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 DECISIONS NOT TO HEAR APPELLANT'S CONSTITUTIONAL CLAIM AND NOT TO GRANT EMPLOYMENT INSURANCE BENEFITS

The instant submission contains the Appellant's requests for leave to appeal of:

1) 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.

2) General Division Member Angela Ryan Bourgeois' November 23, 2023 decision to deny the appellant's appeal in SST file GE-22-2365

SUBMITTED BY EMAIL ON DECEMBER 23, 2023

Submitted by:
Joseph Hickey, PhD

Submitted to (by email):
Social Security Tribunal of Canada – Appeal Division
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1. Overview of the two Leave to Appeal requests

1.1 Chronology of the appeal and constitutional claim

1. The chronology of my request for Employment Insurance (EI) benefits is as follows:

2019-06-03	I began working for the Bank of Canada.
2020-03-11	The World Health Organization (WHO) declared the COVID-19 pandemic.
2020-03-13	My employer instructed me and all of my colleagues to work entirely from home due to the WHO pandemic declaration.
2021-10-06	My employer announced its COVID-19 Vaccination Policy (the “Policy”) to all employees. The Policy required employees to either receive injections of a COVID-19 vaccine or request an accommodation for religious, medical, or human rights reasons.
2021-11-12	I submitted a request for accommodation to my employer, for religious, medical, and human rights reasons.
2021-11-18	At a Microsoft Teams meeting with my employer’s Human Resources (HR) representative, I was informed that may request for accommodation had been denied.
2021-11-22	I was placed on leave without pay or benefits pay by my employer for declining to receive a COVID-19 vaccination, despite my request for accommodation.
2021-11-25	I filed my request for Employment Insurance (EI) benefits to Service Canada.
2021-11-22 to 2022-02-10	I engaged in multiple correspondences by email and telephone with my employer’s HR department and the external firm hired by my employer to process requests for accommodation for medical reasons (Raymond Chabot Grant Thornton (RCGT)) in order to clarify the reasons that my initial accommodation request was denied and to clarify the process for submitting an internal appeal of my employer’s decision to deny my initial request for accommodation under the Policy.
2022-03-18	I duly submitted an internal appeal of my employer’s decision not to grant me an accommodation under its Policy.
2022-04-04	Service Canada informed me that my request for EI benefits was denied.
2022-05-03	I submitted a request for reconsideration of the denial of EI benefits to the Canadian Employment Insurance Commission (CEIC).

2023-05-26	My employer denied my internal appeal of its decision not to grant me an accommodation under its Policy.
2022-06-14	I duly submitted supplementary appeal submissions to my employer regarding myocarditis risk to me if I received the COVID-19 vaccination, in response to my employer's evaluation of the medical aspects of my internal appeal.
2022-06-17	The CEIC informed me that my request for reconsideration was denied.
2022-06-20	My employer suspended its Policy.
2022-06-23	My employer's HR representative confirmed to me by email that she had received my supplementary internal appeal submissions dated June 14, 2022.
2022-07-15	I duly submitted my appeal of the CEIC's decision to deny EI benefits to the Social Security Tribunal of Canada – General Division (SST GD), and included a Notice of Constitutional Question (NCQ).
2022-10-14	The SST GD held a hearing regarding its jurisdiction to hear my constitutional issues raised in my NCQ. The CEIC and I were invited to make submissions about the SST GD's jurisdiction to hear my constitutional claims.
2022-11-24	I made initial submissions regarding the SST's jurisdiction to hear my constitutional claims. I included my arguments that the "misconduct" provisions of the *EI Act* were unconstitutional in their application to me pursuant to the rule of law doctrine of vagueness.
2022-12-05	The new version of the *Social Security Tribunal Regulations* came into force, including new wording in the section regarding the filing of notices of constitutional question.
2022-12-23	The CEIC responded to my November 24, 2022 submissions regarding the SST's jurisdiction to hear my constitutional claims.
2023-01-24	I replied to the CEIC's response of December 23, 2022, and attached an Amended Notice of Constitutional Question (Amended NCQ) to my reply. In my Amended NCQ, I challenged the applicability and operability of the "misconduct" provisions of the *Employment Insurance Act* (*EI Act*) pursuant to the rule of law doctrine of vagueness.
2023-03-03	The SST GD held a hearing 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.

2023-04-07	SST GD member Nathalie Léger decided that the SST GD does not have jurisdiction to hear the constitutional issue raised in my Amended NCQ. I was informed of the SST GD's decision on April 11, 2023.[1]
2023-05-10	I duly submitted a request for leave to appeal the SST GD decision of April 7, 2023 to the Social Security Tribunal – Appeal Division (SST AD).
2023-06-05	The SST AD sent a letter to me and the CEIC stating:

> *"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?"

