Federal Court Cour fédérale

Date: 20250624

Docket: T-427-23

Citation: 2025 FC 1137

Ottawa, Ontario, June 24, 2025

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

THE CANADIAN HUMAN RIGHTS COMMISSION

Respondent

and

NATIONAL SECURITY AND INTELLIGENCE REVIEW AGENCY

Intervenor

JUDGMENT AND REASONS

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I. Nature of the matter and summary

[1] This is an application by the Attorney General of Canada [AG Canada] brought on behalf of four federal government departments, namely Immigration, Refugees and Citizenship Canada [IRCC], Canada Border Services Agency [CBSA], the Canadian Security Intelligence Service [CSIS], and Public Safety Canada [PS], against the National Security and Intelligence Review Agency [NSIRA].

[2] The Applicant requests judicial review of an Investigative Report prepared by NSIRA dated November 25, 2022 [Investigative Report]. The Investigative Report is the Decision under review: these terms are used interchangeably herein.

[3] The Investigative Report concerns human rights complaints allegations made by 100-plus Iranian men [Complainants] to the Canadian Human Rights Commission [Commission] in 2018 who allege discriminatory delay in security screening and processing of their immigration and citizenship requests, contrary to s 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

[4] At its core, this application relates directly to the "security of Canada" and Canada's ability to screen and process foreign nationals in relation to immigration and citizenship.

[5] The four departments of the Government of Canada that bring this application are legally responsible for protecting the security of Canada in relation to the vetting of foreign nationals

attempting to obtain immigration and citizenship rights. Henceforth, I refer to these departments as the "GoC."

[6] Of these, in my respectful view, the role and responsibility of CSIS is of central and critical importance in terms of threats to the security of Canada. Notably only CSIS has a direct mandate from Parliament to investigate, assess, take measures to reduce threats and advise other departments with respect to the "security of Canada" (*Canadian Security Intelligence Service Act*, RSC 1985, c C-23, ss 12-16 [*CSIS Act*]).

[7] During the Commission's investigation of these allegations, each of these four GoC departments informed the Commission the allegations raised issues related to the "security of Canada." This notice triggered a decision by the Commission to request that NSIRA investigate the complaints and send the Commission a report. NSIRA completed its report and sent a redacted report to the Commission.

[8] AG Canada alleges that NSIRA failed to provide the GoC with procedural fairness in its investigation and resulting Investigative Report.

[9] After reviewing the material filed and hearing from counsel, I respectfully conclude this application must be granted. I conclude NSIRA failed to afford the GoC departments their statutory right to make "representations" to NSIRA, legislated by s 25(2) of the *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2 [*NSIRA Act*]. In my respectful view, NSIRA also breached procedural fairness by failing to meet the legitimate expectations

and participatory rights of the GoC departments set out in the two-phase investigative framework agreed upon at the outset of NSIRA's investigation, contrary to jurisprudence. NSIRA also breached procedural fairness in failing to provide the GoC with timely advice regarding procedures for making representations and presenting evidence required by Rule 7.20 of NSIRA's *Rules of Procedure*. I also find the Investigative Report is fatally flawed due the tribunal's failure to comply with its duty of thoroughness in its capacity as a proxy for a Commission human rights investigator, contrary to jurisprudence.

[10] Therefore, NSIRA's Investigative Report will be set aside and the matter remanded for redetermination.

II. Background

A. *The parties*

[11] The four GoC departments bringing this application are:

1. Immigration, Refugees and Citizenship Canada [IRCC] screens and processes immigration and citizenship applications by foreign nationals to ensure they are "not inadmissible," including inadmissibility on national security grounds, terrorism, subversion, espionage, danger to the security of Canada, crimes against humanity and war crimes, criminality including serious criminality and organized criminality, foreign and Canadian sanctions (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 11, 34-40 [*IRPA*]);

2. The Canada Border Services Agency [CBSA] provides recommendations to IRCC concerning inadmissibility and conducts criminal and security screenings, and enforcement of Canadian law in immigration matters (*Canada Border Services Agency Act*, SC 2005, c 38, s 5 [*CBSA Act*]);

3. The Canadian Security Intelligence Service [CSIS] is mandated by Parliament to investigate and reduce threats to the "security of Canada" and provides advice to IRCC, CBSA and across the Government of Canada regarding "threats to the security of Canada" including espionage, terrorism, criminal conduct, "foreign influenced activities," and conducts security screening investigations. The role and responsibility of CSIS is of central and critical importance in terms of threats to the security of Canada. Notably CSIS has a direct and clear mandate from Parliament in relation to the security of Canada (*CSIS Act*, ss 2, 12-16); and

4. Public Safety Canada [PS] consults with CSIS, CBSA, and IRCC and provides advice to the Minister of Public Safety and Emergency Preparedness on national security, criminal and other matters. Notably both CSIS and CBSA (and the Royal Canadian Mounted Police [RCMP]) are responsible to, subject to the direction of, and/or report to Parliament through the Minister of PS (*CSIS Act*, ss 2, 6-7; CBSA Act, s 2, 5-6. 12; *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 2, 5 [*RCMP Act*]).

[12] The jurisdiction of these four GoC departments overlap in relation to the security of Canada. However, in the Court's view, the role and responsibility of CSIS is of central and critical importance in terms of threats to the security of Canada.

[13] All four GoC departments are represented by the AG Canada.

[14] The Commission is named as the Respondent but takes no position on the merits of the procedural fairness issue. Properly in my view, the Commission agrees it is precluded from taking a position on the merits because to do so could be seen as "bootstrapping" its position in respect of another related proceeding (T-1351-24, which my colleague Justice Blackhawk ordered held in abeyance pending judgment in the case at bar). See also jurisprudence such as *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paragraph 64.

[15] The Commission asks the Court for guidance concerning ss 45 and 46 of the *CHRA* and the roles of both the Commission and NSIRA in terms of investigative reports such as the one under review in this case. Commission counsel provided useful information confirming in written and oral submissions that Commission staff's practice regarding other investigative reports is to provide them to the parties for response, before sending them to the Commission for decision.

[16] NSIRA is an independent agency empowered, among other things and when requested by the Commission, to investigate and provide an investigative report to the Commission regarding human rights complaints that in the view of a GoC party raise considerations "relating to the security of Canada." All four departments informed the Commission that the allegations in this case relate "to the security of Canada," a core feature grounding this application. Once tasked by the Commission to investigate and report, NSIRA became a proxy for Commission staff investigators who would normally investigate the complaint, prepare a report, share it with the parties for comment, and sent the report and comments to the Commission for decision.

[17] NSIRA is not a party because its Investigative Report is the subject of this application for judicial review. Normally NSIRA's interests would be represented by AG Canada. That was not possible because AG Canada represents the GoC departments who allege NSIRA denied them procedural fairness. However, NSIRA was granted intervenor status by Associate Judge John C. Cotter, whose Order limited NSIRA's participation to providing information about NSIRA's mission, its legislative framework, the procedure followed in its investigation, and the

evidentiary record before it. Counsel for NSIRA was present at the judicial review hearing and answered questions.

B. *Initial complaints and referral to NSIRA*

[18] In 2018, human rights complaints were filed by over 100 Iranian men alleging discrimination in processing their Canadian visa or citizenship applications. The essence of these complaints is that the GoC discriminated against them on the basis of their national or ethnic origin correlated to their age and sex.

[19] They allege — and it is not generally disputed — that processing their temporary and permanent resident visas and citizenship applications took significantly longer than for foreign nationals of other countries.

[20] All four GoC departments deny they engaged in discriminatory practices in screening immigration or citizenship applications from these Iranian men. The GoC departments say the necessary additional time was justified due to the need for more extensive vetting and security screenings of Iranian men given the (undisputed) facts that: some Iranian men are involved in Iran's unlawful activities as a state sponsor of international terrorism, Iran imposes compulsory military service (conscriptions) on Iranian men between the ages of 22 and 60, and Iranian men serve in Iran's Islamic Revolutionary Guard Corps — a group that has carried out human rights abuses and was designated a terrorist entity under the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] in 2024 because it has "acted in association with listed terrorist entities" in

Canada and elsewhere (*Regulations Amending the Regulations Establishing a List of Entities*, SOR/2024-140 (June 18, 2024) C Gaz II, vol 158, no 14).

[21] According to the GoC, four Government of Canada departments with the benefit of decades of experience on these issues, Iran is one of the "most complex" environments in the world from which an immigration or citizenship application may originate. Iran is also one of the most difficult nations in the world in respect of which to conduct national security vetting and verifications. The GoC says these factors relate to significant security concerns, serious concerns about fraud and authenticity of documents, the lack of diplomatic relationship between Canada and Iran, and the unique country conditions of Iran and not their ethnic or national origin.

[22] NSIRA's was asked to investigate and report on the GoC's vetting and processing practices for such Iranian men and whether they were justified in the national security context.

[23] It is not disputed NSIRA's investigation had to be carried out in accordance with principles of procedural fairness, namely, to provide the GoC departments with a full and fair opportunity to know and answer any concerns or allegations NSIRA might make against the GoC. These principles derive from jurisprudence (case law) and relevant statutes and rules.

[24] In the normal course of a human rights complaint, Commission staff investigators investigate complaints and prepare investigative reports which, together with responses from the parties, are sent to the Commission for decision. After receipt of such investigative reports and responses, the Commission has a general screening function and may decide either to dismiss the

complaints or refer them to a panel of the Canadian Human Rights Tribunal [Tribunal] for determination on the merits per s 44(3) of the *CHRA*.

[25] In this case, the same basic framework applies: the Commission requested a report, after receipt of which and related responses it had a screening function to perform per section 46(2) of the *CHRA*. However, use of normal Commission staff investigators was not possible because matters related to the "security of Canada" involve highly confidential information (protected, classified, secret etc.) that may not be shared with the Commission, the Tribunal, their staff or with members of the public. Secrecy is required by prohibitions in 52(1) of the *NSIRA Act* itself and in the *Foreign Interference and Security of Information Act*, RSC 1985, c O-5 [*Security of Information Act*].

[26] Recognizing the need to protect national security information in human rights allegations to the Commission, Parliament enacted that on notice to the Commission from the Director of CSIS (or IRCC, CBSA and PS) that a human rights complaint relates to the "security of Canada," the Commission may either ask NSIRA to investigate and provide a report, or the Commission may decide dismiss the complaint per s 45(2) of the *CHRA*.

[27] In this case, all four GoC departments notified the Commission the "practices to which this complaint relates, namely the referral and processing of applications for security screening and advice … would involve considerations relating to the security of Canada."

[28] As noted, receipt of these notices gave rise to an obligation on the Commission to either dismiss the complaints, or refer them to NSIRA to investigate, per s 45(2) of the *CHRA*:

Complaint involving security considerations	**Plainte mettant en cause la sécurité**
(2) When, at any stage after the filing of a complaint and before the commencement of a hearing before a member or panel in respect of the complaint, the Commission receives written notice from a minister of the Crown that the practice to which the complaint relates was based on considerations relating to the security of Canada, the Commission may	**(2)** Si, à toute étape entre le dépôt d'une plainte et le début d'une audience à ce sujet devant un membre instructeur, la Commission reçoit un avis écrit d'un ministre fédéral l'informant que les actes qui font l'objet de la plainte mettent en cause la sécurité du Canada, elle peut :
(a) dismiss the complaint; or	**a)** soit rejeter la plainte;
(b) refer the matter to the Review Agency.	**b)** soit transmettre l'affaire à l'Office de surveillance.
[Emphasis added]	[Je souligne]

[29] The underlying rationale for replacing Commission staff as investigators with NSIRA is that NSIRA members and staff have the necessary security clearances to receive and consider confidential (e.g. protected, classified, top secret, etc.) oral and documentary evidence relating to the security of Canada from the four lead or operational GoC departments bringing this application. As noted, these necessary security clearances are not held by the Commission, its staff or Tribunal members.

[30] After receipt of the notices from the GoC departments, the Commission referred the Complaints to NSIRA for investigation and preparation of an Investigative Report for the Commission's subsequent action. In this way, NSIRA became a proxy for Commission staff

investigators charged with preparing an investigative report, obtaining responses from the parties, and forwarding them for consideration by the Commission.

[31] Notably, this is the first time the Commission has referred a matter "relating to the security of Canada" to NSIRA for an Investigative Report. It appears one such referral (see Procedural Ruling at para 42) was made to the Security Intelligence Review Committee (NSIRA's predecessor), but that decision was not further relied on.

[32] Under s 46(1) of the *CHRA*, NSIRA's Investigative Report was due within 90 days of the referral. However, NSIRA requested and was granted 18 months to complete its report. NSIRA completed an unredacted Investigative Report on November 25, 2022. After redactions it was sent to the Commission on March 9, 2023.

[33] AG Canada submits NSIRA breached its duty of procedural fairness to the GoC departments resulting in a fatally flawed Investigative Report. I agree. Therefore, this application will be granted and the matter remanded to NSIRA for redetermination.

III. Issue and Standard of Review

[34] The only issue in this case is whether the Investigative Report results from a procedurally unfair process. I find this is the case.

[35] I am placing the law at the beginning to ground these Reasons, against which I will analyze the facts and circumstances.

