File No. GE-22-2365

SOCIAL SECURITY TRIBUNAL OF CANADA – APPEAL DIVISION

BETWEEN:

JOSEPH HICKEY
Appellant

and

CANADIAN EMPLOYMENT INSURANCE COMMISSION (CEIC)
Defendant

REQUEST FOR LEAVE TO APPEAL OF GENERAL DIVISION'S DECISION NOT TO HEAR APPELLANT'S CONSTITUTIONAL CLAIM

Appellant's request for leave to appeal of General Division Member Nathalie Léger's April 7, 2023 decision not to hear the appellant's constitutional claim raised in SST file GE-22-2365.

SUBMITTED BY EMAIL ON MAY 10, 2023

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Submitted to (by email):
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Context of constitutional claim

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

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

3. However, "misconduct" is not defined in the *EI 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.

4. 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.

Chronology of constitutional claim

5. I was suspended without pay by my employer for declining to receive a COVID-19 vaccination, despite my request for accommodation. The suspension took effect on November 22, 2021.

6. I filed request for EI benefits on November 25, 2021.

7. My request for EI benefits was denied by the CEIC on April 4, 2022, on the basis that I had committed "misconduct" by declining to receive a COVID-19 vaccination.

8. My request for reconsideration was denied by the CEIC on June 17, 2022.

9. I filed an appeal of the CEIC's denial of EI benefits to the Social Security Tribunal of Canada (SST) on July 15, 2022. I included a Notice of Constitutional Question with my appeal.

10. A hearing of the SST General Division was held on October 14, 2022, regarding jurisdiction to hear the constitutional issues raised. The CEIC and I were invited to make submissions about the SST's jurisdiction to hear my constitutional claims.

11. I made initial submissions regarding the SST's jurisdiction to hear my constitutional claim on November 24, 2022. The CEIC responded on December 23, 2022. I replied on January 24, 2023. I attached an Amended Notice of Constitutional Question to my reply.[1]

12. In my Amended Notice of Constitutional Question, I challenged the applicability and operability of the "misconduct" provisions of the *Employment Insurance Act* (*EI Act*) pursuant to the doctrine of vagueness.

13. A hearing of the SST General Division was held on March 3, 2023, concerning the specific question: "Can the doctrine of vagueness be invoked without first invoking a violation of s.7 of the *Charter*?" The CEIC and I submitted a list of authorities prior to the hearing.

14. The SST General Division decided on April 7, 2023 that it does not have jurisdiction to hear the constitutional issue raised in my Amended Notice of Constitutional Question.[2] I was informed of the SST's decision on April 11, 2023.[3]

Grounds for appeal

15. The grounds of appeal are that the General Division:[4]

> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) erred in law in making its decision, whether or not the error appears on the face of the record

16. In my Amended Notice of Constitutional Question,[5] I challenged the constitutional applicability and operability of the "misconduct" sections (ss. 30(1) and 31) of the *Employment Insurance Act* (*EI Act*),[6] pursuant to the doctrine of vagueness.

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[1] Appellant's Amended Notice of Constitutional Question, dated January 24, 2023, at pages GD18-12 to GD18-24 in SST file GE-22-2365.
[2] SST General Division decision of April 7, 2023 (item GD27 in SST file GE-22-2365, attached to these submissions as Tab 2).
[3] Letter from SST General Division Member Nathalie Léger to the Appellant dated April 11, 2023 (attached to these submissions as Tab 1).
[4] *Department of Employment and Social Development Act*, S.C. 2005, c. 34, https://laws-lois.justice.gc.ca/eng/acts/H-5.7/FullText.html, section 58(1).
[5] Appellant's Amended Notice of Constitutional Question, dated January 24, 2023, at pages GD18-12 to GD18-24 in SST file GE-22-2365.
[6] *Employment Insurance Act*, (S.C. 1996, c. 23), https://laws-lois.justice.gc.ca/eng/acts/e-5.6/FullText.html

17. I asked the SST to find the misconduct sections of the *EI Act* to be unconstitutional insofar as they apply to me in my case. I did not ask the SST to invalidate the impugned sections of the *EI Act*.

18. The SST erred in law by denying its jurisdiction to hear my constitutional claim.

19. An outline of my arguments is provided below.

Majority decision in *Toronto (City)* is confined to invalidating legislation

20. The SST General Division based its decision not to hear my constitutional claim entirely on the Supreme Court of Canada (SCC) decision in *Toronto (City) v. Ontario (Attorney General)*,[7] hereafter *Toronto (City)*. (See paragraphs 33-41 of the SST General Division decision of April 7, 2023.)

21. *Toronto (City)* was a split decision, in which a minority of four judges dissented (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting).

22. The majority in *Toronto (City)* held that unwritten constitutional principles cannot be used to invalidate legislation that does not otherwise infringe the *Canadian Charter of Rights and Freedoms*:[8]

> "[5] Nor did the *Act* otherwise violate the Constitution. Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982* […]"
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> […]
>
> "[13] Two issues arise from the foregoing. First, did the *Act* limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?"
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> […]
>
> "[84] In short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can they be applied to support recognizing a right to democratic municipal elections by

[7] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d.
[8] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, at paras. 5, 13, and 84.

narrowing the grant to provinces of law-making power over municipal institutions in s. 92(8) of the Constitution Act, 1867." [emphasis added]

23. In my constitutional claim, I challenged the applicability or operability of the "misconduct" provisions of the *EI Act* pursuant to the doctrine of vagueness.

24. The doctrine of vagueness is rooted in the unwritten constitutional principle of the rule of law:[9]

> 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. [emphasis added]

25. As stated above, the majority in *Toronto (City)* focused entirely on whether the unwritten constitutional principles can serve as a basis for invalidating legislation.

26. The majority did not consider whether the unwritten constitutional principles can serve as a basis for declaring a legislative provision inoperable or inapplicable. Inoperability and inapplicability of legislative provisions were not at issue in *Toronto (City)*.