2023-06-20	I duly made submissions to the SST AD asking that my request for leave to appeal the April 7, 2023 decision of the SST GD be granted immediately.
2023-07-18	The SST AD (Tribunal member Jude Samson) decided that my request for leave to appeal of the SST GD's decision not to hear my constitutional claim was premature, but that I could bring this issue to the Appeal Division again once the SST GD had completed its work.
2023-09-12	The hearing of the merits of my appeal of denial of EI benefits was heard by the SST GD.
2023-11-23	SST GD member Angela Ryan Bourgeois issued her decision denying my appeal of denial of EI benefits.

[1] Letter to the Appellant from SST General Division Member Nathalie Léger dated April 11, 2023, at Tab 1.

2. Leave to Appeal the April 7, 2023 decision not to hear the Appellant's constitutional claim

2.1 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 involving injecting a substance into the individual's body, which is known to produce adverse effects including death.

4. The personal decision to decline a dangerous medical intervention involving injecting a substance into the individual's body, which is known to produce adverse effects including death, 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.

2.2 Grounds for appeal

5. The grounds of appeal are that the General Division:[2]

   (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

6. In her decision of April 7, 2023, SST General Division Member Nathalie Léger refused to hear my constitutional claim. My constitutional claim has never been heard and duly decided, only summarily dismissed based on an *ad hoc* procedural threshold.

7. The specific grounds for appeal of Member Léger's refusal to hear my constitutional claim are that:

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[2] *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).

1. Member Léger incorrectly interpreted and constructed that s. 1(1)(c) of the new *SST Regulations* imposes a "reasonable chance of success" threshold for a constitutional claim to be heard.

2. In the alternative, if Member Léger did not incorrectly construct and apply the said new threshold (which is denied), Member Léger based her decision not to hear my constitutional claim entirely on the majority's decision in the SCC judgment *Toronto (City)*,[3] which is distinguished from my case. *Toronto (City)* is distinguished because it concerns the issue of whether a court can invalidate a legislative provision using an unwritten constitutional principle (specifically: democracy), not whether an administrative tribunal (which does not have jurisdiction to invalidate legislative provisions) can find a legislative provision of its home *Act* inoperable or inapplicable in the specific case before it, using an unwritten constitutional principle (specifically: rule-of-law vagueness).

3. In the alternative, if *Toronto (City)* is not distinguished (which is denied), the SCC majority's statements in *Toronto (City)* concerning the unwritten constitutional principles other than the principle of democracy are *obiter dicta* and are non-binding in my case, which concerns the unwritten constitutional principle of the rule of law and the doctrine of vagueness.

8. The SST erred in law by denying its jurisdiction to hear my constitutional claim. An administrative tribunal empowered to hear constitutional questions has a duty to do so and cannot construct barriers to circumvent this duty.

9. An outline of my arguments is as follows.

2.3 Member Léger erred by incorrectly interpreting and constructing that s. 1(1)(c) of the new *SST Regulations* imposes a "reasonable chance of success" threshold for sufficiency of notice for constitutional claims

10. Administrative tribunals have a duty to hear and consider constitutional claims:[4]

> [77] These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:
>
> > [E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the

[3] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d.

[4] *R. v. Conway*, 2010 SCC 22 (CanLII), https://canlii.ca/t/2b2ds, para. 77.

> effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70] [emphasis added]

11. The duty of administrative tribunals to hear constitutional claims was re-emphasized by the SCC in *Bernard v. Canada (Attorney General)*:[5]

> [72] This Court has recently affirmed that "administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — <u>and duty</u> — to consider and apply the Constitution, including the *Charter*, when answering those legal questions": *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77 (emphasis added). This aligns with the principle that Canadians should be permitted to present their *Charter* claims in the most accessible forum available, without having to bifurcate claims into separate proceedings (*Conway*, at para. 79). [emphasis in original]

12. The duty of administrative tribunals to hear constitutional claims was again repeated by the SCC in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*:[6]

> [36] Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power" (*Carrier Sekani*, at para. 69). <u>Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution</u>, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani*, at para. 72). [emphasis added]

13. The SST has the power to decide "any question of law" in matters before it,[7] and therefore has the duty to consider and apply the Constitution to legal questions before it.

14. The SST's fundamental duty to hear and consider constitutional claims about the effect of the constitution in matters before it means that the SST cannot refuse to hear a constitutional claim

[5] *Bernard v. Canada (Attorney General)*, 2014 SCC 13 (CanLII), [2014] 1 SCR 227, https://canlii.ca/t/g2zxf, para. 72.
[6] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (CanLII), [2017] 1 SCR 1069, https://canlii.ca/t/h51gv, para. 36.
[7] *Department of Employment and Social Development Act*, S.C. 2005, c. 34, s. 64(1), https://laws.justice.gc.ca/eng/acts/h-5.7/FullText.html

based solely on demanding an initial procedural stage imposing an *ad hoc* threshold regarding the sufficiency of the legal argument, which is an error of law going at the heart of constitutional guarantees.

