File No. GE-22-2365

SOCIAL SECURITY TRIBUNAL OF CANADA – GENERAL DIVISION

BETWEEN:

JOSEPH HICKEY
Appellant

and

CANADIAN EMPLOYMENT INSURANCE COMMISSION (CEIC)
Defendant

APPELLANT'S REPLY SUBMISSIONS: THE SOCIAL SECURITY TRIBUNAL'S JURISDICTION TO DECIDE CONSTITUTIONAL ISSUES IN THE APPEAL

Appellant's reply submissions pursuant to Tribunal Member Nathalie Léger's decision letter of Oct. 19, 2022 (item GD12 in SST file GE-22-2365).

SUBMITTED BY EMAIL ON JANUARY 24, 2023

Submitted by:
Joseph Hickey, PhD
Email:
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Submitted to (by email):
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Amended Notice of Constitutional Question

1. The CEIC raises several new issues in response (see below), some of which are addressed by the attached Amended Notice of Constitutional Question ("Amended NCQ").

2. In my Amended NCQ, I challenge the constitutionality of sections 30(1) and 31 of the *Employment Insurance Act* ("*EI Act*") pursuant to the rule of law doctrine of vagueness.

3. I draw the Tribunal's attention to paragraph 1 of my Amended NCQ, which states:

> "1. I make the following submissions about the constitutionality of the *Employment Insurance Act* and its application to me, regarding the concept of "misconduct":
>
> a. Sections 30(1) and 31 of the *Employment Insurance Act* are unconstitutional because "misconduct" is not defined in the *Act* or its *Regulations* and can be (and has been) interpreted by the Canadian Employment Insurance Commission (CEIC) to include refusing a dangerous medical intervention, which cannot be "misconduct" justifying depriving a citizen of government assistance or service, in our constitutional monarchy and parliamentary democracy, founded on the rule of law and respect for rights and freedoms.
>
> b. In the alternative, if ss. 30(1) and 31 of the Act are not unconstitutional, then their application by the CEIC in this case is unconstitutional, because refusing a dangerous medical intervention cannot be "misconduct" justifying depriving a citizen of government assistance or service, in our constitutional monarchy and parliamentary democracy, founded on the rule of law and respect for rights and freedoms."

4. My constitutional questions are limited to this Amended NCQ (and its para. 1), moving forward.

5. In particular, therefore:

    - I do not invoke the *Canadian Charter of Rights and Freedoms* (the "Charter") in my Amended NCQ.
    - I do not challenge the government's vaccination mandate, my employer's vaccination policy, nor my employer's decision to deny me an accommodation under its policy, in my Amended NCQ.

6. In my respectful submission, my Amended NCQ (attached) satisfies the requirements of section 1(1) of the *Social Security Tribunal of Canada Regulations* ("*Regulations*").[1]

7. I plan to duly serve my Amended NCQ on the Attorneys General of Canada and each province within the required timeline stated in section 1(2) of the *Regulations*.

CEIC's response regarding SST's jurisdiction to decide constitutional matters raised in my appeal

8. In its response of Dec. 23, 2022, the Canadian Employment Insurance Commission (CEIC) makes the following entirely new submissions:

    a. That any constitutionality challenge is limited to and necessarily tied to specific *Charter* provisions, an incorrect reading of the *Regulations*.

    b. That my constitutional challenge can be pre-emptively barred on the basis of purely procedural constraints.

9. I reply to the CEIC's new submissions as follows.

No requirement in the Regulations to tie a constitutionality challenge to the Charter *or to any specific* Charter *provisions*

10. The CEIC states, in the opening paragraph of its response submissions:[2]

> "For the following reasons, the Respondent Canada Employment Insurance Commission submits that the Appellant's Notice still does not meet the requirements of subsection 1(1) of the *Social Security Tribunal Regulations* (*Regulations*), as he has failed to outline how sections 30 and 31 of the *Employment Insurance Act* (*EI Act*) violate his rights under the *Canadian Charter of Rights and Freedoms* (*Charter*). Without an outline of submissions as to how the provisions of the *EI Act* violate his *Charter* rights, the Appellant's Notice is not sufficient and his appeal must proceed regularly."

[1] *Social Security Tribunal of Canada Regulations, 2022* (SOR/2022-255), https://laws.justice.gc.ca/eng/regulations/SOR-2022-255/FullText.html.
[2] CEIC response of Dec. 23, 2022 (item GD15 in SST file GE-22-2365), at pg. 1.

11. In its response, the CEIC goes on to make various arguments about the requirements placed on claimants who raise *Charter* issues before the SST.[3]

12. However, the CEIC ignores the fact that the SST is empowered to decide constitutional matters that do not invoke the *Charter*. This is clear from the *Regulations* and the case law, as explained below.

13. Section 1 of the *Regulations* appears under the heading "Constitutional Questions" and is the only section appearing under that heading. The entirety of Section 1 of the *Regulations* is reproduced below:[4]

> **Constitutional Questions**
>
> **Filing of notice**
>
> **1 (1)** A party who wants to challenge the constitutional validity, applicability or operability of a provision of the *Canada Pension Plan*, the *Old Age Security Act*, the *Employment Insurance Act*, Part 5 of the *Department of Employment and Social Development Act* or the rules or regulations made under any of those *Acts* must file a notice with the Tribunal that sets out
>
> (a) the provision that will be challenged;
>
> (b) the material facts relied on to support the constitutional challenge; and
>
> (c) a summary of the legal argument to be made in support of the constitutional challenge.
>
> **Service of notice**
>
> (2) At least 10 days before the date set for the hearing of the appeal or application, the party must serve notice of the challenge on the persons referred to in subsection 57(1) of the Federal Courts Act and file a copy of the notice and proof of service with the Tribunal.
>
> **Failure to file proof of service**
>
> (3) If proof of service has not been filed in accordance with subsection (2), the Tribunal may, on its own initiative or on the request of a party, postpone or adjourn the hearing.

