Federal Court  Cour fédérale

Date: 20120423

Docket: T-1645-10

Citation: 2012 FC 474

[REVISED TRANSLATION]

Ottawa, Ontario, April 23, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

HANI AL TELBANI

and

Respondent

THE SECURITY INTELLIGENCE REVIEW COMMITTEE

Intervener

REASONS FOR ORDER AND ORDER

Introduction

[1] This is an application for judicial review of a decision by the Security Intelligence Review Committee ("SIRC" or "Committee"), dated September 8, 2010, under the signature of the member, the Honourable Denis Losier ("the member"). SIRC determined that when it is investigating a complaint against the activities of the Canadian Security Intelligence Service ("CSIS" or "Service"), including the complaint made by Mr. Hani Al Telbani ("Mr. Telbani"), it has jurisdiction to hear arguments and decide questions of law related to the *Charter of Rights and Freedoms* ("the Charter"). The Committee was granted intervener status to discuss jurisdiction. The respondent did not submit a written memorandum. He concurs with the Committee's arguments and decision.

[2] For the purposes of gaining a better understanding of these reasons, an outline of the process that was followed to respond to this application is included below:

Outline

[3] As a reading of these reasons will show, there is a certain amount of repetition. Taking into account the analysis factors outlined in *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 (*Conway*) used to frame the analysis and address the matter at issue, this repetition is necessary, given the analysis grid that follows.

I. Background

[4] Mr. Telbani sent a formal demand to the Director of CSIS on June 19, 2008, regarding the actions of two of the Service's officers. He alleged that the two officers went to his home, entered his residence without a warrant or permission and acted in a threatening and intimidating manner toward him, in violation of his fundamental rights guaranteed under sections 7, 9 and 10 of the Charter. A report by CSIS was allegedly drafted and forwarded to the Minister of Transport, Infrastructure and Communities in order to have his name added to a Specified Persons List, namely, a "no-fly list" ("the list").

[5] Mr. Telbani therefore demanded that the Service acknowledge its responsibility and remedy the violations committed by, among other things, withdrawing any damaging reports that may have been written about him, taking the proper measures to have his name removed from the list and making an offer of compensation for moral and material damages endured.

[6] In a letter dated June 27, 2008, the acting Deputy Director of CSIS indicated that Mr. Telbani's allegations had been reviewed and that it had been determined that no action would be taken.

[7] On July 11, 2008, Mr. Telbani filed a complaint with SIRC, pursuant to section 41 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 ("the Act" or "the CSISA"), in

which he demanded an investigation to establish and acknowledge CSIS's responsibility for the treatment described in the formal demand letter, and that SIRC recommend to the Service that they begin the process of providing the remedies demanded therein.

[8] Upon receiving the complaint, SIRC invited the parties to file their written submissions regarding its jurisdiction to investigate. The Service did not avail itself of this opportunity, while Mr. Telbani filed his submissions on September 19, 2008.

[9] On December 10, 2008, SIRC determined that it had jurisdiction to investigate the complaint since it involved the Service's activities and it was not trivial, frivolous, vexatious or made in bad faith, in accordance with section 41 of the Act.

[10] On March 23, 2009, during a pre-hearing conference call, CSIS indicated that it objected to SIRC's jurisdiction to deal with Charter arguments and that it wanted a hearing to address the issue. The Service provided written submissions on this subject on June 12, 2009, and Mr. Telbani did likewise on August 3, 2009, and he also withdrew a part of the allegations raised in his complaint.

[11] On October 7, 2009, at the start of the hearing of the complaint, SIRC suggested that it hear all of the evidence before deciding whether it had jurisdiction with respect to the Charter. However, Mr. Telbani indicated that his complaint was based on the breach of his constitutional rights and that if the Committee had no jurisdiction regarding the Charter, he had no other complaint to be heard. The parties then made a joint application to have the Committee determine the issue of jurisdiction before proceeding with the investigation.

[12] SIRC accepted the joint application by the parties and the hearing was adjourned in order to allow the parties to file their written submissions solely on the Committee's jurisdiction. Following

the filing of these documents, SIRC rendered a decision dated September 8, 2010, in which it determined that it did have jurisdiction to investigate the allegations and decide questions of law involving the Charter. That decision is the subject of the present judicial review.

II. Summary of the decision under review

[13] In a 20-page decision, tribunal member Losier begins by summarizing the complaint, the procedures followed and the parties' submissions. He then proceeds with an analysis of SIRC's jurisdiction by summarizing the two types of remedies available in cases of Charter violations, namely, those offered under section 24 of the Charter in cases of unconstitutional actions and those under subsection 52(1) of the *Constitution Act, 1982* where unconstitutional provisions are involved (*R v Ferguson*, 2008 SCC 6 at paras 59-61, [2008] 1 SCR 96).

A. *Jurisdiction within the legislative mandate of SIRC*

[14] Member Losier begins by examining Mr. Telbani's argument that there is no need to proceed with an analysis on the basis of the remedies sought, as the only issue is whether, within SIRC's legislative mandate, the Committee had jurisdiction to investigate the Service's alleged actions. In his ensuing reasons, member Losier expresses the view that the Committee has jurisdiction, within its legislative mandate, to investigate a complaint that raises a violation of constitutional rights provided under the Charter.

[15] He notes that the complaint met the requirements of section 41 of the Act and that, on completion of an investigation of a complaint under the same section, the Committee is to provide "a report containing the findings of the investigation and any recommendations that [it] considers appropriate" (paragraph 52(1)(*a*) of the Act). He also notes that SIRC has the mandate, under section 40 of the Act "of ensuring that the activities of the Service are carried out in accordance with

this Act, the regulations and directions issued by the Minister under subsection 6(2) and that the activities do not involve any unreasonable or unnecessary exercise by the Service of any of its powers" (SIRC Report at paragraph 35 and see also section 40 of the Act). He then emphasizes that the directions issued by the Minister provide that [TRANSLATION] "[t]he government and people of Canada expect…the Service to carry out its duties while respecting the principle of the rule of law and the rights and freedoms guaranteed to Canadians by the ("Charter")" (SIRC report at paragraph 35). The member feels it was crucial that the Committee be invested with the authority to apply the Charter in order to fulfill the mandate conferred upon it by Parliament. The opposite would require the complainants to assert their rights in various different fora, which would go against the directions of the Supreme Court of Canada ("Supreme Court") to the effect that Canadians should be entitled to assert their constitutional rights before the most accessible forum available, without the need for parallel proceedings before the courts.

[16] Lastly, member Losier concludes this part of the analysis by relying on *Omary v Canada (Attorney General)*, 2010 FC 335, [2010] FCJ 388 (*Omary*) to state that by allowing the application for judicial review in that case, [TRANSLATION] "the Federal Court implicitly recognized […] the Committee's jurisdiction to determine Charter issues since the complainant's allegations in this case pertain to the violation of his constitutional rights guaranteed under the Charter" (SIRC Report at paragraph 40).

B. *Jurisdiction under section 52 of the Constitution Act, 1982*

[17] Member Losier notes that, at first blush, the allegations raised in Mr. Telbani's complaint imply that only subsection 24(1) of the Charter is at issue, but that since he must determine a jurisdictional issue without an investigation and thus without a factual background, he feels it would

also be useful to determine the Committee's jurisdiction pursuant to section 52 of the *Constitution Act, 1982*.

[18] He then proceeds with an analysis of jurisdiction as set out in *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504 (*Martin*). Regarding the first issue, that is, whether SIRC has explicit or implied jurisdiction to decide questions of law arising under a legislative provision, he finds that in light of the factors in *Martin*, the Committee has implied jurisdiction. First, he is of the view that the mandate given to SIRC requires that it examine and decide questions of law, including those that involve the application of the Charter, in order to effectively carry out its oversight role with respect to CSIS. Second, in order to move away from *Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854, [1996] SCJ 115 (*Cooper*), according to which the Canadian Human Rights Commission ("CHRC") did not have jurisdiction to decide questions of constitutional law, he distinguishes the role of the Committee. Third, he notes that complaints are reviewed before quasi-judicial hearings. Lastly, he feels that the Committee has the capacity to consider questions of law arising under a legislative provision and that CSIS has failed to rebut the presumption that this jurisdiction also applies to the Charter.

C. *Jurisdiction under section 24 of the Canadian Charter of Rights and Freedoms*

[19] Applying the Supreme Court's approach in *Conway, supra*, at paras 81 and 82, member Losier first notes that he had already determined in his analysis of section 52 that the Committee had jurisdiction to decide questions of law, including Charter matters, and that there is no indication that Parliament intended to exclude the application of the Charter from his jurisdiction. As to the question of whether SIRC can grant the particular remedy sought, given the relevant statutory scheme, he draws a parallel with a declaratory remedy such as that issued in *Canada (Prime*

Minister) v Khadr, 2010 SCC 3 at paras 46-47, [2010] 1 SCR 44 (*Khadr*), and states that [TRANSLATION] "the power to make findings and recommendations provided under section 52 of the [Act] may be characterized as a remedy that takes into account the particular context in which the Committee exercises its functions" (SIRC report at paragraph 87). He is therefore of the opinion that the remedies sought in this complaint, that is, that the Committee investigate, identify and recommend to CSIS that it take the necessary measures, where applicable, to remedy the Charter violations, are the kinds of remedies that Parliament wanted SIRC to be able to grant given its statutory scheme.

III. Issues

[20] The issue can be summarized as follows:

> Is SIRC a court of competent jurisdiction to investigate the respondent's allegations that his constitutional rights guaranteed by the Charter were violated, both within the meaning of subsection 24(1) of the Charter and subsection 52(1) of the *Constitution Act, 1982*?

IV. Applicable standard of review

[21] Given that SIRC's decision pertains to a question of law and of jurisdiction, the parties agree that the applicable standard of review in this case is correctness. Although this question requires that SIRC interpret its enabling statute, and although the Supreme Court has indicated that in such cases deference will usually be warranted (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 54, [2008] 1 SCR 190 (*Dunsmuir*)), as we shall see, the analysis established to decide this question requires much more than a simple analysis of the CSISA. Moreover, the Supreme Court clearly stated that an administrative tribunal "can expect no curial deference with respect to constitutional

decisions" (*Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5, at para 17, [1991] SCJ 42 (*Cuddy Chicks*)) and that its decisions based on the Charter are subject to judicial review on a correctness standard (*Martin*, *supra*, at para 31). Therefore, it is up to this Court to undertake its own analysis of the question and if it does not agree with the determination of the decision maker it will substitute its own view for that of the Committee (*Dunsmuir*, *supra*, at para 50).

V. Position of the parties

[22] The Attorney General contends that SIRC has no jurisdiction to decide questions of law or investigate allegations involving the Charter, or any jurisdiction within the meaning of subsection 24(1) of the Charter, and it cannot declare legislative provisions invalid under subsection 52(1) of the *Constitution Act, 1982*. For its part, SIRC opposes this contention.

[23] Addressing the SIRC's jurisdiction according to the Act, the Attorney General notes that SIRC has no inherent jurisdiction and that it cannot exceed the mandate conferred upon it by its enabling statute, which does not grant it the authority to decide questions of constitutional law, or even questions of general law. In his view, SIRC is an investigative body which plays an advisory role and makes recommendations, but which exercises no adjudicative function and is not a court of competent jurisdiction.

[24] The Attorney General pointed out that in *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 at paragraph 25, 89 DLR (4th) 218 (*Thomson*), Justice Cory made the following comment with regard to recommendations made under section 42 of the Act: "The Committee's recommendation constitutes a report put forward as something worthy of acceptance. It serves to ensure the accuracy of the information on which the Deputy Minister makes the

decision, and it gives the Deputy Minister a second opinion to consider. It is no more than that." The Attorney General also relies on a similar decision in *Omary*, *supra*, at paragraphs 25, 28 and 33, to assert that there is nothing in the Act to suggest that, after conducting an investigation under section 41, SIRC would be called upon to apply provisions of the Act or standards drawn from other statutes, including the Charter. As for the obligations and procedural powers conferred upon SIRC under the Act, the Attorney General maintains that they in no way point to any jurisdiction to decide questions of law.

[25] The Committee acknowledges that its recommendations are non-binding. However, it invokes the investigative and reviewing functions granted to it under section 38 of the Act and notes the very broad power to determine its own procedure conferred upon it under section 39 of the Act and recognized by this Court in *Omary*, *supra*, at paragraph 20, as well as in *Al Yamani v Canada (Solicitor General)*, [1996] 1 FC 174 at paragraph 19, [1995] FCJ 1453 (*Al Yamani*). More importantly, the Committee maintains that interpreting legislation and make findings of questions of law or of mixed law and fact fall within its mandate (*Al Yamani* at para 57 and *Omary* at paras 17-18). The parties' other arguments, raised with respect to the test developed by the Supreme Court in *Conway*, *supra*, will be considered in section "VII. Analysis" of these reasons.

