File No. AD-23-565

SOCIAL SECURITY TRIBUNAL OF CANADA – APPEAL DIVISION

BETWEEN:

JOSEPH HICKEY
Appellant

and

CANADIAN EMPLOYMENT INSURANCE COMMISSION (CEIC)
Defendant

APPELLANT'S SUBMISSION THAT LEAVE TO APPEAL OF GENERAL DIVISION'S DENIAL OF JURISDICTION TO DECIDE HIS CONSTITUTIONAL CLAIM SHOULD BE GRANTED

Appellant's response to the letter dated June 5, 2023 from the SST Appeal Division (file no. AS-23-565) regarding his request for leave to appeal the General Division's April 7, 2023 decision not to hear the appellant's constitutional claim raised in SST file GE-22-2365.

SUBMITTED BY EMAIL ON JUNE 20, 2023

Submitted by:
Joseph Hickey, PhD

Submitted to (by email):
Social Security Tribunal of Canada – Appeal Division
Ottawa, Ontario, Canada
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Nature of the 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 therefore can be (and has been) interpreted by the CEIC to include the individual's personal decision to decline a dangerous medical intervention.

4. The complete absence of a definition of "misconduct" allows the government to arbitrarily define personally declining a dangerous medical intervention as "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 the constitutional claim

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

6. I filed a 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 to CEIC for reconsideration was denied 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 that it does not have jurisdiction to hear the constitutional issue raised in my Amended Notice of Constitutional Question:[2]

> [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.

15. I submitted a request for leave to appeal the General Division's decision not to hear my constitutional claim to the Appeal Division on May 10, 2023.[3]

16. On June 6, 2023, I received a letter from the SST Appeal Division which states:[4]

> **Joseph Hickey**
> **Tribunal file number: AD-23-565**
> **Request from Tribunal Member**
>
> The Tribunal member assigned to this appeal has requested the following:

[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) (communicated to the Appellant on April 11, 2023).
[3] Appellant's Request for Leave to Appeal, dated May 10, 2023 (at pages AD1-8 to AD1-38 in SST file AD-23-565).
[4] Letter from SST Appeal Division to the Appellant dated June 5, 2023 (item AD2 in SST file AD-23-565).

Joseph Hickey wants to appeal the General Division's interlocutory (interim) decision dated April 7, 2023.

Unless there are exceptional circumstances, the Appeal Division has refused in past cases to hear an appeal from an interlocutory decision until the General Division's process is complete, meaning that it has given a final decision in the appeal.

In other words, Joseph Hickey's appeal might have to wait until he knows the final outcome in his case. Then, if he remains unsatisfied with the General Division decision, Joseph Hickey could ask the Appeal Division to consider all relevant issues at the same time.

The parties are invited to make arguments about whether I should follow this approach here. And if so, are there exceptional circumstances that justify proceeding with Joseph Hickey's appeal immediately?

Please provide your response by no later than **June 20, 2023.**

17. The present submission contains my response to the Appeal Division's letter of June 5, 2023.

Leave to appeal the General Division's decision not to hear a constitutional claim

18. At issue is whether the SST Appeal Division should grant me leave to appeal the General Division's decision not to hear my constitutional claim that the "misconduct" provisions of the *Employment Insurance Act* are inoperable or inapplicable pursuant to the doctrine of vagueness.

19. Administrative tribunals derive their jurisdiction from and are bound by their enabling statutes:

> "The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes. I have found that, within the statutory scheme established by the *Railway Act and the National Transportation Act*, the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force." [Emphasis added]
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> ***Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (SCC), [1989] 1 SCR 1722, https://canlii.ca/t/1ft4g, at pg. 1756(*d*-*g*)**

"[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. […]" [Emphasis added]

***Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, https://canlii.ca/t/1vxsm, at para. 29**

"35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, Administrative Law in Canada (3rd ed. 2001), at pp. 183-84)." [Emphasis added]

***ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), https://canlii.ca/t/1mj7l, para. 35**

20. When an enabling statute places a specific limitation on the powers of an administrative tribunal, the tribunal cannot broaden its powers beyond the limitation:

"It is a fundamental rule of interpretation that the meaning of general provisions in the Code cannot be developed in such a way so as to give to the Board powers which are broader than those expressly and specially provided for elsewhere. In *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, 1984 CanLII 26 (SCC), [1984] 2 S.C.R. 412, at p. 432, Beetz J. referred to the reasons for this principle of interpretation as twofold: first, the general may not be interpreted so as to render unnecessary the other provisions setting forth the power of the Board, and second, the limitations inherent in the specific provisions which detail the powers of the Board must be abided by if the intent of the legislature is to be respected. One of the issues in that case was the proper relationship between a broader, general provision, s. 121 of the Code, and the grants of powers made specifically elsewhere in the Code." [Emphasis added]

***Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, 1993 CanLII 31 (SCC), [1993] 3 SCR 724, https://canlii.ca/t/1frzw, at pg. 741(*e-i*)**

"A mere error of law should also be distinguished from a jurisdictional error. This relates generally to a provision which confers jurisdiction, that is, one which describes, lists and limits the powers of an administrative tribunal, or which is [TRANSLATION] "intended to circumscribe the authority" of that tribunal, as Pigeon J. said in *Komo Construction Inc. v. Commission des relations de travail du Québec*, 1967 CanLII 2 (SCC), [1968] S.C.R. 172 at p. 175. A jurisdictional error results generally in an excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of the hearing, during it, in the findings or in

the order disposing of the matter. Such an error, even if committed in the best possible good faith, will result nonetheless in the decision containing it being set aside, because it also falls within s. 28(1)(a) of the *Federal Court Act*." [Emphasis added]

***Syndicat des employés de production du Québec v. CLRB*, 1984 CanLII 26 (SCC), [1984] 2 SCR 412, https://canlii.ca/t/1lpfq, at pgs. 420-421**

"122 The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. At first sight it may appear that the functional analysis applied to cases of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a tribunal's jurisdiction. The difference between these two types of error is clear: only a patently unreasonable error results in an excess of jurisdiction when the question at issue is within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this initial stage a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction: in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal's jurisdiction." [Emphasis added]

***U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 SCR 1048, https://canlii.ca/t/1ft89, para. 122**

21. Section 55 of the *Department of Employment and Social Development Act* ("*DESDA*") states that any decision of the SST General Division may be appealed:[5]

> 55 Any decision of the General Division may be appealed to the Appeal Division by any person who is the subject of the decision and any other prescribed person.

22. The *DESDA* also delimits the allowed grounds of appeal and states the sole criterion by which the tribunal may refuse leave to appeal to be if the appeal has no reasonable chance of success:[6]

[5] *Department of Employment and Social Development Act* (S.C. 2005, c. 34), https://laws.justice.gc.ca/eng/acts/h-5.7/FullText.html, s. 55.
[6] *Ibid.*, s. 58.

Grounds of appeal — Employment Insurance Section

58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Criteria

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. [Emphasis added]

23. To be clear, Parliament gave a specific criterion for refusing leave to appeal and did not include other criteria. The *DESDA* does not include or imply other criteria for refusing leave to appeal, and does not distinguish interlocutory orders in its criterion.

24. I respectfully submit that the SST does not require any additional powers granted by necessary implication to achieve the intent of the statutory scheme,[7] regarding granting leave to appeal, and that the SST exceeds its jurisdiction when it refuses leave to appeal based on any criterion other than that the appeal has no reasonable chance of success.

25. Some Appeal Division decisions have denied leave to appeal from interlocutory motions of the General Division by importing and applying an "exceptional circumstances" threshold, which was exclusively developed by the courts and intended to discern when a court should refrain from interfering with an ongoing administrative tribunal process.[8] I respectively submit that the said "exceptional circumstances" are defined solely within that judicial context, and do not have an actionable meaning for the SST. I further respectively submit that for the SST to thus import the said "exceptional circumstances" threshold constitutes exceeding its jurisdiction.