14. Section 1 of the *Regulations* thus states the requirements for a party wishing to raise a constitutional challenge before the SST. Section 1 makes no specific mention of the *Charter*. In fact, the word *Charter* does not appear anywhere in the *Regulations*.

15. It is clear from Section 1 of the *Regulations* that a party can challenge the constitutional validity, applicability or operability of a provision of the *EI Act*.

16. In my Amended NCQ, I challenge the constitutional validity, applicability or operability of sections 30(1) and 31 of the *EI Act* pursuant to the rule of law doctrine of vagueness.

17. In my Amended NCQ, I do not invoke my *Charter* rights or the *Charter* whatsoever.

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[3] *Ibid.*, at pgs. 2-6.

[4] *Social Security Tribunal of Canada Regulations, 2022* (SOR/2022-255), s. 1, https://laws.justice.gc.ca/eng/regulations/SOR-2022-255/FullText.html.

18. It is clear from the case law that an administrative tribunal that is empowered to decide questions of law may decide constitutional questions that are properly before it:[5]

> "[77] These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions. […]
>
> [78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. […]" [emphasis added]

19. The words "including the *Charter*" in *R. v. Conway*[6] do not mean "only if the *Charter* is invoked". Rather, an administrative tribunal that is empowered to decide constitutional questions has jurisdiction to determine any constitutional question that is properly before it, including constitutional questions that do not invoke *Charter* provisions. This includes non-*Charter* constitutional issues such as the division of provincial and federal powers[7] and whether government laws or actions violate the rule of law including the doctrine of vagueness.[8,9]

20. My Amended NCQ challenges that sections 30(1) and 31 of the *EI Act* violate the rule of law doctrine of vagueness. It does not invoke any *Charter* provisions.

21. In its response, the CEIC argues that "the Appellant's arguments hinge on the determination of whether his employer's policy is unconstitutional, [sic] as his Notice does not outline a valid *Charter* argument pertaining to the operability, validity, or applicability of an *EI Act* provision, his Notice should be dismissed."[10] This argument by the CEIC does not apply to my Amended NCQ, since I do not challenge my employer's policy nor invoke my *Charter* rights in my Amended NCQ.

22. The CEIC also implies that a law can only be found to be unconstitutional due to vagueness if the vagueness argument is made in the context of either s. 7 or s. 1 of the *Charter*.[11] This is incorrect, because the rule of law and the doctrine of vagueness are essential elements of the Canadian constitution, independent of the *Charter*:

> "2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference* and *Committee for the Commonwealth of Canada*)." [emphasis added] [12]

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[5] *R. v. Conway*, 2010 SCC 22 (CanLII), https://canlii.ca/t/2b2ds, at paras. 77-78.
[6] *R. v. Conway*, 2010 SCC 22 (CanLII), https://canlii.ca/t/2b2ds, at para. 77.
[7] *Hunt v. T&N plc*, 1993 CanLII 43 (SCC), https://canlii.ca/t/1frxg, at pg. 311 [a-f];
[8] "Compliance and Enforcement Decision CRTC 2017-367", CRTC, Ottawa, 19 October 2017, File number: PDR 9094-201400302-001, https://crtc.gc.ca/eng/archive/2017/2017-367.htm, at paras. 83-101 [Upheld by the Federal Court of Appeal in *3510395 Canada Inc. v. Canada (Attorney General)*, 2020 FCA 103 (CanLII), https://canlii.ca/t/j82gh].
[9] *1112-10619 (Re)*, 2015 ONSBT 5116 (CanLII), https://canlii.ca/t/gm5h9, paras. 10-58.
[10] CEIC response of Dec. 23, 2022 (item GD15 in SST file GE-22-2365), at pg. 4.
[11] CEIC's response of Dec. 23, 2022 (item GD15 in SST file GE-22-2365), at pages 5-6.
[12] *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), https://canlii.ca/t/1fs9g, at pgs. 626-627.

"The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness, here (*Prostitution Reference and Committee for the Commonwealth of Canada*) as well as in the United States (see *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at pp. 108-9) and in Europe, as will be seen later. These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition." [emphasis added] [13]

"The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice." [emphasis added] [14]

23. The doctrine of vagueness is a "principle of fundamental justice":[15]

"I would therefore conclude that:

[…]

2. The "doctrine of vagueness", the content of which will be developed shortly, is a principle of fundamental justice under s. 7 and it is also part of s. 1 *in limine* ("prescribed by law")." [emphasis added]

24. Principles of fundamental justice are "essential elements of a system of justice which is founded upon […] the rule of law" and such principles are "found in the basic tenets of our legal system":[16]

"30. Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).

31. It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters."

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[13] *Ibid.*, at pg. 632 [h-j].
[14] *Ibid.*, at pg. 643 [b-c].
[15] *Ibid.*, at pg. 632 [a-d].
[16] *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), https://canlii.ca/t/dln, paras. 30-31.

25. That the constitutionality of a law can be challenged pursuant to the rule of law doctrine of vagueness and independent of any claimed *Charter* violation is confirmed by the case law, in particular *1112-10619 (Re)*[17] and "Compliance and Enforcement Decision CRTC 2017-367" (upheld by the Federal Court of Appeal in *3510395 Canada Inc. v. Canada (Attorney General)*),[18] which were cases before Canadian administrative tribunals.