VI. The *Canadian Security Intelligence Service Act* and the role of SIRC

[26] Before proceeding with the analysis of the issue at hand, it is important to have a clear understanding of the CSISA and the role assigned to SIRC. It would also be helpful to provide an overview of the case law involving SIRC and the case law pertaining to the test established by the Supreme Court as well as the criteria to be taken into consideration in the determination of the issue in this matter.

A. *The Act and the role of SIRC*

[27] The overriding concern of the CSISA is protecting national security while safeguarding individual rights. The Act contains three parts (a fourth part became obsolete following a parliamentary review at the end of the 1980s).

(1) The Canadian Security Intelligence Service

[28] The first part of the Act created CSIS, our civilian intelligence agency. Its main functions are collecting information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada (section 12), providing security assessments (section 13), advising Ministers of the Crown on matters relating to the security of Canada (section 14) and collecting information relating to foreign states (section 16).

[29] To carry out these functions, CSIS may enter into arrangements with foreign governments and their police forces, provincial governments, police forces in Canada (sections 13 and 17) and obtain warrants (sections 21 *et seq*). However, such warrants are subject to the statutory requirements set out in Part II of the Act under the title "Judicial Control" and warrants are issued by judges designated for that purpose by the Chief Justice of the Federal Court.

[30] Part III of the Act, entitled "Review," is comprised of two sections: The first describes the role of the Inspector General, who reports to the executive and the second describes the role of SIRC, which reports to the executive, to Parliament and to the complainant.

(2) Inspector General

[31] The Inspector General's functions are to monitor the compliance by CSIS with its operational policies, to review its operational activities and to provide confirmation of the above by submitting certificates (section 30). After receiving a copy of the report of the CSIS Director, the

Inspector General will then submit to the Minister a certificate stating the extent to which the Inspector General is satisfied with the report (section 33). The Inspector General is entitled to have access to any information under the control of the Service, other than a confidence of the Queen's Privy Council (section 31). I note that SIRC not only has this power as well, but that it is also entitled to information under the control of the Inspector General (section 39). As soon as practicable after receiving the CSIS Director's report and a certificate of the Inspector General, the Minister shall forward the report and certificate to the Committee (subsection 33(3)).

(3) Security Intelligence Review Committee

[32] SIRC is comprised of a Chairman and not less than two and not more than four members from among members of the Queen's Privy Council for Canada (who are not members of the Senate or the House of Commons) after consultation by the Prime Minister with the Leader of the Opposition in the House of Commons and the leader of each party having at least twelve members in that House (subsection 34(1)). Every member of SIRC and every person engaged by it must comply with all security requirements under the Act and must take an oath of secrecy set out in the schedule of the CSISA, in the same way as does the Director and employees of CSIS (sections 10 and 37).

[33] There are three main components to the functions of SIRC: (1) the Committee reviews the performance by CSIS of its duties and functions; (2) it arranges for reviews to be conducted, or conducts reviews for the purpose of ensuring that the activities of CSIS do not involve any unreasonable or unnecessary exercise of its powers; and (3) it conducts investigations in relation to complaints made against CSIS, denials of security clearance and reports made pursuant to the *Citizenship Act*, RSC 1985, c C-29 (C*itizenship Act*) or the *Canadian Human Rights Act*, RSC 1985, c H-6 (*Canadian Human Rights Act*) (section 38 of the CSISA).

[34] SIRC's reviewing functions cover all of the duties and functions of CSIS: it has to review reports of the Director of the Service and certificates of the Inspector General, directions issued by the Minister, arrangements entered into with governments and police forces, reports to the Minister regarding purported unlawful actions of employees and CSIS regulations; it must review applications by Ministers for warrants in relation to the conduct of the international affairs of Canada; and it must compile and analyze statistics on the operational activities of the Service (paragraph 38(*a*) and its sub-paragraphs).

[35] As previously noted, the investigative functions of SIRC are rooted not only in the CSISA, but also in the *Citizenship Act* and the *Canadian Human Rights Act*. There is a common thread that justifies the Committee's involvement under these three Acts: the work of CSIS is involved. First, SIRC will investigate any complaint filed concerning CSIS activities or with respect to an individual being denied a security clearance required for employment in the public service or any person who has been denied a contract to provide goods or services to the Government of Canada by reason only of the denial of security clearance (sections 41 and 42). Second, SIRC will investigate where the Minister of Citizenship and Immigration makes a report to the Committee advising it that he or she is of the opinion that a person should not be granted citizenship because there are reasonable grounds to believe that the person will engage in activity that constitutes a threat to the security of Canada, or that is part of a pattern of organized criminal activity punishable under any Act of Parliament by way of indictment (section 19 of the *Citizenship Act*). Lastly, the Canadian Human Rights Commission may also refer a complaint to SIRC if it receives written notice from a minister of the Crown informing it that the practice to which the complaint relates, allegedly committed by the person concerned, was based on considerations relating to the security

of Canada. The committee will then conduct an investigation (section 45 of the *Canadian Human Rights Act*).

[36] SIRC has the authority to determine the procedure to be followed in the performance of any of its duties or functions (subsection 39(1)), which is what it did in this case. This process has been endorsed by the Supreme Court since *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at paragraph 49, 90 DLR (4th) 289 (*Chiarelli*).

[37] In carrying out its duties and functions, SIRC also has access to information under the control of CSIS or the Inspector General, to investigation files relating to complaints made against the Service and security clearances, including information under the control of the deputy head concerned. This right of access also includes information to which access may be limited by any Act of Parliament or any privilege under the law of evidence. In fact, no information deemed by the Committee to be necessary for the performance of its duties and function may be withheld from it, "on any grounds" other than a confidence of the Queen's Privy Council (section 39).

[38] Complaints or investigation requests to SIRC must be made in writing and within a fixed period of time, unless the Committee authorizes otherwise (subsection 42(4) and section 45 of the CSISA as well as subsection 19(4) of the *Citizenship Act* and subsection 45(5) of the *Canadian Human Rights Act*).

[39] In cases where a complaint arises from a denial of security clearance, SIRC must, as soon as practicable, send the complainant a statement summarizing such information as will enable the complainant to be as informed as possible of the circumstances giving rise to the denial of the security clearance (section 46). The same process applies to other complaints made pursuant to the

CSISA, under the *Citizenship Act* or under the *Canadian Human Rights Act* (Rule 45 of SIRC's Rules of Procedure).

[40] When SIRC decides to investigate the denial of a security clearance or a complaint made pursuant to the *Citizenship Act* or the *Canadian Human Rights Act*, it informs the Director of CSIS and the deputy head concerned of the substance of the complaint and of its intention to carry out the investigation. For complaints regarding CSIS activities, the Committee will, prior to proceeding with an investigation, decide whether the complaint is trivial, frivolous, vexatious or made in bad faith, or whether it is not related to labour relations. It will also ensure that the complaint was first dealt with by the Director of CSIS, or determine that the Director failed to respond within a reasonable time (sections 41 and 47).

[41] In addition to having access to information under the control of CSIS or of the deputy head (pursuant to section 42 of the Act), the Committee may summon and enforce the appearance of witnesses and compel them to give oral or written evidence on oath and to produce such documents as it deems requisite to the full investigation and consideration of the complaint, and it may administer oaths in the same manner as a "superior court of record" (section 50). The Committee may even receive and accept such evidence and other information, whether or not such evidence or information would be admissible in a court of law. I would add that except in a prosecution of a person for false statements in extrajudicial proceedings (section 133 of the *Criminal Code*), evidence given by a person before the Committee is inadmissible against that person in a court or in any other proceedings (sections 50 and 51 of the Act).

[42] SIRC investigations are conducted in private. However, the complainant, deputy head concerned and the Director are given an opportunity to make representations to the Committee, to

present evidence and to be heard personally or by counsel. Nonetheless, no one is entitled as of right to be present during, to have access to or to comment on representations made to the Committee by any other person. In spite of this, the Committee's Rules of Procedure allow for statements summarizing information from private hearings to be provided, to the extent that no information related to national security is disclosed (section 48 of the Act and Rule 45 of SIRC's Rules of Procedure).

[43] Once SIRC has completed its investigation of a complaint that has been made regarding CSIS activities (section 41), it will draft a report and make any recommendations it considers appropriate. It will then forward the report, along with its findings and recommendations, to the Director. As for the complainant, he or she will receive a copy of the report, and its findings and recommendations, provided that these are not protected for national security reasons (subsection 52(1) of the Act and Rule 13 of SIRC's Rules of Procedure).

[44] In cases of investigations related to a denial of a security clearance (section 42), SIRC will provide a copy of its report and recommendations to the parties concerned (the Minister, the complainant, the CSIS Director and the deputy head). Here too some of the findings and recommendations may be withheld from the complainant for national security reasons (subsection 52(2)). Prior to disclosing information to the complainant, SIRC must also consult the CSIS Director. The same applies to statements summarizing information, communications and reports subject to the *Canadian Human Rights Act* and the *Citizenship Act* (section 55).

[45] For complaints referred to the Committee pursuant to the *Citizenship Act* or the *Canadian Human Rights Act*, SIRC will avail itself of the same investigative powers conferred upon it by the CSISA. A statement summarizing information will be disclosed to the person concerned and the

rights to be heard, to give evidence and to be represented by counsel are also applicable to the process of handling these complaints (subsections 19(2) and 19(4)-19(6) of the *Citizenship Act*, and subsections 45(2), 45(5) and 45(6) of the *Canadian Human Rights Act*). Furthermore, in the case of the *Citizenship Act*, SIRC's report is sent to the Governor General in Council and the findings of the said report are communicated to the person concerned. The Governor in Council will review the report and determine whether there are reasonable grounds to believe that the person concerned will engage in activity that constitutes a threat to the security of Canada or criminal activity that is punishable by way of indictment (sections 19 and 20 of the *Citizenship Act*). In cases of complaints made pursuant to the *Canadian Human Rights Act*, copies of the report containing the findings of the Committee will be provided to the Commission, the Minister and to the Director of CSIS. The Commission will then determine what information should be disclosed to the complainant (section 46 of the *Canadian Human Rights Act*).

[46] Investigations launched pursuant to the *Citizenship Act* may also be led by a retired judge of a superior court appointed by the Governor General in Council after consultation by the Prime Minister with the Leader of the Opposition in the House of Commons and the leader of each party having at least twelve members in that House (subsection 19.1(1) of the *Citizenship Act*). However, according to the information disclosed by the parties, no investigation has been conducted by a retired judge and no retired judge has been appointed to date.

[47] As for SIRC's research functions, these are intended to compliment its review and investigative role. The purpose of this research is to ensure that the Service's activities are carried out in accordance with the Act, the regulations and directions issued by the Minister under section 6 of the CSISA and that the activities do not involve any unreasonable or unnecessary exercise by CSIS of any of its powers. The Committee may direct the Service or Inspector General to conduct a

review; or it may conduct such a review itself in the circumstances (paragraph 38(*b*) and section 40).

[48] Each year, SIRC submits a report of its activities to the Minister of Public Safety which is then submitted to Parliament. The Committee must consult with the Director of CSIS prior to tabling the report to ensure that information relating to national security is not disclosed. In addition, the Committee may, on request of the Minister or at any other time, furnish the Minister with a special report concerning any matter that related to the performance of its duties and functions without prior consultation with the Director of the Service (section 54). An example of such a report would be "CSIS's Role in the Matter of Omar Khadr," which was published on July 8, 2009, a redacted (for national security reasons) version of which is available to the public (Intervener's Record, Volume 1, Tab E at pp 102 to 137).

[49] In conclusion, CSIS is an intelligence-gathering agency that operates within the parameters established by Parliament, including the statutory definition of what constitute "threats to the security of Canada." The Service is subject to a number of controls: that exercised by the Minister through the issuing of directions; that of the Inspector General through the submission of certificates, that of the Federal Court through the issuing of warrants, that of SIRC by means of its investigative, review and research duties and functions, and finally that of Parliament through the tabling of an annual report and the submission of special reports to the Minister.

[50] The overriding purpose of these controls is, to the extent that it is possible, to ensure that CSIS operates consistently within the laws of Canada and their regulations and that it does not exercise its powers in an unreasonable or unnecessary manner. CSIS has considerable powers, but in spite of the significant powers conferred upon it, Parliament wanted to ensure that fundamental

rights remain protected. When assessing SIRC's investigative role, it is therefore important to keep in mind Parliament's desire to ensure that the mandate of CSIS is articulated legally and that it is consistent with the laws and regulations applicable to similar matters.

B. *A brief review of the case law dealing with SIRC*

[51] The Courts have, in the past, been called upon to determine issues concerning the CSISA and its provisions regarding SIRC. For example, the Supreme Court has already had to make a determination on a SIRC investigation report and on the effect of its recommendations in *Thomson*, *supra*, in which the Court ruled on a denial of a security clearance. The judgment of the majority found that the word "recommendation" at subsection 52(2) of the CSISA should receive its plain and ordinary meaning and should not be taken to mean a final or binding decision, which is left to the Deputy Minister as the employer's representative (*Thomson, supra*, at para 33). The Supreme Court also noted at paragraph 28 that the interpretation of "recommendations" would be the same with regard to an investigation of CSIS activities under section 41, otherwise it would result in SIRC encroaching on the management powers of the Service. I note here that the Federal Court of Appeal, whose decision was appealed, had nonetheless determined the opposite, that is, that the word "recommendation" should not be taken in its literal sense and that it had a binding connotation (*Thomson v Canada*, [1988] 3 FC 108, at pp 137 and 138).

