Federal Court  Cour fédérale

Date: 20230412

Docket: T-1879-18

Citation: 2023 FC 529

Ottawa, Ontario, April 12, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DANNY PALMER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Danny Palmer, the Applicant, comes before this Court to challenge, on judicial review, the decision of the Security Intelligence Review Committee (hereinafter "SIRC") to deny having jurisdiction to entertain a complaint he made concerning the Canadian Security Intelligence Service (hereinafter "CSIS"). The judicial review application is made pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

I. Introduction

[2] Mr. Palmer lost his employment with CSIS in June 2003 by reason of poor performance. He has been litigating that matter, in one fashion or another, ever since. On five occasions he has sought to have SIRC take jurisdiction to review some allegations pursuant to the sections 41 and 42 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [CSIS Act], as they existed at the time of the various complaints made by Mr. Palmer. Sections 41 and 42 were repealed by legislation in 2019.

[3] The provisions which were applicable at the time the Applicant made his five complaints read as follows:

Complaints	**Plaintes**
41 (1) Any person may make a complaint to the Review Committee with respect to any act or thing done by the Service and the Committee shall, subject to subsection (2), investigate the complaint if	**41 (1)** Toute personne peut porter plainte contre des activités du Service auprès du comité de surveillance; celui-ci, sous réserve du paragraphe (2), fait enquête à la condition de s'assurer au préalable de ce qui suit :
(a) the complainant has made a complaint to the Director with respect to that act or thing and the complainant has not received a response within such period of time as the Committee considers reasonable or is dissatisfied with the response given; and	a) d'une part, la plainte a été présentée au directeur sans que ce dernier ait répondu dans un délai jugé normal par le comité ou ait fourni une réponse qui satisfasse le plaignant;
(b) the Committee is satisfied that the complaint is not	b) d'autre part, la plainte n'est pas frivole, vexatoire, sans

trivial, frivolous, vexatious or made in bad faith.

objet ou entachée de mauvaise foi.

Other redress available

(2) The Review Committee shall not investigate a complaint in respect of which the complainant is entitled to seek redress by means of a grievance procedure established pursuant to this Act or the *Federal Public Sector Labour Relations Act*.

Restriction

(2) Le comité de surveillance ne peut enquêter sur une plainte qui constitue un grief susceptible d'être réglé par la procédure de griefs établie en vertu de la présente loi ou de la Loi sur les relations de travail dans le secteur public fédéral.

Denial of security clearance

42 (1) Where, by reason only of the denial of a security clearance required by the Government of Canada, a decision is made by a deputy head to deny employment to an individual or to dismiss, demote or transfer an individual or to deny a promotion or transfer to an individual, the deputy head shall send, within ten days after the decision is made, a notice informing the individual of the denial of the security clearance.

Refus d'une habilitation de sécurité

42 (1) Les individus qui font l'objet d'une décision de renvoi, de rétrogradation, de mutation ou d'opposition à engagement, avancement ou mutation prise par un administrateur général pour la seule raison du refus d'une habilitation de sécurité que le gouvernement du Canada exige doivent être avisés du refus par l'administrateur général; celui-ci envoie l'avis dans les dix jours suivant la prise de la décision.

…

[…]

Receipt and investigation of complaints

(3) The Review Committee shall receive and investigate a complaint from

Réception des plaintes et enquêtes

(3) Le comité de surveillance reçoit les plaintes et fait enquête sur les plaintes présentées par :

(a) any individual referred to in subsection (1) who has

a) les individus visés au paragraphe (1) à qui une

been denied a security clearance; or	habilitation de sécurité est refusée;
(b) 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 a security clearance in respect of that person or any individual.	b) les personnes qui ont fait l'objet d'une décision d'opposition à un contrat de fourniture de biens ou de services pour la seule raison du refus d'une habilitation de sécurité à ces personnes ou à quiconque.

For the sake of completeness, I note that provisions to the same effect are found in the 2019 legislation, the *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2, at sections 16 and 18. The National Security and Intelligence Review Agency was established by the Act and replaced SIRC.

II. The fifth complaint

[4] As already noted, this constitutes the fifth complaint against CSIS launched by the Applicant since he was dismissed close to 20 years ago. An appropriate starting point in the Court's review of the case may be to examine the exact nature of this complaint. I will then outline the other four complaints and their outcome. It will also be necessary to refer to litigation before the Public Service Labour Relations Board, which ended up in this Court on judicial review, to get a more complete picture of this case. It will then be possible to consider more fully the arguments offered by the parties.

[5] The Applicant sent to the Director General of CSIS a long letter on January 2, 2018, complaining about various issues. The letter runs for eight pages. It is said by its author to be his

Complaint against the “Canadian Security Intelligence Services (CSIS) pursuant to section 41 of the Canadian Security Intelligence Service Act (CSIS Act)”.

[6] The formal complaint to SIRC, using Form 41 as required, is, for all intents and purposes, identical to the letter of January 2, 2018. The eight-page form is dated February 18, 2018. It relates exclusively to section 41, not section 42, of the then CSIS Act.

[7] The Applicant summarizes his general complaint in the first paragraph. It is then detailed in the following pages.

[8] Mr. Palmer puts up front that the “complaint is in regard to the two physical assaults by a CSIS member” which were followed, claimed the Applicant, by “retributions” which started in 1997 and went on until 2014. He stated that “retributions and psychological harassment” led to his wrongful dismissal, two wrongful denials of his security clearance and defamatory libel by a CSIS spokesperson. Follow the details of the complaint.

[9] The Applicant alleges that he was assaulted in August and October 1997 by his supervisor; he claims that the assaults were as retribution for disclosing within CSIS (he was in British Columbia at the time) the “illegal disclosure of classified information”, in the first instance, and his concern about “operational policy and communication” in the second instance. It appears from the complaint itself that the matter was raised at the time within CSIS in the BC Region. A presentation by a professional consultant on harassment in the workplace followed. Indeed, after the Applicant’s requested transfer to the Quebec Region was completed in July

1998, an investigation was conducted. The Applicant complained about the quality of the investigation.

[10] Mr. Palmer continued to have concerns about incidents that he claimed occurred. According to him, the management in the Quebec Region did not take seriously intelligence he gathered about a foreign intelligence officer who would have been seeking to kidnap or assassinate two persons residing in Canada. Because the Applicant pursued his investigation without authorization, he says that disciplinary measures were initiated based, he says, on a false disciplinary report. The matter was grieved by the Applicant. He states in his complaint that it is unknown if the "foreign intelligence officer" managed to find the two persons who, he claims, were targeted.

[11] The Applicant's transfer to another area within CSIS in Quebec in April 2001 is presented by him as an additional disciplinary measure. It seems that he considered the transfer as being career limiting. Shortly thereafter, he became concerned about a threat assessment he authored about a student pilot who might want to crash an airplane on a foreign political target in Quebec City during the Summit of the Americas. Mr. Palmer wanted for the threat assessment to be pursued and investigated. Managers at CSIS considered the assessment as far-fetched and an embarrassment, according to the Applicant.

[12] Mr. Palmer continued his complaint's narrative by referring to a tactic he learned about in the summer of 2001 according to which attempts would be made to force potential sources to work by threatening to leak information to allied agencies or the person's "home government".