It would be unjust to pre-emptively bar my constitutional challenge on the basis of purely procedural constraints

26. In its response submissions, the CEIC argues that my constitutional challenge should be barred because of alleged insufficiency of my initial Notice of Constitutional Question ("Initial NCQ") dated July 15, 2022.[19] The CEIC stated the following it in its response:[20]

> "The Appellant has not provided a sufficient notice pursuant to subsection 1(1) of the *Regulations* because he has failed to outline a constitutional challenge relating to the *EI Act* that can be heard by the Tribunal. The constitutional appeal should be dismissed and the matter should proceed regularly."

27. The CEIC seeks to bar my constitutional challenge pre-emptively, without allowing me the opportunity to amend my Initial NCQ. However, the CEIC's own submissions on this point rely on an SST decision in which an appellant was permitted to file an amended NCQ.[21]

28. The SST has allowed appellants to file amended NCQs in other cases not mentioned in the CEIC's response.[22]

29. The SST has also allowed an appellant who raised a constitutional matter during the hearing on merits of his appeal to have the matter adjourned in order to file an NCQ.[23] No date has yet been set for the hearing on merits in my appeal.

30. I am a self-represented litigant, the constitutional matters I am raising are complex, and my appeal is still at a preliminary stage. I respectfully submit that it would be unjust to bar my constitutional challenge without allowing me the opportunity to amend my Notice of Constitutional Question.

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[17] *1112-10619 (Re)*, 2015 ONSBT 5116 (CanLII), https://canlii.ca/t/gm5h9, paras. 10-58.
[18] "Compliance and Enforcement Decision CRTC 2017-367", CRTC, Ottawa, 19 October 2017, File number: PDR 9094-201400302-001, https://crtc.gc.ca/eng/archive/2017/2017-367.htm, at paras. 83-101 [Upheld by the Federal Court of Appeal in *3510395 Canada Inc. v. Canada (Attorney General)*, 2020 FCA 103 (CanLII), https://canlii.ca/t/j82gh].
[19] Appellant's initial Notice of Constitutional Question of July 15, 2022 (item GD2, at pages GD2-7 to GD2-11, in SST file GE-22-2365).
[20] CEIC response of Dec. 23, 2022 (item GD16 in SST file GE-22-2365), at pg. 6.
[21] Decision by SST (General Division) member Charlotte McQuade, dated July 4, 2020, in *Z.B. v. Canadian Employment Insurance Commission* (SST file no. GE-20-309). This decision is included in Tab 1 of the CEIC's response of Dec. 23, 2022 in the instant proceedings (item GD15, at pages GD15-8 to GD15-18 in SST file GE-22-2365).
[22] *VM v Canada Employment Insurance Commission*, 2020 SST 785 (CanLII), https://canlii.ca/t/jcvmm, at para. 5; H *B. v Minister of Employment and Social Development*, 2017 CanLII 146508 (SST), https://canlii.ca/t/hw38j, paras. 6-15.
[23] *DS v Canada Employment Insurance Commission*, 2020 SST 772 (CanLII), https://canlii.ca/t/jbs0v, paras. 1-3.

31. I submit that my Amended NCQ, which is attached to these reply submissions, fully satisfies the requirements of subsection 1(1) of the *Regulations*.

Factual errors in the CEIC's response

32. I wish to correct the following factual errors stated in the CEIC's response of Dec. 23, 2022.

33. The CEIC states that employees of the Bank of Canada "had until November 1, 2021, to comply" with the Bank's vaccination policy. This is incorrect. The Bank's vaccination policy states the following:[24]

> "Bank employees are required to be fully vaccinated against COVID-19 and its variants. Employees must attest to and provide proof of one of the following:
>
> [1] That they have been fully vaccinated against COVID-19 or will be fully vaccinated by November 22, 2021; or
>
> [2] A legitimate medical, religious or other human-rights based reason for not being vaccinated against COVID-19."

34. Therefore, Bank employees had until November 22, 2021 to request accommodation under the Bank's policy. I duly submitted my request for accommodation to the Bank on November 12, 2021.[25] The Bank considered my accommodation request and responded by denying me accommodation, on November 18, 2021.[26] I duly initiated and pursued the internal process offered to me by my employer to appeal my employer's decision to deny me accommodation,[27] and the appeal process was ongoing until my employment relationship was ended by mutual agreement between myself and the Bank of Canada in October 2022.

35. The CEIC states that I could challenge my former employer's vaccination policy and denial of accommodation "through [my] union's grievance process".[28] This statement is false and has no basis in any public record or in the record of this proceeding. I was not a member of a union while employed by the Bank of Canada. To my knowledge, all staff at the Bank are non-unionized, except for security personnel.

36. The CEIC also states the following:[29]

> "The Appellant has indicated that he has already initiated the process to challenge this employer's policy and denial of his accommodation request. By asking the Tribunal to similarly decide these issues, the Appellant is asking the Tribunal to duplicate proceedings which undermines the principles of finality and fairness in litigation, which may be perceived as a collateral attack on the other proceeding, and may ultimately amount to an abuse of process."

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[24] Affidavit of Joseph Hickey of July 14, 2022, at Exhibit A, Tab 1 (GD2-211, in SST file GE-22-2365).
[25] *Ibid*., at Exhibit A, Tab 2 (pages GD2-214 to GD2-217, in SST file GE-22-2365).
[26] *Ibid*., at Exhibit A, Tab 3 (pages GD2-218 to GD2-220, in SST file GE-22-2365).
[27] *Ibid.*, see the chronology of events at para. 2 of my Affidavit of July 14, 2022 (GD2-66 in SST file GE-22-2365).
[28] CEIC response of Dec. 23, 2022 (GD15-4, in SST file GE-22-2365).
[29] *Ibid*., at pg. GD15-4.