[52] One thing is certain: both judgments are in agreement regarding the importance of SIRC's role and the significant amount of authority it has to investigate complaints. Justice Stone, writing for the Federal Court of Appeal, underscored the fact that the purpose of the CSISA was far greater than the mere investigation of complaints about denials of security clearance (*Thomson v Canada*, [1988] 3 FC 108 at para 41):

> Obviously, the purpose of the Act goes well beyond that of protecting the individual interest in obtaining a security clearance, for it is primarily directed toward protecting the national interest in matters of security generally. On the other hand, the "complaints" procedure under Part III appears to take that objective into account by ensuring, especially by the composition and powers of the intervenant and the requirement for secrecy, that this interest not be sacrificed. The Act evidently reflects a careful balancing of the two interests. …

[53] As for SIRC's proceedings and as was previously noted, the Supreme Court had already given its approval. Justice Sopinka, while emphasizing that it was not for him to rule on the issue, concluded that SIRC's proceedings respected the principles of fundamental justice (*Chiarelli, supra*, at paras 43 and 48-51):

> 43 The respondent submitted that his s. 7 rights were violated as a result of the procedure followed by the Review Committee. … Does the fact that Parliament has legislated beyond its constitutional requirement to provide that a hearing will be held enable the respondent to complain that the hearing does not comport with the dictates of fundamental justice? … [A]ssuming that the proceedings before the Review Committee were subject to the principles of fundamental justice, those principles were observed.
>
> …
>
> 48 In the context of hearings conducted by the Review Committee pursuant to a joint report, an individual has an interest in a fair procedure since the Committee's investigation may result in its recommending to the Governor in Council that a s. 83 certificate issue, removing an appeal on compassionate grounds. However, the state also has a considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources …
>
> 49 The *CSIS Act* and Review Committee Rules recognize the competing individual and state interests and attempt to find a reasonable balance between them. The Rules expressly direct that the Committee's discretion be exercised with regard to this balancing of interests.

> 50 In this case the respondent was first provided with the "Statement of Circumstances giving rise to the making of a Report by the Solicitor General of Canada and the Minister of Employment and Immigration to the Security Intelligence Review Committee". This document set out the nature of the information received by the Review Committee from the Ministers, including that the respondent had been involved in drug trafficking, and was involved in the murder of a named individual. Also, prior to the Review Committee hearing, the respondent was provided with an extensive summary of surveillance of his activities (the "Chronology of Information") and a "Summary of Interpretation of Intercepted Private Communications relating to the murder of Domenic Racco". Although the first day of the hearing was conducted *in camera*, the respondent was provided with a summary of the evidence presented. [page746] In my view, these various documents gave the respondent sufficient information to know the substance of the allegations against him, and to be able to respond. It is not necessary, in order to comply with fundamental justice in this context, that the respondent also be given details of the criminal intelligence investigation techniques or police sources used to acquire that information.
>
> 51 The respondent was also given the opportunity to respond, by calling his own witnesses or by requesting that he be allowed to cross-examine the RCMP witnesses who testified *in camera*. The Chairman of the Review Committee clearly indicated an intention to allow such cross-examination … The respondent chose not to exercise these options. Having regard to the information that was disclosed to the respondent, the procedural opportunities that were available to him, and the competing interests at play in this area, I conclude that the procedure followed by the Review Committee in this case did not violate principles of fundamental justice. [Emphasis added.]

[54] In its findings, it is clear that the Supreme Court assessed the procedure followed by SIRC as if the Committee were conducting a court proceeding, while taking into account its particular role with regard to national security. Nonetheless, respect for the principles of fundamental justice is essential in order to ensure that the end result of a decision is just and fair, whether in the form of reports, findings and recommendations or some other form.

[55] The Federal Court has, on a number of occasions, been called upon to review SIRC reports and/or decisions. In *Nourhaghighi v Canada (Canadian Security Intelligence Service)*, 2005 FC 148 at paragraph 15, [2005] FCJ 200 (*Nourhaghighi*), CSIS and SIRC acknowledged that the Committee has an obligation in terms of procedural fairness, including the obligation to provide the parties with an opportunity to be heard.

[56] In *Al Yamani, supra*, and *Moumdjian v Canada (Security Intelligence Review Committee)*, [1999] 4 FC 624, 177 DLR (4th) 192 (CA) (*Moumdjian*), reports issued in application of section 19 of the *Citizenship Act* were deemed to be subject to judicial review by the Federal Court. The same determination was made in *Mikail v Canada (Attorney General)*, 2011 FC 674, at paragraphs 27 and 33, [2011] FCJ 1100 (*Mikail*), in which a report had been prepared by the Committee after a complaint had been made about the Service's activities, pursuant to section 41 of the CSISA. The Court determined that since the complainant's rights, if not his interests, were at play, the report was subject to judicial review by the Federal Court.

[57] In *Omary, supra*, the Committee had stayed its investigation of a complaint against the actions of CSIS pursuant to section 41, pending the result of a civil proceeding filed at the same time in the Superior Court of Québec. Justice de Montigny noted that SIRC was an administrative tribunal and that it had the power to determine its own procedure (*Omary, supra*, at para 24):

> … Even though I am willing to recognize that administrative tribunals have a certain amount of autonomy in managing their cases and proceedings, as the respondent has invited me to do, this discretion must be exercised judicially, that is, in compliance with the statutes or regulations governing them as well as the purpose for which they were created …

Justice de Montigny further noted that the Committee would be able to access more evidence than the Superior Court given that it is authorized to have access to all relevant CSIS evidence and is not subject to the *Canada Evidence Act*, RSC 1985, c C-5 (*Canada Evidence Act*) (Omary, *supra*, at para 34 and see also para 39 of the CSISA). Accordingly, the application for judicial review was allowed and the decision to stay the investigation pending the Superior Court's final decision was set aside.

[58] Following the same line of reasoning as Justice Stone of the Court of Appeal in *Thomson v Canada*, [1988] 3 FC 108, Justice MacKay also noted SIRC's unique role in *Al Yamani, supra*, when he wrote as follows at paragraph 19:

> The unique and significant role of SIRC in reviewing determinations affecting persons, on security grounds, in relation to employment in the public service, and in relation to matters specified under the *Immigration Act*, the *Citizenship Act* [R.S.C. (1985), c. C-29] and the *Canadian Human Rights Act* [R.S.C. (1985), c. H-6], and the historic evolution of that role, is outlined for the Court in the memorandum of argument of the intervenor SIRC. …

[59] In another decision in which Charter issues arose and in which an interlocutory injunction was sought to order SIRC to stay its investigation under section 19 of the *Citizenship Act*, pending a determination on those Charter issues, the same Justice pointed out the particularities of SIRC (*Brar v Canada (Solicitor General),* (1989) 30 FTR 284 at para 29, [1989] FCJ 1113 (*Brar*)):

> The Security Intelligence Review Committee, constituted under the Canadian Security Intelligent Service Act, is unusual in its advisory role and its composition. The Canadian Security Intelligence Service Act, enacted following reports of two Royal Commissions and consideration in Parliament, provided for the creation of a civilian security intelligence service presided over by a Director operating under the direction of the Solicitor General. Among significant provisions for oversight of the agency's operations, the Act provides for creation of the Security Intelligence Review Committee, to be

> composed of a chairman and two to four others appointed by the Governor in Council from among persons who also hold appointment as members of the Queen's Privy Council for Canada, who are not members of the Senate or the House of Commons, after consultation by the Prime Minister with the Leader of the Opposition and the leader of any other party represented by twelve or more Members in the House of Commons. Members of the Committee are required to comply with all security requirements of the Service and to take a statutory oath of secrecy (C.S.I.S. Act, sections 34 and 37). [Emphasis added.]

[60] After listing the functions of SIRC by quoting from section 38 of the CSISA, he commented at paragraph 31 that this section provides the basis for the Committee's important role not only in particular investigations, but also in annual and special reviews of the activities and policies of the Service. Having noted the importance of its role, he concluded that SIRC, "as any other body with which legal and Charter issues are raised, has a responsibility under section 52(1) of the Charter to apply the law and to avoid application of a law that infringes the Charter" (*Brar*, *supra*, at para 44).

[61] Finally, and as the Supreme Court would determine three years later in *Chiarelli*, *supra*, Justice MacKay opined, without making a final determination on the matter, that SIRC is bound by the principles of procedural fairness in its procedures, adding that the Committee itself appears to have recognized its duties in this regard when one considers the procedures it has adopted with the very objective of ensuring fairness to individuals in a manner consistent with the committee's responsibilities to carefully weigh the public interest in national security and the public interests in full disclosure (*Brar*, *supra*, at para 58).

[62] In short, from this brief overview of certain decisions in the case law involving SIRC, the following observations may be made:

- SIRC is a specific statutory body with special attributes relating to national security.

- SIRC's proceedings establish a balance between national security and the rights of individuals.

- SIRC has powers that are similar to those of a superior court of record: the right to be heard, to summon witnesses, to file evidence by witnesses or by other means, to be represented by counsel and to administer oaths.

- SIRC is called upon to investigate complaints regarding CSIS activities, denials of security clearances, ministerial reports pursuant to the *Citizenship Act* and written notices by a Minister to the Canadian Human Rights Commission.

- In all such cases, SIRC conducts an investigation, offers the parties an opportunity to be heard, provides information (provided that it complies with national security interests), drafts a report with findings and recommendations and provides the complainant with information on its contents (again, provided that this complies with national security interests).

- In all cases where SIRC conducts an investigation, the complainants have at least a certain interest in the SIRC report and it is conceivable that their respective rights could be significantly affected.

- It is settled law that SIRC investigation reports and its interlocutory decisions are subject to an application for judicial review by the Federal Court.

- SIRC reports determine questions of fact that allow it to make findings. Thus, SIRC may also be called upon to determine the credibility of witnesses, to prefer the testimony of one witness over that of another, etc.

- SIRC drafts its reports taking into consideration the laws, regulations and rules of evidence, as well as the applicable case law in similar cases.

- SIRC's recommendations do not have the force of a decision and are not meant to involve SIRC in the "management" of CSIS.

- SIRC is entitled to have access to information under the control of CSIS and in the certificates of the Inspector General that a court is not entitled to, as courts are subject to the *Canada Evidence Act*.

C. *The approach to follow according to the case law to determine the issue in this matter*

[63] The most recent precedent for determining whether an administrative tribunal may decide questions of law, including Charter issues, is *Conway, supra*, written by Justice Abella. From the outset, this decision revisits the case law history of the Supreme Court on this issue by identifying three waves of cases, the last wave concluding that specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates (*Conway, supra*, at para 6). This overview of the relevant case law and the reasons developed in *Conway* allowed the Supreme Court to combine the three approaches or trends into a single, functional approach.

[64] It is also of interest to note that the Supreme Court promulgates this single, functional approach both on the basis of section 52 of the *Constitution Act, 1982* and in cases where a remedy is sought in application of subsection 24(1) of the Charter. According to the Supreme Court, if an administrative tribunal is in the best position to decide one of these remedies, there is no reason why it would not also be in the best position to decide the other (*Conway, supra*, at para 80).

[65] The approach recommended by the Supreme Court is to inquire whether the tribunal can grant Charter remedies generally. To make this determination, the first question is whether the tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the Charter from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the Charter when resolving the matters properly before it (*Conway*, *supra*, at para 81, and see also *Martin*, *supra*, at paras 41-42).

[66] Second, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. In order to answer this, one has to discern legislative intent by considering factors such as the statutory mandate, structure and functions of the particular tribunal (*Conway*, *supra*, at para 82). The Supreme Court had previously studied these factors in *R v 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 SCR 575 (*Dunedin*), in which Chief Justice McLachlin examined the "functional and structural approach" and its components, which she described as follows at paragraphs 43 to 46:

> 43 … Framed broadly, this test asks whether the court or tribunal in question is suited to grant the remedy sought under s. 24. This assessment is contextual. The factors relevant to the inquiry and the weight they carry will vary with the particular circumstances at hand. Nonetheless, it is possible to catalogue some of the considerations captured under the general headings of "function" and "structure".
>
> 44 The function of the court or tribunal is an expression of its purpose or mandate. As such, it must be assessed in relation to both the legislative scheme and the broader legal system. First, what is the court or tribunal's function within the legislative scheme? Would jurisdiction to order the remedy sought under s. 24(1) frustrate or enhance this role? How essential is the power to grant the remedy sought [page598] to the effective and efficient functioning of the court or tribunal? Second, what is the function of the court or tribunal in the broader legal system? Is it more appropriate that a different forum redress the violation of Charter rights?