Mr. Palmer disapproved, he says, of those alleged tactics. These allegations resulted in an internal security investigation concerning the Applicant (the details of which are not presented). The Applicant states that he had suspicions that it was in fact "a conduct and discipline investigation, which was really abuse of power for the purpose of harassment and retribution for the complainant's concern" over the use of the tactic. It appears, according to the complaint, that a one-day suspension ensued; the Applicant grieved the disciplinary measure and the disciplinary measure was reversed "by the Director of CSIS". Instead, a reprimand was added to his record.

[13] What the Applicant considered psychological harassment continued until his termination, in June 2003, termination that he calls "wrongful". A supplemental grievance running for 134 pages is said to provide details concerning his termination. It was dated March 2004. The Applicant states that "(t)he corroboration of the report [the grievance] led to the denial of the complainant's security clearance in May 2007 without justification, other than to cover up the harassment and wrongful dismissal".

[14] I pause to note that none of the allegations were supported by independent evidence. These are presented because they constitute the allegations made in support of a complaint made to SIRC pursuant to section 41 of the then CSIS Act. What follows is the general allegation made by Mr. Palmer concerning the refusal by CSIS to issue a security clearance at the "Top Secret" level, as Mr. Palmer sought to litigate his dismissal.

III. Litigation before the PSLRB

[15] The complaint dedicates numerous paragraphs to the issue of the Applicant's attempt to litigate his dismissal. His supplemental grievance came in March 2004. It was late. Mr. Palmer's original grievance about his dismissal was denied by the Director of CSIS on August 5, 2003, less than two months after his termination had become effective. But, Mr. Palmer wanted his supplemental grievance to be considered. He alleged bad faith and disguised discipline on the part of his employer. Because the grievance was out of time, it was refused by CSIS. Mr. Palmer sought to have it adjudicated before the Public Service Labour Relations Board (PSLRB). CSIS argued that the Board did not have jurisdiction because Mr. Palmer had been terminated for cause in relation to performance issues, not for reasons of discipline.

[16] In order to have his supplemental grievance be the subject of adjudication, Mr. Palmer needed an extension of time, which he sought by a letter dated July 14, 2005.

[17] The Board, through its Chairman, Mr. Yvon Tarte, dealt with the matter of the extension of time (2006 PSLRB 9), and not whether the Board had jurisdiction to consider the matter on its merits (para 5). The Board did not address the merits of the supplemental grievance. Mr. Tarte notes that Mr. Palmer did not have a security clearance at the time the matter was before the Board. After reviewing the evidence presented, the Board concluded that, based on the Board's jurisprudence (*Trenholm v Staff of the Non-Public Funds, Canadian Forces*, 2005 PSLRB 65), an extension of time could be granted. Thus, the matter was referred to adjudication, together with the Service's jurisdictional objection according to which the Board could not entertain the

grievance as Mr. Palmer had been dismissed by reasons of poor performance, a ground over which the PSLRB did not have jurisdiction. Mr. Tarte was careful to warn the parties about the limits of his finding and the difficulty Mr. Palmer may face concerning the jurisdiction of the Board. He wrote:

> [66] As indicated earlier, the merits of Mr. Palmer's contentions were not addressed in any detail at the hearing. I will therefore not make, and need not make, any finding as to the likelihood of success of the applicant's "supplemental" grievance. Mr. Palmer should not find in this decision any indication that he might be successful in the determination of that grievance. The Service's jurisdictional objection will have to be dealt with and, in this regard, given the state of the jurisprudence, Mr. Palmer will not have an easy task.

[18] There was ultimately no adjudication on the merits with respect to the grievance as the matter was settled with the assistance of mediation using the services of the adjudicator. We find in the Certified Tribunal Record (CTR) the actual written settlement signed by Mr. Palmer, his counsel at the time as well as by the CSIS representatives (CTR, pages 101 to 104). The Vice-Chairperson of the PSLRB signed as a witness. The agreement was reached on October 25, 2007. The settlement provides that “(t)he parties agree to settle this matter in its entirety on the terms set out below”. One such term is that the parties release and forever discharge each other from any and all claims relating to Mr. Palmer’s employment with CSIS. But the matter was not left there by Mr. Palmer.

[19] A recurring theme in the years that followed, indeed before this Court, was that Mr. Palmer was denied a security clearance at the Top Secret level for the purpose of litigating the dismissal. He contended that he could not conduct his cross-examination of witnesses without access to documents classified at that level. After Mr. Palmer retained counsel, his lawyer was

given a Top Secret security clearance for the purpose of the hearing, and Mr. Palmer received a Secret security clearance which gave him access to a considerable amount of information in a great number of documents. As indicated before, the matter was settled with counsel for Mr. Palmer having had access to all the information and Mr. Palmer having had access to all materials protected at the Secret level. The matter of the supplemental grievance was settled before the merits were ever reached.

[20] Mr. Palmer sought to reopen the settlement close to two years later. He claimed that information obtained in 2008 and 2009 showed that the settlement was the result of fraud and coercion on the part of CSIS. The matter was submitted to the Board on June 5, 2009. We learn from the Board's ruling that, in accordance with the settlement reached on October 25, 2007, Mr. Palmer withdrew the grievance in December 2007.

[21] In essence, Mr. Palmer argued that he needed a Top Secret security clearance for the adjudication of his grievance and that, according to him, he was advised during the mediation in 2007 (conducted by the adjudicator) by CSIS representatives and the adjudicator that the refusal to grant him the Top Secret clearance would prevent the adjudicator from ordering his return to CSIS. He said that it is only subsequently that he learned that the denial of the security clearance was limited to the adjudication of the grievance, which meant that the adjudicator would not have been prevented from ordering the reintegration. He accused his employer of fraudulently denying him the needed clearance to obstruct the disclosure of the evidence which would have established that his dismissal was not justified.

[22] The first issue was whether the PSLRB had jurisdiction to review a settlement agreement. An adjudicator ruled (2010 PSLRB 11) that the Board had jurisdiction to entertain the argument whether the settlement reached by Mr. Palmer and the employer in October 2007 is valid and binding. She sent the matter for adjudication on its merits.

[23] A different adjudicator considered the matter on its merits (2012 PSLRB 1) and she found that the settlement was valid. She wrote:

> [7] Having heard Mr. Palmer's evidence and reviewed his 11-page letter, I am satisfied that all the facts he raises in support of reviewing the conditions that led to the settlement of his grievance were in existence and known to both him and his counsel at the time of the mediation and the settlement.
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> [8] I am singularly unpersuaded by the correspondence Mr. Palmer initiated with CSIS through his new counsel, M^{e} Mercure, between July 31, 2008 and May 19, 2009. This correspondence is irrelevant to the issue of having the Board revisit his settlement and reopen his grievance. It does not establish that the settlement is not valid or binding.
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> [9] At the time of settlement, Mr. Palmer was represented by counsel and his counsel at that time raised the issue of CSIS' refusal of his Top Secret security clearance and its refusal to disclose to him certain documents that he requested because of a concern regarding his reliability. A settlement was reached even though those issues were still outstanding. The correspondence during 2008 and 2009 merely revisits these same issues.
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> [10] Based on the evidence presented, I am not convinced that Mr. Palmer was misled or that his consent to the settlement was obtained through false representations, fraud or coercion. Therefore, there was a mutual intention of both competent parties to resolve the grievance with finality. Furthermore, a party to a settlement cannot extricate himself from a valid and binding settlement merely by making allegations of bad faith.
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> [My emphasis.]

Clearly, the adjudicator found, as a matter of fact, that Mr. Palmer knew about the circumstances that led to his decision to settle his grievance and to withdraw it in accordance with the settlement two months later (in December 2007). The settlement was therefore found to be valid and binding. The Board found "that Mr. Palmer has no further recourse before this Board since the adjudicator is without jurisdiction to determine a grievance once it is withdrawn" (para 14). That took Mr. Palmer to our Court on judicial review of that decision.

