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June 20, 2022

Our File No: TBD

BY EMAIL

Richard Lefebvre
Manager, AD & GD-EI Operations
PO Box 9812, Station T CSC
Ottawa, ON K1G 6S3

Dear Mr. Lefebvre,

RE: HICKEY, Joseph v Canada Employment Insurance Commission (AD-23-565)

This letter responds to the Appeal Division's request for submissions on whether the Appellant can appeal the interlocutory decision from the General Division dated April 7, 2023, that found his Notice of Constitutional Question did not meet the threshold requirements in subsection 1(1) of the *Social Security Tribunal Regulations* (*SST Regulations*).[1]

The Federal Court of Appeal has held that the non-availability of interlocutory relief is "next to absolute."[2] Interlocutory relief is "very rare" and can be allowed in "exceptional circumstances" as it effectively allows "a party to bypass the administrative process."[3] Only in instances where the consequences of an interlocutory decision are "immediate and radical" such that "they call into question the rule of law" will interlocutory relief be permitted.[4] The threshold for an exceptional circumstance is exceptionally high. In *Herbert v Canada* (*Herbert*),[5] procedural fairness concerns regarding the right to be heard raised by the Appellant were found to be insufficient to meet the threshold. Importantly, the Federal Court of Appeal in *Herbert* also made pronouncements that not only were procedural fairness concerns not exceptional, neither were important legal, jurisdictional, nor constitutional issues.[6]

[1] SOR/2022-255 [*Regulations*].
[2] *Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 37 [*Dugré*].
[3] *Ibid* at para 35.
[4] *Ibid*.
[5] 2022 FCA 11 [*Herbert*].
[6] *Ibid* at para 11, citing to *C.B. Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paras 33, 39 – 46.

The high threshold of exceptional circumstances is motivated by the principle of judicial non-interference. The principle of judicial non-interference is to prevent the "fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoid the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway." The reviewing court's role begins with the end of the administrative process.[7]

The Social Security Tribunal has followed this approach on numerous occasions and found that the Appeal Division should not rule on an interlocutory decision, such as a decision on the sufficiency of a notice of constitutional question, absent exceptional circumstances.[8]

There are no exceptional circumstances present in this case that warrant the Appeal Division's intervention by hearing an appeal of an interlocutory decision. The Appellant's discontentment with success of his Notice of Constitutional Question is not an exceptional circumstance. The Appellant should complete the process of having a hearing on the merits of appeal at the General Division before raising issues with being barred from continuing his constitutional appeal. The Appellant may be successful in the regular hearing stream. Hearing an appeal of the General Division's interlocutory decision would be pre-mature and would run afoul of the principle of judicial non-interference to avoid a waste of resources.

The Appellant is not copied on this letter because we understand the Tribunal forwards all documents. Should you have any questions or concerns, please do not hesitate to contact me.

Dani Grandmaître
Counsel for the Commission

[7] *Herbert*, *Supra* note 5, at para 9.
[8] *J. N. v Minister of Employment and Social Development,* 2019 SST 522; *The Estate of MB v Minister of Employment and Social Development*, 2020 SST 32; *RP v Minister of Employment and Social Development*, 2022 SST 242.