27. The words "inapplicable" and "inoperable" do not appear at all in the text of the *Toronto (City)* judgment. The words "invalidating legislation" or "invalidate legislation" appear 22 times in the text of the majority's decision.[10]

28. Furthermore, the majority in *Toronto (City)* based its reasoning regarding the unwritten principles on five past cases, each of which concerned the invalidation of legislation, not whether a provision was solely inapplicable or inoperable in the specific case:[11]

    a. The *Provincial Court Judges Reference*, which concerned the striking down of provincial legislation that reduced the salaries of provincial court judges;[12]

    b. The *Secession Reference*, which concerned the power of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada;[13]

    c. *Babcock*, which concerned the invalidation of a section of the *Canada Evidence Act*, R.S.C. 1985, c. C-5;[14]

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[9] *R. v. Levkovic*, 2013 SCC 25 (CanLII), http://canlii.ca/t/fx94z, para. 32.
[10] The term "invalidate legislation" occurs in the following paragraphs of the majority's decision in *Toronto (City)*: 11, 50 (three times), 51 (twice), 57, 60 (twice), 69 (twice), 71, 72, 73, 78. The term "invalidating legislation" occurs in the following paragraphs of the majority's decision in *Toronto (City)*: 48, 54, 57, 63, 66, 72, 84.
[11] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, paras. 63-75.
[12] *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, 1997 CanLII 317 (SCC), https://canlii.ca/t/1fqzp.
[13] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), https://canlii.ca/t/1fqr3.
[14] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), https://canlii.ca/t/51r8.

d. *Imperial Tobacco*, which concerned the appellants' application for a declaration that the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 was invalid;[15]

e. *Trial Lawyers Association of British Columbia*, which concerned the striking down of provincial legislation imposing court hearing fees.[16]

29. Declarations of inoperability or inapplicability are distinct from declarations of invalidity:[17]

> "[2] When property is expropriated outside this legislative framework for an ulterior motive, such as to avoid paying an indemnity, the expropriation is said to be disguised. Where a municipal government improperly exercises its power to regulate the uses permitted within its territory in order to expropriate property without paying an indemnity, two remedies are therefore available to aggrieved owners. They can seek to have the by-law that resulted in the expropriation declared either to be null or to be inoperable in respect of them. If this option is no longer open to them, they can claim an indemnity based on the value of the property that has been wrongly taken from them."
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> […]
>
> "[35] Second, the Court of Appeal erred in distinguishing between invalidity of a by-law, as declared by the Superior Court in the exercise of its inherent jurisdiction, and inoperability of a by-law, as ordered to remedy an abuse of power. Inoperability and invalidity are both remedies that fall within the Superior Court's discretionary exercise of its inherent power to order a remedy where a by-law is abusive. The duty to act within a reasonable time that applies in exercising the discretion to dismiss or not to dismiss an action to annul a by-law is therefore equally applicable to a finding that a by-law is inoperable (*Thériault v. Gatineau (Ville)*, 2005 QCCA 1245, at paras. 12-14 (CanLII)). This is why the presumption of legal knowledge that determines the starting point for reasonable time also applies to an action to have a by-law declared to be inoperable (*Rimouski*, at para. 27)." [emphasis added]

30. That declarations of inoperability or inapplicability are distinct from declarations of invalidity is also demonstrated by the SCC's decision in *Martin*, which established that administrative tribunals, including those empowered to decide questions of law, do not have the power to make declarations of invalidity. Rather, such tribunals only have jurisdiction to decline to apply unconstitutional laws. Only courts can make declarations of invalidity:[18]

> 31 Third, administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks*, supra, at p. 17. An error of law by an administrative tribunal interpreting the Constitution can always be

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[15] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), https://canlii.ca/t/1lpk1.
[16] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII), https://canlii.ca/t/gds2j.
[17] *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35 (CanLII), https://canlii.ca/t/hsvk5, paras. 2 and 35.
[18] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 (CanLII), https://canlii.ca/t/50dn, para. 31.

reviewed fully by a superior court. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada. [emphasis added]

31. The distinction between invalidity and inoperability (or inapplicability) was also stated by Abella J. (dissenting, but not on this point) in *Tranchemontagne v. Ontario (Director, Disability Support Program)*:[19]

> 79 The reasons of my colleague Bastarache J. suggest that the s. 67(2) revocation of *Charter* jurisdiction does not extend to Code jurisdiction because the consequence of a *Charter* breach is legislative invalidity while non-compliance with the Code gives rise only to inoperability. The difference between invalidity and inoperability explains why, in his view, the legislature revoked *Charter* jurisdiction but not Code jurisdiction. This, with respect, overlooks the fact that administrative tribunals lack the power to make formal declarations of invalidity. A tribunal only has jurisdiction to decline to apply the offending provision. The legislature revoked the SBT's *Charter* jurisdiction because it did not want the SBT to declare any part of the legislation inapplicable. [emphasis added]

32. The SCC affirmed the distinction between invalidity and inapplicability or inoperability in *Mouvement laïque québécois v. Saguenay (City)*:[20]

> [153] However, this Court has held that an administrative tribunal such as the Tribunal does not have jurisdiction to make a general declaration of invalidity (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 31; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257, at para. 44). Only a court of law has the power to do so.
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> [154] In the case at bar, the appellants asked the Tribunal to declare the By-law inoperative and of no force or effect in relation to Mr. Simoneau and, in particular, to order that the interference with his rights cease. Insofar as the By-law infringed the *Quebec Charter*, the Tribunal could declare it to be inoperable against him. However, it could not declare it to be "inoperative and invalid" without further clarification, as that would amount to a general declaration of invalidity, which it does not have the

[19] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII), https://canlii.ca/t/1n3bq, para. 79.
[20] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), https://canlii.ca/t/gh67c, paras. 153-154.