[36] Issues of procedural fairness are reviewed on the correctness standard, which means tribunal conduct in terms of its procedural fairness stands or falls on whether the applicant knew the case to meet and had a full and fair chance to respond: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at paragraph 43. And see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 23 [*Vavilov*]:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[37] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50 [*Dunsmuir*], the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.
>
> [Emphasis added]

IV. Content of procedural fairness

A. *Jurisprudence*

[38] Most central to procedural fairness is that the parties know the case to meet, and have a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56 per Rennie JA [*Canadian Pacific*]:

> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice – was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.
>
> [Emphasis added]

[39] A seminal case on procedural fairness is the Supreme Court of Canada's judgment in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. *Baker* instructs that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Baker* at para 21, citing *Knight v Indian Head School Division No 19*, 1990 CanLII 138 (SCC), [1990] 1 SCR 653, at p 682).

[40] *Baker* outlines five non-exhaustive factors – the "*Baker* factors" – that courts should consider in deciding the nature and extent of procedural fairness in a given set of circumstances (at paras 2228):

> 1. The nature of the decision being made and the process followed in making it;
>
> 2. The role of the decision within the statutory scheme and other surrounding indications in the statute;
>
> 3. The importance of the decision to the individual or individuals affected;
>
> 4. The legitimate expectations of the person challenging the decision;
>
> 5. The choice of procedure by the agency, particularly where statute allows it to choose its own procedures or where it has expertise in determining what procedures are appropriate in the circumstances, and institutional constraints.

[41] *Baker* also confirms at paragraphs 30-34 that parties before decision-makers may have participatory rights. The Supreme Court instructs that parties whose interests are affected by a decision in a fundamental way, must have a meaningful opportunity to present evidence and have it fully and fairly considered. It was not disputed and I find in the context of this case that the GoC parties had the participatory right to a meaningful opportunity to present evidence and argument and have them fully and fairly considered. I note an oral hearing is not always required as a participatory right, which may be satisfied by written submissions (*Baker* at paras 32-33):

> 32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah*, *supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.
>
> 33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different

> ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.
>
> [Emphasis added]

B. *Statutory and procedural requirements of NSIRA's investigations*

[42] The *NSIRA Act* has provisions that apply when NSIRA is asked by the Commission to investigate and report into matters relating to the security of Canada. Most relevant in this case is s 25(2) of the *NSIRA Act* which legislates that the Director of CSIS "***must*** be given an opportunity to make representations" to NSIRA, "to present evidence and to be heard personally or by counsel" [emphasis mine]:

Right to make representations	**Droit de présenter des observations**
(2) In the course of an investigation of a complaint, the complainant, the deputy head concerned and, if the complaint is made under subsection 18(3), the Director must be given an opportunity to make representations to the Review Agency, to present evidence and to be heard personally or by counsel, but no one is entitled as of right to be present during, to have access to or to comment on representations made to the Agency by any other person.	**(2)** Au cours d'une enquête relative à une plainte, le plaignant, l'administrateur général concerné et, s'il s'agit d'une plainte présentée au titre du paragraphe 18(3), le directeur doivent avoir la possibilité de présenter des observations et des éléments de preuve à l'Office de surveillance ainsi que d'être entendus en personne ou par l'intermédiaire d'un avocat; toutefois, nul n'a le droit absolu d'être présent lorsqu'une autre personne présente des observations à l'Office de surveillance, ni de recevoir communication de ces observations ou de faire des commentaires à leur sujet.

[Emphasis added] [Je souligne]

[43] Notably, CBSA, IRCC and PS have the same rights as the Director of CSIS although the Director of CSIS is the only entity specifically identified by Parliament.

[44] Notably, Rule 7.20 of NSIRA's *Rules of Procedure of the National Security and Intelligence Review Agency* [*NSIRA Rules*] also contains mandatory procedural language that reinforces s 25(2)'s duty to permit the GoC departments to make "representations" to it. Rule 7.20 demands that NSIRA "shall" (i.e., must) notify the GoC parties (CSIS, IRCC, CBSA and PS), of (1) the opportunity to make representations under subsection 25(2) of the *NSIRA Act* and (2) of the procedures for the making of representations and presenting evidence. I refer to this as NSIRA's obligation of procedural clarity. It is not disputed that Rule 7.20 applies to this matter:

Right to make representations	**Droit de présenter des observations**
7.20 The Review Agency shall notify the complainant, the Minister referred to in subsection 45(2) of the *Canadian Human Rights Act* and the Director of their opportunity to make representations under subsection 25(2) of the Act, of the time limits the Review Agency has established within which those representations must be made and of the procedures for the making of representations and presenting evidence.	**7.20** L'Office de surveillance doit informer le plaignant, le ministre mentionné au paragraphe 45(2) de la *Loi canadienne sur les droits de la personne* et le directeur de la possibilité de présenter des observations en vertu du paragraphe 25(2) de la Loi, des délais impartis que l'Office de surveillance a établi dans lesquels ces observations doivent être faites et des procédures à suivre pour présenter des observations et des éléments de preuve.
[Emphasis added]	[Je souligne]

[45] I add that even without Rule 7.20 and s 25(2), in my respectful view, the GoC parties are entitled to the participatory rights discussed at paragraphs 30 to 34 of *Baker*, quoted above, because they are parties whose interests are affected by NSIRA's Decision/Investigative Report in a fundamental way; therefore they must have a meaningful opportunity to present evidence and have it fully and fairly considered.

[46] I also find t hat NSIRA may not dispense with its legal obligations under s 25(2) of its enabling statute (the *NSIRA Act*) to give the GoC parties the opportunity to make "representations" to it. Nor in my view may NSIRA dispense with the GoC's participatory rights set out in *Baker*. No one submitted otherwise.

[47] It is also not disputed the *NSIRA Act* and *NSIRA Rules* supplement procedural fairness requirements established by jurisprudence, including the doctrines of legitimate expectations, participatory rights, and the duty of thoroughness discussed later.

C. *The "Baker factors" re duty of procedural fairness owed by NSIRA to GoC including legitimate expectations and participatory rights*

[48] I turn now to the five "*Baker* factors" mentioned above. As noted, the duty of procedural fairness is variable and context specific and is to be considered and assessed with regard to the non-exhaustive "*Baker* factors" (*Baker* at paras 21-28). No one suggested NSIRA owed no duty of procedural fairness.

[49] I will consider each of the five *Baker* factors and assess where NSIRA's duty of fairness lies in the circumstances of this case. As will be seen, I have concluded NSIRA owed the GoC departments a high degree of procedural fairness in its investigation and Investigative Report.

[50] I will also discuss the doctrines of legitimate expectation, and participatory rights. Also discussed will be the duty of thoroughness which lies on investigators of human rights complaints, a role to be performed by NSIRA in this case.

(1) Nature of the decision

[51] This is the first of the five non-exhaustive so-called *Baker* factors. AG Canada submits NSIRA's "investigation is not synonymous with a trial and this factor taken alone would point to a lower content of procedural fairness required." I note the AGC's submissions comport with the Federal Court's judgment in *Canada (Citizenship and Immigration) v Telbani*, 2012 FC 474 [per Noël J] at paragraphs 138-42, which outlined the investigative role of NSIRA's predecessor. However and with respect I find that case is not relevant and distinguishable from the factual and legal matrices at hand: it concerns an individual's complaint against CSIS concerning entry into his home without a warrant.

[52] The Commission submits NSIRA's investigation is "inquisitorial rather than adversarial, in which the decision maker's findings are findings of facts and statements of opinions that carry no legal consequences, that are not enforceable and that do not bind courts considering the same subject matter attract lower content of procedural fairness."

[53] NSIRA points to Rule 12.013 of the *NSIRA Rules*, which states hearings before NSIRA are investigative in nature.

[54] I am not persuaded these submissions adequately address the nature of this matter. In my view, the nature of NSIRA's investigation and report is to delve into, assess and report on matters of very significant national importance, namely the GoC departments' heavy responsibility in screening and vetting foreign nationals seeking Canadian immigration status and citizenship in the national security context. This is a most critical point in considering the nature of this decision.

[55] This case is not a routine matter such as denial of a security clearance to a government worker, or a challenge to an official action or omission. Instead, in my very respectful opinion, the matter at hand is of central importance — it involves in a very real sense the "security of Canada."

[56] More particularly, the nature of the Decision (the investigation and report) is the heavy responsibility processing and vetting immigrants seeking visas or Canadian citizenship. This vetting is directed at possible issues of national security, terrorism, serious criminality, human rights abuses, war crimes and serious matters in relation to a fairly large number of foreign nationals (Iranian men), to ensure they are "not inadmissible" to Canada. IRCC, CSIS and the other GoC parties are legally responsible for ensuring these foreign nationals will not endanger or impair the "security of Canada" in these respects, and/or in relation to espionage, sabotage,

foreign influence and foreign interference, acts of serious violence for the purpose of achieving a political, religious or ideological objective (terrorism), and subversion.

[57] As such, this case will affect the GoC departments processing not only these Iranian men but other foreign nationals from states associated with the sponsorship of state terrorism and or which support and maintain terrorist organizations.

[58] That the nature of this proceeding has at its core the "security of Canada" is not only the Court's assessment; it is the expressed concern of Parliament in the *CHRA* and *NSIRA Act*. Notably the Commission referred the matter to NSIRA because all four GoC departments notified the Commission that the complaints at issue related to the "security of Canada" per s 45(2) of *CHRA* as noted above. The notices were not challenged.

[59] To protect the "security of Canada" in the context of human rights complaints under the *CHRA*, Parliament charged the GoC departments, and most centrally IRCC and CSIS upon which IRCC relies, with what I consider the heavy responsibility of protecting Canada's national security.

[60] In relative terms among the four departments involved in national security CSIS has a most direct mandate from Parliament in respect of the "security of Canada." Most notably, CSIS has legislated powers to collect, retain, and analyze information and intelligence respecting activities that may be on reasonable grounds suspected of constituting "threats to the security of

Canada," and may take measures to reduce such threats, whether within or outside Canada (*CSIS Act*, s 12(1) and s 12.1).

Threats to the Security of Canada	**Menaces envers la sécurité du Canada**
Collection, analysis and retention	**Informations et renseignements**
12 (1) The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.	**12 (1)** Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.
No territorial limit	**Aucune limite territoriale**
(2) For greater certainty, the Service may perform its duties and functions under subsection (1) within or outside Canada.	**(2)** Il est entendu que le Service peut exercer les fonctions que le paragraphe (1) lui confère même à l'extérieur du Canada.
Measures to reduce threats to the security of Canada	**Mesures pour réduire les menaces envers la sécurité du Canada**
12.1 (1) If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat.	**12.1 (1)** S'il existe des motifs raisonnables de croire qu'une activité donnée constitue une menace envers la sécurité du Canada, le Service peut prendre des mesures, même à l'extérieur du Canada, pour réduire la menace.

[61] Specifically, the heavy responsibility assigned to CSIS includes, pursuant to s 12 as defined in s 2 of the *CSIS Act*, the investigation and reduction of "threats to the security of Canada," which include espionage, foreign influence (foreign interference), acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective (terrorism), and the undermining, destruction, or overthrow of the system of government in Canada (subversion):

Interpretation	**Définitions et interprétation**
Definitions	**Définitions**
threats to the security of Canada means	**menaces envers la sécurité du Canada** Constituent des menaces envers la sécurité du Canada les activités suivantes :
(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,	**a)** l'espionnage ou le sabotage visant le Canada ou préjudiciables à ses intérêts, ainsi que les activités tendant à favoriser ce genre d'espionnage ou de sabotage;
(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,	**b)** les activités influencées par l'étranger qui touchent le Canada ou s'y déroulent et sont préjudiciables à ses intérêts, et qui sont d'une nature clandestine ou trompeuse ou comportent des menaces envers quiconque;
(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a	**c)** les activités qui touchent le Canada ou s'y déroulent et visent à favoriser l'usage de la violence grave ou de menaces de violence contre des personnes ou des biens dans le but d'atteindre un

political, religious or ideological objective within Canada or a foreign state, and	objectif politique, religieux ou idéologique au Canada ou dans un État étranger;
(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.	**d)** les activités qui, par des actions cachées et illicites, visent à saper le régime de gouvernement constitutionnellement établi au Canada ou dont le but immédiat ou ultime est sa destruction ou son renversement, par la violence.
but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d). (*menaces envers la sécurité du Canada*)	La présente définition ne vise toutefois pas les activités licites de défense d'une cause, de protestation ou de manifestation d'un désaccord qui n'ont aucun lien avec les activités mentionnées aux alinéas a) à d). (*threats to the security of Canada*)

[62] CSIS also provides security assessments to departments across the Government of Canada, as well as to provincial governments and departments, and indeed to foreign powers (*CSIS Act*, s 13). It also advises Ministers of the Crown related to security matters or criminal activities relevant to the exercise of their powers under the *Citizenship Act*, RSC 1985, c C-29 [*Citizenship Act*] or *IRPA* (*CSIS Act*, s 14).

[63] Notably, CSIS is authorized by Parliament to conduct its investigations both within and outside Canada for the purposes of conducting security assessments or providing advice as outlined above (*CSIS Act*, s 15).