[24] Our Court (Boivin J., as he then was) found the decision of the PSLRB reasonable (2013 FC 374). Procedural fairness was not violated. The Court goes through the factual background. We learn that the PSLRB had ordered CSIS to disclose all documents Mr. Palmer thought were relevant. His counsel had access to all of them while the Applicant was restricted in view of his security clearance granted at the level of Secret. However, the said restriction was limited to less than 5% of all the documents disclosed for the hearing before the PSLRB. The hearing before the PSLRB commenced on October 24, 2007, but the parties entered in mediation the same day. The settlement was reached the following day.

[25] It is reported that the hearing before the PSLRB which concluded that the settlement was valid and binding took four days: 7 witnesses (including Mr. Palmer) were heard, 66 exhibits were produced. Three of those exhibits are the briefing notes from CSIS recommending the denial of a Top Secret security clearance to the Applicant because of alleged carelessness and irresponsibility concerning the handling of classified information. The Applicant denied those allegations.

[26] Our Court stated that, in the case before the Court, "the true question is one of facts – specifically, a factual determination of whether the settlement agreement was entered into under fraud or misleading information from CSIS" (at para 31). The Applicant, through his new counsel at the time, offered a number of arguments:

- the reasons given by the adjudicator were inadequate;
- the adjudicator did not assess the credibility of witnesses and the reliability of the evidence; at any rate, the conclusions reached were unsupported and contradicted by the evidence;
- the adjudicator would have indicated during the hearing that she did not see the reason for holding the hearing, which led to the claim of a reasonable apprehension of bias;
- the decision rendered was a cursory one;
- the Applicant took issue with the adjudicator's refusal to consider the text of the settlement agreement where she would have found that he did not receive an important settlement, thereby avoiding to pre-judge the matter.

[27] Our Court addressed the arguments offered by Mr. Palmer and rejected them.

[28] The Court states at paragraph 44 that "(t)his is not a case where no reasons were provided when they were required, thus breaching procedural fairness – reasons were provided by the adjudicator, and should therefore be assessed when examining whether the decision is reasonable". Moreover, there was no evidence in the record to show that there was an indication at the hearing before the PSLRB that there was no need to hold the hearing. The test to establish

a reasonable apprehension of bias requires cogent evidence which is not present: “The Court finds that there is no merit to the serious allegation that the adjudicator was biased or had pre-judged the matter” (at para 45).

[29] The argument that the PSLRB rendered a hasty or inadequate decision was specifically addressed by our Court: “To the contrary, the adjudicator’s decision is motivated and does address the key issue of the applicant being misinformed by CSIS before signing the settlement agreement” (at para 47).

[30] While Mr. Palmer tried to fault the adjudicator for refusing to consider the text of the settlement agreement, the Federal Court was of the view that the content of the settlement agreement was never in question. It was irrelevant to the issue of whether the Applicant had been misled into agreeing to settle, or if CSIS acted fraudulently or in bad faith.

[31] As to whether the decision was reasonable, the reasons show that the adjudicator concluded validly that the Applicant and his counsel at the time “were aware of all the facts raised in support of reviewing the conditions which led to the settlement” (at para 49). The Court goes on to state at paragraph 50:

> [50] The adjudicator’s reasons address the heart of the applicant’s arguments, which is that he was not aware of certain relevant facts before agreeing to settle, formulated as follows before this Court: that evidence had been reclassified, that CSIS relied on allegations of wrongdoing on his part to deny him Top Secret security clearance, and that the denial of his Top Secret security clearance was for administrative purposes (Applicant’s Record, Memorandum of Fact and Law, Tab 5, p 23). According to the adjudicator, it was clear that the applicant was aware of all these facts when he chose to settle. An examination of the record

> confirms that this conclusion was certainly one of the possible outcomes justifiable by the facts of this case.

[32] In view of the recurring allegation according to which the Applicant was not aware of the reasons why a Top Secret security clearance for the purpose of the adjudication before the PSLRB was refused, it is necessary to reproduce in their entirety some paragraphs from this Court's decision in 2013:

> [52] While the applicant claims not to have been aware of the allegations against him contained in Exhibits 2, 56 and 57, the Court notes that these allegations were referred to on numerous occasions, many of which were prior to the applicant signing the settlement agreement. For instance, letters addressed to the PSLRB contained references to the applicant's carelessness in dealing with classified information (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 18, dated October 11, 2005, p 3; Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 19, dated November 2, 2005).
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> [53] Furthermore, the Court notes that in a letter drafted by the applicant and sent to the PSLRB in March 2006, the applicant clearly expresses his knowledge that CSIS believes that he had shown a disregard to the *Security of Information Act*, RSC 1985, c O-5, and the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, by sending classified documents by fax (Respondent's Record, Vol 2, Tab 39, pp 174 and 177). The same letter indicates that the applicant was aware that this was the reason why his Top Secret security clearance would not be reinstated. In another letter authored by the applicant, dated November 15, 2006, and addressed to the PSLRB, the applicant clearly set out that he was aware of CSIS's concerns with classified information he disclosed to the PSLRB (Respondent' Record, Vol 2, Tab 40, p 183). This correspondence emanating from the applicant pre-dates the settlement agreement. It is therefore farfetched for the applicant to now claim that he did not know why his Top Secret security clearance was denied, and that this lack of knowledge would render the settlement agreement invalid.
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> [54] The applicant claims he was misled by being told that reinstatement with CSIS would be impossible. Given CSIS's refusal of the applicant's Top Secret security clearance, the Court

> is not convinced that this statement, if it was indeed made at the beginning of negotiations, would have been misleading at the time. What the CSIS's November 5, 2008 letter indicated is that there would be no impediments to considering the applicant for a Top Secret security clearance in the future, should another government agency require it for employment purposes. Indeed, CSIS will perform a security clearance for its own employees, but CSIS is also responsible for security clearance for all Departments in government, leaving the final decision, in that case, to the Deputy Head of the Department. However, the letter stressed that, in the absence of such request, the investigation will not be triggered. (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 15). The applicant himself recognized that a Top Secret security clearance is a prerequisite for employment with CSIS (Respondent's Record, Vol 2, Tab 40, pp 182-183). It was therefore open to the adjudicator to conclude that CSIS did not mislead the applicant.
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> [My emphasis.]

[33] There can be no doubt, in my view, that the matter of the Applicant's grievance of his dismissal was the subject of litigation before the PSLRB and before our Court. The March 2004 grievance made by the Applicant was the subject of a settlement in October 2007, resulting in the withdrawal of the said grievance. When the Applicant sought to reopen the settlement agreement in 2009, the matter was allowed to go to adjudication before the PSLRB which concluded that the agreement was valid and binding. On judicial review, these allegations about the settlement agreement being entered into under fraud or misleading information concerning the refusal of the security clearance were equally rejected by our Court. The security clearance issue has been heard and decided. The decision of the PSLRB and the decision of our Court on the issue were final. The continuing reliance on this issue by the Applicant is mistaken. We read at paragraph 58 of this Court's decision in 2013:

> [58] There is no evidence in the record before this Court supporting the conclusion that CSIS would have misled the applicant or coerced him into signing the settlement agreement.

> Having reasonably concluded that the settlement agreement was valid and binding, including the withdrawal of the grievance, the adjudicator was correct in subsequently concluding that she did not have jurisdiction to examine the applicant's grievance.

