRA, and the Applicant provided no explanation as to why they were not.[46]

The Supplementary Report concluded that the Misdiagnosis Allegations should be dismissed because the Applicant did not explain why he did not raise this issue at NSIRA. However, the evidentiary record before the Commission included the October 16, 2020, email, in which the Applicant explained that he did not raise the Misdiagnosis Allegations at NSIRA because NSIRA could not provide an adequate remedy. NSIRA can only give non-binding recommendations; it cannot award monetary damages nor issue binding orders to redress discrimination and prevent it in the future.

d. It is an abuse of process to allow allegations to be raised with the Commission that could have been raised at NSIRA.[47]

The Supplementary Report relied on *Khapar v Air Canada*, 2014 FC 138; and *Bergeron v Canada (Attorney General)*, 2015 FCA 160 for the legal proposition that it is abuse of process to not raise human rights allegations

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[44] *See* Email from Applicant to CHRC (Oct 16, 2022), **AR Vol 1, Tab 3G(i), pp 97-98**.
[45] Supplementary Report (Mar 16, 2022), para 32, **AR Vol 1, Tab 3F, p 83**.
[46] Supplementary Report (Mar 16, 2022), para 31, **AR Vol 1, Tab 3F, p 83**.
[47] Supplementary Report (Mar 16, 2022), para 35 & footnote 1, **AR Vol 1, Tab 3F, p 84**.

at a prior proceeding. However, neither of the two cited cases were decided on this basis. In both cases, the discrimination allegations were addressed in the prior proceeding, and unlike NSIRA, those prior proceedings had the power to issue binding orders to redress discrimination.

v) Applicant's Section 41(1)(d) Submissions

42. On March 30, 2022, the Applicant made submissions in response to the Supplementary Report.[48] The Applicant made the following seven central arguments:

    a. The Applicant's use of the word "same" in his October 16, 2020, email was an imprecise statement by an unrepresented litigant, and it would be unreasonable to be used as a basis to conclude that the two complaints were the same when, in that same email, the Applicant emphasized the differences between the two proceedings, and the substance of the complaints are obviously different.[49]

    b. The Supplementary Report contradicted itself since at paragraph 30 it claimed the proceedings were the same, but at paragraph 33 it acknowledged the differences between the two proceedings.[50]

    c. The Supplementary Report's claim that the Applicant did not explain why he did not raise the allegations at NSIRA i) was false since the Applicant set out his reasons for not raising the human rights allegations at NSIRA in eleven numbered paragraphs in his October 16, 2020, email to the Commission, and ii) was contradicted by the Supplementary Report itself

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[48] Complainant's Response to Supplementary Report (Mar 30, 2022) (**"Applicant's Submissions**"), **AR Vol 1 Tab 3G, pp 89-98**.
[49] Applicant's Submissions, paras 4-5, **AR Vol 1, Tab 3G, pp 90-91**.
[50] Applicant's Submissions, para 6, **AR Vol 1, Tab 3G, p 91**.

at paragraphs 20 and 23 where it mentions the explanation the Applicant gave.[51]

d. The Supplementary Report made an illogical inference that NSIRA's awareness that CSIS shared information must have meant NSIRA "considered" the issue of information sharing. Awareness of a fact is not the same as consideration of the implications of a fact, nor is it the same as conducting an analysis of the legality of the fact.[52]

e. *Khapar* and *Bergeron* are not authority for the proposition that it is abuse of process for a complainant to raise allegations with the Commission that could have been raised at a prior proceeding since in both cases the discrimination allegations were raised at the prior proceeding, and both cases involved different factual circumstances from the Applicant's.[53]

f. The legal test to be considered in this matter was set out by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, and none of the three criteria of that test are met in this case.[54]

g. Even if the *Figliola* test were met, the Supreme Court in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, required that a case not be dismissed where unfairness would result due to a significant difference in "the purposes, processes or stakes involved in the two proceedings", and in the present case there were significant differences which would cause unfairness. NSIRA was an information-gathering proceeding with no powers to issue a binding remedy or provide damages, and the

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[51] Applicant's Submissions, paras 7 & 9, **AR Vol 1, Tab 3G, p 91 & 92**.
[52] Applicant's Submissions, para 8, **AR Vol 1, Tab 3G, pp 91-92**.
[53] Applicant's Submissions, paras 10-14, **AR Vol 1, Tab 3G, pp 92-94**.
[54] Applicant's Submissions, para 15, **AR Vol 1, Tab 3G, p 94**.