[64] IRCC works closely with and is supported by CSIS in national security assessments and advice on matters relating to the "security of Canada" (*CSIS Act*, ss 13, 14). In this connection, IRCC also depends on CBSA for advice and assistance in relation to criminal inadmissibility, among other things. IRCC (with its own Minister reporting to Parliament) has direct links both to CSIS and CBSA who of course share intelligence information amongst themselves. PS (also with its own Minister) is equally integral to this multifaceted GoC security of Canada mandate: the Minister of Public Safety and Emergency Preparedness is responsible to Parliament not only for CSIS, but also for CBSA and the RCMP, Canada's national police force. In this connection, PS, IRCC, CBSA, CSIS and the RCMP deal with other entities in Canada, such as Global Affairs Canada, and other entities domestically and internationally.

[65] The nature of the decision (the Investigative Report) must also be considered in the context of the actual (and ongoing) human rights allegations in this case. While the Complainants allege they were discriminated against on the basis on age and sex correlated to their Iranian nationality, the GoC denies their allegations.

[66] The GoC says the complainants were processed in accordance with the provisions and requirements of *IRPA*, the *CBSA Act*, the *CSIS Act*, the *Citizenship Act*, and related regulations, guidelines and policies. No one disputed the importance of this complex and overlapping legislation.

[67] The GoC submit these legislative and policy requirements are applied objectively to all seeking to come to or be citizens, whether from Iran or otherwise. The GoC submits the

application of the general rules requires careful, individualized assessment. No one disagreed. The GoC advances what I find a logical assertion, that the more complex an application, the longer it will take to assess and determine. This is why the GoC opposes these human rights complaints.

[68] Central to this case is that IRCC must be satisfied that all foreign nationals, including these Iranian men, are "not inadmissible" within the meaning of *IRPA*. IRCC has the legal responsibility and mandate, in the context of immigration and citizenship, to protect the health and security of Canadians and to ensure that every applicant's identity, eligibility and admissibility is assessed and verified before any type of status is granted.

[69] As alluded to earlier, the undisputed background nature of this case is that Iran is and has been a global state sponsor of terrorism: it is nowhere disputed that the Government of Canada designated Iran a State Sponsor of Terrorism in 2012: *Order Establishing a List of Foreign State Supporters of Terrorism*, SOR/2012-170.

[70] Moreover, Iran imposes compulsory military service (conscriptions) on men. It supports and is supported by the Islamic Revolutionary Guard Corps, a cornerstone of the Iranian regime which commits human rights abuses against men, women and girls. I note again Cabinet's decision to list Iran's Islamic Revolutionary Guard Corps as a terrorist entity under the *Criminal Code* because it "acted in association with listed terrorist entities" not only in Iran but elsewhere in the world (*Regulations Amending the Regulations Establishing a List of Entities*, SOR/2024-140 (June 18 2024) C Gaz II, vol 158, no 14).

[71] The Investigative Report at issue in this case confirms:

> 35. Most critically, time spent on Iranian files can often be attributed to national security issues particular to Iranian applicants. There are several reasons for the augmented security concerns directed at Iranian applications. The government designated Iran a state sponsor of terrorism in 2012, with the result that security screening may require more time and attention by CSIS. Iran's political system and the activities of the Iranian government generate concerns that some groups and individuals have committed human rights violations or been involved in subversion or terrorism. In the result, IRCC and its Public Safety partners observe that some Iranian nationals 'may pose a high risk and a significant threat to Canada's national security.' Thus, an analysis 'and need for additional information to determine risk to Canada must be undertaken.'
>
> [Emphasis added]

[72] Considering the above, I conclude the nature of the decision in this case (i.e., the conduct of NSIRA's investigation and its Investigative Report) is a most a serious and substantial matter engaging cross-government legislated standards and investigative requirements directly affecting the vetting and screening of foreign nationals seeking immigration and citizenship, by the four GoC parties (IRCC, CSIS, CBSA and PS), and in addition the RCMP, Global Affairs Canada and other entities.

[73] In my respectful opinion, the "nature of the decision" as a *Baker* factor, is a serious challenge to the GoC heavy responsibility to protect the "security of Canada" in the immigration and citizenship contexts.

[1] In my respectful view the GoC must be afforded a high level of procedural fairness by NSIRA given the nature of this case.

(2) Role of the decision within statutory scheme

[74] This is the second *Baker* factor. The statutory scheme governing the Investigative Report includes both the *CHRA* and the *NSIRA Act*.

[75] AG Canada submits s 25(2) of the *NSIRA Act* "unambiguously entitles the Minister to make representations during the investigation of a complaint, including a human rights complaint referred by the Commission." With respect, I agree. No one disputed the GoC's right to make "representations" is one that "must be given" and may not be denied or abridged (as I find happened here).

[76] Subsection 25(2) of the *NSIRA* Act provides no exceptions to its application:

Right to make representations	**Droit de présenter des observations**
(2) In the course of an investigation of a complaint, the complainant, the deputy head concerned and, if the complaint is made under subsection 18(3), the Director must be given an opportunity to make representations to the Review Agency, to present evidence and to be heard personally or by counsel, but no one is entitled as of right to be present during, to have access to or to comment on representations made to the Agency by any other person.	**(2)** Au cours d'une enquête relative à une plainte, le plaignant, l'administrateur général concerné et, s'il s'agit d'une plainte présentée au titre du paragraphe 18(3), le directeur doivent avoir la possibilité de présenter des observations et des éléments de preuve à l'Office de surveillance ainsi que d'être entendus en personne ou par l'intermédiaire d'un avocat; toutefois, nul n'a le droit absolu d'être présent lorsqu'une autre personne présente des observations à l'Office de surveillance, ni de recevoir communication de

	ces observations ou de faire des commentaires à leur sujet.
[Emphasis added]	[Je souligne]

[77] As AG Canada correctly submits that once the Commission referred this investigation to NSIRA, NSIRA "essentially performs the role of a Commission investigator, making relevant findings in respect of confidential security considerations for further consideration by the Commission." In this respect, NSIRA "may bring its expertise to bear on the security considerations but may not decide the ultimate question of whether the complainants have established a discriminatory practice" (AG Canada Memorandum at para 61).

[78] To emphasize, in this case, NSIRA was tasked by the Commission to perform as proxy for a Commission staff investigator, charged with investigating and making relevant findings in respect of confidential security considerations for further consideration by the Commission.

[79] The Commission, correctly in my view, submits NSIRA's investigative process and report replace "the usual Commission investigator for the purpose of preparing a report for the Commission's review" (at para 62 of its Memorandum). In other words, as AG Canada submits (at para 63 of its Memorandum), in a case like the present, NSIRA "steps into the shoes" as a proxy of a Commission staff investigator investigating and preparing an investigative report.

[80] Thus, the Commission agrees with AG Canada on this point, and so do I.

[81] However, there is a difference between a Commission investigator's report and a report prepared by NSIRA as proxy for Commission staff investigators. The *Security of Information Act* and, very specifically, s 52(1) of the *NSIRA Act* forbid NSIRA from sharing any classified information, documents or explanations from the Respondents with the Commission, its staff and Tribunal(s):

Protection of confidential information	**Protection des informations confidentielles**
52 (1) The Review Agency must consult with the deputy heads concerned in preparing any of the following, in order to ensure that they do not contain information the disclosure of which would be injurious to national security, national defence or international relations or is information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege:	**52 (1)** Afin d'éviter que les documents ci-après ne contiennent des informations dont la communication porterait atteinte à la sécurité ou à la défense nationales ou aux relations internationales ou des informations protégées par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige, l'Office de surveillance consulte les administrateurs généraux concernés pour l'établissement :
…	…
(b) a report under subsection 29(2) or (3) or any of sections 38 to 40 of this Act, subsection 46(1) of the *Canadian Human Rights Act* or subsection 19(6) of the *Citizenship Act.*	**b)** des rapports visés aux paragraphes 29(2) ou (3) ou à l'un des articles 38 à 40 de la présente loi, au paragraphe 46(1) de la *Loi canadienne sur les droits de la personne* ou au paragraphe 19(6) de la *Loi sur la citoyenneté*.
[Emphasis added]	[Je souligne]

[82] As the Commission submits:

> 47. Section 46(2) of the CHRA instructs the Commission to consider the report of NSIRA before deciding on whether to proceed with the complaint. The Report does not bind the Commission, it is meant to provide the Commission with findings of facts that the Commission could not otherwise have access to, given the potential classified nature of the facts at issue. This appears to be the underlying justification for ss. 45 and 46 of the CHRA: allowing the investigation of human rights complaints that raise national security issues by delegating to NSIRA, a specialized administrative decision maker with appropriate security clearance, the duty to investigate potentially classified information and offer findings of fact to the Commission for consideration.
>
> [Emphasis added]

[83] Thus, the Commission may only receive a redacted (blacked out) version of NSIRA's Investigative Report. Of course, the response by AG Canada to NSIRA's Investigative Report would also be redacted.

[84] AG Canada submits it is unable to make an effective response to NSIRA's redacted NSIRA Investigative Report, such that the Commission is "practically compelled" to adopt NSIRA's findings and recommendations. In the very unfortunate circumstances of this case, I agree that is the case.

[85] I make this finding because, as discussed below NSIRA prevented AG Canada from making "representations" on the facts and law to it. Because of this and other breaches of procedural fairness, NSIRA's Report lacked the benefit of submissions by the GoC parties on the facts and law. Presented with a one-sided view of the matter, the Commission would necessarily

be practically compellent in this case, but that should not happen if the normal rules of procedural fairness apply.

[86] To summarize this *Baker* factor, NSIRA must provide the GoC parties with a high degree of procedural fairness given the "security of Canada" is at stake high degree of procedural fairness given the role NSIRA has in this statutory scheme. In concrete terms, this conclusion supports AG Canada's request for a full and fair opportunity to see and respond to NSIRA's completed Investigative Report — as if the report was by a Commission staff investigator.

(3) Importance of the decision to those concerned

[87] This is the third *Baker* factor. Those concerned are twofold in this matter: NSIRA in its capacity as a proxy for a Commission staff investigator, and AG Canada representing CSIS and the other three departments.

[88] On the importance of the decision to the GoC parties, AG Canada submits the appropriate screening and processing of foreign nationals seeking to enter or become citizens are matters of fundamental importance to Canadians. With respect this was not disputed, and I agree.

[89] It seems to me this *Baker* factor overlaps with the two already considered. I therefore refer to my discussion and conclusions above.

[90] I conclude this factor points to a high duty of procedural fairness owed by NSIRA to the GoC departments.

(4) Legitimate expectations based on (a) agreement, (b) s 25(2) of *NSIRA Act* and (c) practice of Commission staff investigative reports

(a) *Legitimate expectations per agreement*

[91] As set out in the Supreme Court's judgment in *Baker,* if a party has a legitimate expectation by agreement or otherwise that a certain procedure will be followed, the duty of fairness requires that procedure to be followed. *Baker* holds it will generally be unfair for a decision-maker to act in contravention of representations as to procedure, or to backtrack on substantive promises without affording significant procedural rights: see *Baker* at paragraph 26 (yet, as will be seen, that is what NSIRA did in this case):

> 26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 5233 (FCA), [1989] 3 F.C. 16 (C.A.). …. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.
>
> [Emphasis added]

[92] To the same effect is the Supreme Court's decision in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*], which holds courts must take into account practices of the administrative decision-makers, and that if a public authority makes representations about the procedure it will follow in making a decision, the scope of the duty of procedural fairness is broader:

> [94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
>
> [Emphasis added]

[93] I conclude this aspect of the *Baker* factors points to affording the GoC parties with a high degree of procedural fairness.

[94] Looking forward briefly, as discussed later in these Reasons, I find the GoC departments also had a legitimate expectation NSIRA would follow the two-phase framework process requested by the AG Canada by letter dated August 11, 2021, as confirmed and in my respectful view, endorsed by the NSIRA Chair in her letter in response dated August 12, 2014.

(b) *Expectation per legislated rights and s 25(2) of NSIRA Act*

[95] AG Canada submits, and I agree s 25(2) of the *NSIRA Act* "gives rise to the expectation that a government respondent to a complaint will be given an opportunity to make representations to the Review Agency, to present evidence and to be heard personally or by counsel." This expectation is strengthened by the *NSIRA Rules*; AG Canada specifically points to Rules 1.01, 1.04, and 7.20 regarding parties' rights to make representations.

[96] It is apparent to me that Parliament's direction in s 25(2) must be respected. I am unable to see any reason to excuse NSIRA from its duty to afford the GoC parties, and in particular, the Director of CSIS who is specifically named, their right to make "representations" to NSIRA.

[97] In this context, I construe the right to make "representations" as legislative shorthand for the right to a meaningful opportunity to present evidence and make legal representations and have them fully and fairly considered as per *Baker* at paragraphs 30 to 34.

[98] Looking forward again, I will find NSIRA failed to afford the GoC parties their right to make representations to it.

[99] I conclude this aspect of the *Baker* factors points to affording the GoC parties with a high degree of procedural fairness.

(c) *Legitimate expectations arising from Commission practice in investigative reports*

[100] As *Baker* at paragraphs 26 and 27, and *Agraira* at paragraph 97 establish, decisions-makers are under a general duty of fairness to respect their past practices.

[101] In assessing this *Baker* factor, it is important to note NSIRA is acting as a proxy for a Commission staff investigator.