jurisdiction to make. In any event, the Tribunal's orders completed its declaration. [emphasis added]

33. The SCC also affirmed the distinction between invalidity and inapplicability or inoperability in *Okwuobi v. Lester B. Pearson School Board*:[21]

> 44 We are in substantial agreement with the respondents. On the question of remedies, the appellants correctly point out that the ATQ cannot issue a formal declaration of invalidity. This is not, in our opinion, a reason to bypass the exclusive jurisdiction of the Tribunal. As this Court stated in *Martin*, the constitutional remedies available to administrative tribunals are indeed limited and do not include general declarations of invalidity (para. 31). Nor is a determination by a tribunal that a particular provision is invalid pursuant to the *Canadian Charter* binding on future decision makers. As Gonthier J. noted, at para. 31: "Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases."
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> 45 That said, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the ATQ. If the ATQ finds a breach of the *Canadian Charter* and concludes that the provision in question is not saved under s. 1, it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force (*Martin*, at para. 33). Such a ruling would, however, be subject to judicial review on a correctness standard, meaning that the Superior Court could fully review any error in interpretation and application of the *Canadian Charter*. In addition, the remedy of a formal declaration of invalidity could be sought by the claimant at this stage of the proceedings. [emphasis added]

34. The SCC also affirmed the distinction between invalidity and inapplicability or inoperability in *Ontario (Attorney General) v. G*:[22]

> [88] However, while s. 52(1) is the substantive basis of constitutional invalidity, the public and the state will often disagree about whether a given law is unconstitutional and, if so, to what extent. Our legal order, grounded in related principles of constitutional supremacy and the rule of law, requires that there be an institution empowered to finally determine a law's constitutionality; s. 52(1) confirms "[t]he existence of an impartial and authoritative judicial arbiter" to determine whether the law is of no force and effect (*Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 89). Even in the absence of a formal declaration, s. 52(1) operates to prevent the application of unconstitutional laws. For example, because of the limits of its statutory jurisdiction, a tribunal or a provincial court's determination that legislation is unconstitutional has no legal effect beyond the decision itself; nevertheless, it must refuse to give effect to legislation it considers unconstitutional

[21] *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16 (CanLII), https://canlii.ca/t/1k1bn, paras. 44-45.
[22] *Ontario (Attorney General) v. G*, 2020 SCC 38 (CanLII), https://canlii.ca/t/jbpb4, para. 88.

(see, e.g., *Martin*, at para. 31; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 15). Thus, the reach of a judicial determination of the unconstitutionality of a law will be limited in the absence of statutory or inherent jurisdiction to issue a general declaration of invalidity. [emphasis added]

35. The SCC also affirmed the distinction between invalidity and inapplicability or inoperability in *R. v. Sullivan*:

> [55] Similarly, the principle from *Martin* that the "invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1)" must be understood in its entire context (para. 28). *Martin* concerned the ability of administrative tribunals to consider the constitutionality of provisions of their enabling statutes (para. 27). Gonthier J. determined that an administrative tribunal empowered to consider and decide questions of law through its enabling statute must also have the power to determine a provision's consistency with the *Charter* because its constitutionality is a question of law (K. Roach, Constitutional Remedies in Canada (2nd ed. (loose-leaf)), at § 6:3). Such a determination is not binding on future decision-makers (paras. 28 and 31). Importantly, Gonthier J. added that only through "obtaining a formal declaration of invalidity by a [superior] court can a litigant establish the general invalidity of a legislative provision for all future cases" (para. 31), a point taken up in later cases of this Court (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 153; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257, at paras. 43-44; *Ontario (Attorney General) v. G*, 2020 SCC 38, at para. 88). In other words, it is the constitutional determination of a superior court judge that binds future decision makers (*R. v. Albashir*, 2021 SCC 48, at paras. 64-65). The inconsistency spoken to in s. 52(1) is revealed through litigation, specifically the judgment that declares the inoperability of the impugned law. The doctrine of *stare decisis* extends the effect of that judgment beyond the parties to the case, *erga omnes* within the province at least — subject to the limits of the doctrine itself. The issue in these appeals concerns the binding nature of such a judgment, and, in my view, consonant with our jurisprudence, a s. 52(1) declaration establishes unconstitutionality "for all future cases" through the authority of the judgment that makes that declaration. I agree with Paciocco J.A., at para. 34 of the judgment in appeal, that Gonthier J. was not seeking to alter the principles of *stare decisis* in *Martin*. [emphasis added]

36. As such, the distinction between invalidation of legislation versus finding legislation to be inapplicable or inoperable in a specific case is firmly established in the SCC's jurisprudence.

37. As stated above, my constitutional claim challenged the applicability and operability of the "misconduct" sections of the *EI Act* insofar as they applied to me in my case.

38. I stated at the March 3, 2023 hearing before the SST General Division that I was not seeking to invalidate or strike down the misconduct sections of the *EI Act*. The audio recording of the

March 3, 2023 hearing will show that I made the following statements (which I read from my notes):

> "I am not seeking that the 'misconduct' sections of the *Act* be struck down. I am seeking that the Tribunal declare the misconduct sections of the *Act* unconstitutional in their application to me in my case. It is the operability and applicability of the misconduct sections that I challenge in my constitutional claim."
>
> […]
>
> "I am not asking the SST to invalidate or strike down the misconduct sections of the *EI Act* in my Notice of Constitutional Question. Rather, I am asking for a finding that the misconduct sections are unconstitutionally vague as far as they operate or apply in my case, and that therefore the misconduct provisions cannot be applied to me to deny my EI benefits."

39. The SST erred in law and incorrectly denied its jurisdiction by applying *Toronto (City)* to my case, in which I sought to challenge the applicability and operability, not the validity, of ss. 30(1) and 31 of the *EI Act*.