37. As I have noted in these reply submissions and per my attached Amended NCQ, I am not challenging the constitutionality of the Bank of Canada's vaccination policy, the Bank of Canada's decision to deny me accommodation under its policy, or the Federal Government's vaccination mandate, in the instant appeal to the SST.

38. Furthermore, contrary to the CEIC's statements above, the Bank of Canada and I mutually agreed to end my employment and resolve outstanding issues, in October 2022. This includes resolution of my internal appeal of the Bank's decision to deny me accommodation. I am not a party in any proceedings that duplicate any of the claims that I am making in the instant proceedings.

Rights of the Claimant

39. In the hearing on merits of my appeal, I plan to argue that I have the right to bodily integrity and the right to decide not to accept any medical treatment, including vaccination, and that these rights are supported in law, including the common law, the *Charter*, and the case law. I plan to argue that due to these rights my decision not to receive a COVID-19 vaccination cannot be characterized as "misconduct" worthy of the punishment of disqualification from benefits under the *EI Act*.

40. In this regard, I plan to rely in part on the decision of the SST General Division – Employment Insurance Section dated Dec. 14, 2022 in SST file GE-22-1889, by Tribunal Member Mark Leonard (the "Leonard decision").[30]

41. The Leonard decision concerned the case of an Employment Insurance benefits claimant who was suspended without pay and subsequently dismissed from her employment because she chose not to receive a COVID-19 vaccination, contrary to her employer's vaccination policy. As in my case, the claimant was denied Employment Insurance benefits by the Canadian government on the claimed basis that her decision not to be vaccinated constituted "misconduct".

42. The Leonard decision states the following, in particular:

> "[72] The Claimant was clear that she was not defying her employer by choosing not to get vaccinated but simply expressing her interest in protecting her health. She says that she did nothing wrong that warranted dismissal and her actions are not misconduct under the *Act*. She raises the allegation that the Employer failed to accommodate the security of her bodily integrity, according to law. She added that she attempted to maintain her job by proposing options such as continuing with testing and other transmission limiting protocols, but the Employer rejected her offer.
>
> [73] Again, it is not the Employer's actions that are in question. But the Claimant raises a valid point concerning her right to bodily integrity.
>
> [74] As I noted above, there is no Federal or Provincial legislation that demands Covid-19 vaccination and therefore vaccination against Covid-19 remains voluntary.

[30] *AL v Canada Employment Insurance Commission*, 2022 SST 1428 (CanLII), https://canlii.ca/t/jtztg.

[75] It is both well founded and long recognized in Canadian common law that an individual has the right to control what happens to their bodies. The individual has the final say in whether they accept any medical treatment.

[76] The common law confirms that the Claimant has a legal basis or "right" to not accept any medical treatment, which includes vaccination. If vaccination is therefore voluntary, it follows that she has a choice to accept or reject it. If she exercises a right not to be vaccinated, then it challenges the conclusion that her actions can be characterized as having done something "wrong" or "something she should not have done," whether willfully or not, that would support misconduct and disqualification within the meaning of the *EI Act*?

[77] Even the Claimant's employment contract (CA) acknowledges that she has the right to refuse any recommended or required vaccination.

[78] The issue of the Covid-19 vaccinations and dismissals resulting from non-compliance is an emerging issue. No specific case law currently exists on the matter that guides decision makers.

[79] Indeed, I could not find a single case where a claimant did something for which a specific right, supported in law, exists, and subsequently that action was still found to be misconduct simply because it was deemed willful.

[80] In the absence of a FCA decision that provides such guidance, I am persuaded that the Claimant has a right to choose whether to accept any medical treatment. Despite that fact that her choice contradicts her Employer's policy, and led to her dismissal, I find that exercising that "right" cannot be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of the punishment of disqualification under the *EI Act*."

RESPECTFULLY SUBMITTED THIS 24th DAY OF JANUARY, 2023

Joseph Hickey, PhD
Appellant, SST Appeal GE-22-2365

ATTACHED: Appellant's Amended Notice of Constitutional Question

File No. GE-22-2365

SOCIAL SECURITY TRIBUNAL OF CANADA – GENERAL DIVISION

BETWEEN:

JOSEPH HICKEY
Appellant

and

CANADIAN EMPLOYMENT INSURANCE COMMISSION (CEIC)
Defendant

APPELLANT'S AMENDED NOTICE OF CONSTITUTIONAL QUESTION TO THE ATTORNEYS GENERAL OF CANADA AND EACH PROVINCE

Pursuant to s. 57 of the *Federal Courts Act* and s. 1 of the *Social Security Tribunal Regulations, 2022*

January 24, 2023

Joseph Hickey, PhD
(Appellant)

I, Joseph Hickey, intend to question the constitutional validity, applicability, and operability of ss. 30(1) and 31 of the *Employment Insurance Act*.[1]

The question is to be argued at a hearing before the Social Security Tribunal of Canada – General Division ("SST") in my appeal with file number GE-22-2365. The date of the hearing is to be determined.

OVERVIEW

I contend that ss. 30(1) and 31 of the *Employment Insurance Act* are unconstitutional pursuant to the rule of law doctrine of vagueness.

Sections 30(1) and 31 of the *Act* allow the Canadian Employment Insurance Commission (CEIC) to deny an individual Employment Insurance (EI) benefits due to the individual's "misconduct".

However, "misconduct" is not defined in the *Act* or its Regulations and can be (and has been) interpreted by the CEIC to include the individual's decision to decline a dangerous medical intervention.

The act of declining a dangerous medical intervention cannot be "misconduct" justifying depriving a citizen of government assistance or service, in our constitutional monarchy and parliamentary democracy, founded on the rule of law and respect for rights and freedoms.