> Commission does not have the same ability of NSIRA to gather information about the actions of intelligence agencies.[55]

E. Section 41(1)(d) Decision

i) Reasons For Decision

43. On June 2, 2022, the Commission sent the Applicant the Decision dated June 1, 2022, that the Commission had decided not to deal with the complaint. The attached Record of Decision is only two sentences long. The first sentence states that the Commission reviewed the Complaint Form, the Report for Decision (without specifying which whether this was the Initial Report or Supplementary Report), and the submissions of the parties filed in response to the Report for the Decision (without specifying which submissions). The second sentence states that the Commission decided not to deal with the complaint because "the other procedure has addressed or could have addressed the allegations of discrimination overall."[56]

44. The Record of Decision does not acknowledge nor address *any* of the seven central arguments the Applicant made in his March 30, 2022, submissions.

ii) Applicant's Submissions Not Placed Before Decision Maker

45. Review of the certified tribunal record ("**CTR**") produced by the Commission for this judicial review application, reveals that two of the Applicant's written submissions were not before the Commission when it made the Decision. The Commission certified that the CTR contained "all the material that was before the CHRC when it made its decision".[57]

46. Problematically, the CTR contains two documents created by the Commission and put to the Applicant for response, but it does not contain the Applicant's responses.

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[55] Applicant's Submissions, para 16, **AR Vol 1, Tab 3G, p 95**.
[56] Record of Decision (June 1, 2022), **AR Vol 1, Tab 3I(ii), p 105**.
[57] Certificate Pursuant to Rule 318(1)(a) (June 28, 2022), **AR Vol 1, Tab 3B, p 43**.

47. First, the CTR contains a list of questions the Commission sent to the Applicant on January 28, 2021, in order to decide whether to dismiss the complaint under s. 41(1)(d) of the *CHRA*.[58] However, the CTR does not contain the letter sent by the Applicant's lawyer on February 26, 2021, answering this list of questions.[59]

48. Second, The CTR contains the Initial Report, which the Commission acknowledged was flawed.[60] However, it does not contain any of the Applicant's representations in response to the flawed Initial Report.[61]

PART II – POINTS IN ISSUE

49. The Applicant submits that the following issues are to be determined:

ISSUE 1: What is the standard of review?

ISSUE 2: Is the Decision unreasonable?

ISSUE 3: Is the Decision procedurally unfair?

PART III – SUBMISSIONS

ISSUE 1: Standard of Review

50. The default standard of review of reasonableness applies to the merits of the Decision.[62] The standard of review for procedural fairness is correctness.[63]

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[58] Appendix A: List of Questions re s. 41(1)(d) Decision, **AR Vol 1, Tab 3E(i), p 60**.
[59] Certificate Pursuant to Rule 318(1)(a) (June 28, 2022), **AR Vol 1, Tab 3B, p 43**; *see* Letter from N Pope to CHRC re s. 41(1)(d) questions (Feb 26, 2021), **AR Vol 1, Tab 2C, p 26**.
[60] Initial Report (Feb 15, 2022), **AR Vol 1, Tab 3E, p 51**; *see* Supplementary Report (Mar 16, 2022), para 5, **AR Vol 1, Tab 3F, p 78**.
[61] Certificate Pursuant to Rule 318(1)(a) (June 28, 2022), **AR Vol 1, Tab 3B, p 43**; *see* Letter from N Pope to CHRC re Initial Report (Feb 17, 2022), **AR Vol 1, Tab 2E, p 37**.
[62] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10, [2019] 4 SCR 653.
[63] *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502.