Obiter dicta in *Toronto (City)* concerning unwritten constitutional principles other than the principle of democracy is non-binding

40. The four-judge minority in *Toronto (City)* strongly disagreed with the majority's decision as unnecessary, imprudent, and fundamentally inconsistent with the existing case law:[23]

> But with respect, the majority's decision to foreclose the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent. It not only contradicts our jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance.

41. Judicial decisions are comprised of two components: *ratio decidendi* and *obiter dicta*.

42. The statements in a decision that refer to the crucial facts and law of the case and that are essential to the outcome of the decision are *ratio decidendi*.

43. In contrast, all statements which, if omitted from a judicial decision, do not change the outcome of the decision are *obiter dicta*.[24]

[23] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, at para. 170.
[24] "Obiter Dicta", *Canadian Online Legal Dictionary*, Irwin Law, https://irwinlaw.com/cold/obiter-dicta/.

44. The only unwritten constitutional principle that was at issue in *Toronto (City)* was the principle of democracy:[25]

> [13] Two issues arise from the foregoing. First, did the *Act* limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*? [emphasis added]

45. Therefore, the majority's statements in *Toronto (City)* generally foreclosing all unwritten constitutional principles (democracy, constitutionalism, rule of law, judicial independence, federalism, parliamentary sovereignty, protection of minorities, separation of powers, …) from invalidating legislation are *obiter dicta*.

46. *Obiter dicta* statements in Supreme Court of Canada decisions are not necessarily binding on lower courts and administrative tribunals. The leading case on this question is *R. v. Prokofiew* ("*Prokofiew*") in which the Court of Appeal for Ontario stated the following (upheld at the SCC):[26]

> [18] Characterization of the comments concerning s. 4(6) in Crawford and Noble as obiter dicta does not, however, determine whether those comments are binding on this court. In R. v. Henry, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76, Binnie J., writing for a unanimous court, recognized that stare decisis commands compliance not only with the ratio decidendi, but some of the obiter from the Supreme Court of Canada. He put it in these terms, at para. 57:
>
> > All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive ratio decidendi to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" . . . . The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience. (Emphasis added)
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> [19] The question then becomes the following: how does one distinguish between binding obiter in a Supreme Court of Canada judgment and non-binding obiter? In Henry, at para. 53, Binnie J. explains that one must ask, "What does the case actually

[25] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, para. 13.
[26] *R. v. Prokofiew*, 2010 ONCA 423 (CanLII), https://canlii.ca/t/2b4db [Upheld in *R. v. Prokofiew*, 2012 SCC 49 (CanLII), https://canlii.ca/t/ft54b, paras. 54-60.]

> decide?" Some cases decide only a narrow point in a specific factual context. Other cases -- including the vast majority of Supreme Court of Canada decisions -- decide broader legal propositions and, in the course of doing so, set out legal analyses that have application beyond the facts of the particular case.
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> [20] Obiter dicta will move along a continuum. A legal pronouncement that is integral to the result or the analysis that underlies the determination of the matter in any particular case will be binding. Obiter that is incidental or collateral to that analysis should not be regarded as binding, although it will obviously remain persuasive.
>
> [21] Lower courts should be slow to characterize obiter dicta from the Supreme Court of Canada as non-binding. It is best to begin from the premise that all obiter from the Supreme Court of Canada should be followed, and to move away from that premise only where a reading of the relevant judgment provides a cogent reason for not applying that obiter. The orderly and rational development of the jurisprudence is not served if lower courts are too quick to strike out in legal directions different than those signalled in obiter from the Supreme Court of Canada. Having [page409] stressed the need for caution when deciding whether to characterize obiter from the Supreme Court of Canada as non-binding and to decline to follow that obiter, I will now set out the reasons why I think the obiter in Crawford and Noble are not binding and should not be followed.

47. In *Profokiew*, it was held that *obiter dicta* expressed by the SCC is not binding on lower courts if it conflicts with *ratio decidendi* in previous SCC decisions:[27]

> [35] In summary, the prevailing Supreme Court of Canada jurisprudence prior to Noble and Crawford is in direct conflict with the obiter in those two cases. This court has continued to apply the ratio decidendi of the earlier cases. To abandon that path and follow the obiter in Noble and Crawford at this juncture would promote neither consistency nor predictability, which are the twin goals served by the principle of stare decisis.

48. The majority's *obiter dicta* in *Toronto (City)* that no unwritten constitutional principle may ever be used to invalidate legislation in any circumstance is squarely at odds with the *ratio decidendi* of preceding SCC judgments, as explained by the minority in *Toronto (City)* as follows:[28]

> [174] In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial

[27] *R. v. Prokofiew*, 2010 ONCA 423 (CanLII), https://canlii.ca/t/2b4db, para. 35 [Upheld in *R. v. Prokofiew*, 2012 SCC 49 (CanLII), https://canlii.ca/t/ft54b, paras. 56-57.]
[28] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, paras. 174-177.

independence finds expression in s. 11(d) of the *Charter*, which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the *Constitution Act, 1867*, which govern superior courts in the province, the unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in circumstances not covered by the express provisions. Writing for the majority, Lamer C.J. held that

> [j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. [para. 109]

[175] In *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, this Court invoked the unwritten principle of the rule of law to create a novel constitutional remedy — the suspended declaration of constitutional invalidity. The Court developed this remedy notwithstanding that the text of s. 52(1) of the *Constitution Act, 1982* states that unconstitutional laws are "of no force or effect" suggesting, when interpreted technically and in isolation from underlying constitutional principles, that declarations of invalidity can only be given immediate effect. As Karakatsanis J. wrote for the majority in *Ontario (Attorney General) v. G*, 2020 SCC 38, although s. 52(1) "does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts 'may have regard to unwritten postulates which form the very foundation of the Constitution of Canada'" (para. 120, quoting *Manitoba Language Rights*, at p. 752).