IV. Previous complaints to the Security Intelligence Review Committee

[34] That takes us to a series of complaints made by Mr. Palmer to SIRC, starting in 2004.

[35] On June 7, 2004, one year after his dismissal, the Applicant submitted his first complaint pursuant to section 41 of the CSIS Act, the first of which was that he was wrongfully dismissed for "weak performance" and CSIS was not accepting his supplemental grievance. On October 25, 2004, SIRC determined that Mr. Palmer "had been entitled to seek redress by means of a grievance procedure under the CSIS Act for your complaint". By application of section 41(2) of the CSIS Act, SIRC does not have jurisdiction.

[36] A second complaint, this time pursuant to sections 41 and 42 of the CSIS Act, was made on January 30, 2007. As for the section 41 complaint, Mr. Palmer challenges the scope of the disclosure made by CSIS in the PSLRB proceedings; he also impugns CSIS' failure to administer a polygraph test allegedly owed to him. He complains about the security clearance at the Top Secret level that CSIS refuses to grant him. Mr. Palmer argues that CSIS uses the security clearance program "to conceal evidence and obstruct justice by denying the reinstatement of my Top Secret security clearance and access to Top Secret documents for evidence". The section 42 complaint relates to the denial of the security clearance.

[37] On May 25, 2007, SIRC dismisses the section 42 complaint. It explains that the jurisdiction is limited to situations where, by reason only of the denial of a required security clearance, a decision is made by a deputy head to deny employment, or to dismiss, demote or transfer an individual or to deny a promotion or transfer an individual. That is not one of the situations involving Mr. Palmer, whose security clearance at the Top Secret level was denied after his employment with CSIS had ceased. That does not constitute one of the situations described at section 42.

[38] The complaint pursuant to section 41 was dealt with on August 22, 2007, where SIRC concludes that it does not have jurisdiction. It states that the issue of inadequate disclosure before the PSLRB is one for the PSLRB, as SIRC does not have jurisdiction over those proceedings. Indeed the PSLRB has the explicit authority to compel the production of documents. Furthermore, the failure to perform a polygraph is not a matter over which SIRC was given jurisdiction as this does not constitute “an act or thing done by the Service”, pursuant to section 41(1) of the CSIS Act.

[39] A third complaint pursuant to section 41 came on August 9, 2009. This one impugns the denial of the security clearance of 2007 and challenges the validity of the settlement agreement of October 2007. Mr. Palmer alleges that the settlement was based on fraudulent misrepresentation by CSIS representatives. Moreover, he makes allegations about the reasons for his dismissal. By letter dated December 22, 2009, SIRC, once again, determines that it does not have jurisdiction over the matter raised by the Applicant. Given that the CSIS Act gives the Director of CSIS the exclusive authority over the human resources management and the

presentation, consideration and adjudication of grievances, SIRC finds that this third complaint "arises from, and is within the context of the grievance process and that the allegations raised in your complaint are the same allegations as those raised in your letter dated May 31, 2009 to the Public Service Labour Relations Board".

[40] On May 11, 2013, Mr. Palmer tried to revive his section 41 complaint relative to the denial of his request for a Top Secret security clearance. The document runs for eight pages, starting with Mr. Palmer's first grievance about his dismissal rejected by the CSIS Director in August 2003 and discussing at length the refusal to grant him the Top Secret security clearance for the adjudication before the PSLRB, to the post-settlement attempt to reopen the said settlement. At page 6 of 8, one reads:

> As a result of the above-mentioned facts I submit that this complaint is well founded.
>
> As I continue to be denied access to the denial briefs dated 2007, 2010 and 2011, I request that the SIRC obtain them and review the selective and arbitrary process followed by CSIS in denying my clearance and in shielding that denial from scrutiny by the SIRC. I note that at no time was I given the opportunity to respond to the allegations therein.

The attempt at reopening the complaint was rejected on September 3, 2013 in the following terms:

> On October 25, 2004, May 25, 2007, August 22, 2007 and December 22, 2009, SIRC wrote either to yourself or to your counsel to advise that, after conducting preliminary reviews of your various complaints, SIRC had no jurisdiction to investigate them. The reasons for these determinations were provided in these letters to you. We have taken your recent request very seriously and have reviewed your recent correspondence in light of the past determinations in relation to your files. I regret to inform you that SIRC does not see any new information which would warrant a

> reconsideration of the SIRC's position on its jurisdiction to investigate. Therefore, SIRC's files with respect to your complaints will remain closed.

[41] A fourth complaint came on July 3, 2015, this one relative to sections 41 and 42.

[42] The section 41 complaint related to an alleged breach of its own security policy by CSIS in that it was careless in handling what CSIS deemed secret and top secret documents entered in evidence before this Court in a case involving the Applicant. Mr. Palmer alleged that, through that carelessness, unfettered access to classified documents was allowed. That resulted in two articles being published in the media. When reached by the journalist, a CSIS spokesperson made comments which Mr. Palmer felt resulted in his reputation being tarnished. SIRC, once again, found it did not have jurisdiction under section 41(1). The decision letter of March 15, 2016 provides:

> After a preliminary review, the Committee found that your allegation with respect to disclosure involved a specific proceeding which was wholly before the Federal Court of Canada. The Federal Court of Canada has jurisdiction to rule on the admissibility of evidence before it as well as on disclosure matters. As such the Committee does not have jurisdiction to investigate this allegation. The Committee also found that your complaint regarding the statements that would have been made by the CSIS spokesperson does not constitute an "act or thing done by the Service" as per section 41 of the *CSIS Act*. Consequently the Committee is without jurisdiction to investigate this matter.

[43] The section 42 complaint related again to the denial of the security clearance. The same reason given concerning a prior complaint (the second complaint) to explain the lack of jurisdiction was repeated:

> Your dismissal of July 2, 2003 was grounded in poor performance and not in a denial of a security clearance. Your current complaint involves the denial of your request to obtain a security clearance to access documents in the context of litigation which followed that dismissal. As the denial of your request did not result in any dismissal or denial of employment, the requirements of section 42 of the *CSIS Act* have not been met and the Committee is thus without jurisdiction. As such, please be advised that the Committee's file with respect to your section 42 complaint has been closed.

[44] All SIRC decisions are final. Only the SIRC decisions concerning the 4th complaint, both decisions dated March 15, 2016, were made the subject of a notice of application for judicial review before the Federal Court. The notice of application was filed on February 16, 2017 (T-210-17). Being filed beyond the required period of time following the decision an applicant wants to challenge, Mr. Palmer sought an extension of time. His motion for extension of time was dismissed by our Court, with costs. O'Reilly J. found "that Mr. Palmer has presented little evidence or argument that his application has merit, that his application would not prejudice the AGC, or that there is a reasonable explanation for the delay". The four-part test for an extension of time was not met. Mr. Palmer asked the Court to reconsider its decision, thus relying on rule 397(1) of the *Federal Courts Rules*. The motion for reconsideration was dismissed as well, with costs, as Mr. Justice O'Reilly was "unable to identify any material that I overlooked". An appeal to the Federal Court of Appeal (A-292-17) was dismissed with costs, "the appellant having failed to provide a reasonable explanation for his inaction and to propose a timetable for the remainder of the proceedings and having conceded in his representations that the subject matter of the appeal has become moot".

[45] Thus, the previous decisions of SIRC were never validly challenged and they stand.