26. There are a number of SST cases in which the Appeal Division chose not to adopt the said imported "exceptional circumstances" judicial test or criterion for granting leave to appeal of an interlocutory decision of the General Division.[9]

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[7] *Reference re: Section 101 of the Public Utilities Act*, 2017 NLCA 34 (CanLII), https://canlii.ca/t/h3zkm, paras. 16-17; referring to *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), https://canlii.ca/t/1mj7l.

[8] *Szczecka v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 9425 (FCA), https://canlii.ca/t/gt5t3; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61 (CanLII), [2011] 2 FCR 332, https://canlii.ca/t/289v5.

[9] For example: *Minister of Employment and Social Development v J. P.*, 2016 CanLII 99562 (SST), https://canlii.ca/t/gxl40; *Minister of Employment and Social Development v P. F.*, 2017 CanLII 55643 (SST), https://canlii.ca/t/h5n1c; *RP v Minister of Employment and Social Development*, 2020 SST 1002 (CanLII),

27. For example, in *Minister of Employment and Social Development v P. F.*, the Appeal Division explained that the exceptional circumstances test belongs to the doctrine of exhaustion, which disallows a party before an administrative tribunal from seeking judicial review by a court of an interlocutory decision made by the administrative tribunal, but which in no way disallows interlocutory decisions of a tribunal from being appealed within the tribunal's statutory framework:

> [26] I am also aware that other members of the Appeal Division have determined that an application for leave to appeal an interlocutory decision of the General Division is premature, citing *Szczecka v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 9425 (FCA), [1993] F.C.J. No. 934 (FCA): for example, see *A.N. v. Minister of Employment and Social Development*, 2015 SSTAD 280 at para. 21 and *W.F. v. Canada Employment Insurance Commission*, 2016 SSTAD 523. I respectfully part company with my fellow members, whose decisions are not binding on me, with respect to their determination of this issue.
>
> [27] In *Szczecka*, the Federal Court of Appeal dismissed an application for judicial review of an interlocutory decision because the remedies available within the applicable administrative framework had not been exhausted. The Federal Court of Appeal explained this principle in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, as follows:
>
> > [30] The normal rule is <u>that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted</u>. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: [citations omitted].
> >
> > [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. <u>All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or</u>

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https://canlii.ca/t/jdfjd; *RM v Minister of Employment and Social Development*, 2020 SST 743 (CanLII), https://canlii.ca/t/jc1c7; *The Estate of FF v Minister of Employment and Social Development,* 2021 SST 255 (CanLII), https://canlii.ca/t/jjg3r.

> when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted. [underlining added]
>
> [28] My reading of *Powell*, *Szczecka* and other cases dealing with the same issue, is that the courts have held that recourse *to the courts* is to be made only after all remedies under the administrative process have been exhausted. These cases do not stand for the proposition that interlocutory decisions cannot be appealed *within* the administrative framework established by statute. [Emphasis in the original]
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> ***Minister of Employment and Social Development v P. F.*, 2017 CanLII 55643 (SST), https://canlii.ca/t/h5n1c, paras. 26-28**

28. Additionally, the SST's *Rules of Procedure* refer solely to the statutory "reasonable chance of success" criterion for granting leave to appeal, and make no mention of the "exceptional circumstances" test that has been imported from the judicial review context and arbitrarily imposed in some SST Appeal Division decisions:[10]

> **How to appeal a General Division decision to the Appeal Division**
>
> **26 (1)** To appeal a General Division decision, an appellant must file an application for permission to appeal with the Tribunal's Appeal Division. The application must include
>
> **(a)** the appellant's full name;
>
> **(b)** the appellant's contact information;
>
> **(c)** the appellant's reasons for appealing; and
>
> **(d)** a copy of the General Division decision, the date of the General Division decision or the General Division file number.
>
> […]
>
> **Getting permission to appeal**
>
> **(3)** To be granted permission to appeal, the appellant must show
>
> **(a)** for an Income Security appeal, that at least one of the criteria set out in section 58.1 of the *Department of Employment and Social Development Act* is met; and

[10] *Social Security Tribunal Rules of Procedure* (SOR/2022-256), https://laws.justice.gc.ca/eng/regulations/sor-2022-256/FullText.html, s.26.