[176] Beyond the Reference context, in *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, this Court used the rule of law principle to read down s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing "the principle of the rule of law recognized both in the preamble and in all our conventions of governance" (para. 41).

[177] And in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII), [2014] 3 S.C.R. 31, this Court struck down a regulation imposing hearing fees that were found to deny people access to the courts based in part on the unwritten constitutional principle of the rule of law, and relatedly, access to justice.

49. The SCC majority's *obiter dicta* in *Toronto (City)* generally foreclosing all unwritten constitutional principles from invalidating legislation directly conflicts with the *ratio decidendi* of past SCC decisions. Therefore, the said *obiter* is not binding on the SST General Division in my case.

50. *Obiter dicta* in a SCC decision is also not binding if it plays a peripheral role in the reasoning of the decision.[29]

51. In a section entitled "(2) Relevance of the Democratic Principle to Municipal Elections",[30] the majority in *Toronto (City)* expresses its reasons why the unwritten constitutional principle of democracy cannot be used to invalidate provincial legislation regarding municipal elections. This section of *Toronto (City)* is a self-contained analysis that responds to the question at issue in the case. The majority's *obiter dicta* regarding all unwritten constitutional principles, which is contained in preceding paragraphs in the judgment, is unnecessary, peripheral, and not integral to the analysis of the question at issue in the case. Therefore, the majority's *obiter* statements about all unwritten constitutional principles are not binding.

52. Additionally, the doctrine of vagueness was not at issue in *Toronto (City)*. Likewise, the doctrine of vagueness was not at issue in *British Columbia v. Imperial Tobacco Canada Ltd.*,[31] which is cited in *Toronto (City)* as an example in which it was held that the rule of law cannot be used to invalidate legislation.

53. Lastly, in my respectful submission, the fact that the five-judge majority's *obiter dicta* in *Toronto (City)* was strenuously opposed by four SCC judges in a dissenting opinion in the same judgment is itself a sufficient reason that the majority's *obiter dicta* should not be considered binding on lower courts and tribunals.

54. The SST erred in law and incorrectly denied its jurisdiction by deciding it was bound by the *obiter dicta* statements of the majority decision in *Toronto (City)*.

55. This in-effect amounted to deciding that a statute can be completely vague, as long as there is no *Charter* violation.

56. I request leave to appeal the SST General Division's decision not to hear my constitutional claim regarding the application of the "misconduct" provisions of the *EI Act* in my case.

[29] *Ibid.*, paras. 36-38 [Upheld in *R. v. Prokofiew*, 2012 SCC 49 (CanLII), https://canlii.ca/t/ft54b, para. 58.]
[30] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, paras. 76-82.
[31] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), https://canlii.ca/t/1lpk1.

RESPECTFULLY SUBMITTED ON MAY 10, 2023

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

Table of Tabs

Tab 1

Social Security Tribunal of Canada
Tribunal de la sécurité sociale du Canada

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C.P. 9812
Succursale T
Ottawa ON K1G 6S3

April 11, 2023

EMAIL

Joseph Hickey

EMAIL

ESDC Legal Services - GD-EI
EILS General Delivery Mailbox

Appellant: Joseph Hickey
Tribunal File Number: GE-22-2365
Commission Record Identifier:

Decision - Charter Challenge Notice

The Tribunal Member has reviewed the submissions filed on January 24, 2023. The Tribunal Member has determined that this appeal **does not** raise a Charter argument that meets the requirements of paragraph 20(1)(*a*)[1] of the *Social Security Tribunal Regulations*. The attached document is the Tribunal member's decision and reasons.

Nathalie Leger
Member, General Division

Your appeal will now proceed as a regular appeal.

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[1] **20 (1)** If the constitutional validity, applicability or operability of any 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 regulations made under any of those Acts is to be put at issue before the Tribunal, the party raising the issue must

(a) file a notice with the Tribunal that

(i) sets out the provision that is at issue, and

(ii) contains any submissions in support of the issue that is raised

How to send documents to the Tribunal

You can send documents to us by email, regular mail, or fax. Our address is at the top of this letter. The email and fax number are below under “How to contact us.”

Always send copies of your documents. Keep your originals.

Write the Tribunal File Number on the first page of each document you send.

Your documents must be in English or French. If they are in another language, you must get them translated at your own expense.

You must send the documents yourself; we will not investigate or seek out evidence on your behalf.

Receiving documents from the Tribunal

When we receive a document, we send a copy to each of the parties. We give each document a number. You will get numbered copies of your own documents as well. You must read all of the documents we send. You will need to refer to documents by their number during your appeal.

Keep all appeal documents in a secure place. They contain personal information.

Where can I find more information?

Please visit our website at https://sst-tss.gc.ca/en for additional information on the Tribunal and the appeal process.

Has your contact information changed?

Tell us right away if your contact information changes. If we cannot reach you or your representative, the Tribunal may decide the appeal without you being involved.

How to contact us

Always give your Tribunal File Number when you contact us. It is at the top of this letter.

Call: Office hours are Monday to Friday, 7:00 a.m. to 7:00 p.m. Eastern Time.

Toll-free: 1-877-227-8577
From outside Canada and the US, call collect: 613-437-1640

TTY: 1-866-873-8381
From outside Canada and the US, call collect: 1-613-948-8181

Email: info.sst-tss@canada.gc.ca
Fax: 1-855-814-4117 (toll-free) or 1-613-941-5121

Kind regards,

Registry Operations
Secretariat to the Social Security Tribunal of Canada

Tab 2

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Joseph Hickey
Respondent:	Canada Employment Insurance Commission
Representative:	Dani Grandmaître

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (483650) dated June 17, 2022 (issued by Service Canada)

Tribunal member:	Nathalie Léger
Decision date:	April 7, 2023
File number:	GE-22-2365

Tab 2

Decision

[1] The Amended Charter Challenge Notice (Amended Notice) filed by the Appellant does not meet the requirements to raise a constitutional issue before the Social Security Tribunal of Canada (Tribunal).