15. On December 5, 2022, a new version of the *Social Security Tribunal Regulations* ("*SST Regulations*") came into force.[8] In the new *SST Regulations*, the wording of the section pertaining to Constitutional Questions was changed.

16. The version of the *SST Regulations* in force prior to December 5, 2022 stated:[9]

> 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 Human Resources and Skills 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
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> (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; and

17. The new version of the *SST Regulations* states:

> 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.

18. Member Léger stated that the old version of the *SST Regulations* imposed a low barrier on constitutional claimants:[10]

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[8] *Social Security Tribunal Regulations*, 2022 (SOR/2022-255), https://laws.justice.gc.ca/eng/regulations/SOR-2022-255/FullText.html.
[9] *Social Security Tribunal Regulations*, 2013 (SOR/2013-60), *Canada Gazette* Vol. 147, No. 8 – April 10, 2013, https://canadagazette.gc.ca/rp-pr/p2/2013/2013-04-10/html/sor-dors60-eng.html.
[10] SST General Division Decision of Nathalie Léger in file GE-22-2365, dated April 7, 2023 (Tab 2), at para. 11.

> [11] […] 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." Therefore, all that was needed was an explanation of the argument, in layman'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. 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.

19. Member Léger stated that the new *SST Regulations* imposed a higher barrier on claimants than the old *SST Regulations*. She incorrectly interpreted and constructed that the new *SST Regulations* require the Tribunal to evaluate whether or not the constitutional claim has a reasonable chance of success based on the summary of legal arguments submitted in the Notice of Constitutional Question:[11]

> [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." But it does mean that it is necessary to evaluate if the argument brought forward has at least a minimal chance of success.

20. Member Léger's finding that the new *SST Regulations* impose a higher barrier on constitutional claimants than the old *SST Regulations*, and her finding that the new barrier requires the Tribunal to evaluate, at the notice stage, whether the constitutional argument has a reasonable chance of success, are incorrect. Her use of these incorrect findings and thus constructed barrier to bar the constitutional question is an error of law.

21. The new barrier stated by Member Léger is nowhere to be found in the *EI Act*, the *Department of Employment and Social Development Act* ("*DESDA*"), the *SST Regulations*, or elsewhere.

22. Section 1(1)(c) of the new *SST Regulations* merely requires the claimant to submit "(c) a summary of the legal argument to be made in support of the constitutional challenge". There is nothing in the section stating any requirement regarding the sufficiency or quality of the summary of the legal argument, and it is clear from the section's use of the word "summary" that the claimant's full arguments are not to be submitted at this preliminary procedural stage.

23. By interpreting and constructing that the new *SST Regulations* require the Tribunal to evaluate whether or not the constitutional claim has a reasonable chance of success based on a summary of the legal argument, Member Léger was not merely interpreting but in-effect creating new

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[11] *Ibid.*, para. 13.

law. However, courts and administrative tribunals do not have the power to create law: that is Parliament's role. In the words of then-Chief Justice of Canada Beverly McLachlin:[12]

> "While courts cannot shrink from the task of maintaining the guarantees of the constitution, they must approach the laws adopted by Parliament and the legislatures with due deference for their preeminent law-making role and their ability to arrive at optimal solutions through debate and research."

24. It was an error of law, jurisdiction, and procedural justice to refuse to hear my constitutional claim based on section 1(1)(c) of the *SST Regulations*.

25. In the alternative, if section 1(1)(c) does impose a "reasonable chance of success" barrier on claimants that is evaluated based merely on the claimant's summary of legal arguments submitted in order to satisfy the procedural notice requirements of the *SST Regulations* (which is denied), then I submit the following arguments in answer to Member Léger's erroneous assessment of the chances of success of my claim.

2.4 The majority decision in *Toronto (City)* is confined to invalidating legislation, and is distinguished

26. Member Léger based her decision not to hear my constitutional claim entirely on the Supreme Court of Canada (SCC) decision in *Toronto (City) v. Ontario (Attorney General)*,[13] hereafter *Toronto (City)*.[14]

27. *Toronto (City)* is distinguished because it concerns a court's limits in striking down a statute, not an administrative tribunal's duty not to give effect to a provision it considers unconstitutional.