ISSUE 2: Decision is Unreasonable

51. The decision is unreasonable because it is not properly justified by its reasons. It is not sufficient for the outcome of a decision to be *justifiable*; the decision must be *justified* by way of its reasons.[64] Even an otherwise reasonable outcome cannot stand if it was reached on an improper basis.[65]

52. The Decision is unreasonable for each of the following six reasons:

    a. The Decision fails to grapple with any of the Applicant's seven central arguments;

    b. The Decision fails to justify its departure from binding precedent;

    c. The Decision fails to account for the evidence before it;

    d. The Decision is not transparent and intelligible;

    e. The Decision is not based on internally coherent reasoning; and

    f. The Decision does not explain why the outcome best reflects the legislative intent of the *CHRA*.

A. Fails to Grapple with Central Arguments

53. The Decision is unreasonable because it fails to meaningfully grapple with any of the seven central arguments the Applicant made in his March 30, 2022, submissions.

54. A decision will be unreasonable if the decision maker failed to "meaningfully grapple with key issues or central arguments raised by the parties."[66] Reasons that simply "summarize arguments made, and then state a peremptory conclusion" are not

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[64] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 86, [2019] 4 SCR 653.
[65] *Ibid* at para 86.
[66] *Ibid* at para 128.

adequate.[67] A decision maker's statement that it has not been persuaded by a particular submission is also not adequate.[68]

55. This is a shift from the pre-*Vavilov* approach. The Federal Court of Appeal noted this shift in *Farrier*, when it found a decision unreasonable for failing to provide reasons on two issues raised by the applicant. The Court of Appeal explained, "Before *Vavilov* I would probably have found, as did the Federal Court, that, in light of the presumption that the decision-maker considered all of the arguments and the case law before it and after having read the record, the decision was reasonable."[69] However, as a result of the shift in the law, the Court held that "the reasons do not meet the standard of reasonableness described by the Supreme Court in *Vavilov*."[70]

56. In his submissions, the Applicant raised seven central arguments, which are outlined at paragraph 42 above.[71] The full text of the reasons for decision in response to these submissions is two sentences long. It does not mention any of the arguments made nor meaningfully respond to any of them.[72]

B. Fails to Justify Departure from Binding Precedent

57. The Decision is unreasonable because it fails to justify its departure from the binding precedents of the Supreme Court in *Figliola*[73] and *Penner*.[74]

58. A decision is unreasonable where the decision maker departs from binding precedent without justifying the departure:

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[67] *Ibid* at para 102.
[68] *Paul v Canada (Attorney General)*, 2022 FC 1157 at paras 32-34.
[69] *Farrier v Canada (Attorney General)*, 2020 FCA 25 at para 12, 161 WCB (2d) 531.
[70] *Ibid* at para 19.
[71] *See* Applicant's Submissions, **AR Vol 1, Tab 3G, pp 89-96**.
[72] Record of Decision (June 1, 2022), **AR Vol 1, Tab 3I(ii), p 105**.
[73] *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422.
[74] *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125.

> An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted.[75]

59. A decision is also unreasonable where a decision maker interprets or applies a statutory provision without regard to a relevant case in which a court considered that provision:

> Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context[76]

60. The Applicant specifically brought *Figliola* and *Penner* to the Commission's attention.[77]

61. *Figliola* sets out three criteria that all need to be met to dismiss a human rights complaint on the basis that another tribunal dealt with it:

    1) there was concurrent jurisdiction;

    2) the legal issue was essentially the same; and

    3) the complainant had the opportunity to know the case to be met and to meet it.[78]

62. The Applicant presented evidence and submissions demonstrating that none of these three criteria were met:

    1) although NSIRA has jurisdiction to consider human rights issues, NSIRA does not have jurisdiction to grant the remedies that the CHRC can grant;

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[75] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 112, [2019] ACS no 65.
[76] *Ibid* at para 112.
[77] Applicant's Submissions, paras 15-16, **AR Vol 1, Tab 3G, pp 94-95**.
[78] *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 37, [2011] 3 SCR 422.