[2] The Appellant's appeal will now continue as a regular appeal.

Overview

[3] Even if the case is still in the early stage of adjudication, important and complicated legal issues are already at play. In this interlocutory decision, I will rule on only one thing: the sufficiency of the Amended Notice of constitutional question filed by the Appellant.

[4] This Charter challenge is substantially different from the ones that are regularly brought before the Tribunal. Here, the Appellant is not claiming that one of his specific rights protected by the *Canadian Charter of Rights and Freedom* (Charter) has been violated, but that the term "misconduct", found in sections 30(1) and 31 of the *Employment Insurance Act* (Act), is unconstitutionally vague based on the doctrine of vagueness.

[5] I will start by explaining what the purpose of section 1(1) of the *Social Security Tribunal Regulations*[1] (Regulations) is and why I think that a more thorough evaluation is needed. I will then explain the evolution of the notices submitted by the Appellant. I will go on to present the arguments of both parties on the question of the use of the rule of law to constitutionally challenge a section of the Act and will give my analysis of those arguments. I will end this decision on the question of the sufficiency of the Amended Notice submitted by the Appellant in this very particular case.

[1] *Social Security Tribunal Regulations*, 2022 (SOR/2022-255). This new Regulations came into force on December 5, 2022.

I- Purpose of Subsection 1(1) of the Regulations

[6] The obligation to file a Notice when challenging the constitutionality of a section of the Act is not something unique to the Social Security Tribunal.[2] It is an obligation that exists for most courts and tribunals because it gives the Attorney General[3] the possibility to defend a law that was passed by elected officials.[4] It is part of the constitutional balance that needs to be maintained between the judiciary powers and the parliamentary sovereignty. It also provides an opportunity to assess whether there is a sufficient factual basis and a constitutional argument that is not moot or frivolous.

[7] At the time the Appellant filed his appeal and his first Notice, the Regulations had not been replaced yet. The obligation to file a Notice when constitutionally challenging a section of the Act and other matters relating to a constitutional challenge were then found at section 20 of the Regulations[5]. A new Regulations came into force on December 5, 2022. Because this is before the Appellant filed his Amended Notice, I must apply the "new" Regulations.[6]

[8] Subsection 1(1) of the Regulations reads as follows:

> 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.

---

[2] See, for example, section 57 of the *Federal Courts Act*.
[3] Both the Attorney General for the federal government and those for the provinces need to be served the notice.
[4] *Finlay* v. *Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, at paragraph 28
[5] *Social Security Regulations* SOR/2013-60
[6] *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c.* v. *Castor (The) (C.A.)*, 2002 FCA 479

[9] The Tribunal only has jurisdiction to hear a constitutional challenge against a specific section of one of the Acts that it oversees. It cannot hear a constitutional challenge against a decision of an employer or against any other law. It is therefore important to know, from the outset, which Act, and what section of it, is contested. This is also important for the Attorney General to know what is being challenged.[7]

[10] The notice must also contain the main facts that support the constitutional challenge. The Supreme Court of Canada has said, on many occasions, that a constitutional decision cannot – and should not - be taken in a factual vacuum. [8] There must therefore be a sufficient factual basis to evaluate the context of the constitutional violation and the impact on the person or group affected. It is at the hearing that all the details, the documents and the witnesses will come into play.

[11] Finally, the Regulations require the Appellant to provide a summary of the legal argument he or she intends to bring forward. This is a new requirement. The last version of the Regulations, at subsection 20 (1) a) ii), only required an appellant to provide, "any submissions in support of the issue that is raised."[9] Therefore, all that was needed was an explanation of the argument, in laymen's terms, of how the appellant understood his legal case to be. The Tribunal has said that this requirement was not a heavy burden to meet[10]. There was no evaluation of the strength of the legal arguments brought forward by the appellant at this stage – if the submissions were related to the claim, and not frivolous, it was sufficient to meet the requirements.

[12] The new version of the Regulations requires the Appellant to submit "a summary of the legal argument to be made in support of the constitutional challenge." In interpreting this new wording, we must take into consideration the fact that most appellants are not represented and may not use the proper legal terms or explain the applicable legal test in all their nuances.

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[7] *Bekker* v. *Canada*, 2004 FCA 186 at paragraph 9
[8] *Mackay* v. *Manitoba,* 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357, at pages. 361-62, *British Columbia (Attorney General)* v. *Council of Canadians with Disabilities*, 2022 SCC 27
[9] Section 20(1) a) ii) of the *Social Security Regulations* SOR/2013-60
[10] *R. S.* v *Minister of Employment and Social Development*, 2017 CanLII 84970 (SST, Appeal division)

[13] But the change in the wording of the Regulations does point to the necessity for appellants to present a legal argument that is relevant to their constitutional challenge and that presents at least a sliver of hope of being argued successfully. This should, in most cases, be easy to meet. Courts have said that they will not dismiss a notice unless "it is plain and obvious that the Appellant's constitutional argument has no reasonable chance of success."[11] But it does mean that it is necessary to evaluate if the argument brought forward has at least a minimal chance of success.

[14] If the Tribunal is satisfied that all three requirements have been met, then the Appellant will be permitted to move on to the next step in the Charter challenge process[12].

[15] In the case at hand, there is no issue that the first two requirements of subsection1(1) have been met. The sections of the Act that are being contested are clearly identified and the factual basis is sufficient in the context of this case. What is contested is the sufficiency of the legal argument.

II- The Evolution of the Notices

[16] The Appellant filed his first Notice as part of his appeal to the Tribunal. He was contesting the decision of the Employment Insurance Commission (Commission) to deny him benefits because of misconduct pursuant to subsection 30(1) of the Act.