> 45 The inquiry into the structure of the court or tribunal relates to the compatibility of the institution and its processes with the remedy sought under s. 24. Depending on the particular remedy in issue, any or all of the following factors may be salient: whether the proceedings are judicial or quasi-judicial; the role of counsel; the applicability or otherwise of traditional rules of proof and evidence; whether the court or tribunal can issue subpoenas; whether the evidence is offered under oath; the expertise and training of the decision-maker; and the institutional experience of the court or tribunal with the remedy in question: see Mooring, *supra*, at paras. 25-26. Other relevant considerations may include the workload of the court or tribunal, the time constraints it operates under, its ability to compile an adequate record for a reviewing court, and other such operational factors. The question, in essence, is whether the legislature or Parliament has furnished the court or tribunal with the tools necessary to fashion the remedy sought under s. 24 in a just, fair and consistent manner without impeding its ability to perform its intended function.
>
> 46 Two sources may provide guidance in determining the function and structure of a court or tribunal: the language of the enabling legislation and the history and accepted practice of the institution. The court or tribunal's constituting legislation may clearly describe its function and structure. However, it often may be necessary to consider other factors to fully appreciate the court or tribunal's function, or the strengths and limitations of its processes. Factors like the workload of the court or tribunal [page599], the time constraints it operates under, and its experience and proficiency with a particular remedy, cannot be assessed on the face of the relevant legislation alone; rather, regard must be had to the day-today practice of the court or tribunal in question.

[67] In her analysis of the case law of the Supreme Court in *Conway*, *supra*, Justice Abella noted that a tribunal's factual findings and the record it compiles when considering a constitutional question are of invaluable assistance in constitutional determinations (*Conway*, *supra*, at para 67).

[68] Furthermore, in the same overview of the case law, Justice Abella emphasized the fact that where a tribunal has specialized expertise, that expertise makes it the appropriate forum for assessing Charter compliance and for determining the constitutional validity of its enabling statute. Justice Abella specifically cited Justice La Forest in *Cuddy Chicks*, above, at para 19:

> It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of Charter issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the Charter challenge to its enabling statute, particularly at the s. 1 stage where policy considerations prevail. At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(*b*) of the *Labour relations Act*. [Emphasis added.]

VII. Analysis

Issue:

Is SIRC a court of competent jurisdiction with the authority to investigate the respondent's allegations that his constitutional rights guaranteed by the Charter were violated, both within the meaning of subsection 24(1) of the Charter and subsection 52(1) of the Constitution Act, 1982?

A. *There is no explicit jurisdiction, but is there an implied jurisdiction?*

[69] It is clear upon reading the CSISA that Parliament did not confer explicit power on SIRC when it is conducting an investigation, but before addressing the steps of the test established by the Supreme Court in detail, I would like to offer some general comments as a prelude to providing an overview of the situation with regard to implied power.

[70] As was demonstrated by the review of the CSISA, Parliament's concern was to ensure that the Service operates within a legal framework and does not exercise its exceptional powers in an unreasonable or unnecessary manner or in a manner that does not comply with Canada's statutes and regulations. I am of the view that, given the three main functions of SIRC: to review, research and investigate, Parliament's concern cannot but apply to each of these functions.

[71] The following elements serve to illustrate Parliament's concern: the definition of "threats to the security of Canada" (the framework within which CSIS must operate); directions issued by the Minister; judicial control over the issuing of warrants; departmental oversight through the Inspector General; and the reviewing role of SIRC including, among other things, its research functions to ensure that CSIS operates in accordance with the CSISA, its regulations and the directions issued by the Minister, and that it does not exercise its powers unreasonably or unnecessarily.

[72] Directions issued by the Minister, granted under subsection 6(2) of the Act, provide, among other things, the following (Intervener's Record, Volume I, Tab 2A, Minister's Directions on the Operations of the Service at pp 8-9):

> [TRANSLATION]
>
> The government and the population of Canada expect the Service to conscientiously assume the responsibilities conferred upon it under the *Canadian Security Intelligence Service Act* (*CSIS Act*). They also expect the Service to carry out its duties and functions while respecting the principle of the rule of law and the rights and freedoms guaranteed to Canadians under the *Canadian Charter of Rights and Freedoms*.
>
> The directions that follow, which I present in accordance with section 6 of the *CSIS Act*, are intended to help the Service meet these expectations.
>
> FUNDAMENTAL PRINCIPLES
>
> The four fundamental principles are designed to provide a framework for the Service's operations.
>
> - The rule of law must be observed.
> - The investigative means must be proportional to the gravity and imminence of the threat.
> - The greater the risk associated with a particular activity, the higher the authority required for approval.
> - With regard to the use of intrusive investigative techniques:

> - the need for their use must be weighed against possible damage to civil, religious, post-secondary and media establishments;
>
> - the least intrusive techniques must be used first, except in emergency situations or where less intrusive investigatory techniques would not be proportionate to the gravity and imminence of the threat;
>
> - the level of authority required for approving their use must be commensurate with their intrusiveness, and with any risks associated to using them. [Emphasis added.]

[73] It should be noted that both these directions and the certificates issued by the Inspector General must be submitted to SIRC. In addition, the Committee also has access to information under the control of CSIS and the Inspector General. Thus, SIRC is privy to the regulations and internal policies of CSIS, protected documents that are accessible to very few bodies. A court would only be granted such access in exceptional circumstances if, with due consideration of the interests at play, the process set out at section 38 of the *Canada Evidence Act* allowed it.

[74] During these investigations, whether they are conducted as a result of complaints regarding CSIS activities, the denial of a security clearance pursuant to the CSISA or complaints made pursuant to the *Citizenship Act* or the *Canadian Human Rights Act*, SIRC decides questions of fact in each case. The Committee is called upon to determine the truthfulness of the testimony heard, must determine the validity of one version over another, and in the end, must rule in favour of one of the parties, whether it is the complainant or the person concerned, or, if applicable, the Director of CSIS, the Minister of Citizenship and Immigration or a Minister who submitted a written notice under subsection 45(2) of the *Canadian Human Rights Act*. In order to do this, it must use legal standards and parameters. If, for example, it is called upon to decide whether there are reasonable grounds to believe that the person concerned is a "threat to the security of Canada" as alleged by the

Minister, SIRC must apply the definition of "threat" as it is defined in our statutes and developed in the case law. In addition, the same applies with regard to the legal concept of "reasonable grounds."

[75] In cases of complaints made against CSIS and some of its activities, SIRC must consider the statutes of Canada, particularly the CSISA and its regulations, the Directions issued by the Minister and the internal policies of CSIS. To carry out its duties, the Committee must not only apply the law in such cases, it must assess the evidence according to the standards established by the law and according to the interpretation that was given to them in the case law. The same applies for complaints about a denial of a security clearance or complaints filed under the *Canadian Human Rights Act*.

[76] It is therefore clear that for SIRC to be able to carry out its investigative functions, it simply cannot operate in a legal vacuum. It must interpret the law in order to make determinations on questions of fact submitted to it through the filing of complaints. To claim otherwise would be contrary to Parliament's concern about ensuring that CSIS operates in compliance with the laws of Canada, including the CSISA, its regulations and CSIS policies.

[77] In short, SIRC has all of the required attributes of a court of competent jurisdiction. It has the expertise to decide questions of fact and law and is one of the few bodies that have access to protected information under the control of CSIS.

[78] In my introductory remarks to this analysis, I mentioned that the CSISA does not explicitly grant the power to determine questions of law to SIRC. Let us now examine how the CSISA implicitly assigns SIRC the power to decide questions of law. In order to do this, we shall revisit the factors developed in *Martin*, *supra*, at paragraph 41 and apply them to the specific circumstances of this case.

(1) In order to fulfill its legislative mandate, SIRC must determine questions of law

[79] The mandate set out in the Act and conferred upon SIRC is to ensure that CSIS acts in accordance with the laws of Canada, with the CSISA and in accordance with the Minister's directions and official national security regulations and policies.

[80] The CSISA resulted from the work and the report tabled by the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Commission). In the 1970s, intelligence activities of the RCMP raised a storm of criticism after the public was made aware of some of them (for example, the theft of a Parti Québécois membership list, a fire in a barn where a meeting was scheduled to be held, as well as surreptitious entries, opening mail and using wiretaps without a warrant, all described in the McDonald Commission's Third Report, published in 1981 and entitled: "Certain RCMP Activities and the Question of Governmental Knowledge"). Public confidence in this organization had been deeply shaken and Parliament had to act in order to rectify this situation. What ensued was the creation of the McDonald Commission and the start of parliamentary debates which culminated in the enactment of the CSISA. In *Atwal v Canada*, [1988] 1 FC 107 (CA) (*Atwal*), the Court of Appeal considered the constitutionality of a wiretap and search warrant as well as the provisions of the Act under which the warrant had been issued. At paragraph 45 of this decision, Justice Mahoney offers an insightful overview of the reforms that issued from the McDonald Commission:

> 45 … The events that led to the McDonald Commission inquiry and report and Parliament's ultimate decision to introduce the judiciary into the intelligence gathering system are fresh enough in our minds to permit judicial notice of some generalities. The previous system had been rendered unacceptable to the government and Parliament by its loss of public credibility. A great many people simply did not believe that what had been done in the name of national security had been justified, important as most of them accepted national security to be. Popular scepticism was

> prompted as much, if not more, by the identity of the targets of the system, as they became known, as by the modus operandi of those engaged in it. One measure chosen to lend the new civilian Service public credibility was the introduction of judicial control at the point where its covert activities may intrude into the private lives of Canadian citizens and residents. Judicial intervention was not required to allow the Service to conduct surveillance effectively; that could, more conveniently, have continued under executive fiat. It was required to protect potential targets against unjustified surveillance and to assure the public that such protection was being effectively afforded. The benefit of judicial intervention to the Service and, thus, to Canada, will be imperilled if it is presented to and perceived by the public as primarily a [page140] function of the intelligence gathering system rather than of the judicial system. [Emphasis added.]

[81] As expressed in this excerpt from the case law from 1988, it was necessary, given the storm of criticism over the activities of the RCMP's former intelligence arm, to introduce judicial control over the issuing of warrants. The purpose of this was to protect individuals from unjustified surveillance and to uphold individual rights, while at the same time protecting national security. It was essential to ensure that CSIS would operate within a legal framework in order to restore public confidence and it was precisely this objective that led to the creation of SIRC. Thus, Parliament acknowledged this, through the House of Commons' Special Committee on the Review of the *CSIS Act* and the *Security Offences Act*, RSC 1985, c S-7 (House of Commons' Special Committee), when it declared that "the new national security system will be successful only to the extent that Parliament and the public have confidence in its integrity" (Applicant's Record, Volume II, Tab 21, Government's response to the Report of the House of Commons' Special Committee p 70). SIRC, like the Federal Court, became a key element in ensuring that a climate of trust could be built.

[82] Indeed, it was this interpretation that Justice O'Connor adopted as Chairman of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (O'Connor Commission), where, in his report entitled "A New Review Mechanism for the RCMP's

National Security Activities," he wrote as follows (Intervener's Record, Volume I, Tab 2G at p 212):

> The Security Intelligence Review Committee (SIRC) was established in 1984 as an independent, external review body that reports on the operations of CSIS directly to the Parliament of Canada. SIRC's role has long been understood to be that of assuring Parliament and the Canadian public that Canada's security intelligence service is fulfilling its mandate to ensure the security of the state while respecting individual rights and liberties as guaranteed under Canadian law. To this end, SIRC examines past operations of CSIS and investigates complaints. [Emphasis added.]

[83] Therefore, taking into account all of its duties and functions, SIRC's mandate is to scrutinize CSIS activities for the purpose of ensuring that it operates in accordance with Canadian law, with the CSISA, and with its regulations and policies, while ensuring that Canada's security is protected and that individual rights guaranteed under Canadian law are also protected. In a dissenting opinion in *Thomson*, *supra*, at paragraph 78, Justice L'Heureux-Dubé expressed this view with regard to SIRC's role as set out in the Act:

> The CSIS Review Committee was established for various reasons. Its most important role is probably that of a watchdog agency over the Service, and its reports serve to alert the public of CSIS's misdoings and errors. But the Committee also functions as the only means of redress available to a candidate whose employment has been blocked by a flawed CSIS report …

[84] In order to be able to carry out this mandate, SIRC must review CSIS's work in light of Canadian laws. Consequently, it is called upon to apply these laws. To recap, SIRC has three main functions to perform: (1) to review generally the performance by CSIS of its duties and functions; (2) to arrange for reviews to be conducted, or to conduct reviews, for the purpose of "… ensuring that the activities of the Service are carried out in accordance with this Act, the regulations and directions issued by the Minister ... and that the activities do not involve any unreasonable or

unnecessary exercise by the Service of any of its powers …" (section 40 of the CSISA**)**; and (3) to conduct investigations in relation to complaints received with respect to the activities of the Service, the denial of a security clearance, or reports made to the Committee pursuant to the *Citizenship Act* and matters referred to the Committee pursuant to the *Canadian Human Rights Act*.