[102] In this respect, the Commission told the Court the "usual process" required by the *CHRA* and rules in relation to investigative reports prepared by Commission investigators (NSIRA's function) is for Commission staff investigative to send their reports to the parties "to obtain responding submissions" (at para 31 of its Memorandum). It is only after receipt of responding submissions that an investigative report and the response(s), are sent to the Commission for decision. In this respect the Commission cites s 43(2) of the *CHRA* and Rule 10.3 of the *Canadian Human Rights Commission Complaint Rules*.

[103] At the hearing, the Court and Commission counsel discussed the usual Commission staff procedure and investigative reports. The Commission confirmed investigative reports prepared for the Commission (by Commission staff investigators) are sent by Commission staff to the parties so that they may file a response. The responses are then sent with the investigative report to the Commission to consider in making its decision.

[104] In some cases, the Commission decision would be a screening decision under s 44(3) of *CHRA,* i.e., a decision to dismiss a complaint or send it to the Tribunal.

[105] The same is true here. In the case at bar, following receipt of NSIRA's Investigative report, the Commission must once again decide whether to dismiss the complaints pursuant to s 46(2) or refer it to the Tribunal pursuant to s 44(3) of the *CHRA.*

[106] AG Canada correctly confirms the Commission's practices require investigative reports to be provided to those affected for response, after receipt Commission staff send both the investigative report and responses to the Commission for decision.

[107] AG Canada correctly adds that the practice of sharing investigative reports with the parties is required by a long line of jurisprudence:

> 62. … Based on a long line of jurisprudence, procedural fairness in the context of this decision-making process requires that the Commission inform the parties of the substance of the evidence obtained by the investigator, which will be put before it, and give the parties the opportunity to respond to the evidence and make all relevant representations in relation thereto.

[108] In this connection, AG Canada correctly relies on *Syndicat des Employés de Production du Québec et de l'Acadie v Canada (Human Rights Commission),* [1989] 2 SCR 879 [*SEPQA*] at 900(i)-01(b); *Sketchley v Canada (Attorney General),* 2005 FCA 404 [*Sketchley*] at paragraph 115. The law is summarized in *Sketchley*:

> [115] In order to determine the degree of investigative thoroughness required in this context, the factors from *Baker* must be applied. First, how close is the administrative process to the judicial process? As the Supreme Court stated in *SEPQA*, at the

> screening phase under subsection 44(3) [then subsection 36(3)] "[i]t is not intended that this be a determination where the evidence is weighed as in a judicial proceeding"; rather, the Commission must determine "whether there is a reasonable basis in the evidence for proceeding to the next stage" (at page 899). In this context of the Commission's screening function, the investigator must be considered "as an extension of the Commission" who "prepares a report for the Commission" (*SEPQA*, at page 898). The investigator's recommendations are often adopted by the Commission at this stage. However, the parties are provided with a copy of the investigator's report, and are entitled to make submissions in writing before a decision is made (*SEPQA*, at page 899; *Radulesco*, at page 410). This consideration thus points towards a weaker level of procedural protection.
>
> [Emphasis added]

[109] In my view the Commission's practice is a consistent practice of the Commission as noted in *Agraira*. I was not pointed to any relevant exceptions to it.

[110] This also points to a higher degree of procedural fairness.

(d) *Summary*

[111] More generally, I also agree well-established practices and principles of procedural fairness require the Commission to share its investigative reports with the parties, so they know the case to meet and have a full and fair chance to respond. This is required by the Federal Court of Appeal in *Canadian Pacific*, cited above, at para 56:

> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the

> concept of justice – was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.
>
> [Emphasis added]

[112] I am not persuaded that there is any difference in terms of procedural fairness requirements between an investigative report prepared by Commission staff and an investigative report prepared by NSIRA, especially where in this case NSIRA acts as a proxy for the Commission's investigative staff. In both cases the procedural requirements are the same. Specifically, procedural fairness requires that the investigative report be provided to the affected parties for response before it is sent to the Commission for decision. In both cases, the response of the affected parties must be sent to the Commission along with the investigative report.

[113] It seems to me that to do otherwise is to offend procedural fairness jurisprudence requiring the affected party to know the case against (or for) them (i.e., what is in the investigative report) and to have a full and fair opportunity to respond. To do otherwise would also offend both the Commission's wisely adopted procedurally fair practices, and its rules.

[114] In my respectful view, the doctrine of legitimate expectation points to an increased level of procedural fairness.

(5) Choice of procedure by the agency: s 25(2) and Rule 7.20

[115] I note NSIRA in a Procedural Ruling (made after it completed its report) says that when the *NSIRA Act* and the *NSIRA Rules* are read together, NSIRA has "broad discretion and control

over its investigative process." In the usual course in a routine case, I would agree courts should defer to NSIRA in line with *Baker* at paragraph 27 and the Supreme Court's holding in *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 that "[c]onsiderable deference is owed to procedural rulings made by a tribunal with the authority to control its own process" (at para 231).

[116] However, I find nothing in the jurisprudence, nor the *NSIRA Rules* or *NSIRA Act* that expressly or implicitly permits NSIRA to dispense with NSIRA's mandatory and legislated duty to afford the GoC parties a right to make "representations" to NSIRA per s 25(2).

[117] Nor is there any justification to breach the legitimate expectations of the parties without, at a minimum it possible at all, fair and reasonable notice under Rule 7.20.

[118] Nor am I persuaded NSIRA is an any way authorized to dispense with the participatory rights of the GoC parties except in the clearest of cases, and then only after fair and reasonable notice is afforded.

[119] In my respectful view, NSIRA was under a continuing obligation to provide the GoC parties with procedural clarity under its own Rule 7.20. Rule 7.20 requires NSIRA to advise the parties of "the procedures for the making of representations and presenting evidence." As such Rule 7.20 is integral and reinforces GoC's rights to make "representations."

[120] Rule 7.20 necessarily entails a duty to give reasonable notice to the parties of amendments and variations in procedures. There is little point in having a right to make representations without proper notice of when and how representations must be made. And there is no point in such a rule if it may be revoked at any time (let alone at the last minute) without reasonable notice. In my respectful view NSIRA is no more entitled to dispense with its duties under Rule 7.20 than to dispense with s 25(2) of the *NSIRA Act*. I will find below it did both in its call with AG Canada on November 22, 2022.

[121] On balance, the duty of fairness under this factor must be taken at the high end.

D. *NSIRA's duty of thoroughness as a human rights investigator*

[122] AG Canada further submits, and ample jurisprudence supports the proposition that investigators of human rights complaints — be they Commission staff investigators or NSIRA as proxy for Commission staff investigators — are required to be thorough in their investigation and resulting report: *Slattery v Canada (Human Rights Commission) (TD)*, 1994 CanLII 3463 (FC), [1994] 2 FC 574 at 598, aff'd (1996), 205 NR 383 (FCA) [*Slattery*]; *Richards v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 341 at paragraphs 78 [*Richards*]; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraphs 115-25 [*Sketchley*]; *Egan v Canada (Attorney General)*, 2008 FC 649 at paragraph 5; *Wong v Canada (Public Works and Government Services)*, 2018 FCA 101 at paragraphs 14, 20; *Garvey v Myers Transport Ltd*, 2005 FCA 327 at paragraphs 2223; *Sanderson v Canada (Attorney General)*, 2006 FC 447; *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paragraph 74; *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 at paragraph 8 [*Tahmourpour*]; *Harvey v VIA Rail Canada Inc*, 2019

FC 569 at paragraph 20 [*Harvey*]; *Sidoli v Canada (Attorney General)*, 2024 FC 1673 at paragraphs 4951; *Public Service Alliance of Canada v Canada (Treasury Board)*, 2005 FC 1297 at paragraphs 3536. See also *Syndicat des Employés de Production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 SCR 879 at paragraph 25.

[123] The Federal Court of Appeal confirms in *Richards* that an investigation is not thorough if the investigator fails to investigate obviously crucial evidence or to address crucial submissions by one of the parties:

> [7] In making a decision pursuant to subsection 44(3) of the Act, the function of the Commission is analogous to that of a judge at a preliminary inquiry in the sense that the Commission does not adjudicate a complaint, but determines on the basis of the investigator's report, and any submissions by the complainant and other parties, whether there is a reasonable basis in the evidence for proceeding to an inquiry (*Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, at paragraph 53; *Syndicat des Employés de Production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879, at page 899).
>
> [8] The work of the investigator is treated as part of the work of the Commission. If the Commission accepts the recommendation of an investigator without giving separate reasons, as in this case, it is presumed to have adopted the reasons of the investigator (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404 (CanLII), [2006] 3 F.C.R. 392 at paragraph 37; *Syndicat des Employés de Production du Québec et de l'Acadie*, cited above, at pages 902 and 903).
>
> [9] Generally, the Commission is entitled to deference in relation to the scope and depth of the investigation upon which it relies in deciding whether a complaint should be dismissed or referred to the Tribunal for an inquiry. <u>However, as a matter of procedural fairness, a decision of the Commission may be quashed if it is based on an investigation that is not neutral or not thorough</u>. (*Slattery v. Canada (Human Rights Commission) (T.D.)*, 1994

> CanLII 3463 (FC), [1994] 2 F.C. 574 at paragraph 56, affirmed (1996), 205 N.R. 383 (F.C.A.)).
>
> …
>
> [11] The cases dealing with the thoroughness of an investigation have established that an investigation is not thorough if the investigator fails to investigate obviously crucial evidence or to address crucial submissions by one of the parties (see, for example, *Sketchley* (cited above), *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, and *Public Service Alliance of Canada v. Canada (Treasury Board)* (F.C.), 2005 FC 1297 (CanLII), [2006] 3 F.C.R. 283, at paragraph 42). It is an open question whether there are any other grounds upon which the thoroughness of an investigation may be challenged.
>
> [Emphasis added]

[124] *Harvey* further defines and I agree that "obviously crucial" witnesses as "witnesses who were directly involved with an applicant's work and related experiences" (at para 39).

[125] In this case, I conclude the CSIS witness and the witnesses from the other GoC departments were all obviously crucial.

E. *Summary of procedural fairness and other relevant requirements*

[126] Stepping back and summing up, in my respectful view, the *Baker* factors and other jurisprudence discussed above confirm, individually and collectively, that AG Canada and the GoC departments were entitled to a high degree of procedural fairness from NSIRA in its investigation and preparation of the Investigative Report.

[127] NSIRA was obliged to afford the GoC its statutory right to make "representations" mandated by s 25(2) of the *NSIRA Act*, and to provide the GoC parties with procedural clarity demanded by NSIRA's Rule 7.20, and reasonable notice of material changes. NSIRA was under a procedural fairness duty to meet the GoC's legitimate expectations and to afford the GoC their participatory rights per *Baker*. As a human rights investigator, NSIRA came under a duty of thoroughness in its investigation and hearing of crucial witnesses — particularly that of CSIS.

[128] Previously I mentioned the importance of continuing past practices of decision-makers confirmed in *Baker* and *Agraira* (see paras 91 and 92 above). In this respect, NSIRA as a proxy for a Commission staff investigator was obliged to follow the procedurally fair and usual course of Commission staff investigators in this case, and was required to disclose NSIRA's Investigative Report to the GoC parties to afford than an opportunity to know the case against (or for) them, and afford them a full and fair opportunity to respond before sending both Investigative Report and the response of the GoC departments (both in redacted form) to the Commission for its decision to either dismiss the complaints or refer them to a Tribunal for determination on the merits, pursuant to 46(3) of *CHRA*.

V. Analysis of NSIRA's investigation and report with reference to procedural fairness and other requirements

A. *NSIRA's investigation*

[129] With these principles in mind, I turn now to discuss how NSIRA conducted its investigation and prepared its Investigative Report. NSIRA's investigation and report-writing took place between May 25, 2021 (when it received the request from the Commission) and

November 25, 2022 (when it completed its draft Investigative Report, subject to redaction of confidential information).

[130] This is a fact-driven analysis. It is best to set out how this matter proceeded chronologically, drawing conclusions where required.

(1) Two-phase framework agreement reached for the overall conduct of NSIRA's investigation

[131] By letter dated August 11, 2021, and after some preliminary exchanges of correspondence and material, AG Canada wrote NSIRA to provide information and seek clarification. AG Canada proposed a two-phase format for the investigation: (1) an evidentiary phase including documentary production and interviews with GoC witnesses, and (2) "complete submissions" after the evidentiary phase was complete:

> … [D]uring the call you asked for submissions in the nature of a memorandum of fact and law to be delivered prior to the investigative interview. We can certainly provide the Agency with an outline of the evidence that we propose to adduce during the interviews, in the form of an overview or a proposed statement of facts. A memorandum of fact is more problematic since at this point the scope of the Agency's investigation, the determinations it intends to make and the legal standards it intends to apply have not been communicated to us. In the normal course, submissions would follow once the evidentiary phase is complete. We are certainly prepared to file complete submissions at that time. Can you provide further information concerning the format of the submissions that the Agency would like to have?
>
> [Emphasis added]

[132] By letter dated August 12, 2021, the Honourable Marie Deschamps, Chair of NSIRA (and former Justice of the Supreme Court of Canada), responded to AG Canada that the

procedure following the preliminary exchanges would be an "evidentiary phase" followed by a "full memorandum of fact and law":

> With respect to the *ex parte* case management conference, I have determined that an outline circumscribing the facts, the legal arguments and a description of the evidence that the Responding Departments plan, as they are currently informed, to lead and produce during the investigation of the complaints is indispensable for an effective and efficient case management. Please note that the outline that I am requesting is not meant to be a full memorandum of fact and law which as you mentioned would follow the evidentiary phase. The outline as described above will assist the Members of the Review Agency during their investigation of the referred complaints and provide the Responding Departments' position regarding the scope of the Review Agency's investigation and report. Further, in order to properly case manage the investigations and, more specifically, to assist in the narrowing of the scope of the issues, to identify procedural steps and timelines, and to streamline evidentiary matters, the above information is required. …
>
> [Emphasis added]

[133] I find that in essence the Chair of NSIRA agreed with AG Canada's proposed two-phase investigative framework. The framework agreed upon (corroborated and confirmed by more than a year of subsequent events — until November 22, 2022 that is) was:

1. an evidentiary phase in which documentary evidence would be supplied and NSIRA would interview GoC witnesses for a day, and

2. after the evidentiary phase was complete, AG Canada would file a "full memorandum of fact and law," after which NSIRA would complete its report.