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

29. 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*:[15]

> "[5] Nor did the *Act* otherwise violate the Constitution. <u>Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*</u> […]"

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[12] "Canada's Legal System at 150: Democracy and the Judiciary", Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, At the Empire Club of Canada, Toronto, Ontario, June 3, 2016, https://www.scc-csc.ca/judges-juges/spe-dis/bm-2016-06-03-eng.aspx.

[13] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d.

[14] SST General Division Decision of Nathalie Léger in file GE-22-2365, dated April 7, 2023 (Tab 2), paras. 33-41.

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

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

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

31. The doctrine of vagueness is rooted in the unwritten constitutional principle of the rule of law:[16]

> 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]

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

33. 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)*.

34. 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.[17]

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[16] *R. v. Levkovic*, 2013 SCC 25 (CanLII), http://canlii.ca/t/fx94z, para. 32.

[17] 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.

35. 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:[18]

    1. The *Provincial Court Judges Reference*, which concerned the striking down of provincial legislation that reduced the salaries of provincial court judges;[19]

    2. The *Secession Reference*, which concerned the power of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada;[20]

    3. *Babcock*, which concerned the invalidation of a section of the *Canada Evidence Act*, R.S.C. 1985, c. C-5;[21]

    4. *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;[22]

    5. *Trial Lawyers Association of British Columbia*, which concerned the striking down of provincial legislation imposing court hearing fees.[23]

36. Declarations of inoperability or inapplicability are distinct from declarations of invalidity:[24]

> "[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."
>
> […]
>
> "[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

[18] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, paras. 63-75.
[19] *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.
[20] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), https://canlii.ca/t/1fqr3.
[21] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), https://canlii.ca/t/51r8.
[22] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), https://canlii.ca/t/1lpk1.
[23] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII), https://canlii.ca/t/gds2j.
[24] *Lorraine (Ville) v. 2646*-*8926 Québec inc.*, 2018 SCC 35 (CanLII), https://canlii.ca/t/hsvk5, paras. 2 and 35.

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]

37. 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:[25]

> 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 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]

38. 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)*:[26]

> 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]

[25] *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.
[26] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII), https://canlii.ca/t/1n3bq, para. 79.

39. The SCC affirmed the distinction between invalidity and inapplicability or inoperability in *Mouvement laïque québécois v. Saguenay (City)*:[27]

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

40. The SCC also affirmed the distinction between invalidity and inapplicability or inoperability in *Okwuobi v. Lester B. Pearson School Board*:[28]

> 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."
>
> 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]

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[27] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), https://canlii.ca/t/gh67c, paras. 153-154.
[28] *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.

41. The SCC also affirmed the distinction between invalidity and inapplicability or inoperability in *Ontario (Attorney General) v. G*:[29]

> [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 (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]

42. The SCC also affirmed the distinction between invalidity and inapplicability or inoperability in *R. v. Sullivan*:[30]

> [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

[29] *Ontario (Attorney General) v. G*, 2020 SCC 38 (CanLII), https://canlii.ca/t/jbpb4, para. 88.
[30] *R. v. Sullivan*, 2022 SCC 19 (CanLII), https://canlii.ca/t/jp64b, para. 55.

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]

43. 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.

44. As shown in the SCC's statements quoted above,[31] administrative tribunals do not have jurisdiction to invalidate legislation: only courts can do that.

45. Furthermore, an administrative tribunal "must refuse to give effect to legislation it considers unconstitutional".[32] This means that an administrative tribunal must determine whether it considers the legislation unconstitutional. It cannot construct away its duty in this regard.

46. An administrative tribunal has a duty not to give effect to unconstitutional statutes, and not to apply statutes in ways that violate constitutional rights. Therefore, it must examine such a claim when presented to it.

47. 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.

48. 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."
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> […]

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[31] *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; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII), https://canlii.ca/t/1n3bq, para. 79; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), https://canlii.ca/t/gh67c, paras. 153-154; *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; *Ontario (Attorney General) v. G*, 2020 SCC 38 (CanLII), https://canlii.ca/t/jbpb4, para. 88; *R. v. Sullivan*, 2022 SCC 19 (CanLII), https://canlii.ca/t/jp64b, para. 55.

[32] *Ontario (Attorney General) v. G*, 2020 SCC 38 (CanLII), https://canlii.ca/t/jbpb4, at para. 88.

> "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."

49. 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 of ss. 30(1) and 31 of the *EI Act*, whereas *Toronto (City)* is distinguished because it concerns a court's limits in striking down a statute, not an administrative tribunal's duty not to give effect to a provision it considers unconstitutional.

50. In the alternative, if *Toronto (City)* is not distinguished from my case (which I deny), then I make the following argument.

2.5 The majority's *obiter dicta* in *Toronto (City)* concerning unwritten constitutional principles other than the principle of democracy is non-binding

51. 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:[33]

> 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.