2) the legal issues were completely different, and

3) the Complainant did not know about some of the discriminatory conduct until the conclusion of the NSIRA process.[79]

63. *Penner* adds an additional safeguard, holding that a tribunal should not dismiss a complaint if it would result in unfairness, regardless of whether the threshold of a test to dismiss is met. The Supreme Court said that unfairness will result "where there is a significant difference between the purposes, processes or stakes involved in the two proceedings."[80]

64. The Applicant submitted that pursuant to *Penner*, it would be unfair to dismiss the complaint because is a significant difference between the purposes, processes and stakes involved in the two proceedings. NSIRA was an information-gathering proceeding with no powers to issue a binding remedy or provide damages. The CHRC does not have the same ability of NSIRA to gather information about the actions of intelligence agencies, and its purpose is to remedy and redress discrimination through binding orders and monetary damages.[81]

65. Nothing in the two-sentence reasons for decision nor any of the underlying reports demonstrates that the Commission considered *Figliola* nor *Penner*. There is no justification provided for not applying the tests from either case.

C. Fails to Account for Evidence Before It

66. The Decision is unreasonable because the Commission failed to account for the evidence before it, namely the October 16, 2020, email from the Applicant which demonstrates that the Applicant did provide an explanation for not raising human rights issues at NSIRA.

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[79] Applicant's Submissions, para 15, **AR Vol 1, Tab 3G, pp 94**.
[80] *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 42, [2013] 2 SCR 125.
[81] Applicant's Submissions, para 16, **AR Vol 1, Tab 3G, pp 95**.

67. *Vavilov* says that a decision will be unreasonable if the decision maker has failed to account for the evidence before it.[82] This does not mean that a decision maker always needs to mention every piece of evidence before it. A statement in the reasons for decision that the decision maker considered all the evidence before it will suffice in some circumstances.[83]

68. However, in some circumstances, the court should infer that evidence that was not specifically mentioned in the reasons for decision was not considered. The more important the evidence is that was not mentioned, the more willing a court should be to infer from the silence that it was not considered. There is also a bright line rule: evidence contradicting a factual finding must be explicitly mentioned:

> a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact.[84]

69. The Supplementary Report, at paragraphs 31 and 33, erroneously stated that the Applicant did "not explain why he did not raise his human rights allegations" at NSIRA.

70. In his March 30, 2022, Response the Applicant provided as evidence an email to the CHRC dated October 16, 2020, in which the Applicant had set out in eleven numbered paragraphs his reasons for not raising his human rights allegations at NSIRA. In that email, the Applicant had even underlined and bolded a section to emphasize the reason: NSIRA's recommendations are "***non-binding***".[85] This squarely contradicts the factual finding in paragraphs 31 and 33 of the Supplementary Report.

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[82] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 126, [2019] ACS no 65.
[83] *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at para 16, [1998] FCJ No 1425 (FC).
[84] *Ibid* at para 17, emphasis added.
[85] Email from Applicant to CHRC (Oct 16, 2022), list item 2, **AR Vol 1, Tab 3G(i), p 97**, emphasis in original.

71. The final reasons for decision do not mention this October 16, 2020, email. Since the email squarely contradicts the Supplementary Report's factual findings, an inference that it was not considered by the final decision maker should be inferred from the silence.

D. Not Transparent nor Intelligible

72. The Decision is unreasonable because it is not transparent nor intelligible.

73. For a decision to be reasonable, it must be "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it."[86] It is "unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party."[87]

74. The Decision does not meet this requisite standard of transparency and intelligibility because reasons for decision contain no reasoning. The first sentence summarizes the documents reviewed, and the second sentence states the Commission's conclusion. They do not inform the Applicant of the reasons for that conclusion. [88]

75. It would not be appropriate for this Court to fashion its own reasons to buttress the unintelligible decision. This would allow the Commission "to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion."[89]

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[86] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 95, [2019] ACS no 65.
[87] *Ibid* at para 95.
[88] Record of Decision (June 1, 2022), **AR Vol 1, Tab 3I(ii), p 105**.
[89] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 96.

E. Based on Internally Incoherent Reasoning

76. The Decision is unreasonable to the extent that it might be seen as adopting the reasoning of the Supplementary Report[90] since the Supplementary Report contains contradictions and bases a key conclusion on an illogical inference.

77. A decision will be unreasonable where the reasons "reveal that the decision was based on an irrational chain of analysis".[91] One way this can occur is "if the reasons exhibit clear logical fallacies".[92]

i) Internal Contradictions

78. The Supplementary Report contradicted itself on two key factual findings: First, at paragraph 30 it claims that issues raised in the NSIRA and CHRC complaints were the same. However, at paragraph 33, the Supplementary Report contradicts itself when it states (correctly) that the Applicant did not raise human rights issues at NSIRA.