[134] It is also my conclusion that proceeding with a two-phase investigation — an evidentiary phase followed by a full memorandum of fact and law — created legitimate expectations of the GoC, and also established their participatory rights. Moreover, in my respectful view this

exchange of letters satisfied NSIRA's obligation to provide GoC parties with procedural clarity as to how its process would unfold (required by NSIRA's Rule 7.20).

[135] I also find that if this process had been followed, the GoC parties' statutory right per s 25(2) of the *NSIRA Act* to make "representations" to NSIRA would have been met through the filing of a "full memorandum of fact and law." In a word, this agreement covered the relevant bases at the time. It would also have positioned NSIRA to prepare a thorough report per its duty of thoroughness as a proxy human rights investigator. In the usual course, then, none of the faults identified in these Reasons would have occurred, and this application based on procedural fairness would not have become necessary. Of course, there might have been issues with the reasonableness of Investigative Report per *Vavilov* and other administrative law jurisprudence, but that is entirely another matter.

[136] As will be seen, I also find this two-phase investigation remained in place and was never amended or withdrawn from August 12, 2021, until November 22, 2022. It was not until that date that counsel for NSIRA, during an unrelated call, and without reasonable notice, informed the GoC parties its report would be issued within six days (two of which were on a weekend).

[137] In my respectful view, this egregiously late notice effectively prevented the GoC parties from filing the "full memorandum of fact and law" set out in NSIRA's Chair letter of August 12, 2021. In addition, it deprived the GoC departments of their right to make "representations" under s 25(2) of the *NSIRA Act* and resulted in a human rights report fatally flawed by the tribunal's lack of thoroughness.

[138] Notably in addition, as will be seen, and despite repeated requests for procedural and related process information, NSIRA (except for the Chair's letter of August 12, 2021) never complied with its Rule 7.20 duty to notify the GoC of their opportunity to make representations per s 25(2) of the *NSIRA Act*, or of the procedures for the making of representations and presenting evidence:

Right to make representations	**Droit de présenter des observations**
7.20 The Review Agency shall notify the complainant, the Minister referred to in subsection 45(2) of the *Canadian Human Rights Act* and the Director of their opportunity to make representations under subsection 25(2) of the Act, of the time limits the Review Agency has established within which those representations must be made and of the procedures for the making of representations and presenting evidence.	**7.20** L'Office de surveillance doit informer le plaignant, le ministre mentionné au paragraphe 45(2) de la *Loi canadienne sur les droits de la personne* et le directeur de la possibilité de présenter des observations en vertu du paragraphe 25(2) de la Loi, des délais impartis que l'Office de surveillance a établi dans lesquels ces observations doivent être faites et des procédures à suivre pour présenter des observations et des éléments de preuve.
[Emphasis added]	[Je souligne]

[139] On August 27, 2021, to continue with the chronology, and in accordance with their exchange of correspondence dated August 11 and 12, 2021, AG Canada sent NSIRA its "Preliminary Outline of Facts and Evidence."

[140] By then the parties had agreed CSIS and witnesses from the other three GoC departments — IRCC, CBSA and PS — would be interviewed by NSIRA Member(s) November 17, 2021.

[141] By email dated September 3, 2021, NSIRA requested submissions regarding the scope of its investigative report that the Agency must deliver to the Commission.

[142] On October 15, 2021, AG Canada sent NSIRA its views on the "scope" of the investigative report, and submitted NSIRA should address three issues:

a. What are the security considerations upon which security screening for eligibility and admissibility are based?

b. How do those considerations affect the delivery of immigration services (i.e., is there an adverse impact)? and

c. Are the measures adopted to address those security considerations justified, in that changing them to improve processing times for applicants from Iran would be inconsistent with the objectives of the measures or would otherwise cause undue hardship?

[143] Inexplicably, NSIRA never responded to AG Canada's submissions on the scope of its report. In fact, NSIRA never responded to AG Canada's letter at all. NSIRA never communicated the criteria it would apply in preparing its report. NSIRA never advised AG Canada of the legal standards it would apply. NSIRA never provided AG Canada with any of NSIRA's evidentiary findings. Notwithstanding AG Canada and the GoC parties sent all requested documentation to NSIRA, NSIRA reciprocated by keeping the GoC parties in the dark.

[144] That said I find the two-phase process remained in effect. Accordingly, while the evidentiary phase continued until November 22, 2022, the GOC departments were effectively blindfolded: they were never asked nor had an opportunity to comment on the legal standards NSIRA would apply or legal issues NSIRA might consider. Nor did the GoC parties have any

opportunity to comment on the relevance of the evidence or testimony they were providing NSIRA.

(2) November 17, 2021, investigative interviews run out of time – CSIS allowed only one hour, CSIS and other testimony not complete

[145] On November 10, 2021, AG Canada sent NSIRA several Statements of Anticipated Evidence setting out what the GoC witnesses wished to submit during the upcoming interviews. Note this is a full year before the deadline for NSIRA to complete its report. I understand these agendas were agreed upon. Each GoC representative would provide an overview presentation in the morning session, followed by country - and case-specific information in the afternoon session.

[146] In particular, the CSIS Statement set out what the CSIS witness' testimony wished to cover:

> The CSIS witness is expected to testify about the following areas relevant to the complaints under investigation by the National Security and Intelligence Review Agency:
>
> Overview presentation (morning session):
>
> - Mandate and authorities of the Canadian Security Intelligence Service ("CSIS" or the "Service")
> - Service policy as it relates to security screening
> - The Service's role in the immigration security screening process for different business Lines
> - The Service's processing stages and tools
> - Intersection between the three partner agencies in the context of security screening

- Nature and use of indicators and other criteria during the period relevant to the complaints (2015-2018)
- Shift to use of thematic indicators in 2018
- Factors that can affect the time required to perform security screening

Country-specific and Case-specific information (afternoon session)

- Screening criteria specific to Iran during the complaints period (2015-2018) and nature and effect of 2018 changes
- Service statistics on Iranian screening times, 2015 - 2019
- Factors contributing to screening time with an effect on Iranian applications
- Measures directed at alleviating pressures related to the processing of applications with an effect on Iranian applications
- The Service's role in the security screening of the three sample cases with specific reference to steps taken by CSIS in those cases, when such steps are taken more generally and why
- Explanation of the Service's specific screening tools and processes

[Emphasis in original]

[147] In terms of the duty of thoroughness, in *Richards* the Federal Court of Appeal held an investigation is not thorough if the investigator fails to investigate obviously crucial evidence or to address crucial submissions by one of the parties. To recall, *Harvey* defines an "obviously crucial" witnesses as "witnesses who were directly involved with an applicant's work and related experiences" (at para 39).

[148] In this case, given the centrality of CSIS in relation to the security of Canada and in the national security screening and vetting those trying to obtain immigration status and citizenship of Canada, I find the CSIS witness was "obviously crucial," and their testimony was obviously crucial evidence in terms of NSIRA's duty of thoroughness discussed above (Part IV(D) above). It simply could not be ignored.

[149] It is not disputed that the November 17, 2021 interviews did not go as expected. AG Canada summarizes the interviews as follows, which I accept: mid-way though the day, the presiding Member changed the proposed split between morning (overview) and afternoon (country- and case-specific information) requiring each witness to cover the whole of their evidence at once. The CSIS witness reports a substantial amount of time was devoted to questions asked by NSIRA Members and its counsel.

[150] CSIS was given only one hour to testify. The CSIS witness was unable to get through its agreed agenda. Its crucial evidence was not completed. Indeed, the meeting ended without NSIRA having a full presentation from any of the witnesses, except IRCC.

[151] Importantly, notwithstanding the most central role and responsibility that Parliament assigns CSIS in relation to the "security of Canada," the one (1) hour NSIRA allocated to CSIS was not enough.

[152] Counsel for AG Canada emphasizes, and I agree that while NSIRA gave none of the GoC witnesses sufficient time, CSIS did not have the opportunity to provide apparently significant

material evidence. As noted, the missing CSIS information was crucial evidence in terms of the duty of thoroughness NSIRA owed as a proxy human rights investigator.

[153] The CSIS evidence CSIS wanted to give was:

> Overview presentation (morning session):
>
> - […]
> - Nature and use of indicators and other criteria during the period relevant to the complaints (2015-2018)
> - Shift to use of thematic indicators in 2018
> - Factors that can affect the time required to perform security screening
>
> Country-specific and Case-specific information (afternoon session)
>
> - […]
> - Measures directed at alleviating pressures related to the processing of applications with an effect on Iranian applications
> - The Service's role in the security screening of the three sample cases with specific reference to steps taken by CSIS in those cases, when such steps are taken more generally and why
> - Explanation of the Service's specific screening tools and processes
> - Answer questions on the Service's turnaround time statistics for the 41 group complainants

[154] AG Canada provided affidavit evidence summarizing the interviews which I accept:

> 23. The proceedings commenced at approximately 10:15 AM on November 17th with a procedural discussion and submissions on NSIRA's jurisdiction by counsel for the GOC Respondents.

> 24. The IRCC witness began his testimony at the conclusion of submissions by counsel for the GOC Respondents. He testified until approximately 1:00 PM, including a brief morning break. While the witness had prepared a presentation, the two presiding Members and, to a lesser degree, Review Agency counsel, interjected frequently with questions on the merits of the complaints. It was after the morning break that Member Forcese proposed a shift away from the subdivision contemplated between the morning and afternoon (overview presentations followed by questioning of each witness) and suggested that each witness testify "in full" (i.e., individually to complete his or her testimony on all issues) one after the other.
>
> 25. Consequently, upon resuming at 1:45 PM after a lunch break, two witnesses from PS testified, followed by the CBSA witness.
>
> 26. The CSIS witness then testified for approximately one hour before proceedings concluded at 5:45 PM.
>
> 27. The Members asked questions of each witness throughout their respective testimonies. Based on the nature of the proceedings, by the lunch break, GOC Respondents' counsel suggested that the sample cases the witnesses had prepared to address - at the Review Agency's request and based on the Case Processing Documents produced - be dealt with on another occasion. The Members did not agree or disagree on the face of the transcript.
>
> [Emphasis added]

[155] In context, while the interviews were scheduled for one day, NSIRA asked for and had a full year and a half (18 months) to investigate and complete its report. When the interviews were terminated NSIRA still had over a year left. No additional time was ever afforded CSIS or the other witnesses.

(3) Post-interviews AG Canada asks to complete CSIS submissions while evidence-gathering phase continues

[156] Notably, AG Canada objected to the inadequacy of the interviews on several occasions after November 17, 2021, but to no avail. NSIRA never disputed the interviews were inadequate — until more than a year later in a Procedural Ruling issued January 2023 (re-issued February 2023).

[157] Indeed, AG Canada's affiant, present at the interviews, deposes that when the interviews were over: "I had the impression that NSIRA would schedule further interviews."

[158] While I find the affiant's expectations most reasonable, they were not met.

[159] To continue with the chronology, on December 15, 2021, AG Canada complained to NSIRA that the GoC witnesses did not have sufficient time "to discuss the documents respecting the comparator countries and processing times or the particulars of the illustrative cases." These issues had been jointly selected by NSIRA and the GoC before the meeting.

[160] In the same letter, AG Canada suggested their witnesses re-attend to finish their testimony:

> We would be grateful for a copy of the transcript as soon as it is available. We made note of some issues that arose during the hearing that are in addition to those listed in your letter and we want to ensure that we have a full opportunity to address them. The transcripts will provide us with the necessary context to inform our responses.

> I want to remind you that our witnesses did not have sufficient time to discuss the documents respecting the comparator countries and processing times or the particulars of the illustrative cases selected by the Agency and by our clients. We can make them available to re-attend for this purpose. As well, we will provide you with the names of some other individuals who are better placed to address some of the policy issues raised during questioning. We can make them available for investigative interviews if you wish.
>
> [Emphasis added]

[161] NSIRA never responded to the letter of December 15, 2021. Nor did NSIRA ever respond to AG Canada's submissions that (1) NSIRA did not give GoC witnesses sufficient time, (2) comparator countries and processing times identified by NSIRA and the GoC departments were not covered, (3) the fact the interviews did not cover particulars of the illustrative cases selected by NSIRA and the GoC, and or (4) that GoC witnesses were willing to reattend or otherwise.

[162] Nor indeed did NSIRA ever respond to any of AG Canada's letters in this regard.

[163] On January 10, 2022, AG Canada sent further documents and answers to NSIRA as undertaken during the interviews. AG Canada repeated that CSIS and other witnesses did not have an opportunity to explain the processing statistics, comparator country data and sample case records.