V. The reasons for the rejection of the 5th complaint

[46] SIRC disposed of the latest complaint in a fashion similar to the other four complaints: it was dismissed. It concluded that it does not have jurisdiction to investigate the complaint. However, before making that determination, SIRC sought submissions from the parties on its jurisdiction to entertain the complaint on March 12, 2018. Mr. Palmer did not address in his submissions of April 12, 2018 (CTR, p 106) the obstacle that constitutes section 41(2) of the CSIS Act. Instead, he repeated the allegations made, affirming that his complaint is not trivial, frivolous or vexatious, or made in bad faith.

[47] Mr. Palmer also commented that he could not seek redress by means of a grievance as the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 (FPSLRA) could not apply to him. The Applicant came back, again, to the denial of the security clearance, which he claimed was wrongfully denied. There was no acknowledgement that the matter had been litigated before the PSLRB and this Court.

[48] There were also general allegations that "(t)he Service wilfully succeeded to obstruct, pervert and defeat the course of justice by three wrongful denials of the complainant's Top Secret security clearance. The security clearance denials were to prevent the disclosure of evidence as cited in the complaint that involved criminal negligence, death threats, extortion, breach of duty and trust and other wrong-doings" (p 6 of 7). These appear to relate directly to the specific allegations in previous grievances. The Applicant concludes his submissions on SIRC's jurisdiction by stating that "(t)he complaint could not be brought to the FPLRB for the

complainant is no longer without [sic] the 30-day limit and the acts within the complaint did not result in disciplinary measures against the complainant… Given the current political climate on harassment, the complainant believes that SIRC would take harassment that included physical assaults and compromised national security, seriously, as well as the harassment practices had continued from 2007 to 2014 with the clearance denials and the libel of the CSIS spokesperson" (p 7 of 7).

[49] Surprisingly, in my view, the Applicant never addresses section 41(2) of the CSIS Act which, repeatedly, had been raised by SIRC as a bar to exercising jurisdiction: it "shall not investigate a complaint in respect of which the complainant is entitled to seek redress by means of a grievance procedure established pursuant to this Act…" If the matter is one that can be the subject of a grievance, SIRC is prohibited by legislation from investigating it.

[50] CSIS provided its view on the jurisdiction issue by a letter dated April 16, 2018 (CTR, p 17). The fifth complaint is said to be nothing other than an attempt to re-litigate grievances and issues previously considered by SIRC: indeed, Mr. Palmer seeks to re-litigate his dismissal from the Service. The matters raised, including alleged physical assaults in 1997, are all matters for which the Applicant was entitled to seek redress through the grievance procedure or were already raised before SIRC which found that it did not have jurisdiction. That, claims counsel for CSIS, constitutes bad faith on the part of Mr. Palmer and the complaint is vexatious.

[51] SIRC concluded on September 28, 2018 (CTR, pp 3 to 10) that it does not have jurisdiction. It considered that the issues raised were labour relations matters over which SIRC does not have jurisdiction. One reads:

> After conducting its preliminary review, the Committee determined that the allegations raised in your complaint have been raised in previous complaints before the Committee, with the addition of a new element. It should be noted that CSIS management's handling of the assault allegations made at the time, which would have occurred in 1997, were not raised in your grievance procedure with CSIS or before the Public Service Labour Relations Board. Furthermore, the Committee determined that CSIS management's response to workplace conduct is a labour relations matter.
>
> Accordingly these allegations are linked to matters which could have been raised before the CSIS grievance procedure or the Public Service Labour Relations Board. The Committee does not constitute the proper forum to address such matters. Subsection 41(2) of the *CSIS Act* specifically states that "[t]he Review Committee shall not investigate a complaint in respect of which the complainant is entitled to seek redress by means of a grievance procedure established pursuant to this Act or the *Federal Public Sector Labour Relations Act*."

[52] An even fuller explanation is provided by the SIRC Designated Member who conducted the analysis. The review includes the history of the section 41 complaints done in a careful and complete manner. I reproduce the paragraphs which constitute the gist of the analysis:

> I have carefully considered all of the information before the Committee in the conduct of my preliminary review. Since 2004, the Complainant has lodged five separate section 41 complaints with the Committee. On four separate occasions, the Committee has determined that it did not have jurisdiction to investigate those section 41 complaints.
>
> The Complainant is raising the same complaints as in the past, but has added a <u>new element</u> where he suggests he was harassed by CSIS after reporting to CSIS management that he was assaulted by his supervisor. It should be noted that CSIS management's handling of the assault allegations made at the time, which would

> have occurred in 1997, were not raised by the Complainant in his grievance procedure with CSIS or before the PSLRB.
>
> I am of the view that CSIS management's response to workplace conduct is a labour relations matter. Accordingly these allegations are linked to matters which could have been raised before the CSIS grievance procedure or the PSLRB. The Committee does not constitute the proper forum to address such matters. Subsection 41(2) of the *CSIS Act* specifically states that "[t]he Review Committee shall not investigate a complaint in respect of which the complainant is entitled to seek redress by means of a grievance procedure established pursuant to this Act or the *Federal Public Sector Labour Relations Act*."
>
> [My emphasis.]

VI. Arguments and analysis

[53] The Applicant in this case is a litigant in person. That may explain in part why his memorandum of fact and law, prepared before the Supreme Court of Canada judgment in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], was not adjusted to reflect the framework now in place in cases involving administrative law. Instead, Mr. Palmer had extensive speaking notes, which included his memorandum of fact and law, but also many other pages referring to *Vavilov*. The Court allowed him the opportunity to use the speaking notes, in spite of the objection of counsel for the Respondent in order, for the Applicant, to present his case fully.

[54] Unfortunately, Mr. Palmer never addressed the core issue he faces. Section 41 of the *CSIS Act* limits the jurisdiction SIRC was given by legislation. The Applicant had the burden to convince the Court that SIRC's conclusion that it did not have jurisdiction was not reasonable. He failed.

[55] In effect, Mr. Palmer continues to seek to litigate his dismissal from CSIS, close to twenty years later. His memorandum of fact and law, supplemented by extensive speaking notes, is in large part a rehash of grievances and complaints that have been considered over the last 20 years.

[56] Thus, the original factum is largely constituted of facts and allegations he has made through the years, from his allegations that he suffered two "assaults" (a matter that was the subject of an investigation by CSIS after the Applicant complained, but does not appear to have been formally grieved), to his allegations that he denounced practices, uncovered operational policy breaches and offered threat assessments not taken seriously by his employer.

[57] The incidents are presented in the factum over many pages. The fact that the grievance was settled in October 2007 is simply discounted at paragraph 20 by "(a) settlement was reached in October 2007 based on a wrongful denial of a security clearance". That is not accurate. The matter of the Top Secret security clearance was in fact litigated when Mr. Palmer was successful in having the settlement agreement considered anew by the PSLRB, and then by this Court on judicial review of that decision. As seen before, our Court concluded that "(t)here is no evidence in the record before this Court supporting the conclusion that CSIS would have misled the applicant or coerced him into signing the settlement agreement" (2013 FC 374 at para 58). That puts this issue to rest and any dispute would constitute a collateral attack on decisions of SIRC and this Court which have not been challenged. They are final.

[58] Mr. Palmer seems to recognize that his attempt at judicial review is largely governed by the reasonableness standard of review, at least for his arguments which do not allege some form of violation of the principles of procedural fairness. I agree. Whether or not SIRC has jurisdiction to consider the fifth complaint made by Mr. Palmer requires an interpretation of its home statute, an exercise governed by the standard of review of reasonableness (*Vavilov*, at paras 24-25). However, contrary to what was asserted by the Applicant, his burden is not to show that his construction could be reasonable, but rather that the interpretation favoured by SIRC is not reasonable (*Vavilov*, at para 100).