[85] Each of these functions, in order to be fully and properly carried out, must ensure that CSIS exercises its activities in a manner that is consistent with the law, with the CSISA, the regulations and directions issued by the Minister, and that they are not exercised in an unreasonable or unnecessary manner. Consequently, the results of SIRC's review are submitted to the Minister, to the Director of CSIS and ultimately to Parliament through the tabling of annual reports or special reports to the minister, which are eventually made available to the public. In this regard, the file contains a number of excerpts from annual reports, as well as a special report on "CSIS's Role in the Matter of Omar Khadr" (Intervener's Record, Volume 1, Tab E at pp 102 to 137). A simple reading of these reports reveals precisely this kind of constant reference to the laws of Canada, to the CSISA, and its regulations and policies.

[86] As for SIRC's investigative role, whether it is with regard to CSIS activities, to the denial of a security clearance involving CSIS or reports and matters referred to it pursuant to the *Citizenship Act* or the *Canadian Human Rights Act*, the Attorney General contends that SIRC does not need to decide questions of law in order to carry out this function. In short, it was suggested that SIRC's [TRANSLATION] "sole objective" is to make findings and recommendations and that, as a consequence, it does not have jurisdiction to decide questions of law. Thus, SIRC was depicted as being similar to a commission of inquiry, nothing more, nothing less. The Attorney General does not believe that the legislation grants an implied power authorizing SIRC to decide questions of law and therefore does not recognize the mandate described above.

[87] A review of the complaints dealt with by SIRC over the years provides an answer. From the time of its establishment until March 31, 2005, SIRC (excluding complaints filed pursuant to the *Official Languages Act*, RSC 1985, c 31 (4th supp)) received 883 complaints, which can be broken down into the following categories (Intervener's Record, Volume I, Tab 2G at p 222):

- 771 complaints filed pursuant to section 41 of the CSISA (activities of the Service);
- 131 complaints filed pursuant to section 42 (denial of a security clearance);
- 17 complaints with regard to citizenship issues;
- 11 complaints with regard to immigration issues;
- 13 complaints referred by the Canadian Human Rights Commission.

[88] In addition, we learn from the annual reports that SIRC receives over 30 new complaints per year that require investigating (Intervener's Record, Volume I, Tabs 2C and D at pp 51 and 64). No breakdown of the types of complaints was given, but in light of the annual reports submitted, it can be safely assumed that the vast majority of these relate to CSIS activities under section 41 of the Act. The O'Connor Report reveals that SIRC devotes 20% of its resources to investigations, of which 5% are devoted to work conducted at hearings (Intervener's Record, Volume I, Tab 2G at p 222).

[89] Turning now to a specific review of the investigative process set out in section 41 of the CSISA, the Intervener's Record provides a glimpse of the kinds of complaints made with regard to CSIS activities that the Committee has had to deal with in the past: alleged intimidation, claims of human rights violations and mistreatment, allegations that CSIS used evidence obtained through torture, allegations of discriminatory practices, harassment and interference by CSIS in the employment selection process, among others. A review of the summaries of these complaints

reveals that SIRC, in order to carry out its functions, made use of, among other things and in a non limitative way, the Charter, the *Canadian Human Rights Act*, the CSISA, its regulations and internal policies, including directions from the Minister, the *Privacy Act*, the *Criminal Code* and certain conventions on the use of torture (Intervener's Record, Volume I, Tabs 2B, 2C and 2D). Given this review, it is more than likely that the Attorney General had already been provided with a number of opportunities to raise the issue in this matter, namely, whether the Committee can decide questions of law, including Charter issues, but that he simply chose not to do so until very recently.

[90] Investigations pursuant to section 41 of the CSISA may be conducted on behalf of "any person" with respect to complaints about "any act or thing done by the Service." Prior to fully exercising its jurisdiction to investigate complaints, SIRC must first determine whether the Director of CSIS responded to the complaint within a reasonable period of time or whether the complainant was satisfied with the response given (paragraph 41(1)(*a*)).

[91] The Committee must then determine whether the complaint is trivial, frivolous, vexatious or made in bad faith. This stage is crucial for the complainant, as it directly affects his or her interest in seeing that the complaint is ultimately dealt with (*Mikail*, *supra*, at paragraphs 32, 37 and 47). To that end, SIRC must be able to rely on the law applicable to such matters. It cannot go against the interest of the complainant without doing so on the basis of legal considerations. A simple finding of fact would not suffice, unless it included a solid legal basis (paragraph 41(1)(*b*)). Furthermore, the Committee must satisfy itself that the complaint does not raise factual issues relating to a labour relations problem (subsection 41(2)). To this end, SIRC must take into consideration not only its enabling statute, but also the *Public Service Labour Relations Act*, SC 2003, c 22.

[92] In light of the foregoing, it seems to me that the investigative function of section 41 of the CSISA includes not only a duty to decide questions of fact (in English, SIRC is called upon to submit a report containing "the findings of the investigation" ("des conclusions" in French) (paragraph 52(1)(*a*))), but also to do so by taking into account the applicable law according to the particular circumstances of the complaint under review. Frankly, it is difficult to see how SIRC would be able to fulfil its mandate without taking existing laws into account. Failing to apply the country's legal values would be tantamount to abdicating its legislative mandate.

[93] The same is true when particular attention is given to SIRC's investigative role. The interests of the persons concerned, their rights, and the legislative framework of the complaints process all require the applicable law to be taken into account. Failure to recognize that the legislative mandate carries with it an implied power to decide questions of law would effectively consign SIRC's investigative role to obsolescence. After all, if no questions of law can be decided, what purpose would the complaints process serve? It would make no sense if SIRC was reduced to making findings of fact without being able to measure those findings against a legal backdrop.

[94] When Parliament enacted the CSISA, it sought to establish a system of controls that would ensure that CSIS, in exercising its exceptional powers, would do so legally and within the limits of what our laws allow. If we were to make the finding the Attorney General would like us to make, that SIRC cannot decide questions of law when it is conducting an investigation and making findings and recommendations, this would go against Parliament's intention. SIRC's legislative mandate requires that it be able to decide questions of fact and law when conducting investigations.

[95] The Attorney General compares SIRC's investigative role to that of a Royal Commission of Inquiry. As an example, he cites the report of the Internal Inquiry into the Actions of Canadian

Officials in Relation to Abdullah Almaki, Ahmad Abou-Elmaati and Muayyed Nureddin ("Iacobucci Commission") in which Justice Iacobucci opined that for the purposes of his inquiry, he could not make determinations on Charter issues (Applicant's Record, Volume II, Appendix B, Tab 13, Iacobucci Commission Report at para 29):

> First, I must repeat that the mandate of this Inquiry is limited by its nature. It does not lie within my mandate to draw conclusions about civil, criminal or constitutional responsibility. The standards that I intend to apply are not legal standards; despite the very able submissions concerning these standards offered by many Inquiry participants, I do not intend to make findings about whether torts, or crimes, or breaches of the *Canadian Charter of Rights and Freedoms* or other constitutional and international norms might have occurred. Nonetheless, the basic principles that emerge from legal sources including Canadian law, the *Charter* and various international instruments are helpful in informing my determinations as to whether Canadian officials acted properly in the circumstances. [Emphasis added.]

[96] In a manner that could not be clearer, Justice Iacobucci stated that the mandate of his inquiry was limited and that the mandate given by the Governor General in Council did not allow him to make determinations with regard to civil, criminal or constitutional responsibility. Commissions of inquiry receive their mandates from Cabinet, and their roles and functions vary accordingly. Although it is limited in this regard, the case appears to reveal a much broader mandate for the O'Connor Commission (Intervener's Record, Volume I, Tab 2G). To associate SIRC with the Iacobucci Commission, as the Attorney General seeks to do, strikes me as inappropriate. As required by the factors raised in *Conway*, if no explicit power to decide questions of law is assigned to a tribunal, one must examine whether the legislation contains an implied power. Thus, the importance of identifying the tribunal's statutory mandate.

[97] The Attorney General further argues that SIRC's role, when conducting investigations, is akin to that of an investigator during the first stage of the review of a complaint filed under the *Canadian Human Rights Act*. In support of his argument, the Attorney General relies on *Cooper*, *supra*, in which the majority ruled that the CHRC could not decide questions of law, including Charter issues.

[98] Here again we find an attempt to associate SIRC with the CHRC, but in reality they are two distinct organizations which do not fulfill the same functions. The role of an investigator at the first stage, under the *Canadian Human Rights Act*, is to investigate the complaint and to submit a report to the CHRC. After reviewing the report, the CHRC determines what measures will be undertaken to follow up on the complaint, which includes the possibility of referring the complaint to the Chairperson of the Human Rights Tribunal. The investigator's work is therefore at the first stage. In addition, the investigator's powers are limited and are not comparable to those granted to SIRC under the CSISA (*Canadian Human Rights Act*, at sections 43, 44, 47 and sections 48-50 and 52 of the CSISA).

[99] When SIRC is dealing with a complaint that has been referred to it by the CHRC on national security grounds, it investigates the complaint in the same manner as it would a complaint regarding CSIS activities. Upon completing its investigation, SIRC then submits its report and findings to the CHRC, which will then determine what action will be taken to follow up on the complaint and what information will be provided (sections 45 and 46 of the *Canadian Human Rights Act* and sections 49 and 55 of the CSISA). However, although the investigation stage is not final in and of itself, in SIRC's case, its investigation, report and findings are final. The CHRC accepts the report as such and does not second guess its findings. It then decides what steps should be taken in light of the report and after considering the particular facts in the matter. Unlike the CHRC investigator,

questions of law are to be decided by SIRC. In the case of the CHRC, either it or the Human Rights Tribunal can ultimately decide questions of law. These are therefore two distinct roles and one cannot associate the role of the CHRC investigator with SIRC's investigative role or conclude that SIRC cannot decide questions on the sole basis that the Supreme Court ruled as it did with regard to the investigator in *Cooper*, *supra*.

[100] The Attorney General also contends that Parliament could have, on a number of occasions, specifically stated that SIRC was able to decide questions of law but did not do so, in spite of it being asked expressly to do just that. I acknowledge in fact that during a parliamentary review of the CSISA pursuant to section 56 of the statute, the House of Commons' Special Committee expressed a desire to modify SIRC's reviewing function at section 40 so as to include the examination of whether CSIS was complying with the Charter and the laws of Canada, including provincial laws (Applicant's Record, Volume 2, Tab 20 at p. 156).

[101] First, I note that the primary concern of the House of Commons' Special Committee was about SIRC's reviewing function (paragraph 38(*b*) and section 40 of the CSISA) and not its investigative function (section 41 of the CSISA). Second, the same committee was not seeking to amend the Act to enable SIRC to decide questions law, including Charter issues and provincial laws, rather, it sought to have SIRC, as a part of its reviewing role, examine whether CSIS was complying with the Charter and provincial laws.

[102] Moreover, in the government's response to the House of Commons' Special Committee, it took care to note that SIRC's reviewing function was one of the key components of the Act. The following is an excerpt from that response (Applicant's Record, Volume II, Tab 21, Government's Response to the Report of the House of Commons' Special Committee at p. 71):

> SIRC's review role is a cornerstone of the accountability framework established by the CSIS Act.
>
> CSIS has a statutory mandate and a framework of Ministerial direction which recognize that its activities are sanctioned by law and are to be conducted in accordance with the rule of law, including the Charter. For its part, SIRC has a mandate to review the propriety of CSIS activities, with emphasis on the delicate balance between national security and individual freedoms.
>
> Section 38 of the CSIS Act directs SIRC to review generally the performance by the Service of its duties and functions. This includes reviewing:
>
> - CSIS Annual Reports and certificates of the Inspecter General;
> - Ministerial direction;
> - CSIS's arrangements with domestic and foreign governments and agencies;
> - section 20 on unlawful conduct; and
> - regulations.
>
> Section 40 of the legislation makes SIRC responsible for reviewing the Service's compliance with the *CSIS Act*, its regulations and Ministerial direction, as well as reviewing CSIS activities to ensure they do not involve an unreasonable or unnecessary exercise of powers. [Emphasis added.]

[103] I once again note how important it is for the government and the CSISA to render CSIS accountable and to maintain trust between CSIS, Parliament and the public. I also note the role that the government has set out for SIRC and the mandate it is called upon to carry out. Moreover, in its response, the government recognized that CSIS activities are governed by a legislative framework and are to be carried out in accordance with the rule of law, including the Charter.

[104] The government emphasized in its response that the Service's activities must be conducted in accordance with the rule of law, including the Charter. This does not appear to me to mean that

SIRC must not, in the performance of its duties and functions, apply the Charter and the laws of Canada, quite the opposite. Furthermore, when discussing SIRC's investigative role in its response, the government refers to SIRC as acting in the same manner as a tribunal would (Applicant's Record, Volume II, Tab 21, Government's Response to the Report of the House of Commons' Special Committee at p 75).