[164] AG Canada repeated that the witnesses were ready to appear and testify to these matters at the convenience of the Agency:

> We remind the Agency that the witnesses who appeared on November 17 did not have an opportunity to explain the processing statistics, comparator country data and sample case records. The witnesses are ready to appear and testify to these matters at the convenience of the Agency.

[165] NSIRA never responded to the January 10, 2022, letter.

[166] Between June and September 2022, the GoC parties continued to send NSIRA evidence and material in response to various written requests from NSIRA following the interviews.

[167] At no time did NSIRA indicate a desire or willingness to hear further testimony from the GoC witnesses who appeared on November 17, 2021.

[168] No direction or notice under Rule 7.20 was ever issued. The parties continued with evidence gathering of the two-phased process.

[169] On October 19, 2022, AG Canada sent NSIRA a chart containing witness corrections and clarifications to interview transcript from CBSA and CSIS. Once again, AG Canada repeated: "As stated on January 10th, the respondent witnesses remain available to appear again at the Agency's convenience to clarify any of the information provided in January 2022 and any of the enclosed information."

[170] The letter emphasized NSIRA needed the rest of the CSIS testimony: "In respect of [CSIS], the witness is available and would welcome the opportunity to complete her testimony on points not fully canvassed on November 17, 2021 due to time constraints" and the letter sets

out three areas in particular. That said, the letter advised: “In the alternative to a further investigative interview, [the witness] will provide additional information by way of annotated submissions, with reference primarily to the contextual documents produced on January 10, 2022 alongside the respondents’ partial answers to undertakings.”

[171] NSIRA never responded to the October 19, 2022, letter.

[172] The record establishes the evidence-gathering phase continued throughout this period. AG Canada submitted many additional documents requested by NSIRA between June and October 2022, on June 10, July 4, August 31, September 21, October 11, and October 28, 2022. This conduct corroborates the parties were then in the first phase evidence-gathering.

[173] There is no evidence any of these communications or letters constituted “representations” per s 25(2) of the *NSIRA Act*, nor that they constituted a “full memorandum of fact and law.” Nothing suggests NSIRA provided any notice under Rule 7.20 to vary the process agreement in the August 11 and 12, 2021 exchange of letters.

[174] In summary, NSIRA never responded to AG Canada’s submissions of December 15, 2021, January 10, 2022, and October 19, 2022, to the effect that NSIRA had not given the GoC witnesses sufficient time to explain their processing statistics, comparator country data and sample case records. Nor did NSIRA respond to AG Canada’s suggestion for it to provide supplementary submissions on the issue of transmitting the Investigative Report to the Commission.

[175] Nor did NSIRA explain its decision to ignore AG Canada's letters. The Court finds NSIRA's decision to not respond to AG Canada's letters presumptively deliberate and inexplicable serious given the heavy responsibilities of the four GoC departments and national security interests in this case.

(4) Events of November 2022 — NSIRA issues Investigative Report

[176] Events evolved in late November 2022, as the apparent deadline for NSIRA to complete its report approached. To recall, in late May 2021 NSIRA was given 18-months to investigate and prepare its Investigative Report. The deadline — unless extended again — would expire November 28, 2022. It is not known if a further extension was requested.

[177] In any event, by letter dated November 14, 2022, after receiving no response from NSIRA to its October 19, 2022, letter (nor to those of December 15, 2021, or January 10, 2022), AG Canada sent NSIRA a written statement of the CSIS witness.

[178] For the fourth time, this letter repeated AG Canada's objection that NSIRA had not given the CSIS witness an opportunity to complete their testimony. It repeated that the CSIS witness continued to be available, and that AG Canada looked forward to next steps coming from NSIRA (in line with the provisions of ss 25(2) of the *NSIRA Act*, and rule 7.20 of the *NSIRA Rules*).

[179] The uncontested evidence regarding the (otherwise secret) letter of November 14, 2022, is that the CSIS witness statement:

> made certain points on documents previously produced and additional enclosed documents, given that the witness had not been given the opportunity to testify again. AGC counsel stated in the covering letter that the CSIS witness continued to be available to answer any questions arising from earlier testimony or from the Additional Statement. AGC counsel further indicated that the GOC Respondents looked forward to hearing from the Review Agency as to next steps in the matter and indicated that counsel would be available to attend a case management conference if required. AGC counsel requested that the Review Agency communicate its procedural directions by way of non-classified/encrypted email to all counsel of record.
>
> [Emphasis added]

[180] I pause to note, the reference to "next steps" is made in the context of *NSIRA Rule* 7.20 which says NSIRA "shall notify … the Director [of CSIS] … of the time limits … and of the procedures for the making of representations and presenting evidence [emphasis added]." I refer to these requirements as the "duty of procedural clarity."

[181] Notably, except for the two-phase procedure framework letter from NSIRA's Chair dated August 12, 2021, there is no evidence NSIRA ever complied with its Rule 7.20 obligations. Indeed, I agree with counsel for AG Canada, that NSIRA *never* complied with Rule 7.20 except in the August 12, 2021, letter which (as will be seen) NSIRA attempted to revoke and dispense with without reasonable notice on November 22, 2022.

[182] On November 22, 2022, Counsel for AG Canada and NSIRA had an unrelated call to discuss redactions. To recall, the Investigative Report was prepared first in unredacted form, but could not be sent to the Commission, its Tribunals or staff until redactions were made to black out all confidential (classified, secret etc.) information.

[183] During the call, counsel for NSIRA informed AG Canada that NSIRA's Investigative Report would be issued ***that week***, to enable NSIRA to meet its 18-month deadline of November 28, 2022. At the time, only six days remained before the Investigative Report would be finalized. Two of those six days were on the weekend.

[184] NSIRA never provided AG Canada with notice of NSIRA's modification or more properly in my respectful view, NSIRA's decision to revoke the two-phase 'evidence-gathering phase / full memorandum of fact and law phase' framework confirmed in the Chair of NSIRA's letter of August 12, 2021.

[185] Moreover, as AG Canada correctly submits, at no time before this call did NSIRA ever offer the GoC the opportunity to make written or oral submissions on the merits of its Investigative Report. I note that NSIRA had obtained an extension before; a further extension was not out of the question.

[186] NSIRA sent its Investigative Report to AG Canada and the GoC departments on November 29, 2022. However, it was only sent for redactions. It was not sent to obtain AG Canada's response, the preparation of which response along with the report itself would in the normal course have been sent to the Commission for decisions per the Commission's practice.

[187] Briefly, as to what follows next, by letter dated December 20, 2022, AG Canada advised NSIRA it had breached its duty of procedural fairness owed to the GoC in preparing its Investigative Report. The letter was stated to be an informal submission. NSIRA never

responded to this letter, nor invite more formal detailed submissions from AG Canada. Instead, NSIRA issued a Procedural Ruling dated January 27, 2023, rejecting AG Canada's submissions. NSIRA found it committed no breach of procedural fairness.

[188] NSIRA sent its redacted Investigative Report to AG Canada on March 9, 2023, and to the Commission on March 13, 2023. NSIRA never invited AG Canada to respond.

B. *NSIRA's Investigative Report*

[189] The only issue in this case is whether NSIRA breached its duty of procedural fairness to the GoC parties namely CSIS, IRCC, CBSA and PS. Therefore, it is not necessary to detail the Investigative Report.

[190] However, briefly put NSIRA criticized the GoC measures to process and vet Iranian men seeking immigration and citizenship status. NSIRA asserted the screening process (deemed advisable by all four GoC departments) was not justifiable on national security grounds.

[191] In this respect, one must keep in mind the Report was prepared without the benefit of any "representations" (except as to the "scope" of the investigation back in 2021) from AG Canada nor a "full memorandum of fact and law" from the GoC departments. Nor were the GoC departments given procedural clarity under Rule 7.20 other than in the September 11 and 12, 2021 correspondence.

C. *AG Canada submits NSIRA breached procedural fairness, and NSIRA's subsequent Procedural Ruling*

(1) AG Canada procedural fairness complaints to NSIRA

[192] As just noted, by letter dated December 20, 2022, AG Canada made an informal request for relief pursuant to Rule 13.03 of *NSIRA Rules*. The four GoC departments submitted there was a "lack of procedural fairness afforded [the GoC] in this investigation," and "request[ed] the opportunity to make formal submissions respecting the Agency's report."

[193] AG Canada submitted:

> • NSIRA denied the GoC the opportunity to make representations on NSIRA's findings, contrary to s 25(2) of the *NSIRA Act*;
>
> • NSIRA did not discharge its duty to notify the GoC of its opportunity to make representations under s 25(2) of the *NSIRA Act*, contrary to Rule 7.20 of the *NSIRA Rules of Procedure*;
>
> • While the Report states that NSIRA's "fact-finding" does not constitute part of a "separate administrative process", s 45(5) of the *CHRA* indicates the GoC is entitled to the same procedural protections afforded under s 8(1)(d)(iv) of the *NSIRA Act*;
>
> • The GoC must make submissions before the Report is made to the Commission because NSIRA's findings are based on sensitive national security information that, apart from a successful application for disclosure under s 58 of the *CHRA*, will not be available to the Commission. If the Respondents wish to submit that certain findings are not supported by the evidence, the CHRC will not be in a position to address them;
>
> • The Commission will not be able to consider the additional statement by the CSIS witness, which NSIRA characterized as "last-minute" in its Report [an inaccurate characterization that NSIRA later removed in *errata* in January 2023]. In fact, the CSIS statement was only provided after lengthy delay by NSIRA and repeated requests by AG Canada for a follow-up interview or for

> the witness to provide the information in another format, which received no response from NSIRA.

[194] AG Canada's informal letter requested an opportunity to make representations re the Investigative Report:

> Accordingly, as a matter of procedural fairness, the Respondents respectfully request that the Agency provide them with the opportunity to make formal representations in respect of the record provided to the Agency and in response to the report. Facilitation of the Respondents' rights will clearly require the Agency to seek a further extension from the Commission under subsection 46(1) of the CHRA and if requested, the Respondents would be pleased to support the Agency's request for extension, including by providing the Commission directly with the above submissions going to the procedural fairness of the investigation.
>
> [Emphasis added]

[195] AG Canada submitted further submissions were necessary given the uncertainty of the referral process or NSIRA's and the Commission's roles:

> This is the first reference by the CHRC of a matter to NSIRA. We are uncertain whether the Respondents will be able to make effective submissions to the CHRC and the CHRT since several aspects of the subsequent process remain unclear:
>
> • Will the Canadian Human Rights Commission provide the report to the complainants?
>
> • Will the Commission provide the parties to the complaints an opportunity to make submissions on the report, recognizing that (i) neither the complainants nor the Commission are privy to the Agency's ex parte investigation; and (ii) the Respondents will be restricted in their representations given the classified nature of the evidence and information received by the Agency?
>
> • Will the report be provided to and used in any way by the Tribunal (including in lieu of direct

> evidence) if any of the complaints are referred, recognizing that in the ordinary course, the Tribunal process is de novo and the Tribunal is generally not provided with the Commission investigator's reports or the parties' submissions to that report?

(2) NSIRA issues Procedural Ruling

[196] Without inviting anything further from AG Canada, on January 27, 2023 (re-issued on February 13, 2023), NSIRA issued a Procedural Ruling finding it committed no breach of procedural fairness. NSIRA denied the request by CSIS and the other GoC departments for an opportunity to make submissions to NSIRA on its Investigative Report before sending it for consideration by the Commission. Instead, NSIRA viewed the complaint as a request to reopen the Investigative Report in respect of which it was *functus officio*.

[197] In my respectful view, the Procedural Ruling is materially flawed and failed to provide justification for what I consider NSIRA's failure to provide the GoC departments with a procedurally fair investigation resulting in a fatally flawed Investigative Report that must be set aside essentially for the following reasons.

(a) *Ignores two-phase framework agreement*

[198] To begin with, NSIRA's Procedural Ruling ignores the framework agreement evidenced by AG Canada's letter of August 11, 2021, and NSIRA Chair Marie Deschamps' letter of August 12, 2021. The framework agreement confirmed there would be a two-phase investigation involving (1) an "evidentiary phase" followed by (2) AG Canada submitting a "full memorandum of fact and law" for the four GoC departments.

[199] As I found above (V(A)(1)), the Chair of NSIRA agreed with AG Canada's proposed two-phase investigative framework. The framework agreed upon (and confirmed by subsequent events for more that a year—that is, until November 22, 2022) was there would be:

> 1. An evidentiary phase in which documentary evidence would be supplied and NSIRA would interview GoC witnesses for a day, and
>
> 2. After the evidentiary phase, AG Canada would file a "full memorandum of fact and law," prior to NSIRA providing its final report to the Commission.

[200] In my view AG Canada and NSIRA were on the same page at that time. I also find the agreement to proceed with a two-phase investigation – an evidentiary phase followed by a full memorandum of fact and law – created legitimate expectations of the GoC, and their participatory rights. In my respectful view this exchange of letters satisfied NSIRA's obligation to provide GoC parties with procedural clarity as to how its process would unfold which it was required to do by NSIRA's Rule 7.20. I also find that if this agreed upon investigation had proceeded, the GoC parties' statutory right per s 25(2) of the *NSIRA Act t*o make "representations" to NSIRA would be met through filing of a "full memorandum of fact and law." In a word, this agreement covered relevant bases.