Contentions to be argued by the appellant

1. I make the following submissions about the constitutionality of the *Employment Insurance Act* and its application to me, regarding the concept of "misconduct":

    a. Sections 30(1) and 31 of the *Employment Insurance Act* are unconstitutional because "misconduct" is not defined in the *Act* or its *Regulations* and can be (and has been) interpreted by the Canadian Employment Insurance Commission (CEIC) to include refusing a dangerous medical intervention, which cannot be "misconduct" justifying depriving a citizen of government assistance or service, in our constitutional monarchy and parliamentary democracy, founded on the rule of law and respect for rights and freedoms.

    b. In the alternative, if ss. 30(1) and 31 of the Act are not unconstitutional, then their application by the CEIC in this case is unconstitutional, because refusing a dangerous medical intervention cannot be "misconduct" justifying depriving a citizen of

[1] *Employment Insurance Act*, (S.C. 1996, c. 23), https://laws-lois.justice.gc.ca/eng/acts/e-5.6/FullText.html.

government assistance or service, in our constitutional monarchy and parliamentary democracy, founded on the rule of law and respect for rights and freedoms.

Material facts relied on to support the constitutional challenge

Documents and chronology

2. All of the documents in the SST file for my appeal have been individually coded at the page-level by the SST using its numbering system. For example, the code GD5-1 indicates page "1" of document "GD5" in the SST file for my appeal. I use the SST's document-codes to specific documents, in this Notice.

3. I rely on the facts attested to in my affidavit of July 14, 2022,[2] and stated in any other documents contained in the SST file for my appeal.

4. A chronology of the events giving rise to the constitutional challenge is as follows:[3]

2019-06-03	I began working at the Bank of Canada as a Data Scientist, in the Bank's Canadian Economic Analysis Department.
2020-03-11	The World Health Organization (WHO) declared the COVID-19 pandemic.
2020-03-13	Due to the WHO's pandemic declaration, I and my departmental colleagues and most other staff of the Bank began working from home 100% of the time ("100% telework").
2021-10-06	The Bank announced its COVID-19 Vaccination Policy to staff and the policy took effect.
2021-11-12	I requested an accommodation under the Bank's vaccination policy, for medical, religious, and human rights reasons.
2021-11-18	The Bank's Human Resources Department ("Bank HR") informed me that my accommodation request was denied and that I would be placed on unpaid leave without benefits as of November 22, 2021.
2021-11-25	I submitted a request for Employment Insurance (EI) benefits to Service Canada.
2022-03-16	I duly submitted an internal appeal of the Bank's decision not to grant me an accommodation under its vaccination policy.

[2] Coded as GD2-65 to GD2-896 in the record of SST file GE-22-2365.
[3] See the affidavit of Joseph Hickey, at para. 2 (GD2-66 in the record of SST file GE-22-2365).

2022-04-04	Service Canada informed me that my request for EI benefits was denied.
2022-05-03	I submitted a Request for Reconsideration of Service Canada's denial of EI benefits to the Canadian Employment Insurance Commission (CEIC).
2022-05-26	The Bank denied my internal appeal of its decision not to grant me an accommodation under its vaccination policy.
2022-06-14	I duly submitted supplementary appeal submissions to the Bank regarding myocarditis risk to me, in response to the Bank's evaluation of the medical aspects of my internal appeal.
2022-06-17	The CEIC informed me by phone call that my Request for Reconsideration was denied.
2022-07-15	I duly submitted my appeal of the CEIC's June 17, 2022 decision to the Social Security Tribunal of Canada – General Division ("SST").
2022-10-07	My employment at the Bank of Canada was ended by mutual agreement with my employer. All issues between myself and the Bank were resolved, including my internal appeal of the Bank's decision to place me on unpaid leave pursuant to its mandatory vaccination policy.
2022-10-14	A pre-conference hearing of the SST was held, regarding the SST's jurisdiction to decide constitutional matters raised in my appeal. SST Member Nathalie Léger decided to receive submissions from myself and the CEIC regarding the SST's jurisdiction.
2022-10-19	SST Member Léger sent a letter to all parties stating her decision to receive jurisdictional submissions and the deadlines for the appellant's arguments, the CEIC's response, and the appellant's reply.
2022-11-24	I submitted my jurisdictional arguments to the SST.
2022-12-23	The CEIC submitted its response to my jurisdictional arguments.
2023-01-24	I submitted my reply to the CEIC's Dec. 23, 2022 response to my jurisdictional arguments.

Proven dangerousness of the vaccine

5. I have submitted extensive scientific evidence and documentation demonstrating that the COVID-19 vaccines are dangerous. This information is included in the record of my SST appeal.[4]

6. A plethora of dangerous adverse events have been associated with the COVID-19 vaccines in the scientific literature,[5] and the COVID-19 vaccines have been proven to have caused death in autopsy studies.[6]

7. In particular, significantly elevated risk of potentially fatal heart inflammation (myocarditis or pericarditis) following COVID-19 vaccination for males under age 40 has been demonstrated in many countries and jurisdictions, including in publications in the highest-level peer-reviewed academic journals.[7] In this regard, I am personally in a high-risk category, being male and under age 40.[8]

8. Additional statements in peer-reviewed scientific journals regarding the risk of myocarditis from COVID-19 vaccines, published after or shortly before my filing of my SST appeal, include the following:

    - Research article in the journal *Vaccines* (19 August 2022):[9]

        > "Overall, these results indicate that both mRNA vaccines were associated with markedly elevated risk of myocarditis and pericarditis in 18–39-year-olds and that the risk during the 7 days after vaccination was modestly greater after mRNA-1273 than after BNT162b2. […] This study found that among 18–39-year-olds, both mRNA COVID-19 vaccines were associated with a substantial increased risk of myocarditis and pericarditis, with the highest risk in 0–7 days after dose 2." [emphasis added]

    - Invited commentary reviewing several studies, in the *Journal of the American Medical Association (JAMA) Network Open* (24 June 2022):[10]

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[4] See the affidavit of Joseph Hickey at: Sections 2e and 3d of Exhibit A (GD2-88 to GD2-157 and GD2-166 to GD2-173 in SST file GE-22-2365) and Exhibit F (GD2-860 to GD2-877 in SST file GE-22-2365).