[17] In his Notice, the Appellant argued that sections 30(1) and 31 of the Act violated sections 2, 7, and 15 of the Charter. He also asked the Tribunal to grant remedies under section 24(1) of the Charter.

[18] A pre-hearing conference was held on October 14, 2022. I explained to the Appellant that the Tribunal does not have the jurisdiction to decide on the validity of the Federal Government's vaccination mandate, his employer's vaccination policy or the

[11] *FU2 Productions Ltd.* v. *The King*, 2022 TCC 148 at paragraph 34; *Director of Public Prosecutions* c. *Jetté*, 2022 QCCQ 8113 at paragraphs 15, 29 and 30
[12] Which is the filing of a detailed Charter Record that includes all of the evidence, submissions and authorities the claimant intends to rely on.

refusal of his employer to accommodate him. I also explained that the Tribunal does not have the jurisdiction to grant damages under section 24(1) of the Charter. The Tribunal only has jurisdiction to declare a section of the Act or of a regulation inapplicable under s.52 of the Charter.

[19] The Appellant did not agree with the Tribunal's decision and maintained that I had jurisdiction. The parties agreed to plead this issue in writing. One month was given to each party to submit their arguments, and one more month was given to the Appellant to reply[13].

[20] In the document sent[14], the Appellant made new submissions about the constitutional validity of sections 30(1) and 31 of the Act.[15] He now argued that those sections must be "declared unconstitutional because "misconduct" is not defined in the Act or its Regulations (…)[16] and is too vague. He rests this argument on the constitutional principle of the rule of law and the doctrine against vagueness.

[21] The Respondent argued in its response[17] that the Appellant's Notice was insufficient because, essentially, it did not outline a violation of either subsection 2(a) or section 7 of the Charter in sufficient details to meet the requirements of the Regulations. Also, the Respondent submitted that because the Appellant had not identified which section 7 rights had been violated, he could not raise the issue of vagueness in relation to it.[18] Furthermore, if he wanted to invoke the issue of vagueness at the section 1 stage of the Charter analysis, the Tribunal would have to assume a section 7 violations, which it cannot do.[19]

[22] The Appellant replied on January 24, 2023, by submitting an Amended Notice.[20] In it, he still challenges the constitutionality of section 30(1) and 31 of the Act. This has

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[13] See GD12
[14] See GD14
[15] GD14-8 to GD14-12 (Part Four)
[16] GD14-3
[17] See GD-15
[18] GD15-5
[19] GD15-6
[20] GD18

not changed. But he is no longer relying on sections 2 or 7 of the Charter or on any other specific section of the Charter. He is also no longer contesting the policy put in place by his employer or that he was not accommodated.

[23] He is now relying *solely* on the rule of law doctrine and the doctrine of vagueness as being "essential elements of the Canadian constitution, independent of the Charter".[21] He argues that it can therefore be used independently to challenge the constitutional validity of a section of the Act.[22]

III – Argument of both parties re: vagueness as an autonomous constitutional argument

[24] After having carefully reviewed the submissions of both parties[23], I advised them that I would hold a hearing on the specific question of the possibility of invoking the doctrine of vagueness without invoking a violation of section 7 of the Charter. I also asked the parties to send me the list of authorities they intended to rely on at least two weeks before the hearing on this very specific issue. Both parties sent me a list of more than 12 decisions[24], not all of which were pleaded at the case-management conference.

Submissions by the Appellant

[25] The Appellant had already filed some submissions on this issue in his Amended Notice[25]. He submits that the doctrine against vagueness forms part of the principle of fundamental justice, which itself is part of "the basic tenets of our legal system."[26]

[26] At the hearing, he argued that the doctrine of vagueness is inherent to the rule of law and that it can be raised in situations where the rights protected by section 7 of the

[21] GD18-6
[22] GD18-4 to GD18-8
[23] See paragraph 11 above.
[24] The Appellant also sent in a few more decisions two days before the hearing and a delay was given to the Respondent to comment on those.
[25] GD18
[26] GD18-7

Charter are not in issue. Even if I have reviewed all the decisions that were submitted, it is not necessary to go through them all here.

[27] The Appellant relied first on *R.* v. *Nova Scotia Pharmaceutical Society*, [27] the leading authority on vagueness, although in the context of section 7 of the Charter. In this decision, the Supreme Court of Canada stated that the issue of vagueness is part of the rule of law because a law that is too vague does not give enough guidance to citizens on how to act. It can be raised both while deciding if the rights protected by section 7 have been infringed or while applying the Oakes test at the section 1 stage.[28]

[28] He also relied on *Kelowna Mountain Development Services Ltd.* v. *Central Okanagan (Regional District)*[29]. This was a challenge to a municipal bylaw where no Charter argument was raised. In its decision, the Court of Appeal explains the main principles relating to vagueness in the municipal context.[30] It decided that the issue of determining if a provision of a law is capable of interpretation is a different issue than the actual interpretation and application of the law in a specific case. The first issue (being capable of interpretation) refers to vagueness.[31] If a section of a law cannot be interpreted because it is too vague, then it must be voided.

[29] The Appellant referred the Tribunal to other decisions to the same effect. It is not necessary to refer to them in detail here. They showed three things : first, the concept of vagueness has been used to invalidate certain dispositions in municipal law. Second, the rule against vagueness is part of the rule of law, which is an important (unwritten)

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[27] *R.* v. *Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 SCR 606. In this case, section 7 of the Charter was in issue.
[28] See pp 626 and 627 of the decision.
[29] *Kelowna Mountain Development Services Ltd.* v. *Central Okanagan (Regional District)*, 2014 BCCA 369
[30] *Kelowna Mountain Development Services Ltd.* v. *Central Okanagan (Regional District)*, 2014 BCCA 369 at paragraph 17
[31] *Kelowna Mountain Development Services Ltd.* v. *Central Okanagan (Regional District)*, 2014 BCCA 369 at paragraph 18

constitutional principle. Third, the concept of vagueness has been raised in some non-Charter context, although with limited success.[32]

Submissions by the Respondent

[30] The Respondent's essential argument is that vagueness can be raised in civil cases when interpreting definitions in a bylaw or a regulation, or in a constitutional challenge in relation to the violation of a Charter right. But that it cannot be invoked before the Tribunal as a stand-alone way of attacking the constitutional validity of a section of the Act. To this effect, they referred me first to *Vanguard Coatings and Chemicals Ltd.* v. *M.N.R.*,[33] at pages 397 and 398, where the Court says that it does not have the power to declare a section of an act void for uncertainty.