79. Second, at paragraph 31 the Supplementary Report claims that the Applicant did not explain why he did not raise the Misdiagnosis Allegations at NSIRA. However, at paragraph 23, the Supplementary Report notes that the Applicant had explained this: the Applicant did not raise these issues at NSIRA because NSIRA cannot provide adequate remedies such as damages and binding orders to remedy wrongdoing and prevent it in the future. The Supplementary Report noted the Applicant's submissions about this at paragraph 23, yet it ignored this when it turned to its analysis at paragraph 31.

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[90] The Record of Decision does not say it has adopted the Supplementary Report's reasoning, so it would be inappropriately speculative to attribute this reasoning to the Decision. Nevertheless, this section exists to demonstrate that even if one were to make this assumption, the Decision would still be unreasonable.
[91] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 103.
[92] *Ibid* at para 104.

ii) Illogical Inference

80. The Supplementary Report made an illogical inference, at paragraph 32, when it based its conclusion that NSIRA had assessed whether the sharing of the CIC Briefs was discrimination contrary to the *CHRA* on the fact that that NSIRA was aware of the information sharing.

81. This inference is patently illogical. Awareness of a fact is not the same as consideration of the implications of the fact, nor is it the same as conducting an analysis of the legality of the fact.

82. For example, I may be aware that it rained yesterday, but that does not mean I have taken the time to consider the implications the rain has for local farmers' crop yields. Or I may be aware that a friend crashed his car into someone else's, but that does not mean I have analysed the incident to determine whether it constitutes dangerous driving under s. 320.13 of the *Criminal Code*.

83. Likewise, NSIRA may have been aware that the Respondent had shared information, but that does not mean that NSIRA considered whether this sharing of information constituted discrimination under s. 5 of the *CHRA*. Rather, since there is not a single mention of the *CHRA* or any other reference to human rights or discrimination, it would be unreasonable to conclude that NSIRA had considered the legality of the information sharing under the *CHRA*.

F. Not Explain Why Best Reflects Legislative Intent

84. The Decision is unreasonable because the Commission did not explain why its decision best reflects the legislature's intention, and the outcome is contrary to the legislative intent of the *CHRA*.

85. Regardless of how much discretion a decision maker is given, the decision "must ultimately comply 'with the rationale and purview of the statutory scheme under

which it is adopted'".[93] There is no such thing as absolute and untrammelled discretion, and "any exercise of discretion must accord with the purposes for which it was given".[94]

86. The principle of responsive justification means that if a decision has serious consequences for an individual, such as on their dignity or livelihood, the decision maker "must explain why its decision best reflects the legislature's intention."[95] This Decision affects the Applicant's dignity and livelihood since the sharing of mental health information and the forced misdiagnosis impact his ability to obtain or retain a job and impact his and others' perception of him as a capable and competent member of society.

87. The purpose of the *CHRA* is "to give effect […] to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have […] without being hindered in or prevented from doing so by discriminatory practices".[96]

88. The Applicant submitted to the Commission that if the Commission dismissed the Applicant's complaint on the basis that the Applicant "could have, and should have" had his human rights complaint dealt with at NSIRA, this would frustrate the purposes of the *CHRA* for complainants who have been discriminated against by a security intelligence agency. The Applicant submitted that this would force anyone who has been discriminated against by a security intelligence agency to choose between seeking the truth (information through NSIRA) or seeking justice (a binding remedy through CHRC).[97]

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[93] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 108, [2019] ACS no 65.
[94] *Ibid* at para 108.
[95] *Ibid* at para 133.
[96] *Canadian Human Rights Act*, RSC 1985, c H-6, s 2, emphasis added.
[97] Applicant's Submissions, para 17, **AR Vol 1, Tab 3G, pp 95**.

89. The CHRC does not have the same ability of NSIRA to gather information about the actions of intelligence agencies.[98] Victims of discrimination by intelligence agencies will not be allowed both truth and justice if this Decision stands. It will theoretically be one or the other, and, in reality, it will be neither. Without first seeking the truth, and gathering information through NSIRA, it will be impossible to bring a viable claim at the CHRC for justice.