[5] See, for example, "Over 1000 peer-reviewed articles showing evidence of harm from COVID-19 vaccine products" at Section 2e (vi) of Exhibit A of the Affidavit of Joseph Hickey (GD2-112 to GD2-150 in SST file GE-22-2365).

[6] See Section 2e (iv) of Exhibit A of the Affidavit of Joseph Hickey (GD2-101 to GD2-104 in SST file GE-22-2365), including the reference S. Choi et al., "Myocarditis-induced Sudden Death after BNT162b2 mRNA COVID-19 Vaccination in Korea: Case Report Focusing on Histopathological Findings", *J. Kor. Med. Sci.* 36 (2021) e286, https://jkms.org/pdf/10.3346/jkms.2021.36.e286.

[7] *Ibid*. For example, the reference by M. Oster et al. ["Myocarditis Cases Reported After mRNA-Based COVID-19 Vaccination in the US From December 2020 to August 2021", *Journal of the American Medical Association* 327 (2022) 331-340, https://doi.org/10.1001/jama.2021.24110] reports a rate of myocarditis 11.3 times higher than normal following the second dose of the Pfizer COVID-19 vaccine and 12.6 times higher than normal following the Moderna COVID-19 vaccine, for males aged 30-39.

[8] Affidavit of Joseph Hickey, at para. 19 (GD2-71 in SST file GE-22-2365).

[9] K. Goddard et al., "Risk of myocarditis and pericarditis following BNT162b2 and mRNA-1273 COVID-19 vaccination", *Vaccine* 40 (2022) 5153-5159, https://doi.org/10.1016/j.vaccine.2022.07.007, (GD14-16 to GD14-22 in SST file GE-22-2365).

[10] E.S. Weintraub et al., "Myocarditis or Pericarditis Following mRNA COVID-19 Vaccination", *JAMA Network*, 5 (2022) e2218512, https://doi.org/10.1001/jamanetworkopen.2022.18512, (GD14-23 to GD14-25 in SST file GE-22-2365).

> "Global vaccine-safety monitoring of adverse events following COVID-19 vaccination has been ongoing since COVID-19 vaccines became available in December 2020. [Authors' Refs 2-4] Public health and regulatory bodies have been using passive surveillance systems in combination with data on doses administered, clinical reports, and population-based electronic medical record systems to evaluate the association of COVID-19 vaccination with myocarditis and pericarditis. [Authors' Refs 2-4] The evidence gathered to date supports an association between mRNA COVID-19 vaccination and myocarditis or pericarditis; the risk appears highest for adolescent and young adult male individuals following dose 2, with symptom onset usually occurring within several days of vaccination. [Authors' Refs 2-7]
>
> […]
>
> Based on an analysis from Vaccine Safety Datalink, an electronic medical record–based monitoring system in the US, mRNA vaccination was associated with a substantially increased risk of myocarditis or pericarditis in persons aged 18 to 39 years, with the highest risk occurring in the 0 to 7 days following dose 2 of mRNA-1273 or BNT162b2. [Authors' Ref 4] Additional analysis of Vaccine Safety Datalink data indicated that the risk of myocarditis or pericarditis was higher for mRNA-1273 compared with BNT162b2. [Authors' Ref 6] A study conducted in Denmark also found a higher risk for myocarditis or pericarditis following mRNA-1273 vaccination compared with BNT162b2 when evaluating the risk after dose 2 in male individuals aged 12 to 39 years. [Authors' Ref 7]" [emphasis added]

Summary of the legal argument to be made in support of the constitutional challenge

Constitutional principle of the rule of law, and the doctrine against vagueness

9. The constitutional status of the principle of the rule of law is beyond question, and the principle can be (and has been) applied to judicially declare a statute invalid:[11]

> The constitutional status of the rule of law is beyond question. [...] This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (per Rand J., *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142). [...] [emphasis added]

10. Pursuant to the rule of law, "the law should be such that people will be able to be guided by it" [emphasis added].[12]

11. The rule of law provides a shield for individuals from arbitrary state action:[13]

[11] *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), http://canlii.ca/t/1ftz1, at para. 63 and see paras. 59 to 67.
[12] *Ibid.*, para. 62.
[13] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), http://canlii.ca/t/1fqr3, para. 70.

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, supra, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action. [emphasis added]

12. The rule of law engenders the doctrine against vagueness and requires that a law must provide fair notice to citizens and must limit enforcement discretion:[14]

> The doctrine against vagueness is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion. Understood in light of its theoretical foundations, the doctrine against vagueness is a critical component of a society grounded in the rule of law: *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606, at pp. 626-27; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 S.C.R. 76, at para. 16.

13. The Supreme Court of Canada has characterized the doctrine against vagueness as having at least the following characteristics:[15]

> The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness, […]. These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition. [p. 632, g-j]
>
> […] In any event, given that, as this Court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not a central concern in a vagueness analysis. [p. 633 f-g]
>
> Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these enactments are often found vague. [p. 635, c-d]
>
> A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.