[59] It may be appropriate to note at this stage that the reviewing court must operate on the basis of the principle of judicial restraint and adopt a posture of respect toward the administrative decision maker (*Vavilov*, at paras 13 and 14). As the majority of the Supreme Court puts it at paragraph 13: “Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process.”

[60] The Applicant sought to draw a parallel with *Vavilov* in suggesting that SIRC interpreted his submissions in a purely textual way. If I understand the argument, SIRC was created for the purpose of investigating the activities of CSIS in order to ensure that they are legal, which presumably means, in the view of the Applicant, that SIRC enjoys a limitless jurisdiction. Unfortunately, the Applicant never attempts to explain what is the meaning of “shall not investigate a complaint in respect of which the complainant is entitled to seek redress by means of a grievance procedure”. As seen, SIRC interprets its jurisdiction as not including where the

issue is one that constitutes a labour relations matter where an employee is entitled to seek redress by means of a grievance procedure. In the view of SIRC, "these allegations are linked to matters which could have been raised before the CSIS grievance procedure or the PSLRB"; in other words, it "shall not investigate a complaint in respect of which the complainant is entitled to seek redress by means of a grievance procedure", in the words of section 41(2) of the CSIS Act. It suffices that a complainant be entitled to seek redress. The SIRC jurisdiction is not limitless. Whether or not a grievance is launched is irrelevant. It is the possibility to grieve which counts. In the case at bar, the Applicant did not make a case for a different interpretation. Indeed, the interpretation given to the subsection that limits SIRC's jurisdiction would appear to be eminently reasonable as section 41(2) speaks of a complainant being "entitled to seek redress". On its face, section 41(2) does not confer on SIRC a limitless jurisdiction. If the grievance procedure is available to address a complaint, SIRC is without jurisdiction. The Applicant did not discharge his burden to show that the interpretation was not reasonable.

[61] Mr. Palmer is right that the *Vavilov* Court makes it imperative that the administrative decision maker justify its decision. But it was justified in this case. The reason for concluding that it lacks jurisdiction is explained by SIRC, after having sought the views of the parties. The hallmarks of reasonableness are justification, transparency and intelligibility; is the decision "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99)? Not only is the process followed important, but so is the outcome. If SIRC does not have jurisdiction, it cannot examine the merits of an issue over which it lacks jurisdiction. Nevertheless, Mr. Palmer complains about the fact that SIRC did not address the merits of his case. Once again, he raises the matter of his security clearance, a matter that was

disposed of by the PSLRB and this Court. It also ignores that the supplemental grievance was made the subject of a settlement that was valid and binding.

[62] The issue before this Court is concerned with the finding by SIRC that it does not have jurisdiction because the fifth complaint, like the other four section 41 complaints, is relating to CSIS management's response to workplace conduct which is a labour relations matter which can be made the subject of redress by means of a grievance procedure established either by the CSIS Act or other federal legislation such as the FPSLRA (or other legislation to the same effect, as relevant statutes changed over time). That decision made by SIRC is intelligible, it is transparent and it is justified. Mr. Palmer, under the rubric of failure by the Committee to provide adequate reasons, is actually challenging the fact that SIRC ignored the merits of his complaint. What needs to be understood is that the merits of a case are not reached if the decision maker does not have jurisdiction over the matter. Whether or not the matter brought before the PSLRB by Mr. Palmer ought to have been before the PSLRB who may not have had jurisdiction is now irrelevant. As SIRC found, it does not have jurisdiction if the complainant was entitled to seek redress by means of a grievance procedure under the CSIS Act. Fundamentally, the Applicant had to address why SIRC reached an unreasonable conclusion that it did not have jurisdiction because the matters raised could have been addressed through the grievance process. He did not.

[63] Mr. Palmer sought to make hay out of his argument that SIRC's stated conclusions are unsupported by the facts in evidence. Here, the Applicant is referring to a passage in the SIRC fifth decision where there is reference to the other four complaints. These are nothing other than background as they have all been disposed of in a final way, given that they have not been

challenged successfully. These are not an attempt by SIRC to address again complaints already disposed of. Specifically, the Applicant refers at his paragraphs 111, 112 and 113 of his memorandum of fact and law to his fourth complaint, a complaint which was dismissed: it was not challenged by the Applicant and the SIRC decision therefore stands. It cannot be challenged indirectly as part of a completely different complaint, the fifth one. In effect, the Applicant takes the reference to the fourth complaint in the SIRC decision and tries to argue that the SIRC decision was either wrong or the complaint was not examined on the merits, as if the matter were still alive. It is not.

[64] Moreover, under that same general rubric, the Applicant disputes the actual findings of SIRC concerning the fifth complaint on the basis that SIRC did not compare the facts provided in his previous complaints (memorandum of fact and law, para 115) because, says the Applicant, it should have taken the evidentiary record and the general factual matrix into account. With respect, the Applicant confuses the alleged merit of his complaints with the jurisdiction required for SIRC to entertain the complaints. I repeat: the Applicant never addresses the interpretation to be given to section 41(2) of the CSIS Act which limits SIRC's jurisdiction. If the matter could have been grieved, SIRC says that it lacks jurisdiction. As pointed out before, SIRC cannot reach the merits of a complaint if it does not have jurisdiction.

[65] The confusion continues at paragraphs 116 to 120 of the Applicant's memorandum of fact and law. Here, the Applicant takes issue with SIRC referring to the grievance procedure at CSIS or before the PSLRB. The point made by SIRC in the passages reproduced at paragraphs 51 and 52 of these reasons is that section 41(2) ousts jurisdiction to consider complaints which

could be dealt with by way of a grievance under the CSIS Act or one of the federal statutes relevant at the time to address grievances. This is merely a reference to the legislation.

[66] SIRC in its reasons concerning the fifth complaint referred to the PSLRB. The Applicant notes that the PSLRB was not in existence at the time. It appears that it was the Public Sector Staff Relations Board, the predecessor of the PSLRB, which existed. If this constitutes a shortcoming, it is not sufficient to set aside a decision, as "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov*, at para 100). The Applicant's objection is no more than superficial and peripheral. The point of the matter was that an issue that can be grieved is not to be dealt with by SIRC.

[67] The Applicant sought to fault SIRC for not having considered his complaint, made specifically with respect to section 41 of the CSIS Act, to include a complaint made in accordance with section 42. The Applicant speaks of a "cursory decision" because his alleged section 42 complaint was not addressed. This argument is without any merit. The Applicant had to concede at the hearing of his application that there is no mention of section 42 in the complaint made using the form for a section 41 complaint. Indeed, the record shows that Mr. Palmer knew about the existence of Form 42 for complaints pertaining to section 42 of the CSIS Act as he made such complaint in July 2015 (CTR, p 147). This constituted a fourth complaint (together with another one under section 41) which was dismissed in March 2016. Mr. Palmer was terminated for poor performance. Section 42 grants SIRC the authority to examine a denial

of security clearance only in the circumstances described at s 42(1) of the CSIS Act. Mr. Palmer's situation does not meet any of the circumstances found in that subsection according to SIRC. Not only was the issue disposed of in the SIRC decision concerning the fourth complaint, but the suggestion made by the Applicant that his complaint under section 42 was rolled into his fifth section 41 complaint does not have an air of reality.