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

53. 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*.

54. In contrast, all statements which, if omitted from a judicial decision, do not change the outcome of the decision are *obiter dicta*.[34]

55. The only unwritten constitutional principle that was at issue in *Toronto (City)* was the principle of democracy:[35]

> [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, <u>can the unwritten constitutional principle of</u>

[33] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, at para. 170.
[34] "Obiter Dicta", *Canadian Online Legal Dictionary*, Irwin Law, https://irwinlaw.com/cold/obiter-dicta/.
[35] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, para. 13.

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]

56. 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*.

57. *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):[36]

> [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)
>
> [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 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.
>
> [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

[36] *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.]

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.

58. 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:[37]

[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.

59. 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:[38]

[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 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

[37] *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.]

[38] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, paras. 174-177.

> [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.

60. 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.

61. *Obiter dicta* in a SCC decision is also not binding if it plays a peripheral role in the reasoning of the decision.[39]

62. In a section entitled "(2) Relevance of the Democratic Principle to Municipal Elections",[40] 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

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[39] *Ibid.*, paras. 36-38 [Upheld in *R. v. Prokofiew*, 2012 SCC 49 (CanLII), https://canlii.ca/t/ft54b, para. 58.]
[40] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), https://canlii.ca/t/jjc3d, paras. 76-82.

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.

63. 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.*,[41] 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.

64. 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.

65. 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)*.

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

2.6 Request

67. 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.

68. In plain terms, it is inconceivable to the appellant that the SST could circumvent examining whether it is unconstitutional to take the meaning of "misconduct" to include the individual's decision to decline a dangerous medical intervention involving injecting a substance into the individual's body, which is known to produce adverse effects including death. In effect, it has done exactly that, despite the issue being squarely put to it.

[41] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), https://canlii.ca/t/1lpk1.

3. Leave to Appeal the November 23, 2023 decision to deny the Appellant employment insurance benefits

3.1 Context of my claim for EI benefits

69. I worked as a Data Scientist in the Bank of Canada's Canadian Economic Analysis Department, beginning in June 2019.

70. On March 13, 2020, I and all my departmental colleagues along with almost all other employees at the Bank were directed to work entirely from home, due to the World Health Organization's declaration of the COVID-19 pandemic.

71. On October 6, 2021, my employer announced that it was implementing a COVID-19 Vaccination Policy (the "Policy").

72. The Policy presented two distinct avenues (or "streams") for compliance:

    1. Receive enough injections of a COVID-19 vaccine to become "fully vaccinated"

    2. Request an accommodation not to be vaccinated for medical, religious, or other human rights reasons

73. I requested an accommodation for medical, religious, and human rights reasons.

74. My employer informed me in the evening of November 18, 2021 that my request for accommodation had been denied and that I would be placed on unpaid leave as of November 22, 2021.

75. I worked entirely from home from March 13, 2020 until I was placed on involuntary unpaid leave effective November 22, 2021.

76. My employer offered an open-ended and non-exhaustive process to "appeal" its decision not to grant me an accommodation under the Policy. There were no set deadlines for submitting an appeal, and the decision on the appeal was not final: the door was always open for me as an employee to submit additional information to support my request for an accommodation, which would be duly considered by my employer.

77. I duly engaged with the appeal process, as follows.

78. First, I communicated with my employer's Human Resources (HR) department and with the external firm (Raymond Chabot Grant Thornton (RCGT)) hired to handle employees' requests for medical accommodation. I asked for the reasons that my accommodation request was denied, and for information about the process for submitting an internal appeal of the decision to deny

accommodation, including whether there were any deadlines for submitting the internal appeal.[42]

79. Second, I duly submitted my internal appeal on March 18, 2022.[43]

80. Third, following my employer's May 26, 2022 decision to deny my internal appeal of its decision not to grant me an accommodation, I duly submitted supplementary appeal submissions, on June 14, 2022. [44]

81. My employer suspended its Policy on June 20, 2022. My employer confirmed receipt of my June 14, 2022 supplementary appeal submissions,[45] but did not respond to them.

3.2 Grounds for appeal

82. The grounds of appeal are that the General Division: [46]

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

83. In her decision of November 23, 2023, SST General Division Member Angela Ryan Bourgeois denied my appeal of the CEIC's decision not to grant me EI benefits.[47]

84. The specific grounds for appeal of Member Bourgeois' decision are that:

    1. Member Bourgeois applied an overly narrow, outdated, and constructed definition of "misconduct" under the *EI Act*, which nonsensically applies irrespective of the demand being made by the employer (section 3.3, below).