[201] In my view, this two-phase investigation remained in place and was never amended or withdrawn from August 12, 2021, until November 22, 2022. This is corroborated and confirmed by the conduct of both parties, namely the many letters and material from AG Canada to NSIRA during this time.

[202] It was not until November 22, 2022 that NSIRA, during an unrelated call, and without reasonable notice, informed the GoC parties its report would be completed within six days – two of which were on a weekend. This egregiously late notice effectively preventing the GoC parties from filing a full (or really any fair) memorandum of fact and law set out in the NSIRA Chair's letter of August 12, 2021. Nobody suggested otherwise.

(b) *Failure to provide procedural clarity contrary to Rule 7.20*

[203] Notably also as seen above, NSIRA (except for the Chair's letter of August 12, 2021) never complied with its Rule 7.20 duty to notify the GoC of their opportunity to make representations per s 25(2) of the *NSIRA Act*, or of the procedures for the making of representations and presenting evidence:

Right to make representations	**Droit de présenter des observations**
7.20 The Review Agency shall notify the complainant, the Minister referred to in subsection 45(2) of the *Canadian Human Rights Act* and the Director of their opportunity to make representations under subsection 25(2) of the Act, of the time limits the Review Agency has established within which those representations must be made and of the procedures for the making of representations and presenting evidence.	**7.20** L'Office de surveillance doit informer le plaignant, le ministre mentionné au paragraphe 45(2) de la *Loi canadienne sur les droits de la personne* et le directeur de la possibilité de présenter des observations en vertu du paragraphe 25(2) de la Loi, des délais impartis que l'Office de surveillance a établi dans lesquels ces observations doivent être faites et des procédures à suivre pour présenter des observations et des éléments de preuve.
[Emphasis added]	[Je souligne]

[204] As discussed above, in my respectful view Rule 7.20 reinforces NSIRA's duty to receive "representations" from the GoC parties legislated in s 25(2). In this context, I construe the right to make representations as legislative shorthand for the right to a meaningful opportunity to present evidence and make legal representations and have them fully and fairly considered as per *Baker* at paragraphs 30 to 34.

[205] The only evidence in the record of any compliance by NSIRA with its own Rule 7.20 is found in the exchange of correspondence which as found established the two-phase investigative process of August 11 and 12, 2021, subsequently corroborated by conduct of the parties.

(c) *No merit to suggestion GoC was heard or was afforded ability to make representations*

[206] I agree with AG Canada that procedural unfairness also arises from NSIRA's failure to respect Parliament's requirement per s 25(2) of the *NSIRA Act* that "the Director (of CSIS) ***must*** (emphasis added) be given an opportunity to make representations" to NSIRA.

[207] As to the content of the word "representation" which was discussed by the parties, with respect I find the statutory right to make "representations" is not differentiated from the right to procedural fairness per *Canadian Pacific*, paragraph 56 and includes both the right to know the case to meet a full and fair chance to respond. In the case at bar that entailed the right to make submissions on the facts and law before NSIRA completed its report, and once the report was completed, the right to a full and fair chance to respond to NSIRA's Investigative Report before it, and the response, were sent to the Commission. Neither were afforded in this case.

[208] NSIRA suggests the GoC parties had many opportunities to make representations and either did so or should have taken advantage of them but did not. NSIRA concludes the GoC parties "were heard."

[209] With respect I disagree. In my very respectful opinion the GoC departments were neither heard, nor afforded their s 25(2) right to make "representations" under the *NSIRA Act*, nor were they ever afforded the benefit of their legitimate expectations or participatory rights.

[210] The Procedural Ruling summarizes the conduct of NSIRA's investigation and concludes the GoC parties were heard:

> 12. The Respondents provided written materials to NSIRA on 27 August 2021; 29 September 2021; 15 October 2021; 10 November 2021; 17 November 2021; 10 January 2022; 10 June 2022; 4 July 2022; 31 August 2022; 21 September 2022; 11 October 2022; 28 October 2022; and 14 and 15 November 2022.
>
> 13. NSIRA heard from the Respondents' witnesses during a full day classified investigative hearing on 17 November 2021. This interview included submissions from the Respondents' counsel on their views of NSIRA's role in the investigation.
>
> 14. The August 2021 and the November 2022 filings included submissions from the Respondents' counsel on their views of NSIRA's role in this matter. Counsel also communicated with NSIRA counsel throughout this process, on 26 May 2022, and 22 November 2022.
>
> …
>
> 51.An NSIRA investigation is not a process in which all evidence must be received by oral hearing No provision in the NSIRA Act can be read as obliging an indefinite and enduring entitlement to oral hearings. An NSIRA investigation is a process, in which (under section 25) the Respondents were to be given "an opportunity to make representations ..., to present evidence and to be heard personally or by counsel." NSIRA convened a full day of

> respondent oral investigative interviews and hearings in November 2021 , with considerable written submissions before and after.
>
> 52. Procedural fairness would have obliged additional oral hearings where, especially, the credibility of the witness was at issue. 6 In this matter, there were no questions of credibility. The information presented to NSIRA was heavily dependent on a documentary record. In keeping with its control of its own proceedings, NSIRA concluded after the day of investigative interviews in November 2021 that the supplemental information it required to complete its investigation was best elicited in writing, primarily through requests for information. NSIRA also received additional information willingly from the Respondents. As the Respondents note, the CSIS witness referred to in the letter did supply supplemental written submissions in the form of a sworn statement and accompanying documents. This came before the CHRC deadline for the Final Report in November 2022, and I read and considered it in finalizing that report. The Respondents were heard.
>
> [Emphasis added]

[211] In my respectful view, there is no merit to suggest the many letters AG Canada sent NSIRA were "representations," opportunities to make representations, or that the GoC parties were heard. In my view the correspondence NSIRA points to was almost exclusively evidence-gathering within phase one and consistent with the two-phase understanding reached at the outset in August 2021.

[212] Certainly, nothing suggests the material sent to NSIRA either singularly or collectively constituted a "full memorandum of fact and law" set out in the Chair's letter of August 12, 2021, nor am I able to see how in any way transmitting documents constitutes making "representations." The contrary submission is without merit.

[213] Dealing specifically with each of the letters noted by NSIRA in paragraph 12 above, the Court concludes:

> **27 August 2021**: AG Canada's preliminary outline of facts and evidence is just that, namely evidence-gathering;
>
> **29 September 2021**: Per the Investigative Report, "submissions respecting factors contributing to delay in processing immigration applications as well as 15 documents" (at para 17). However, from the record, these submissions consisted of "information regarding the relevant factors that contribute to delay in processing applications, particularly from Iran", all as requested by NSIRA. This document notes the GoC "will discuss these factors in detail at the hearing/investigative interviews scheduled for November 17, 2021" This is evidence-gathering.
>
> **15 October 2021**: "a further production to NSIRA containing 204 unclassified, protected and classified documents" (Investigative Report at para 17). This is evidence-gathering. AG Canada appears from the record to have also made submissions on the jurisdiction of NSIRA under the statutory scheme, which is discussed below;
>
> **10 November 2021**: From the record, statements of anticipated evidence to be presented at the investigative interviews as well as "three additional documents" (Investigative Report at para 17). Again this is evidence-gathering and advance information re evidence to be presented at the interviews;
>
> **17 November 2021**: Submissions made during the investigative interviews, which as noted by NSIRA above were from "the Respondents' counsel on their views of NSIRA's role in the investigation" (Procedural Ruling at para 13). Notably, the November 17 interviews were designed as part of the evidence-gathering phase to hear from GoC witnesses on the merits of the screening protocol under review in terms of its relative complexity, comparators and the security of Canada. The interviews were never completed and multiple requests to make additional submissions ignored without required procedural clarity or any response at all until a few days before NSIRA finalized its report in late November - a full year later;
>
> **10 January 2022**: Submissions of "an additional 128 documents in response to undertakings given during the investigative interview" (Investigative Report at para 19.) This is entirely evidence-gathering;

> **10 June and 4 July 2022**: "following NSIRA's requests for additional particulars regarding each individual Complainants, the [GoC] produced a further 18 documents" (Investigative Report at para 19). This is entirely evidence-gathering;
>
> **31 August, 21 September, 11 and 28 October 2022**: the GoC "produced an additional 62 protected and classified documents in response to NSIRA's requests for additional information regarding particular Complainants and pertaining to IRCC's processing of citizenship applications" (Investigative Report at para 20). This is evidence-gathering; and
>
> **14 and 15 November 2022**: "written submissions on the nature and form of the NSIRA's Report to the Commission, an additional classified statement by the CSIS witness, and seven supplemental documents" (Investigative Report at para 21). This is evidence-gathering re the additional documents.

[214] The foregoing confirms the vast bulk of AG Canada's filings were simply to send material requested by NSIRA. I should add that while AG Canada made submissions on the "*scope*" of NSIRA's report on October 15, 2021, these were not representations and were in no way submissions of fact and law respecting the merits.

[215] In this respect I also again respectfully adopt AG Canada's submissions and reject as unfounded NSIRA's assertion that the right to make representations was restricted to issues of redactions. There is no merit in that conclusion. AG Canada submits, and I agree the right to make representations is unqualified:

> 84. The right to make representations in subsection 25(2) of the NSIRA Act is unlimited and unqualified. That right is not, as Member Forcese held in his January 27, 2023 Unclassified Procedural Ruling, limited to making submissions to protect classified information from disclosure during the investigation. No such restrictive language appears in section 25. To the contrary, the text of section 25 expressly provides that the complainants, the Minister and the Director shall be given the opportunity to make representations. Indeed, subsection 25(2) begins with the words,

> "In the course of an investigation". As a result, subsection 25(2) mandates a continuing duty to afford the parties the opportunity to be heard during the investigation in respect of the matters under investigation. Member Forcese's restrictive interpretation of subsection 25(2) is unreasonable.

[216] Here it is important to recall, as AG Canada submits that the GoC had no knowledge of the legal standard NSIRA intended to apply in its Report and therefore no capacity to argue that the standard was or was not met on the evidence before NSIRA:

> 88. By email received September 3, 2021, the Registrar of the Review Agency requested counsel for the GOC Respondents to make submissions, including law and arguments, respecting the proper scope of the report that the Agency must deliver to the Commission pursuant to s. 346(1) of the CHRA.
>
> 89. Counsel made those submissions on October 15, 2021. Referring to elements of the tests for prima facie discrimination and bona fide justification under the CHRA, the GOC Respondents submitted that the Review Agency must address the following issues in its report:
>
> a. What are the security considerations upon which security screening for eligibility and admissibility are based?
>
> b. How do those considerations affect the delivery of immigration services (i.e., is there an adverse impact)? and
>
> c. Are the measures adopted to address those security considerations justified, in that changing them to improve processing times for applicants from Iran would be inconsistent with the objectives of the measures or would otherwise cause undue hardship?
>
> 90. The GOC Respondents argued that the Review Agency had no jurisdiction to make a finding of discrimination as that issue is reserved for the Tribunal if the matter should be referred to a hearing by the Commission.

> 91. The Review Agency did not respond to these submissions. It did not communicate the criteria it would apply to prepare its Report. Accordingly, the GOC Respondents had no knowledge of the legal standard the Review Agency applied to prepare its Report and therefore no capacity to argue that the standard was met on the evidence before NSIRA.

(d) *GoC was not heard at interviews*

[217] Regarding the interviews of November 17, 2021, I canvass them in considerable detail above (Section V(A)(2)).

[218] To reiterate, while NSIRA agreed to hear from CSIS on the following matters, the fact is CSIS testimony from its crucial witness was not dealt with at the interviews. I am not satisfied CSIS, nor the GoC parties generally, were afforded their right to make representations per s 25(2) of the *NSIRA Act* in relation to the following issues, nor am I satisfied they were afforded their procedural fairness right to fully and fairly present their position. The following CSIS testimony from its crucial witness was not submitted:

> Overview presentation (morning session):
>
> - […]
> - Nature and use of indicators and other criteria during the period relevant to the complaints (2015-2018)
> - Shift to use of thematic indicators in 2018
> - Factors that can affect the time required to perform security screening
>
> Country-specific and Case-specific information (afternoon session)
>
> - […]

- Measures directed at alleviating pressures related to the processing of applications with an effect on Iranian applications
- The Service's role in the security screening of the three sample cases with specific reference to steps taken by CSIS in those cases, when such steps are taken more generally and why
- Explanation of the Service's specific screening tools and processes
- Answer questions on the Service's turnaround time statistics for the 41 group complainants

[219] In this respect, notwithstanding the most central role and responsibility that Parliament assigns CSIS in relation to the "security of Canada," NSIRA provided CSIS only one (1) hour at the interviews. To reiterate my findings above (Section V(A)(2)), in my respectful view the time NSIRA allowed the witnesses from CSIS specifically, and the departments generally, was not adequate because CSIS was prevented from providing crucial witness evidence relating directly to the security considerations for the alleged human rights violations. While the interviews were scheduled for one day, NSIRA obtained a full year and a half (18 months) to investigate and complete its report. Notably, AG Canada objected to the inadequacy of the interviews on several occasions after November 17, 2021, but inexplicably never received a response until more than a year later on November 22, 2022.