90. Despite these submissions from the Applicant, the reasons for the Decision do not explain why the Commission believes this outcome best reflects Parliament's intention in enacting the *CHRA*. This makes the Decision unreasonable.

ISSUE 3: Decision is Procedurally Unfair

91. The Decision is procedurally unfair because the two of the Applicant's written submissions were not placed before the decision maker. The Decision was made with reference to the faulty Initial Report, without regarding the submissions made by the Applicant about that Initial Report being faulty. And it was made with reference to the initial questions posed to the Applicant, but without the answers the Applicant provide to those questions.

92. The Federal Court of Appeal has confirmed a reviewing court cannot infer that documents omitted from the CTR were, in fact, considered.[99] Furthermore, the Commission explicitly certified that the CTR contained "all the material that was before the CHRC when it made its decision".[100]

93. The Applicant had a legitimate expectation[101] that the Commission would consider all his written submissions in response to reports put before the Commission. The

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[98] *See* Email from Applicant to CHRC (Oct 16, 2022), list items 7-8, **AR Vol 1, Tab 3G(i), p 98** in which the Complainant informed the CHRC of his repeated attempts to obtain information under the *Access to Information and Privacy Act* and states "only the NSIRA […] has access to all information held by CSIS, no matter how highly classified that information may be."
[99] *Gordillo v Canada (Attorney General)*, 2022 FCA 23 at paras 86-87.
[100] Certificate Pursuant to Rule 318(1)(a) (June 28, 2022), **AR Vol 1, Tab 3B, p 43**.
[101] *See Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26, [1999] ACS no 39 (SCC).

January 28, 2021, letter from the Commission to the Applicant stated, "The Commission will use the report, as well as the complaint form and any of the parties' submissions to the report, to decide whether to deal with the complaint."[102]

94. The CTR contains the flawed Initial Report, but it does not contain any of the Applicant's representations in response to the Initial Report.[103] It may have been permissible for the Commission to discard the flawed Initial Report entirely, and not place it nor the submissions in response to it in front of the decision maker. However, it was procedurally unfair for the Commission to place the flawed Initial Report in front of the decision maker without also providing the Applicant's representations in response to that Report.

95. Additionally, the CTR contains the list of questions the Commission sent to the Applicant on January 28, 2021, to decide whether to dismiss the complaint,[104] but the CTR does not contain the letter sent by the Applicant's lawyer on February 26, 2021, answering this list of questions.[105]

PART IV – ORDER SOUGHT

96. Based on the foregoing, the Applicant seek the following relief:

    a. The Decision be set aside and remitted to a different decision maker for redetermination in accordance with the Court's reasons;
    b. The costs of this application; and
    c. Such further and other relief as counsel may request and this Honourable Court may permit.

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[102] Letter from CHRC to Applicant re s. 41(1)(d) (Jan 28, 2021), **AR Vol 1, Tab 2A, p 21**.
[103] Certificate Pursuant to Rule 318(1)(a) (June 28, 2022), **AR Vol 1, Tab 3B, p 43**.
[104] Appendix A: List of Questions re s. 41(1)(d) Decision, **AR Vol 1, Tab 3E(i), p 60**.
[105] Certificate Pursuant to Rule 318(1)(a) (June 28, 2022), **AR Vol 1, Tab 3B, p 43**; *see* Letter from N Pope to CHRC re s. 41(1)(d) questions (Feb 26, 2021), **AR Vol 1, Tab 2C, p 26**.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8 September 2022

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PART V – LIST OF AUTHORITIES

Legislation

1 *Canadian Human Rights Act*, RSC 1985, c H-6

2 *National Security and Intelligence Review Agency Act X*, SC 2019, c 13, s 2

Jurisprudence

3 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] ACS no 39

4 *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422

5 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] ACS no 65

6 *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53, [1998] FCJ No 1425

7 *Farrier v Canada (Attorney General)*, 2020 FCA 25, 161 WCB (2d) 531

8 *Gordillo v Canada (Attorney General)*, 2022 FCA 23

9 *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502

10 *Paul v Canada (Attorney General)*, 2022 FC 1157

11 *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125