    2. Member Bourgeois applied the legal test for misconduct to the wrong action (my decision not to be vaccinated) rather than the action she should have applied it to (my decision to pursue the accommodation stream of my employer's Policy) (section 3.4, below).

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[42] Affidavit of Joseph Hickey affirmed on July 14, 2022 (beginning at page GD-65 in SST file GE-22-2365, including pages GD2-221 to GD2-234; pages GD2-707 to GD2-711; and pages GD2-805 to GD2-806)
[43] *Ibid.*, Exhibit A (beginning at page GD2-74 in SST file GE-22-2365).
[44] *Ibid*., Exhibit F (beginning at page GD2-860 in SST file GE-22-2365).
[45] *Ibid*., Exhibit G (beginning at page GD2-878 in SST file GE-22-2365).
[46] *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).
[47] SST General Division Decision of Angela Ryan Bourgeois in file GE-22-2365, dated November 23, 2023 (Tab 3).

3. Member Bourgeois decided that my decision to pursue the accommodation stream of the Policy, and my decision not to be vaccinated, impaired my ability to complete my work duties, which they did not: I was just as capable of completing my work duties during the 7 months that I was placed on unpaid leave under the Policy (from November 22, 2021 to June 20, 2022) as I was during the 20 months that I worked entirely from home following the WHO's declaration of the COVID-19 pandemic (March 13, 2020 to November 19, 2021). Furthermore, none of my colleagues who were vaccinated and continued working were ever required to come to the workplace on-site during the entire time the Policy was in place. (Section 3.5, below.)

4. Member Bourgeois in-effect incorrectly found that I could have chosen to receive the vaccination after my employer informed me that my initial request for accommodation was denied. This is incorrect: I could not receive the vaccination because it violated my *Charter* and human rights. (Section 3.6, below.)

5. Member Bourgeois decided that the nature of the employer's Policy is irrelevant to her decision regarding misconduct, which is not supported by the case law, including the judgment *Astolfi v. Canada (Attorney General)*, 2020 FC 30 (CanLII), which shows that employee actions that are non-compliant with employer policies or requirements that are unreasonable or that could cause harm to the employee do not constitute misconduct under the *EI Act*. (Section 3.7, below.)

85. The SST erred in law and fact in denying my appeal.

86. An outline of my argument is as follows.

3.3 Applied definition of "misconduct" leads to absurd consequences

87. The meaning of misconduct under the *EI Act* was stated in the case *Canada (Attorney General) v. Lemire*, 2010 FCA 314 (CanLII) at paragraphs 11-14 under the heading "Notion of Misconduct" as follows:[48]

> Notion of misconduct
>
> [11] Subsection 30(1) of the Act provides that a claimant "is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause …". The legal notion of misconduct for the purposes of this provision has been defined in the case law as wilful misconduct, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal: *Canada (A.G.) v. Tucker*, 1986 CanLII 6794 (FCA), [1986] 2 F.C. 329 (C.A.), at paragraph 15; *Mishibinijima v. Canada* (Attorney General), 2007 FCA 36, 279 D.L.R. (4th) 121, at paragraph 14.

[48] *Canada (Attorney General) v. Lemire*, 2010 FCA 314 (CanLII), https://canlii.ca/t/fkqjk, paras. 11-14.

> [12] The two components of this jurisprudential definition have also been considered by the case law.
>
> [13] The notion of wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional: *Canada (Attorney General) v. Secours* (1995), 179 N.R. 132 (F.C.A.). Therefore, no criminal or penal conviction is required to establish misconduct: *Canada (Attorney General) v. Granstrom*, 2003 FCA 485 at paragraph 12.
>
> [14] To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment: *Canada (Attorney General) v. Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 F.C. 684 (C.A.), at paragraph 14; *Canada (Attorney General) v. Cartier*, 2001 FCA 274, 284 N.R. 172, at paragraph 12; *Canada (Attorney General) v. Nguyen*, 2001 FCA 348, 284 N.R. 260, at paragraph 5.

88. According to the legal test stated in *Lemire*, the CEIC must establish the following to demonstrate misconduct under the *EI Act*:

    1. The employee conduct that is alleged to breach an employer's rule or policy must be "willful", that is, it must be "conscious, deliberate, or intentional"; and

    2. There must be a causal link between the claimant's conduct and his or her employment. The employee's conduct must therefore constitute a breach of an express or implied duty arising from the contract of employment.

89. The SST often applies a definition of misconduct using the following statement, which was repeated by Member Bourgeois in her decision in my case: [49]

    > "[T]here is misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of duties owed to his employer and that, as a result, dismissal was a real possibility."

90. According to this application of the meaning of "misconduct" under the *EI Act*, if an employer tells an employee he will be fired or suspended for not doing something and the employee does not comply, then the employee commits misconduct and is disqualified from receiving governmental employment insurance benefits upon being suspended or fired, irrespective of the act demanded by the employer.