[105] To conclude this section, I note that CSIS's activities are the subject of both section 40 and section 41 of the CSISA, in which the complaint made must be directed at the activities of the Service. Having defined SIRC's statutory mandate (namely, to ensure that CSIS conducts its activities in accordance with the law, including the Charter, the CSISA and its regulations, all of which is intended to achieve uniformity and consistency in the interpretation of the Act), I believe the legislative requirements with respect to the reviewing functions described at paragraphs 38(1)(*a*) and 38(1)(*b*) and section 40 are the same for the investigative functions described at sections 38, 41, 42 *et seq*. To fulfill its mandate, SIRC must ensure that the activities that are being reviewed or investigated comply with the law. If they do not, it is SIRC's duty to report this, otherwise, it would not be fulfilling its statutory mandate. Given the nature of SIRC's mandate, it therefore has an implied power to decide questions of law, including Charter issues.

(2) SIRC's interaction with other elements of the administrative system is another indication of its implied jurisdiction to determine questions of law

[106] Having identified SIRC's statutory mandate, *Martin*, *supra*, then proposes that we examine SIRC's interaction with other elements of the administrative system. We will begin with a general overview before paying special attention to SIRC's investigative function and its interaction with other statutory elements.

[107] A close reading of the CSISA provides an illustration of SIRC's position with respect to national security and its elements. SIRC is a crucial element of the legislative framework. It is, through its reviewing and investigative functions, the external review body that ensures that CSIS operates in accordance with the law, and with the CSISA and its regulations. Consequently, it renders CSIS accountable, and thus ensures Parliamentary and public confidence in CSIS. Upon completing a review, SIRC submits a report to the Minister, the Director of CSIS, to the persons concerned (in investigation report cases), and in certain cases to the CHRC and the Minister of Citizenship. SIRC also submits an annual report to Parliament via the Minister and publishes reports on specific topics from time to time.

[108] To carry out its duties and functions, SIRC has access to all documentation under the control of CSIS that it considers necessary for its work, except for confidences of the Queen's Privy Council. It therefore has privileged access to confidential CSIS information that would normally be protected under the *Canada Evidence Act*. No other external review body has such full access to secret CSIS files.

[109] SIRC reviews not only CSIS activities, but also Ministerial directions, reports of the Director of CSIS, certificates of the Inspector General, CSIS arrangements with domestic and foreign agencies and warrants issued by the Federal Court. It is an oversight role, providing SIRC with access to everything that involves CSIS activities and operations.

[110] This general role shifts when SIRC performs its investigative functions. It becomes the body that holds all of the information, including that under the control of CSIS as well as that which is disclosed to it by the complainant. SIRC has in its possession Ministerial directions, instructions to employees and internal policies. It interviews persons who can provide helpful information to the

investigation. There are also hearings before it where each of the parties involved can be heard, even to the exclusion of the other party.

[111] When SIRC investigates a complaint related to CSIS activities, it submits a report to the Minister, the Director of CSIS and the person concerned. The latter will receive, after consultation with the Director of CSIS, all of the information that is not protected for national security reasons. The report contains findings of fact and recommendations.

[112] This process is important for the parties involved. The person concerned has a definite interest in having his or her complaint validated. For CSIS, it reflects on the credibility of its operations. For the Minister, the result of this type of process provides an external perspective on CSIS activities and access to a full report. It also allows the Minister to ensure that the activities of the Service are carried out in accordance with the law, the CSISA and his or her directions. Armed with these findings of fact and recommendations, the Minister can then, by issuing directions or by other means, make an informed decision on how to correct the situation and ensure that it does not happen again.

[113] In an attempt to minimize SIRC's interaction with other elements, the Attorney General argues that the recommendations are [TRANSLATION] "simply of an advisory nature." Thus, in the Attorney General's view, it is not appropriate for SIRC to be able to decide questions of law or apply the Charter. He adds that the Committee's report is not subject to appeal, which to him is an indication that the CSISA does not grant SIRC an implied jurisdiction to decide questions of law.

[114] It is true that SIRC's reports only make recommendations and that these are not binding. The Supreme Court made this determination in *Thomson*, *supra*, when it found that the final decision on whether to grant security clearance rested with the Deputy Head. In that judgment, at

paragraph 28, the Supreme Court stated that by making recommendations that were non-binding, the Committee avoided encroaching on the management powers of the Service. However, this does not mean that the fact of being limited to issuing recommendations diminishes the impact of these recommendations. Nor does it minimize SIRC's interaction with other elements, such as the Minister, the Director of CSIS or the person concerned.

[115] A recommendation made by SIRC includes findings of fact that favour either the complainant's version of events or that of CSIS and follows determinations made on the basis of the facts in the record. The recommendations, while non-binding, have a definite impact on CSIS, as it must later justify its actions to the Minister and ultimately to Parliament. If the report is conclusive and the recommendations are relevant, this will have an impact on CSIS and it will not be able to simply ignore the recommendations. A recent Federal Court decision determined that while the recommendations were not binding, they can be characterized as being of a determinative nature (*Mikail, supra*, at para 47). Moreover, the complainants are conscious of the fact that the final outcome of their complaint will be non-binding recommendations. Nonetheless, the number of complaints with respect to CSIS activities over a ten-year period (during which 711 complaints were made regarding the activities of the Service) attests to a growing interest in this process, despite the fact that the results are non-binding.

[116] The other argument put forth by the Attorney General in this regard is that there is no appeals process for SIRC investigation reports. It is true that the Act does not provide for an appeals process. However, SIRC investigation reports are subject to judicial review by the Federal Court (section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7). Therefore, it is factually inaccurate to assert that SIRC investigation reports that determine questions of law and Charter cannot be reviewed if necessary. Moreover, where pure questions of law or natural justice arise in a judicial

review, a correctness standard will be applied (*Dunsmuir, supra*, at para 50). Consequently, the judicial system provides for judicial review of reports resulting from SIRC investigations which raise or determine questions of law, including Charter issues.

[117] A number of concerned parties have in the past applied for judicial review in an effort to have corrections made to SIRC investigation reports or decisions (*Mikail, supra*, at paras 46-49; *Al Yamani, supra*, at para 27; *Omary, supra*, at para 28; *Moumdjian, supra*, at paras 21 and 23; *Thomson v Canada*, [1988] 3 FC 108; *Nourhaghighi, supra*; *Brar, supra*; *Zundel v Canada (Minister of Citizenship and Immigration)*, [1998] 2 FC 233, [1997] FCJ 1638). The lack of an appeals process for SIRC investigation reports is thus offset by the possibility of obtaining judicial review of these reports. Questions of law determined by SIRC are therefore reviewable and the Federal Court can intervene in the event that SIRC errs in law.

[118] The Attorney General's two arguments to minimize SIRC's interaction with other elements of the administrative system are insufficient to neutralize or minimize the above conclusions. The fact that these are recommendations of a [TRANSLATION] "mere" administrative value and that there is no appeals process provided to correct errors in law does not diminish the importance of SIRC's interaction with the persons concerned, the Director of CSIS and the Minister. Investigation reports, including the findings of fact and recommendations contained therein, are of undeniable importance to all of these parties.

[119] Therefore, I find that SIRC's interaction with other elements of the administrative system supports the theory that Parliament granted SIRC an implied jurisdiction to determine questions of law, including those based on Charter issues.

(3) SIRC is adjudicative in nature

[120] In *Martin*, *supra*, the Court considered the adjudicative nature of the Nova Scotia Workers' Compensation Appeals Tribunal and made the following findings (*Martin*, *supra*, at para 53):

> … the Appeals Tribunal is fully adjudicative in nature. It is independent of the Board and is placed under the supervision of the Minister of Justice, whereas the Board is supervised by the Minister of Labour. The Appeal Tribunal establishes its own rules of procedure (s. 240(1)), can consider all relevant evidence (s. 246(1)) and records any oral evidence, for future reference [page542] (s. 253(1)). Its members have the powers, privileges and immunities of a commissioner appointed under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372 (s. 178(1)), including the power to summon witnesses, compel testimony, require production of documents, and punish persons guilty of contempt; they also have certain powers of entry (s. 180). Although the Appeals Tribunal is normally required to render its decision within 60 days of the hearing, or if there is no hearing, on the day on which all summons have been received (s. 246(3)), it may "at any time, extend any time limit prescribed by this Part or the regulations where, in the opinion of the Appeal Tribunal, an injustice would otherwise result" (s. 240(2)). This extension power allows it to give proper consideration to the more intricate issues raised by a *Charter* appeal, as was done in this case. While only the Chief Appeal Commissioner is required to be a practising lawyer (s. 238(5)), in reality all appeal commissioners have been admitted to the bar. Moreover, this Court has recognized that non-lawyers sitting on specialized tribunals can make important contributions to *Charter* adjudication: *Cuddy Chicks*, *supra*, at pp. 16-17. In my view, there is no reason to doubt that the Appeals Tribunal is an adjudicative body fully capable of deciding *Charter* issues, as demonstrated by its competent reasons on the s. 15(1) issue in the case at bar. [Emphasis added.]

[121] The Federal Court of Appeal also considered the same factor from *Martin* in *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2006] FCJ 1682 (*Covarrubias*). It had to determine whether a Pre-Removal Risk Assessment (PRRA) officer had an implied jurisdiction to decide questions of law, including, in particular, an implied jurisdiction to declare inoperative provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the

IRPA) when their application would result in a person's Charter rights being violated. In reviewing the third factor, namely, whether the tribunal is adjudicative in nature, the Court noted that a PRRA decision is largely administrative and not adjudicative because most PRRA applications were decided on the basis of written submissions rather than oral hearings (*Covarrubias, supra*, at para 54).

[122] As was noted at paragraph 54 in *Martin, supra*, while the presence of an adjudicative process is an important factor in finding an implied jurisdiction to decide questions of law, its absence would not by itself be determinative.

[123] SIRC, in carrying out its investigative duties and functions with respect to a complaint about CSIS activities, has many of the normal attributes of a court of law:

- For SIRC to begin an investigation, the complainant has to be dissatisfied with the response given by the Director of CSIS or have not received a response within a reasonable period of time (paragraph 41(1)(*a*)).

- SIRC must be satisfied that the complaint is not trivial or frivolous and that it is not related to a labour relations matter (subsections 41(1) and 41(2)).

- SIRC must inform the parties of their right to be heard personally, to present evidence and make representations, but no one is entitled, as of right, to be present, to have access to or comment on representations made to the Committee (subsection 48(2)).

- SIRC may disclose the facts of the case to the parties in the interest of fairness, provided that the disclosure complies with the need to protect the security of Canada (Rule 46 of SIRC's Rules of Procedure).

- The parties have the right to be represented by counsel and SIRC may summon witnesses, administer oaths, compel witnesses to give oral or written evidence and to produce documents in the same manner as a superior court of record (paragraphs 50(*a*) and 50(*b*)).

- SIRC has jurisdiction to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as it sees fit, whether or not that evidence or information would be admissible in a court of law (paragraph 50(*c*)).

- SIRC has the authority to determine the procedure to be followed in the performance of any of its duties or functions. This process has been endorsed by the Supreme Court in *Chiarelli*, *supra*, at paragraphs 43 and 49.

- SIRC has been granted wide access to information under the control of CSIS or of the Inspector General and no information may be withheld from it "on any ground," notwithstanding any Act of Parliament or any privilege under the law of evidence, other than a confidence of the Queen's Privy Council for Canada (section 39 at subsection 39(1), paragraphs 39(2)(*a*) and 39(2)(*b*) and subsection 39(3)).

- SIRC has a duty to provide the Minister and the Director of CSIS with a report containing the findings of the investigation and any recommendations it considers appropriate. The complainant is to be provided with those findings that are not protected for national security reasons, after consultation with the Director of CSIS (paragraphs 52(1)(*a*), 52(1)(*b*) and 55(*b*) of the Act and Rule 13 of SIRC's Rules of Procedure).

[124] The Attorney General emphasizes that SIRC members are not required to have received legal training or to have experience to decide questions of law, including Charter issues and that this

means SIRC cannot decide questions of law or Charter issues. In response to this, it should be noted that there are a number of criteria to be met before SIRC members are selected and appointed, and there is a fixed term of office. The maximum number of members is four, with the exception of the Chairman, and they must be members of the Queen's Privy Council for Canada who are not members of the Senate or House of Commons. They may only be appointed after consultation by the Prime Minister with the Leader of the Opposition in the House of Commons and the leader of each party having at least twelve members in that House. Members are appointed part-time during good behaviour for a term not exceeding five years, with the possibility of being re-appointed for another five years (subsections 34(1), 34(2) and 34(3)). Members are required to take the oath of secrecy set out in the schedule of the CSISA (section 37).