[68] The memorandum of fact and law spends paragraph after paragraph arguing that SIRC rendered a "cursory decision" because it did not deal with the merits of the case. It even alleges at paragraph 126 of the memorandum of fact and law that the "service willfully [sic] succeeded to obstruct, pervert, and defeat the course of justice by three wrongful denials of the Applicant's Top Secret security clearance. The security clearance denials were to prevent the disclosure of evidence as cited in the complaint that involved criminal negligence, death threats, extortion, breach of duty and trust and other wrongdoings". These are remarkable utterances unsupported by any evidence. In fact, in spite of the matter of the settlement agreement having been litigated, with the conclusion that the settlement of the grievance concerning the dismissal was valid and binding, the Applicant raises once again that the security clearance process was abused by CSIS, "thereby controlling the disclosure of evidence and denying the Applicant a fair hearing before the PSLRB, as well as forcing an unfair settlement" (memorandum of fact and law, para 130). There is no merit to the submission.

[69] Mr. Palmer apparently never accepted the decision taken by SIRC that it did not have jurisdiction, because a complainant, who is entitled to seek redress by means of a grievance procedure in accordance with the CSIS Act, is prevented from raising the issue in a complaint

before SIRC, by operation of section 41(2). This is made particularly obvious as the Applicant writes at paragraph 131 of his memorandum of fact and law: “The cursory decision by the SIRC decision-maker did not consider that the Applicant’s grievance is no longer before any tribunal or court, as such the SIRC can and ought to exercise its power and duties and oversight in this matter.” Such is not the issue. Put simply, Mr. Palmer had to show how SIRC is unreasonable in finding that what he raised is in the nature of a matter that could have been grieved, whether or not it was grieved. As put bluntly by SIRC, “CSIS management’s response to workplace conduct is a labour relations matter” (see para 52 of these reasons for judgment). The Applicant failed to argue how that view is unreasonable.

[70] The same themes were present in the new submissions made by Mr. Palmer during the hearing of this case.

[71] Mr. Palmer seeks to revisit the history of this case and issues that have been decided. For instance, he goes back at length on the decision of this Court finding that the PSLRB’s conclusion that the settlement agreement was valid and binding. He alludes to paragraph 58 of the decision, where the Court concludes that there is no evidence supporting the conclusion that CSIS misled the Applicant or coerced him in signing the settlement agreement. Without any evidence in support, he claims that a senior official within CSIS would have written on the first page of the briefing note of May 2007 recommending that a Top Secret security clearance not be granted that there were no facts to support such denial. Surely, says the Applicant, that shows that he was misled. The only problem with this proposition, and it is a significant one, is that the evidence is completely missing.

[72] Similarly, the Applicant makes allegations that the said denial of the security clearance in 2007 was the result of a series of fraudulent actions to make it look like a denial when the true intention was to prevent him from accessing information for the hearing and to coerce him into a settlement. That is the very matter that was litigated and decided against the Applicant. There was no evidence of a conspiracy then, and there is none now. Moreover, as a matter of fact, Mr. Palmer's counsel was granted a Top Secret clearance and he was able to review the relevant documents before a settlement agreement was reached. But the Applicant goes even further in accusing CSIS of a ruse signed off by the Director of CSIS to be used in committing fraud. This is inappropriate.

[73] The Applicant asserts that SIRC found that the PSLRB had jurisdiction to review the matters raised in his various allegations. I have reviewed the various complaints raised by Mr. Palmer through the years. I could not find any such finding. At best, SIRC concluded that the first complaint was outside its jurisdiction because Mr. Palmer was entitled to seek redress by means of the grievance procedure under the CSIS Act, while the conclusion with respect to the fifth complaint merely refers to the words from section 41(2): SIRC does not have jurisdiction if the allegations could have been raised through the CSIS grievance procedure or the PSLRB process. It is not SIRC who confirmed that the PSLRB could have jurisdiction in the matter, but rather the Applicant who brought his grievance before the PSLRB before he settled the grievance with the assistance of the adjudicator. Indeed, he is the one who went back to the PSLRB to re-open the settlement agreement and took the matter on judicial review before this Court. If, as he seems to contend now, the PSLRB's jurisdiction (or other bodies over the years) did not extend to dismissals by reason of poor performance, that does not change the fact that the availability of

the CSIS grievance procedure suffices to bar SIRC from asserting jurisdiction. Mr. Palmer does not demonstrate that the SIRC finding is unreasonable.

[74] The fifth section 41 complaint concerns, when read in its entirety, events which the Applicant has raised over the years in one fashion or another in his attempt to dispute his dismissal from CSIS. Here again, in his fifth complaint, he asserts that he has suffered retribution for having made some "disclosures". The first few lines of the fifth complaint set the stage:

> Specific Allegations against the Canadian Security Intelligence Service (CSIS (Canadian Security Intelligence Service)):
>
> The complaint is in regards to two physical assaults by a CSIS member and the retributions towards the complainant's recounting of them started in 1997 and lasted until 2014. The complaints only caused further retributions and psychological harassment to the complainant that led to his wrongful dismissal, two wrongful denials of his security clearance and defamatory libel by a CSIS spokesperson. CSIS has harassment policy that includes, that in includes [sic] physical assault and abuses of power. For the most part, the actions detailed in this letter fall under the criteria of abuses of power as described in CSIS harassment policy. Though physical harassment and assault is more easily understood, the definition of psychological harassment is less well known.
>
> (CTR, p 118.)

The following pages expand by referring to events which had largely been raised in previous complaints.

[75] The Applicant's task was to convince the Court that the SIRC's decision was not reasonable. The new element in the Applicant's narrative, as noted by SIRC, was the assaults he claimed he suffered in the workplace following "disclosures". These assaults were in fact disclosed to CSIS management and action was taken in the form of a seminar on harassment and

an investigation conducted about the incidents. This episode is directly addressed in the SIRC decision under review. It is noted that the Applicant did not raise the matter in a grievance procedure either with CSIS or the PSLRB (or the PSLRB's predecessor). That, says SIRC, could have been done, and was not. I repeat: section 41(2) was interpreted by SIRC as denying its jurisdiction if a complainant is entitled to seek redress by means of a grievance procedure. That conclusion is deserving of deference as SIRC interprets its home statute.

[76] Mr. Palmer, neither in his submissions to SIRC, on whether or not it had jurisdiction, nor before this Court on judicial review, offered views on why the SIRC decision is not reasonable. Instead of an argument, he suggests in his supplementary speaking notes delivered at the hearing of the case that his complaints were never litigated on their merits, which, he asserts, makes his previous complaints under section 41 wrongly decided. At its highest, the argument is that a reasonable person would believe that, eventually, SIRC would see the seriousness of the complaints and see that it has jurisdiction. Insistence does not make an argument any better. That may be more of a "Hail Mary pass" than a cogent legal argument.

[77] What continued to be dearly missing is the demonstration by the Applicant that SIRC's decision was unreasonable. It is not so much that SIRC was mistaken, as the Applicant seems to contend, to consider through the years the complaints as labour issues, but rather that the Applicant continued to raise for all intents and purposes the same issue in the hope that SIRC would relent and accept jurisdiction in spite of section 41(2). SIRC sought the views of the parties on jurisdiction before considering further the fifth complaint: Mr. Palmer did not offer countervailing views before SIRC and before this Court.