[31] The Respondent then referred me to *Toronto (City)* v. *Ontario (Attorney General)* (*City of Toronto*),[34] a recent Supreme Court of Canada decision. In this decision, the Court discusses[35] the role and impact of unwritten constitutional principles[36], the rule of law being one of those principles.[37] The majority of the Court is of the opinion that unwritten constitutional principles cannot be used to invalidate a law.[38] They state that those principles can only be used in two ways : 1- as an aid in the interpretation of constitutional provisions and 2- as a way to "develop structural doctrines unstated in the written Constitution *per se*."

[32] The other decisions listed by the Respondent were all rendered before *City of Toronto,* and I will not review them in detail here.

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[32] See for example *Groupe La Québécoise inc.* c. *Procureur général du Québec*, 2023 QCCA 227 (CanLII). The Appellant refers the Tribunal to paragraph 12, to show the concept had been raised. But what is more important to notice is that the Court of Appeal, at paragraph 13, says the concept does not apply to the case under review.
[33] *Vanguard Coatings and Chemicals Ltd.* v. *M.N.R.*, 1986 CanLII 6788 (FC), [1987] 1 FC 367
[34] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34
[35] I must mention that this is a very complex decision, where the justices where split 5 to 4.
[36] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraphs 49 to 63
[37] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 49
[38] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 63

IV- Analysis – can vagueness and the rule of law be argued in a constitutional challenge when no Charter argument is being raised?

a) Unwritten constitutional principles

[33] I must start this analysis by stating that the issue I have to decide at this stage is not : is the term “misconduct” unconstitutionally vague? but rather is: can the rule of law, and the principle against vagueness, be used to declare constitutionally invalid a section of the Act when no Charter rights is being invoked?

[34] The answer to this question is no. The Supreme Court of Canada, in *City of Toronto*, has clearly said that it cannot. I will review this decision and then explain why I am bound by it.

[35] The context in City of Toronto is that of a provincial law, passed in the middle of the municipal election process, reducing the number of wards by nearly half. The city and other groups contested the law on two bases: first, because it infringed on the freedom of expression protected by section 2b) of the Charter and second, because it violated the unwritten constitutional principle of democracy. Five judges, including the Chief Justice, dismissed the appeal.

[36] I will not review the reasoning on the freedom of expression question since it is not at issue in this appeal. I will only deal with the question of unwritten constitutional principles. It is important to note that even if it was the principle of democracy that was at issue in City of Toronto, the Court’s reasoning is applicable to all unwritten constitutional principles.[39]

[37] First, what exactly are “unwritten constitutional principles”? Our constitution is a combination of “written and unwritten norms.”[40] The unwritten norms, like the principle of democracy, the rule of law or the principle of fundamental justice, are essentially the “context and backdrop to the Constitution’s written terms[41]." Said in other words, they

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[39] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraphs 49 to 63
[40] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 49
[41] *Toronto (City)* v. *Ontario (Attorney General),* 2021 SCC 34 at paragraph 50

form the architecture, the structure that can help in the analysis and interpretation of the written rights, freedoms and other norms found in the Charter and in the Constitution[42].

[38] After explaining what, in their opinion, can unwritten constitutional principles be used for, the court concludes this way: “In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation.”[43] This settles the matter.

b) *Stare decisis*

[39] I am bound by this decision because of what is called “vertical *stare decisis*”.[44] This simply means that lower courts (including administrative tribunals) are bound to follow decisions of higher courts.[45] Because the Supreme Court of Canada is the highest court in our country, I am bound to follow its decisions when it has ruled on a question that is the same as the one before me. Again, since the Supreme Court of Canada gave a clear and unambiguous answer to that question, I am bound to follow it.

[40] This also explains why I am not dealing expressly with the other decisions cited by the Appellant. Since they all preceded the Supreme Court’s decision, they cannot be relied on as valid precedents if they give a different answer than the one given by our highest court.

[41] This means that the Appellant’s argument, as framed at this point, has *no* chance of success. It also means that it cannot constitute a “legal argument to be made in support of”[46] the constitutional challenge raised, which is the third element required for a Notice of Constitutional Question to be valid. The legal argument brought forth by the Appellant cannot support the constitutional challenge because the highest court has

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[42] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 55
[43] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 63
[44] *R.* v. *Sullivan*, 2022 SCC 19 at paragraph 65
[45] *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101 at paragraph 42; *Carter* v. *Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331 at paragraph 43 where the Court says that precedents must be followed “rigidly”.
[46] Subparagragh 1(1) c) of the Regulations

said that it cannot do what the Appellant wants it to do. Therefore, I must conclude that the Notice is insufficient to support a constitutional challenge.

Conclusion

[42] The Appellant's Amended Notice includes properly identified provisions in the Act and sufficient facts to meet the requirements of subsection 1(1) of the Regulations. But it does not provide the outline of a valid constitutional argument.

[43] I therefore find that his Amended Notice does not comply with the requirements of subsection 1(1) of the Regulations and is therefore insufficient to raise a constitutional issue before the Tribunal.

[44] The Appellant's appeal will now continue as a regular appeal.

[45] The parties will be advised of the next steps in due course.

Nathalie Léger
Member, General Division – Employment Insurance