[125] In this regard, the government's response to the Report of the House of Commons' Special Committee, *supra*, explained at pages 70 and 71 the importance of SIRC and its members for Parliament (Applicant's Record, Volume II, Tab 21, Government's Response to the Report of the House of Commons' Special Committee at p 70):

> THE ORIGINS OF SIRC
>
> When the CSIS Act was being drafted, it was recognized that the success of the new national security system would depend largely on Parliamentary and public confidence in the integrity of the system. Several options for providing independent external review of the Service's performance of its mandate were considered.
>
> One option was to assign the independent external review function to a committee of Parliament. There would be practical difficulties, however, in providing legislators with direct access to information about CSIS operations, much of which simply could not be disclosed publicly, including third-party information and information about:
>
> - CSIS capabilities, techniques and investigative methods;
> - ongoing operations;

> - technical sources;
>
> - the identity of targets; and
>
> - the identity of human sources.
>
> Moreover, within the Canadian parliamentary system, legislators have traditionally been free to publicly use information, from whatever source, in discharging their duties to their constituents, their parties and the House. Providing parliamentarians with classified documents or creating a permanent parliamentary structure with national security responsibilities, it was believed, could inhibit the independence of legislators.
>
> Another option, therefore, was selected -- the SIRC option. SIRC was established as a surrogate for Parliament. It consists of Privy Councillors who are not sitting members of either the House of Commons or the Senate. SIRC has full access to CSIS, except Cabinet confidences, and it is free to investigate all aspects of CSIS operations. Though required to maintain confidentiality, SIRC submits public annual reports.
>
> Specific tasks spelled out for SIRC in the CSIS Act fall into two broad categories: -- reviews and complaints. [Emphasis added.]

[126] This special status gives SIRC an exceptionally important role to fulfill with respect to national security. SIRC, through its close affinity with parliamentarians, is trusted by the Parliament of Canada. Although its members are only part-time and there is no statutory requirement for them to have received legal training, they have, through their mandate and their duties, a privileged position that provides them with an uncommon knowledge of national security matters. This specialized knowledge gives them an expertise in national security that other courts do not possess. Such expertise is of great benefit to them when they are dealing with complaints about CSIS activities. In this regard, *Cuddy Chicks, supra*, at paragraphs 16 and 17, stated the following (see also *Martin, supra*, at para 53):

> 16 The overarching consideration is that labour boards are administrative bodies of high calibre. The tripartite model which has been adopted almost uniformly across the country combines the

> values of expertise and broad experience with acceptability and credibility. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-236, Dickson J. (as he then was) characterized the particular competence of labour boards as follows:
>
> > The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.
>
> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters [page17] which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. Therefore, while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases; see, for example, *Northern Telecom Canada Ltd v. Communication Workers of Canada*, [1983] 1 S.C.R. 733.
>
> 17 That having been said, the jurisdiction of the Board is limited in one crucial respect: it can expect no curial deference with respect to constitutional decisions. Furthermore, a formal declaration of invalidity is not a remedy which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts, the ruling of the Board on a *Charter* issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises. [Emphasis added.]

[127] The Attorney General does not consider the above-mentioned special characteristics attributed to SIRC as being indicative of an implied power conferred upon the Committee by

Parliament. Instead, he claims that SIRC does not have the authority to render justice, and that its role is limited to that of conducting investigations and acting as an advisory body. As he has often repeated, the Attorney General claims that SIRC only makes recommendations. He adds that the CSISA grants no absolute right to be present during, or to have access to or to comment on representations made to the Committee by any other person and that the complainant is not entitled to see the entire report, whereas no other court of law would be limited in such a manner. The Attorney General characterizes the Committee's jurisdiction as being procedural, rather than adjudicative, and suggests that such procedural jurisdiction is comparable to that of other investigative bodies, although he is unable to provide any examples in that regard.

[128] I have already commented on the importance of SIRC's role and its power to make recommendations to the parties. I would add that if one were to make an analogy between a recommendation and a declaratory power of a court of law, SIRC has a power to make recommendations which recalls that of a declaratory judgment of a court of law. In *Khadr, supra*, at paragraphs 46 and 47, the Supreme Court concluded, following its determination that Mr. Khadr's rights had been violated, that a declaration was a remedy under the Charter:

> 46 In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence [page 67], and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.
>
> 47 The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for the Court to allow Mr, Khadr's application for judicial review in part and to grant

> him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the Charter. [Emphasis added.]

[129] I do not claim that SIRC had a declaratory power similar to that of the judiciary. What I am merely noting by referring to that decision is that a recommendation is similar to a declaratory judgment and that the Supreme Court recognized that a declaration was a discretionary remedy for a violation of rights protected under the Charter. I further note that SIRC, for the purposes of investigating a complaint with regard to CSIS activities, has jurisdiction over the matter at issue, that a complaint investigated by SIRC is a real question, not a theoretical one, and that a complainant in such a situation has an interest in raising it (see *Mikail, supra*, generally, and particularly at paragraphs 10, 27, 32, 33, 37, 46 to 49 and 55).

[130] I would also note that the Supreme Court, at paragraph 17 in *Cuddy Chicks*, above, appears to support the theory that the fact that recommendations made by SIRC are not binding is not determinative. After all, the Supreme Court stated that a labour relations board treating an impugned statutory provision as invalid is not tantamount to a formal declaration of invalidity, does not constitute a binding legal precedent and is limited in its applicability to the matter in which it arises. Nonetheless, it has jurisdiction to decide questions of law that involve the Charter.

[131] I now turn to the Attorney General's argument that the fact that SIRC can exclude either party from a hearing or that it can disclose only part of a report to the complainant on national security grounds is incompatible with the basic rules of a judicial process. Whether under the *Canada Evidence Act* at subsection 38.11(2), the *Immigration and Refugee Protection Act* at paragraph 83(1)(*c*) or the *Access to Information Act*, RSC 1985, c A-1 at subsection 47(1), it is

possible, on national security grounds, to hold hearings in which only one of the parties is present. Moreover, the person concerned is not automatically entitled to be provided with the reasons of a judgment in their entirety, again on national security grounds.

[132] Parliament allows the Court to act in this way in order to protect national security. It is therefore inaccurate to claim that the way SIRC operates is incompatible with the basic rules of a judicial process. For both SIRC and a court of law, the process to be followed when national security is at stake is to ensure that principles of fundamental justice are respected according to the circumstances of the case, while ensuring that confidential information is not disclosed. Consequently, one of the parties may be excluded from a hearing and the party concerned may receive a report of judgment from which confidential information has been redacted.

[133] In conclusion, my review of SIRC's investigative attributes has led me to find that they are considerable and are not dissimilar to those of a court of law. I see in them significant features that point to similarities between SIRC and an adjudicative body. Accordingly, the factor used in *Martin*, *supra*, weighs in favour of recognizing that SIRC has an implied jurisdiction to decide questions of law in exercising its duty of investigating complaints about CSIS activities. As the Supreme Court teaches us in *Martin*, this factor, while not in itself determinative, is important to keep in mind when considering implied jurisdiction.

(4) Some practical considerations to discuss

[134] The Supreme Court stated that this factor is also not determinative and that it can never supplant the intention of the legislature (see *Martin, supra*, at para 56).

[135] As has been demonstrated in this analysis, SIRC's mandate requires that it be able to decide questions of law in order to carry out its mandate in a satisfactory manner. Second, SIRC's

interaction with other elements of the national security system in general and its investigative function are also indicative of the need for it to have the authority to decide questions of law in order to fully accomplish its statutory duties. Third, the particular features of SIRC's investigative function make it an adjudicative body having the power to make recommendations. The ensuing conclusion from this analysis is that Parliament, by enacting the CSISA, sought to give SIRC an implied jurisdiction to decide questions of law. While they are not determinative, in order to provide a more complete analysis and with a view to responding to all of the arguments, let us now examine some of the practical considerations raised by the parties.

[136] The Attorney General suggests that providing SIRC with the power to decide questions of law, including those involving alleged Charter violation, would pose a hindrance to the expeditious nature of the complaints process set out in the CSISA while at the same time unduly [TRANSLATION] "complicating" the process. According to the Attorney General, this would result in increased costs and delays to the process. Moreover, given the Committee's simple power to make recommendations, it would result in a multitude of procedures, as the other Charter remedies cannot be granted by SIRC. The complainant would then need to go before a court of law in order to obtain a full remedy.

[137] The CSISA sets out specific rules of investigation such as the rule allowing written or oral evidence to be received and accepted, whether or not such evidence would be admissible in a court of law (paragraph 50(*c*)) and the rule that no one is entitled as of right to be present during, or to have access to, representations made to the Committee by any other person (subsection 48(2)). Without explaining the effect or impact these specific rules have on SIRC's investigative regime, the Attorney General asserts [TRANSLATION] "that the courts are in a much better position than

SIRC to determine alleged Charter violations" (Applicant's Memorandum at para 68). This argument has already been dealt with in part in the previous two sections of this analysis.

[138] I would add that the investigative process is chiefly concerned with protecting national security while ensuring that the complainants and CSIS have access to a forum which provides them with procedural fairness and respect of their rights in accordance with the circumstances of the matter. That explains the reason for these particular rules. As we shall see in the following paragraphs, SIRC's investigative process has certain attributes that distinguish it from those of a court of law when it is deciding questions of law and dealing with matters of national security. I would like to point out that these observations are made in the context of comparison with the particular process followed by SIRC and are not intended to be a criticism of the process set out at section 38; they are only made in an effort to assess some of the assets offered by SIRC that may compensate for the limited remedies it can grant.

[139] The following five factors illustrate important differences between proceedings before SIRC and those before a court of law with respect to deciding questions of law including those related to the Charter, during an investigation of CSIS activities:

- SIRC has unrestricted access to information held by CSIS. A court of law would have access to it only if the procedure followed under section 38 of the *Canada Evidence Act* allowed it and the designated judge of the Federal Court authorized it in accordance with that Act.

- The expertise of the members of SIRC and its staff is a particular asset when it comes to examining the facts underlying a complaint raising questions of law including those related

to the Charter. Except for designated judges of the Federal Court, courts of law are not in a comparable situation.

- Since it has tools for deciding complaints on the merits, SIRC's investigation procedure is more expeditious than that of a court of law.

- SIRC's investigation procedure provides for hearings in which parties can be heard while national security is protected and the principles of natural justice recognized in similar situations are respected. Evidence summaries will be given out at hearings in accordance with the CSISA and the SIRC rules. *A contrario*, a court of law would have some difficulties in a similar situation; for example, the admission of evidence, testimony and submissions would all have to protect national security while providing fair and equitable proceedings to the parties and the complainant, in particular. Before the Committee, all of these stages proceed with rules that are already known and accepted by the parties.

- SIRC's procedure provides for the provision of investigation reports, which include findings of fact and recommendations. The complainant will receive everything except for information that must be protected in order to preserve national security. Unless there is an explicit provision regarding national security, a court of law may have some obstacles to overcome before it is able to release its judgment.

[140] It is true that, since it can only result in findings of fact and recommendations, SIRC's investigation procedure could never fully satisfy a complainant's needs. However, before a court of law, that complainant could not be fully satisfied that the court would have had access to all the information needed to administer justice, given national security concerns. SIRC will necessarily have more complete knowledge of the case than a court of law.

[141] In addition, at the end of the investigation of the complaint against CSIS's activities, the complainant, the Director of CSIS and the Minister receive a report containing findings on the merits of the complaint and recommendations, if any (the version of the report sent to the complainant is redacted for reasons of national security). The effect of such a report on the parties is not to be minimized. It is possible that, depending on the result, the parties may then agree on a resolution. The option of applying for judicial review also remains at the parties' disposal. They may apply for a court remedy as well. At that stage, depending on its admissibility, the report, its findings of fact and recommendations may prove useful.

[142] This last scenario would imply a second proceeding, but, given the many advantages of SIRC's investigation procedure, it is possible that, on the whole, the complainant and the director of SIRC would both benefit significantly from it. When we are dealing with national security, it necessarily implies complications, which SIRC's investigation procedure would reduce. It is not a perfect system, but it certainly appears to be the best one in the circumstances.

[143] I end by noting that there may be complementarity in national security between SIRC's investigation procedure and proceedings before a court. This is also suggested in *Omary, supra*. To review, after noting the admissibility of the complaint and its jurisdiction to investigate it, SIRC decided to stay its investigation pending the final decision of the Superior Court in the civil proceeding instituted by the applicant. The complainant then applied for judicial review of that decision. Justice de Montigny found that SIRC should have continued its investigation and set aside the stay decision. In doing so, he explained that the two proceedings had different objectives and that there was no reason they both could not have continued at the same time (*Omary, supra*, at paras 33-34):

> 33 The same logic must apply, *a fortiori*, when the body responsible for investigating does not make a decision, as in the case of a disciplinary committee, but can only make recommendations, as in SIRC's case. The latter must avoid making findings akin to legal liability on the part of CSIS, since that is not its mandate. This is a common characteristic of all commissions of inquiry. However, the Superior Court is required to decide the respondent's legal liability, and must determine whether fault, damage and a causal link have been proved.
>
> 34 What is more, the evidence to be submitted to SIRC and the Superior Court will undoubtedly be different. Section 39 of the Act authorizes the Committee to have access to all relevant evidence; however, the evidence that the applicant may submit to the Superior Court will be limited by the provisions of the *Canada Evidence Act* (R.S., 1985, c. C-5) and national security prerogatives. [Emphasis added.]