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[14] *R. v. Levkovic*, 2013 SCC 25 (CanLII), http://canlii.ca/t/fx94z, para. 32.
[15] *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), http://canlii.ca/t/1fs9g.

> For instance, the wording of the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou* and quoted at length in the *Prostitution Reference*, at pp. 1152-53, was so general and so lacked precision in its content that a conviction would ensue every time the law enforcer decided to charge someone with the offence of vagrancy. The words of the ordinance had no substance to them, and they indicated no particular legislative purpose. They left the accused completely in the dark, with no possible way of defending himself before the court. [p. 636, a-f]
>
> What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion. The need to provide guidelines for the exercise of discretion was at the centre of the ECHR reasons in *Malone*, supra, at pp. 32-33, and the *Leander* case, judgment of 26 March 1987, Series A No. 116, at p. 23.
>
> Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions.[16] […] [p. 642, e-j] [emphasis added]

14. The doctrine against vagueness has been used to determine that laws are without force and effect as a result of vagueness and uncertainty.[17]

15. The doctrine against vagueness has been invoked to challenge the constitutionality of Quebec's *Act respecting the laicity of the state* ("Law 21") prohibiting the wearing of religious symbols by public employees.[18] The court considered the question and decided that the law did not violate the doctrine of vagueness. The case is currently being argued before the Quebec Court of Appeal.[19]

16. The doctrine of vagueness was invoked to challenge the constitutionality of public health orders in Saskatchewan. The Provincial Court of Saskatchewan decided that the orders were not unconstitutionally vague.[20]

17. The Ontario Social Benefits Tribunal (OSBT) considered whether a regulation under the *Ontario Disability Support Program Act* violated the doctrine of vagueness as elaborated in *R. v. Nova Scotia*

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[16] And see: *Ibid.,* pgs. 634-635.
[17] *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 (CanLII), http://canlii.ca/t/g6zz5, see para. 110; *2312460 Ontario Ltd. and 748485 Ontario Ltd., and 2312460 Ontario Ltd., v. City of Toronto*, 2013 ONSC 1279 (CanLII), http://canlii.ca/t/fwbt7, see para. 36; *Wainfleet Wind Energy Inc. v. Township of Wainfleet*, 2013 ONSC 2194 (CanLII), http://canlii.ca/t/fx2wd, see paras. 31 to 40.
[18] *Hak c. Procureur général du Québec*, 2021 QCCS 1466 (CanLII), https://canlii.ca/t/jff8f, at paras. 642-676.
[19] M. Amador, "Quebec's top court begins hearing appeals on secularism law known as Bill 21", *Global News*, 7 November 2022, https://globalnews.ca/news/9257556/quebec-bill-21-appeal-court/.
[20] *R v Keough*, 2022 SKPC 23 (CanLII), https://canlii.ca/t/jprtg, at paras. 85-96.

Pharmaceutical Society,[21] and decided that the regulation did not violate the doctrine of vagueness.[22] The OSBT accepted that it had jurisdiction to make this decision.

18. The Canadian Radio-television and Telecommunications Commission (CRTC) considered whether a federal statute (the "Canadian Anti-Spam Legislation") violated the doctrine of vagueness as elaborated in *R. v. Nova Scotia Pharmaceutical Society*,[23] and decided that the regulation did not violate the doctrine of vagueness.[24] The CRTC, which is an administrative tribunal,[25] accepted that it had jurisdiction to make this decision. In fact, both the plaintiff and the Attorney General of Canada agreed that the CRTC had the jurisdiction to decide all the constitutional issues in this case.[26] The CRTC also noted that the jurisdiction of administrative tribunals to decide questions of constitutionality is not limited to constitutionality under the *Charter*.[27]

Sections 30(1) and 31 of the Employment Insurance Act *are unconstitutionally vague*

19. The term "misconduct", used in the impugned sections, is not defined in the *Employment Insurance Act* or its *Regulations*.

20. In my case, "misconduct" was in fact interpreted by the CEIC in effect to mean refusal to receive a dangerous medical intervention, even though I was concurrently duly appealing my employer's decision to deny me an accommodation to continue working (remotely, from home) without receiving the medical intervention.

21. As further context regarding the interpreted "misconduct": My employer unilaterally demanded that I receive the medical intervention, after I had already been employed for 2.5 years. My employment contract did not contain any requirement to receive medical interventions of any kind.

22. The CEIC's interpretation of "misconduct" in my case to mean refusal to receive an unwanted and dangerous medical intervention (while also appealing my employer's decision not to accommodate) has no connection or relationship to any past interpretation of misconduct in Canadian labour law or employment-benefits law, to my knowledge following my search.

23. The CEIC's interpretation of misconduct defies reasonable anticipation or fair notice of any citizen, and amounts to arbitrary state action to deny me a government service or benefit.

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[21] *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), http://canlii.ca/t/1fs9g.
[22] *1112-10619 (Re), 2015 ONSBT* 5116 (CanLII), https://canlii.ca/t/gm5h9, at paras. 10-58.
[23] *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), http://canlii.ca/t/1fs9g.
[24] "Compliance and Enforcement Decision CRTC 2017-367", CRTC, Ottawa, 19 October 2017, File number: PDR 9094-201400302-001, https://crtc.gc.ca/eng/archive/2017/2017-367.htm, at paras. 83-101; Upheld by the Federal Court of Appeal in *3510395 Canada Inc. v. Canada (Attorney General)*, 2020 FCA 103 (CanLII), https://canlii.ca/t/j82gh.
[25] "The CRTC is an administrative tribunal that regulates and supervises broadcasting and telecommunications in the public interest." – quote from: "Our Mandate, Mission and What We Do", Canadian Radio-television and Telecommunications Commission,11 May 2018, https://crtc.gc.ca/eng/acrtc/acrtc.htm, Accessed 16 November 2022.
[26] "Compliance and Enforcement Decision CRTC 2017-367", CRTC, Ottawa, 19 October 2017, File number: PDR 9094-201400302-001, https://crtc.gc.ca/eng/archive/2017/2017-367.htm, at para. 17.
[27] *Ibid.*, at footnotes 2 and 3.