> **(b)** for an Employment Insurance appeal, that there is a reasonable chance of success on at least one of the grounds of appeal set out in section 58 of the *Department of Employment and Social Development Act*. [Emphasis added]

29. Based on the above, I respectfully submit that in-effect the only question duly before the Appeal Division for deciding my request for leave to appeal is whether my appeal has a reasonable chance of success.

My appeal has a reasonable chance of success

30. In my constitutional claim, I challenged the operability and applicability of the "misconduct" sections of the *EI Act*. I expressly did not ask for a declaration of constitutional invalidity. The General Division misdirected itself on this pivotal point.

31. I stated at the March 3, 2023 hearing of the General Division that I was not seeking to invalidate or strike down the misconduct sections of the *EI Act* in my constitutional claim. 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."

32. Rather than addressing the operability or applicability of the "misconduct" sections of the *EI Act*, the General Division unilaterally and incorrectly decided that the issue before it was the validity of the said sections:[11]

> [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?

[11] SST General Division decision of April 7, 2023 (item GD27 in SST file GE-22-2365), paras. 33-34.

> [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. [Emphasis added]

33. The General Division denied its jurisdiction to hear my constitutional claim on the false basis of deciding on a question (validity of a law) that was different from the question I raised (applicability or operability of the law).

34. I respectfully submit that the General Division clearly denied its jurisdiction to hear my duly brought constitutional claim, and that my appeal cannot be viewed as having no reasonable chance of success.

There are exceptional circumstances in the instant appeal

35. In the alternative, if the Appeal Division does have statutory authority to deny leave to appeal for a reason other than "no reasonable chance of success" (which is denied), and if the Appeal Division has jurisdiction to import and apply the judicial "exceptional circumstances" threshold (which is denied), then I submit that the vaccination mandates applied during COVID constitute an exceptional circumstance. Never before in Canadian history has an important state benefit (here EI) been denied to individuals for having refused to receive a medical injection with proven harms as serious as death.

36. This denial of benefits has been made, by the Canadian Employment Insurance Commission, on the basis that the refusal to receive the injections constitutes "misconduct" under the *EI Act*. The term "misconduct" is not defined in the *EI Act*, and cannot include an individual's decision not to receive a medical treatment by injection. The "misconduct" provisions of the *EI Act* are thus unconstitutionally vague.

37. This constitutional issue is of exceptional gravity, and is of broad importance both to the public and to the administration of justice, including public confidence in the administrative tribunal and judicial systems.

38. Additionally, there is a large number (dozens, if not hundreds) of ongoing SST appeals in which the appellant was denied Employment Insurance benefits on the basis of "misconduct" under the *EI Act* for declining to receive a COVID-19 vaccination.[12]

39. My constitutional claim, if successful, could ultimately resolve many of these similar cases, which would become moot, because my constitutional claim asserts that the misconduct sections of the *EI Act* are inoperable or inapplicable, in the circumstances, because they are unconstitutionally vague.

[12] For example, a search for cases involving the terms "vaccination" and "misconduct" dated between 2021-06-01 and 2023-06-12 returns 424 decisions using the SST's search tool on its website: https://decisions.sst-tss.gc.ca/sst-tss/en/d/s/index.do?cont=vaccination+misconduct&ref=&d1=2021-06-01&d2=&or=.

40. As such, there is the potential to save significant tribunal and judicial resources by hearing my constitutional claim immediately.

RESPECTFULLY SUBMITTED ON JUNE 20, 2023

Joseph Hickey, PhD
Appellant, SST file no. AD-23-565