[144] As mere *obiter*, Justice de Montigny compared SIRC, during its investigations, with a commission of inquiry. I have already explained that SIRC could not be compared with a commission of inquiry because its mission and its functions, its interaction with the other components and its adjudicative nature distinguish it so much so that it must be noted that it has an implied jurisdiction to decide questions of law. I note again that Justice de Montigny did not need to elaborate on this point in his analysis and that it was merely in passing that he had compared SIRC with a commission of inquiry.

[145] However, I agree with his statement that the evidence accessible to SIRC, compared to that accessible to a court of law, would be different because of the framework put in place by the *Canada Evidence Act* and national security prerogatives. Hence the possibility of complementarity between the two types of recourse. There is no doubt that SIRC, having all of the evidence before it, would be in a better position to decide questions of law. Is it then possible that a court of law, having in evidence SIRC's report, if admissible, could better determine the remedies to be granted following a determination that there was an infringement of Charter rights? It seems to me that,

taking into account the entire issue created by protecting national security, for the complainant as well as CSIS, it would be a more appropriate solution and that the parties' interests would be better served.

[146] These practical considerations are not determinative in and of themselves, but they help to better understand the situation. However, as mentioned in *Conway, supra*, at paragraph 79, duplicity of proceedings is to be avoided as much as possible. In this case, duplicity is inevitable given the constraints imposed by national security, but a single proceeding instituted in a court of law would not give the complainant ample opportunity to submit all of the evidence needed for a judgment. In addition, the proceeding would also include, for reasons of national security, recourse to a procedure under section 38 of the *Canada Evidence Act*. In contrast, SIRC holds, protects and controls in a certain manner national security-related information. Only SIRC, in the course of its investigations, can have all the evidence necessary to decide questions of fact and of law including those related to the Charter. Having taken into account all of these practical considerations and although there is no miracle solution, I conclude that the advantages of SIRC's investigation procedure favour such a system and, consequently, favour an implied jurisdiction to decide questions of law.

[147] Having reviewed all of the factors in *Martin, supra*, I find that SIRC, in the course of its investigations, has the implied jurisdiction to decide questions of law including those related to the Charter.

B. *Parliament did not exclude the Charter from SIRC's jurisdiction*

[148] The Charter has been in force since April 17, 1982, while the CSISA came into effect just over two years later, namely, on July 16, 1984. It does not appear anywhere in the legislation that Parliament intended to exclude the application of the Charter from the functions of SIRC, including

that of investigation. If such was its intention, Parliament could have certainly done so while the adoption of the Charter was still fresh in its memory.

[149] Let us recall the government's response to the report of the House of Commons' Special Committee, *supra*, at page 71, where the government stated categorically that ". . . [CSIS's] activities are sanctioned by law and are to be conducted in accordance with the rule of law, including the Charter." Having to investigate CSIS's activities through its functions of review, examination and investigation, SIRC must ensure uniformity in the application of the law including the Charter.

[150] Let us pass to the next step, as suggested in *Conway*, *supra*, at paragraph 82, and examine whether SIRC may grant the particular remedy sought by the complainant.

C. *SIRC has jurisdiction to grant the particular remedy sought under the CSISA*

[151] In *Conway*, *supra*, Justice Abella explains, at paragraph 82, that when a court finds that a tribunal has an explicit or implied jurisdiction to decide questions of law and that Parliament did not exclude the Charter from its jurisdiction, it must then be examined whether the "particular" remedy sought may be granted. To answer this question, Parliament's intention must be discerned and it must be determined whether the remedy sought is one of those that Parliament intended the tribunal to be able to grant. The factors that will enable us to make that determination are the tribunal's statutory mandate, structure and function, which the Supreme Court described in more detail in *Dunedin*, *supra*, at paragraph 75:

> 75 The functional and structural approach strikes this balance between meaningful access to Charter relief and deference to the role of the legislatures. It rests on the theory that where a legislature confers on a court or tribunal a function that involves the determination of matters where Charter rights may be affected, and

> furnishes it with processes and powers capable of fairly and justly resolving those incidental Charter issues, then it must be inferred, in the absence of a contrary intention, that the legislature intended to empower the tribunal to apply the Charter. This approach promotes direct and early access to Charter remedies in forums competent to issue such relief. At the same time, the jurisdiction of courts and tribunals ultimately remains a matter of legislative intention. Parliament and the legislatures remain master over the powers the tribunals they create possess. Subject to constitutional constraints, they may withhold the power to grant any or all Charter remedies. They may indicate such exclusion either expressly, or by implication, such as where they do not properly equip the tribunal to hear and decide Charter rights and remedies. Whether Parliament or the legislature intended to exclude a particular remedial power is determined by reference to the function the legislature has asked the tribunal to perform and the powers and processes with which it has furnished it. [Emphasis added.]

[152] We have already identified the mandate, structure and functions of the SIRC in order to establish whether the Act contains an implied jurisdiction to decide questions of law, including the Charter. With this analysis in mind, section 52 of the CSISA grants SIRC the power to report and make findings based on the facts presented ("the findings of the investigation") and make appropriate recommendations (paragraph 52(1)(*a*)).

[153] In this case, the applicant requested the following remedy (Applicant's Record, Volume 1, Tab 3, letter of complaint to SIRC dated July 11, 2008):

> [TRANSLATION]
>
> Therefore, we request that this Committee conduct an investigation in relation to the actions of the CSIS officers to determine and acknowledge the responsibility of the Canadian Security Intelligence Service in the unlawful, intimidating and unfair treatment of our client.
>
> Also at issue are the threat of reprisal and the presumed reprisals taken by writing a damaging report about him and sending it to the Minister of Transport, Infrastructure and Communities, in order to have his name added to a Specified Persons List ("no-fly list").

> Our client also requests that this Committee identify and recommend that CSIS take the necessary steps to rectify this serious injustice by remedying the violations against our client, including:
>
> - By setting aside any damaging reports that may have been written about him;
> - By taking the necessary steps to remove his name from the Specified Persons List ("no-fly list") and to allow him to travel and return to Canada;
> - By ensuring that he does not experience any harm from either national or foreign security agencies;
> - By taking steps and ensuring his life, freedom and safety;
> - By sending an offer of compensation for the moral and material damages (threats, intimidation, arrest without a warrant, loss of the airline ticket, psychological distress, loss of his resident status in Saudi Arabia) that he endured because of this unacceptable conduct by CSIS officers.
>
> Based on the foregoing, we request that an investigation into CSIS's wrongful acts be conducted in accordance with section 41 of the *CSIS Act*.
>
> We also request to have an oral hearing to make the necessary representations in our client's interests.
>
> [Emphasis added.]

[154] In short, the remedy sought is that SIRC investigate the activities of CSIS, that it clarify the role of CSIS in regard to the allegations raised and that it report its findings of fact and include in that report the recommendations listed. The purpose of these recommendations would be to remedy the violations against Mr. Telbani, specifically by recommending the setting aside of any damaging reports that may have led to the inclusion of his name on the Specified Persons List (the "no-fly list"), that the necessary steps be taken to remove his name from the list and that an offer of compensation be issued for the moral and material damages he endured.

[155] Having already thoroughly assessed in detail the statutory mandate of SIRC, its structure and functions, there is no basis to find that Parliament would not have intended in these circumstances that SIRC investigate or issue these non-binding recommendations. On the contrary, the Committee's mandate to ensure that the Service act in accordance with the laws of Canada, including the CSISA, its regulations and the Minister's directions, leaves no doubt that the Committee should investigate these allegations with respect to the Service's activities. The Committee's structure gives it an ideal mechanism to conduct investigations into these allegations without putting national security at risk and the investigative functions of the Committee allows it to determine the validity of allegations and to produce a report that includes the non-binding recommendations "that [it] considers appropriate" and without limitations indicated in the Act (paragraph 52(1)(*a*)). SIRC may therefore grant the particular remedy sought, given the relevant statutory scheme.

VIII. Conclusion

[156] When considering the issue raised in this matter, i.e. whether SIRC is a court of competent jurisdiction to investigate the respondent's allegations that his constitutional rights were violated, it is important to remember the context in which the Committee was established. The CSISA was a result of the work and report tabled by the McDonald Commission, established by Parliament after intelligence activities of the RCMP—including surreptitious entries without warrants—raised a storm of criticism after the public was made aware of some of them. As the Court of Appeal already explained, "The previous system had been rendered unacceptable to the government and Parliament by its loss of public credibility. A great many people simply did not believe that what had been done in the name of national security had been justified …" (*Atwal*, *supra*, at para 45). Thus, the creation of SIRC was one of the controls put in place by Parliament to prevent such measures and to restore

public confidence: "SIRC's role has long been understood to be that of assuring Parliament and the Canadian public that Canada's security intelligence service is fulfilling its mandate to ensure the security of the state while respecting individual rights and liberties as guaranteed under Canadian law" (O'Connor Commission, "A New Review Mechanism for the RCMP's National Security Activities," Intervener's Record, Volume I, Tab 2G at p 212).

[157] It is also important to remember the allegations that initiated this matter. Mr. Telbani's complaint accuses CSIS of [TRANSLATION] "unlawful, intimidating and unfair treatment" because of the actions of two officers who went to his home, entered his residence without a warrant or permission and acted in a threatening and intimidating manner toward him, in violation of his fundamental rights guaranteed by the Charter. It is also alleged that the name of Mr. Telbani was added to a Specified Persons List because of a report issued by CSIS. Without commenting on their truthfulness, these allegations recall other complaints filed against the Service and that the Committee has had to deal with in the past: alleged intimidation, claims of human rights violations and mistreatment, allegations of discriminatory practices, harassment and interference in the employment selection process and many others (Intervener's Record, Volume I, Tabs 2B, 2C and 2D).

[158] In the cases where these allegations are shown to be true, they must definitely be addressed and it is highly probable that remedies deserve to be granted. However, these remedies do not necessarily have to take the form of monetary relief. In many cases, it may be that findings of fact accompanied by an apology are sufficient, or that a practice or policy at the source of the criticized act be modified, or further that the Service rectify an error for which it is responsible (e.g. by taking action to remove a name on the Specified Persons List). It is not always necessary for a person to commence proceedings in court to be heard and to obtain a remedy.

[159] Parliament created SIRC to be an accessible mechanism: "Any person may make a complaint ... with respect to any act or thing done by the Service" (CSISA at subsection 41(1)). Having full access to all information relevant to the complaint and clear regulations and procedures already in place that allow it to proceed without delay, SIRC was also created to be an effective and rapid investigation mechanism and, therefore, inherently less costly for the individual and CSIS. As well, SIRC has the power to produce a report with findings and recommendations that make the non-monetary relief identified above possible. However, Parliament has also provided some balance since the Committee may not intrude into the management of the Service or unduly interfere in the protection of national security. Notwithstanding that limitation to the possible remedies, the 711 complaints filed against the activities of the Service over approximately 10 years show how this mechanism has been useful to these complainants, not to mention the need of a mechanism to address the allegations in these complaints. However, to now find that SIRC is not a court of competent jurisdiction to investigate allegations that the constitutional rights of a complainant were violated would significantly limit this mechanism, despite all the above-noted observations and benefits, and would require complainants to proceed to court where the resolution of the complaint is uncertain.

[160] CSIS asked the question: is SIRC a court of competent jurisdiction to investigate allegations that the constitutional rights of a complainant were violated? As confirmed by this Court's analysis in accordance with the analytical approach established by the Supreme Court, the answer to this question is the following:

- The CSISA does not grant SIRC explicit jurisdiction to decide questions of law;

- In determining whether legislation grants implied jurisdiction to decide questions of law, the analysis shows the following:
    - that the statutory mandate given to SIRC supports the argument of implied jurisdiction;
    - that SIRC's interaction with all the components of the national security system adds to the argument of implied jurisdiction;
    - that SIRC is an adjudicative body that has the attributes to decide questions of law;
    - that practical considerations as a whole weigh in favour of SIRC when it conducts investigations.
- Consequently, to carry out its mandate in fulfilling its investigative function, SIRC must decide questions of law;
- Having noted this implied jurisdiction to decide questions of law, the CSISA does not exclude Charter questions from this jurisdiction;
- Bearing in mind the Act and the specific remedy sought, SIRC may grant them under the CSISA.

A. *Costs*

[161] In accordance with the order of Prothonotary Aronovitch dated February 8, 2011, the respondent may not claim costs. This will be done.

ORDER

The application for judicial review of the decision of the Security Intelligence Review Committee dated September 8, 2010, is dismissed without costs.

"Simon Noël"

_____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1645-10
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v HANI AL TELBANI ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 31, 2012
REASONS FOR ORDER AND ORDER:	NOËL J.
DATED:	April 23, 2012

APPEARANCES:

Kathia Bustros Michael Peirce	FOR THE APPLICANT
Nadia Effendi	FOR THE INTERVENER

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPLICANT
Doyon & Associés Montréal, Quebec	FOR THE RESPONDENT
Borden Ladner Gervais LLP Ottawa, Ontario	FOR THE INTERVENER