91. The non-contextual blanket application of this constructed definition of misconduct, irrespective of what is demanded by the employer, is absurd in our democracy.

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[49] SST General Division Decision of Angela Ryan Bourgeois in file GE-22-2365, dated November 23, 2023 (Tab 3), at para. 13, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, https://canlii.ca/t/1qgkr, para. 14.

92. One can imagine many circumstances in which employer demands can be legitimately refused by employees. For example, it is justifiable for an employee to refuse an employer's demand that the employee commit or be subjected to criminal acts, or acts that violate the employee's *Charter* or human rights, or acts that directly harm or injure others, or acts of self-harm, or acts exposing the employee or others to unnecessary risk of bodily harm. Such refusals are legitimate, yet they would be deemed "misconduct" disqualifying the employee from EI benefits for loss of income due to refusing the employer's demand, under the legal test being applied by the SST.

93. In the context of COVID-19 vaccination policies, the employer demand that employees be vaccinated is advised by the current government.

94. One can imagine many circumstances in which the government could advise or require employers to impose policies that are objectively contrary to science, safety, decency, *Charter* rights, human rights, dignity of the person, or respect for bodily integrity.

95. For example, the Quebec government banned the wearing of clothing or objects deemed to be religious in many workplaces, which infringes individuals' *Charter* rights.[50] An individual who is fired for declining to remove their deemed-religious clothing or symbols would commit misconduct and be disqualified from receiving EI benefits, under the current definition of misconduct.

96. As another example, it was formerly a criminal offence in Canada for a woman to have an abortion. A woman who had an abortion and was subsequently fired for having engaged in the said criminal act would have committed "misconduct" and been disqualified from EI benefits, according to the present definition of misconduct. The same can be said about same-sex sexual activity, which was a criminal offence in Canada until 1969, and could be argued to put employees at risk of disease.

97. Workplace policies requiring employees to denounce colleagues for their political, religious, or cultural views or practices can be advised or condoned by governments, as in periods such as McCarthyism, or had the Stephen Harper Conservatives won the 2015 Canadian federal election and implemented a "barbaric cultural practices hotline" as was promised during the election campaign.[51]

98. Clearly, governments can create laws and advise workplace policies that offend basic norms of decency, not to mention *Charter* and human rights. There has to be a limit to how far the government can go in using removal of employment and employment insurance to impose its policy schemes of the day. The *EI Act* should be understood to contribute to imposing the said limit.

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[50] *Hak c. Procureur général du Québec*, 2021 QCCS 1466 (CanLII), https://canlii.ca/t/jff8f.

[51] CBC News, "Conservatives pledge funds, tip line to combat 'barbaric cultural practices'", 2 October 2015, https://www.cbc.ca/news/politics/canada-election-2015-barbaric-cultural-practices-law-1.3254118.

99. As can be seen from the examples above, the definition of misconduct currently applied by the SST leads to absurd consequences when one considers examples beyond traditional workplace misconduct such as theft or consuming alcohol or illegal drugs during working hours. The test for misconduct must include a consideration of whether the impugned employee act or omission was justifiable in a free and democratic society.

100. Therefore, the currently applied definition of misconduct under the *EI Act* must be revised to include consideration of whether the impugned employee act or omission is justifiable in a free and democratic society.

101. In my case, the SST's erroneous application of its constructed meaning of misconduct, irrespective of what is demanded, leads to the finding that an individual's decision to decline a dangerous medical intervention involving injecting a substance into the individual's body, which is known to produce adverse effects including death, while not apparently hindering the individual's ability to fulfill his contractual obligations, is misconduct. This is an obscene result.

102. Misconduct cannot mean whatever the employer or government wants, and EI is not intended to be a tool that governments can use to coercively force obedience arbitrarily.

103. The application of the overly narrow and outdated test for misconduct by SST General Division Member Bourgeois in the decision below was an error of law.

3.4 Member Bourgeois applied the legal test for misconduct to the wrong action (my decision not to be vaccinated) rather than the action she should have applied it to (my decision to pursue the accommodation stream of the Policy)

104. As stated at paras. 87-88 of these submissions, in order to establish that an employee's act or omission constitutes "misconduct", the CEIC (which has the burden of proof) must establish that the said act or omission was "wilful", where "wilful" means "conscious, deliberate, or intentional".[52]

105. At para. 27 of her decision, Member Bourgeois stated:[53]

> [27] The Appellant opted to remain unvaccinated after November 22, 2021, even though the employer hadn't approved an accommodation for his unvaccinated status under its policy. The Appellant was suspended under the policy. He knew that he couldn't perform his duties while suspended. <u>His decision to remain unvaccinated when he hadn't been approved for an accommodation was a deliberate, intentional, and willful act.</u> He knew that his decision would get him suspended under the policy, and he

[52] *Canada (Attorney General) v. Lemire*, 2010 FCA 314 (CanLII), https://canlii.ca/t/fkqjk, paras. 11-14.
[53] SST General Division Decision of Angela Ryan Bourgeois in file GE-22-2365, dated November 23, 2023 (Tab 3), para. 27.