[78] One final word on the recurring theme of the denied security clearance. That very matter was directly addressed by the PSLRB and our Court some ten years ago. Collateral attacks on decisions are not permitted (*Wilson v R*, [1983] 2 SCR 594 at pp 599 et al) and the further arguments on the issue are not to be entertained. The finality principle requires that the issue not be addressed further.

[79] In summary, SIRC found it did not have jurisdiction to entertain the fifth complaint made by Mr. Palmer because of the bar that section 41(2) of the CSIS Act constitutes. The matter raised by Mr. Palmer could have been addressed through the grievance process at CSIS, or before the administrative tribunals if the jurisdiction exists. Either way, a litigant has subsequently a recourse before this Court on judicial review. Mr. Palmer's burden before the reviewing court was to convince that the decision to conclude that jurisdiction does not exist was unreasonable. He was not successful. In fact, he never addressed what was the fundamental problem he faced.

VII. Issue Estoppel

[80] It is further argued by the Respondent that, to the extent the Applicant considers again the matters he already raised in his four previous complaints, these should not be considered again by this Court. That is because the doctrine of issue estoppel prevents such further consideration. It is not strictly required to address this argument given the conclusion already reached. Nevertheless, I propose the following observations.

[81] In *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*], the Supreme Court of Canada underscored the need for finality in litigation:

> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> [My emphasis.]

Once an issue has been decided between parties, it should not be made the subject of further litigation. The *Danyluk* court cited with approval this definition of "issue estoppel":

> 24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.] [Emphasis in original.]
>
> This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.),

> speaking for the majority in *Angle, supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> [My emphasis.]

SIRC concluded that, given the facts raised in the various complaints, it did not have jurisdiction in view of the strict prohibition of section 41(2) ("shall not investigate a complaint"). Should these matters be raised again subsequently?

[82] *Danyluk* provides the conditions required for the doctrine of issue estoppel to find application:

> 25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

To the extent Mr. Palmer raises in his fifth complaint issues which had been decided previously without having been successfully challenged, the doctrine of issue estoppel prevents the re-

litigation as the three pre-conditions have been met: same question, decision is final and the same parties are involved.

[83] Here, the same question was raised again in the fifth complaint: does SIRC have jurisdiction, or does section 41(2) constitute a bar to exercising jurisdiction because the whole saga is a matter of labour relations which could have been addressed through a grievance process? There is no doubt that the parties are, and have been, the same. The various decisions about the four early complaints made by SIRC are also final. They could have been challenged on judicial review, but the four previous complaints have not been, thus making those SIRC decisions final. Can the Applicant have another bite at the cherry? The answer should be "no" for the matters already raised and decided.

[84] *Danyluk* adds a second step to the analysis in that there exists a discretion as to whether issue estoppel ought to be applied in the circumstances. I have no doubt that SIRC has the capacity to exercise adjudicative authority. Indeed the authority to adjudicate is given to SIRC in the CSIS Act and it did adjudicate in respect of the four previous complaints. In the case at bar, SIRC referred specifically to the previous complaints and found that the fifth complaint was a rehash, to a large extent, of the previous complaints where SIRC found it was lacking jurisdiction. There is no indication that this authority to adjudicate was exercised in a manner that could attract this Court's discretion to refuse to consider the application of estoppel. No argument was offered by the Applicant and I could not find in this case circumstances that would require this Court's intervention, such as those described at paragraph 52 of *Toronto (City) v C.U.P.E., Local 79,* 2003 SCC 63, [2003] 3 SCR 77 [*C.U.P.E.*]:

> 52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.
>
> [My emphasis.]

There is no such thing in this case.

[85] The Supreme Court in *Danyluk* referred with approval to the House of Lords where Lord Keith of Kinkel wrote in *Arnold v National Westminster Bank plc*, [1991] 3 All ER 41, at p 50: "(o)ne of the purposes of estoppel being to work justice between the parties, it is open to courts to recognize that in special circumstances inflexible application of it may have the opposite result." The Court in *Danyluk* identified a number of factors that should be considered in the exercise of discretion. The most important of these factors is the potential injustice that may result from the application of the issue estoppel doctrine.

[86] None of these special circumstances are present in this case as far as where the four previous complaints find their way in the fifth one. More specifically, I cannot see any potential injustice that could have been suffered in view of the unambiguous language in s 41(2). It follows that the doctrine of issue estoppel precludes any further consideration of what constitutes

each of the prior four complaints found by SIRC to be outside its jurisdiction conferred by sections 41 and 42 of the CSIS Act. At any rate, the same outcome would have been reached through the abuse of process doctrine if one of the issue estoppel's three pre-conditions were not met. As the Court in *C.U.P.E.* wrote at paragraph 37, "(a)s Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice". Mr. Palmer cannot raise again before SIRC matters that have been found to prevent having jurisdiction over the matters raised. Those decisions are final, the same jurisdictional question has been dealt with and the decisions involve the same parties.

[87] However, with respect to the assault suffered allegedly by the Applicant in 1997, SIRC acknowledges that this constitutes a "new" issue in that it was not raised in the previous four complaints. Thus, estoppel would extend to the conclusions (material facts and conclusions of law or mixed fact and law) which were determined in earlier decisions on complaints made by Mr. Palmer. But estoppel cannot apply to that which has not been raised in previous complaints.

[88] As noted by SIRC in its decision concerning the fifth complaint, the Applicant raised the same complaints as in the past but for an added element "where he suggests that he was harassed by CSIS after reporting to CSIS management that he was assaulted by a supervisor" (para 6, at p 10/350 of the CTR). That, concludes SIRC, could have been the subject of redress by means of a grievance procedure: as such, SIRC is prevented from dealing with the complaint.

[89] The alleged assault issue was addressed at the time as a labour relations issue that could have been grieved, but was not. Irrespective of estoppel, Mr. Palmer had the burden to show that SIRC's decision to conclude that it was barred from investigating that specific complaint about the alleged assault issue was unreasonable. He did not discharge his burden.

[90] The basis on which SIRC found it did not have jurisdiction is that, as with other complaints, section 41(2) prevents considering further the "new issue" because the "new issue" constitutes a complaint in respect of which the Applicant was entitled to seek redress by means of a grievance process. Accordingly, the Court would not dispose of that "new issue" on the basis of estoppel, but rather on the basis that the Applicant has not discharged his burden to show that the SIRC conclusion, that it does not have jurisdiction in view of section 41(2), was unreasonable.

VIII. Conclusion

[91] Mr. Palmer has been unsuccessful in his attempt to show that the SIRC decision with respect to his fifth complaint was not reasonable. His previous four complaints had been found to be such that section 41(2) of the CSIS Act prevented SIRC from having jurisdiction. Raising the same matters once again did not assist the Applicant. As for the "new" matter, SIRC found that it could have been dealt with through the grievance process. That has not been shown by the Applicant to be a decision that is unreasonable. The judicial review application must therefore be dismissed.

[92] When canvassed, the parties suggested that costs in the range of $1,000 to 2,000, as a lump sum, would be appropriate. The Court orders that costs in the amount of $2,000, inclusive of disbursements and taxes, be in favour of the Respondent.

JUDGMENT in T-1879-18

THIS COURT'S JUDGMENT is:

1. The judicial review application is dismissed.

2. Costs in the amount of $2,000, inclusive of disbursements and taxes, are ordered in favour of the Respondent.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1879-18
STYLE OF CAUSE:	DANNY PALMER v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 16, 2022
JUDGMENT AND REASONS:	ROY J.
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APPEARANCES:

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Émilie Tremblay	FOR THE RESPONDENT

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