24. The apparent and in-effect purpose of this arbitrary state action is to coerce me to be injected with a COVID-19 vaccine against my will, by denying me a significant financial benefit and by labeling my personal medical choice in a way that would be generally perceived in society as deviant ("misconduct"). These apparent purposes have no connection or relationship to the purpose of the employment insurance benefits program or the *Employment Insurance Act*.

25. As such, ss. 30(1) and 31 of the *Employment Insurance Act* offend the rule of law doctrine of vagueness and are unconstitutional.

26. The SST has the jurisdiction to decide this question, pursuant to s. 64(1) of the *Department of Employment and Social Development Act*.

The application of ss. 30(1) and 31 of the Employment Insurance Act to me is unconstitutional

27. In the alternative, if ss. 30(1) and 31 of the *Employment Insurance Act* are not unconstitutional in themselves pursuant to the doctrine of vagueness, then their application to me is unconstitutional in my case. That is, their application to me in my case, in-effect violates my constitutional right not to be subjected to unconstitutionally vague law.

28. The CEIC is acting as though ss. 30(1) and 31 of the *Act* are sufficiently vague to interpret my decision to refuse a dangerous medical intervention (while I was concurrently appealing my employer's decision to deny accommodation) as "misconduct". The CEIC is acting as though ss. 30(1) and 30 are unconstitutionally vague.

29. Thus, the application of ss. 30(1) and 31 of the *Act* to me in my case violates my constitutional right not to be subjected to vague law.

30. The following listed documents are available to the Attorneys General, and are not attached to the present Notice.

Table of Documents in the record of SST appeal GE-22-2365

Item	Pages	Date	Description of Document
GD2	GD2-1 to GD2-6	2022-07-15	Emails from Appellant to SST and Attorneys General of Canada and each province
	GD2-7 to GD2-11	2022-07-15	Appellant's Notice of Constitutional Question
	GD2-12 to GD2-18	2022-07-15	Appellant's Notice of Appeal to the SST General Division
	GD2-19 to GD2-64	2022-07-15	Appellant's arguments supporting his Notice of Appeal
	GD2-65 to GD2-896	2022-07-14	Appellant's affidavit in support of his Notice of Appeal
GD3	GD3-1	2022-07-21	List of documents in item GD3
	GD3-2	2022-07-21	Acronyms list
	GD3-3 to GD3-17	2021-11-26	Appellant's Application for Benefits (effective November 21, 2021)

	GD3-18 to GD3-19	2021-11-26	Record of Employment of Appellant
	GD3-20 to GD3-21	2022-06-09	Record of Employment of Appellant
	GD3-22	2022-03-10	Supplementary Record of Claim – employer
	GD3-23 to GD3-25	2022-03-18	Supplementary Record of Claim – claimant
	GD3-26	2022-04-04	Notice of Decision
	GD3-27	2022-04-05	Supplementary Record of Claim – claimant
	GD3-28 to GD3-39	2022-05-03	Request for Reconsideration
	GD3-40	2022-06-16	Supplementary Record of Claim – employer
	GD3-41	2022-06-17	Supplementary Record of Claim – claimant
	GD3-42 to GD3-43	2022-06-17	Notice of Reconsidered Decision
	GD3-44 to GD3-857	2022-04-08	Documents faxed by Appellant to the CEIC
GD4	GD4-1 to GD4-7	2022-07-21	CEIC's representations to the SST
GD5	GD5-1 to GD5-4	2022-07-19	Notice to Potential Added Parties sent from SST to Bank of Canada on
GD6	GD6-1	2022-08-17	Email from Appellant to the SST
GD7	GD7-1 to GD7-2	2022-09-14	Email from Appellant to the SST
GD8	GD8-1 to GD8-3	2022-10-04	Notice of Pre-Hearing Conference
GD9	GD9-1	2022-10-04	Email from Appellant to the SST, requesting rescheduling of the Pre-Hearing Conference
GD10	GD10-1 to GD10-3	2022-10-07	Notice of Pre-Hearing Conference
GD11	GD11-1 to GD11-9	2022-10-11	Email from Appellant to the SST
GD12	GD12-1 to GD12-3	2022-10-19	Letter from Tribunal Member Nathalie Léger stating decision to receive submissions from the Appellant and the CEIC regarding the SST's jurisdiction to decide constitutional questions, and setting deadlines for the Appellant's submissions, CEIC's response, and Appellant's reply
GD13	GD13-1	2022-10-13	Letter from the CEIC's counsel to the SST
GD14	GD14-1	2022-11-24	Appellant's cover email, with attachment
	GD14-2 to GD14-14	2022-11-24	Appellant's submissions regarding SST's jurisdiction to decide constitutional questions
	GD14-15 to GD14-22	2022-07-12	Scientific article attached to Appellant's submissions
	GD14-23 to GD14-25	2022-06-24	Scientific article attached to Appellant's submissions
GD15	GD15-1 to GD15-18	2022-12-23	CEIC's response regarding SST's jurisdiction to decide constitutional questions, plus tab.

RESPECTFULLY SUBMITTED THIS 24th DAY OF JANUARY, 2023

Joseph Hickey, PhD
Appellant, SST Appeal GE-22-2365

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CC: Respondent, Canadian Employment Insurance Commission (courtesy of the Social Security Tribunal of Canada)