[220] I would no more constrain NSIRA members from asking questions of crucial witnesses than permit NSIRA to prevent GoC witnesses from completing their testimony including answering additional NSIRA questions and follow-up. If that took more that a day — as it did — NSIRA should have continued the interviews. The failure to do so engaged and breached

NSIRA's duties of thoroughness as a human rights investigator which flawed its Investigative Report and disrespected jurisprudence regarding crucial witnesses outlined above (Section VI(D)).

[221] It is significant in my view that NSIRA never disputed that the interviews were inadequate, until the matter was raised by AG Canada after which it issued the Procedural Ruling in January 2023 (re-issued February 2023).

[222] I add that even if NSIRA was under no duty of procedural fairness and could decline to hear and discuss CSIS's further evidence, which is not the case, in my respectful view NSIRA was still obliged to give the GoC reasonable notice under Rule 7.20 of such a substantial and material variance of its processes. However, despite repeated entreaties from AG Canada, NSIRA never provided the GoC with procedural clarity on the status of the interviews until its peremptory notice in an unrelated call on November 22, 2022 – more than a year after the issue arose – which came too late without sufficient notice.

[223] The Court concludes that NSIRA's verbal advice to the GoC parties on November 22, 2022 (it would complete its report six days later, i.e., with the obvious implication interviews were a dead letter) did not constitute the reasonable notice required by principles of procedural fairness, nor did it comply with Rule 7.20 requirements to notify the GoC departments of their opportunity to make representations and of the time limits within which those representations must be made.

[224] With respect, NSIRA either a) simply and inexplicably waited too long to decide this point, or b) having decided the point at some unknown but earlier time, waited too long to give notice of its central decision. In either case, the GoC departments were denied procedural fairness in terms of legitimate expectations and participatory rights. In addition, this last-minute announcement in my respectful view was in breach of NSIRA's own Rule 7.20 and duty to provide timely procedural clarity.

(e) *High level of procedural fairness required by not provided*

[225] The Procedural Ruling says NSIRA is the "master of [its] own procedure" (*Rosianu v Western Logistics Inc*, 2021 FCA 241 at para 34). It further states:

> 32. There is no practice by NSIRA or its predecessor of eliciting submissions on draft investigative reports. NSIRA's procedural rules, created pursuant to section 7.1 of the NSIRA Act, do not extend such an entitlement Rule 7.20, cited by the Respondents in their 20 December letter, entitles parties to notice of the investigation and of the manner of making submissions during that investigation. That Rule does not, on its face or by implication, create an entitlement to make submissions on a draft final report. As noted, the Respondents made numerous submissions over the course of the investigation, both in writing and then in the investigative interview and hearing on 17 November 2021. The - Respondents regularly exercised their right to be heard. It is not clear, therefore, how they can now claim that Rule 7.20's notice requirement was not observed by NSIRA.
>
> [Emphasis added]

[226] With respect these arguments have no merit. As NSIRA itself observes (Investigative Report, para 10), in this case it is a proxy for a Commission staff investigator, a point the Court accepted having heard submissions from AG Canada and the Commission.

[227] In this context, and after reviewing the *Baker* factors, the Court concluded above that the GoC parties were entitled to a high degree of procedural fairness (see Section IV(C) above). This was certainly not provided.

[228] NSIRA's Procedural Ruling also says that "there is no requirement in common law procedural fairness that parties be given an opportunity to make submissions on a draft decision," citing *Canada (Attorney General) v Ennis*, 2021 FCA 95 at paragraph 75. Rather, NSIRA says it is entitled to respect in evaluating its procedural choices (*Baker* at para 27). The Procedural Ruling states:

> 36. NSIRA and its predecessor have been conducting complaints investigations under their governing statutes for decades. NSIRA's practice of not eliciting submissions on draft reports is a conscious one, reflecting a decided choice in the management of its process. As suggested above, were parties entitled to make submissions on NSIRA investigative reports before they were finalized, the investigative process would be mired in delay associated with the need to conduct multiple rounds of redactions. Compounded delay would have considerable implications for the expeditious conduct of NSIRA investigations, already protracted because of the challenge of managing investigations in a classified environment.
>
> [Emphasis added]

[229] The short answer is that by its own admission (at para 42 of the Procedural Ruling), NSIRA states it had never dealt with a Commission referral before. This was its first. Simply put, NSIRA had no relevant past practice to apply in a case like this. Therefore, it was not able to, nor bound to apply "past practices" in treating the GoC parties as it did.

[230] The other objection to this argument is the uncontroverted submission of the Commission that Commission staff investigators share investigative reports with the parties and give them an

opportunity to respond, which response is then sent to the Commission for its decision. This ensures procedural fairness to the GoC departments. That reasonable expectation was not afforded here.

[231] With respect, more generally NSIRA's finding on this issue misses the point. It is one thing to hold as NSIRA does that it has flexibility in its investigations. It is an entirely different matter to hold acontextually that it may do so in this special complex national security case in which it owed a high duty of procedural fairness.

[232] It seems to me that while this case was treated at the outset correctly, the process was inexplicably changed, with only a few days left, to be treated as if it was a routine complaint under its general mandates under s 16(1) (against CSIS), 17(1) (against the Communications Security Establishment) or 18(3) (about denials of security clearances and related denials of contracts) of the *NSIRA Act*, or referred to NSIRA under ss 45.53(4.1) or 45.67(2.1) of the *RCMP Act*.

[233] However as found above, this is not a routine matter such as denial of a security clearance to a government worker, or a challenge to an official action or omission. Instead, in my very respectful opinion, the matter at hand is of central importance — it involves in a very real sense the "security of Canada" and the heavy responsibility lying on the GoC departments to adequately process and vet those seeking immigration and citizenship status. Changing the treatment of this case at the last possible minute was procedurally unfair and incorrect. Measured

on the standard of correctness, as the law requires, I find NSIRA's purported change of procedural options in late November 2022 was incorrect.

(f) *Workarounds not responsive*

[234] To recall, AG Canada asked and NSIRA agreed that after the evidence-gathering first phase, the GoC parties would have the right to file a "full memorandum of fact and law." To recall as well, s 25(2) of the *NSIRA Act* gives the right to the GoC parties (and specifically the Director of CSIS) to make "representations" to NSIRA before a report is sent to the Commission. I have found NSIRA afforded neither to the GoC parties.

[235] Instead, NSIRA's Procedural Ruling offers "workarounds":

> 46. Finally, in the event that the Respondents feel encumbered during later stages of the CHRA process in relying on classified information, other work arounds are possible, including sharing the government position with a security-cleared CHRC investigator, a section 52 proceeding under the CHRA, or (were the government to resist such a proceeding) relying on summaries prepared by a Federal Court judge acting under section 38 of the *Canada Evidence Act*.

[236] I am not persuaded the availability of workarounds satisfies NSIRA's duty of procedural fairness to the GoC parties. Instead of construing its statute and rules in the narrow and incorrect manner discussed above, in my respectful view procedural fairness required NSIRA to apply its rules with flexibility, purposefully, contextually and holistically in the manner proposed by AG Canada and as found by this Court.

D. *GoC parties denied procedural fairness*

[237] With respect, particularly given the 18-month time frame NSIRA was given, and NSIRA's inexplicable refusal to respond to any of AG Canada's letters (of December 15, 2021, January 10, 2022, and November 14, 2022), I find NSIRA's November 22, 2022, attempt to revoke or dispense with the two-phase framework agreement of August 2021 came far too late.

[238] It was not effective under NSIRA Rule 7.20 because of its egregious failure to provide reasonable timely notice of what constituted a complete reversal and nullification of longstanding two-phase format by eliminating the GoC's right to file a "full memorandum of fact and law."

[239] In my view, the abrupt about-face also violated the GoC's rights to procedural fairness generally, denied their legitimate expectations, and breached their participatory rights in NSIRA's process. Moreover, it unlawfully purported to dispense with the GoC departments' right to make "representations" to NSIRA legislated in s 25(2) of the *NSIRA Act*.

[240] In this connection I emphasize that NSIRA's verbal communication of November 22, 2022, constituted the first procedural advice provided by NSIRA since the two-phase framework agreement exchange dated August 11 and 12, 2021. With respect this far too short time-frame (six days) was unreasonable and insufficient under NSIRA's Rule 7.20 which I conclude was not respected.

[241] It is very important to recall that until the Investigative Report was finalized (November 28, 2022), the GoC had no knowledge of what position NSIRA would take against (or for) them in its recommendations and report to the Commission. As set out earlier in AG Canada's submission of October 15, 2021 (to which NSIRA never responded), AG Canada had no knowledge of the criteria NSIRA would apply in preparing its report. Further, AG Canada never knew what legal standards NSIRA would apply to the evidence and testimony before it.

[242] Importantly AG Canada never knew, nor had an opportunity to make submissions on the facts and law relating to first phase evidentiary findings made by NSIRA.

[243] I find the GoC departments were kept in the dark in terms of relevant facts and law, and contrary to the agreement by NSIRA's Chair dated August 12, 2021, never met AG Canada's legitimate expectation and procedural fairness right to file a "full memorandum of fact and law" at the second phase of NSIRA's investigation, once the evidentiary phase was complete.

[244] Given this very unsatisfactory situation, it is straightforward to see why the procedurally fair practice of the Commission requires such investigative reports to be sent to the parties for their response ***before*** sending both reports and responses to the Commission.

[245] In addition, I agree with AG Canada that because the GoC departments were afforded no meaningful opportunity to adduce all relevant evidence and make submissions, there is no basis for this Court to conclude that NSIRA complied with its procedural obligations under its home statute, its procedural rules or the principles of fairness:

> 47. While a tribunal's findings of fact and interpretation of its home statute are reviewable on a reasonableness standard, the ultimate question before this Court is whether the procedural choices made by NSIRA were sufficient to comply with the requirements of subsection 25(2), the relevant procedural rules and the common law principles of procedural fairness. This is a question that involves no deference to the reasoning of NSIRA. Since the GOC Respondents were afforded no meaningful opportunity to adduce all relevant evidence and make submissions, there is no basis for this Court to conclude that NSIRA complied with its procedural obligations under its home statute, its procedural rules and the principles of fairness.
>
> (AG Canada Memorandum at para 47)

[246] NSIRA's conduct was procedurally incorrect and warrants judicial intervention.

E. *Concluding comments*

[247] With respect, the parties should gather sufficient instruction from the foregoing to govern the reconsideration that will be ordered. I emphasize the Court is ordering a redetermination with the clear expectation the reconsideration will afford the GoC parties their right to make representations per s 25(2), and as well, their right to know the case they have to meet and a full and fair opportunity to respond per *Canadian Pacific*, cited above, at para 56:

> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice – was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.
>
> [Emphasis added]

[248] NSIRA and the GoC parties may wish to use the same record as already generated or a different one. They will and likely should have preliminary discussions followed by a two-phase framework or agree to some another framework or process(es). Regardless, NSIRA must respect its duty to receive representations from the GoC parties per s 25(2) and must act in accordance with its Rule 7.20. Any legitimate expectations and participatory rights of the GoC departments must be afforded to them. NSIRA must respect its duty of thoroughness as a proxy human rights investigator for the Commission. NSIRA must in the result produce a procedurally fair and statutory compliant investigative report.

[249] Technically NSIRA may send its redacted investigative report to the Commission, which Commission staff will then send to AG Canada for response as usual practice, which redacted response with NSIRA's report would then be sent to the Commission for decision.

[250] Respectfully, it may save time and be preferable for NSIRA to prepare its investigative report in a procedurally fair and compliant manner, and send it directly to AG Canada for response. It may be that NSIRA would agree to amendments. NSIRA would then send its completed Investigative Report together with AG Canada's response (both redacted) to the Commission for its decision.

VI. Conclusions

[251] I conclude NSIRA failed to afford the GoC departments their statutory right to make "representations" to NSIRA, legislated by s 25(2) of the *NSIRA Act*. In my respectful view, NSIRA also breached procedural fairness by failing to meet the legitimate expectations and

participatory rights of the GoC departments set out in the two-phase investigative framework agreed upon at the outset of NSIRA's investigation, contrary to jurisprudence. NSIRA also breached procedural fairness in failing to provide the GoC with timely advice regarding procedures for making representations and presenting evidence required by Rule 7.20 of NSIRA's *Rules of Procedure*. The Investigative Report is fatally flawed due the tribunal's failure to comply with its duty of thoroughness in its capacity as a proxy for a Commission human rights investigator, contrary to jurisprudence.

[252] Therefore, this application for judicial review will be granted.

VII. Costs

[253] The AGC sought costs in its written material but abandoned its request at the hearing. The CHRC does not seek costs and submits no costs should be awarded against it as it appears in its capacity as a representative of the public interest. In my respectful view and in my discretion, this is not a case for costs.

JUDGMENT in T-427-23

THIS COURT'S JUDGMENT is that:

1. This Application for judicial review is granted.
2. The Decision (the Investigative Report) is set aside.
3. The matter is remanded for redetermination by a different decision maker in accordance with these Reasons, and in particular paragraphs 247 to 250 above.
4. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-427-23
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v THE CANADIAN HUMAN RIGHTS COMMISSION v THE NATIONAL SECURITY AND INTELLIGENCE REVIEW AGENCY
PLACE OF HEARING:	OTTAWA, ONTARIO
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JUDGMENT AND REASONS:	BROWN J.
DATED:	JUNE 24, 2025

APPEARANCES:

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