> decided to continue on that course. He knew that his suspension would continue until he was vaccinated, received accommodation under the policy, or the policy was revoked or changed. [emphasis added]

106. The CEIC had the burden of proof to demonstrate that my alleged non-compliance with the accommodation stream of the Policy (stream #2 in paragraph 72 of these submissions, above) was "wilful", which it did not do nor even attempt to do.

107. Member Bourgeois stated that my "decision to remain unvaccinated […] was a deliberate, intentional, and willful act." However, my decision to remain unvaccinated is not the issue. I chose the accommodation stream of the Policy (stream #2 in paragraph 72 of these submissions). The question that the Member was required to address, therefore, was whether or not I was wilfully non-compliant with the accommodation stream of the Policy.

108. The Member applied the test for wilfulness to the vaccination stream of the Policy (stream #1 in paragraph 72 of these submissions) instead of the accommodation stream of the Policy. The Member therefore made an error of law by applying the legal test for wilfulness to the wrong issue. My choice to remain unvaccinated is irrelevant.

109. Also at para. 27 of her decision, Member Bourgeois stated:[54]

> [27] The Appellant opted to remain unvaccinated after November 22, 2021, even though the employer hadn't approved an accommodation for his unvaccinated status under its policy. The Appellant was suspended under the policy. He knew that he couldn't perform his duties while suspended. His decision to remain unvaccinated when he hadn't been approved for an accommodation was a deliberate, intentional, and willful act. <u>He knew that his decision would get him suspended under the policy, and he decided to continue on that course.</u> He knew that his suspension would continue until he was vaccinated, received accommodation under the policy, or the policy was revoked or changed. [emphasis added]

110. Member Bourgeois stated that I knew that my decision not to be vaccinated would get me suspended under the Policy. However, even if this were true, it is not the issue. Simply knowing that one's employer will suspend you is not enough to establish misconduct. There has to be an element of fault on the part of the employee. The act or omission by the employee has to be intentional. My act was to request an accommodation and duly pursue my employer's process for appealing and providing additional information to support the accommodation request, which I continuously did up until the date the Policy was removed (June 20, 2022). Any non-compliance with the accommodation stream of the Policy on my part was not wilful.

111. Also at para. 27 of her decision, Member Bourgeois stated:

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[54] *Ibid.*, para. 27.

> The Appellant opted to remain unvaccinated after November 22, 2021, even though the employer hadn't approved an accommodation for his unvaccinated status under its policy. The Appellant was suspended under the policy. He knew that he couldn't perform his duties while suspended. His decision to remain unvaccinated when he hadn't been approved for an accommodation was a deliberate, intentional, and willful act. He knew that his decision would get him suspended under the policy, and he decided to continue on that course. He knew that his suspension would continue until he was vaccinated, received accommodation under the policy, or the policy was revoked or changed. [emphasis added]

112. Member Bourgeois stated that I knew that I would remain on unpaid leave until I received accommodation under the Policy. This is not the issue. The issue is whether my alleged non-compliance with the accommodation stream of the Policy (stream #2 in paragraph 72 of these submissions) was wilful. Wilful non-compliance with the accommodation stream of the Policy means deliberately and intentionally choosing not to seek an accommodation. I was not wilfully non-compliant with the accommodation stream of the Policy. The fact that I was suspended by my employer as I attempted to follow the accommodation stream of the Policy is not relevant to whether or not my alleged non-compliance was wilful. Wilfulness is a separate and discrete issue that requires a legal evaluation. The Member erred in law by not making this separate and discrete evaluation. The CEIC did not even attempt to establish that my alleged non-compliance with the accommodation stream of the Policy was wilful, yet it had the burden of proof.

113. At para. 32 of her decision, Member Bourgeois stated:[55]

> [32] In the circumstances, the Appellant could have normally foreseen that his decision to stay unvaccinated when his accommodation request hadn't been approved would result in his suspension. In other words, he knew or ought to have known that his conduct would impair the performance of the duties he owed to his employer. He couldn't perform his duties if he was suspended.

114. This is incorrect and unreasonable. My conduct was to pursue the open-ended and indeterminate accommodation stream of the Policy. I could not have known that my initial accommodation request would be denied until I was informed so on November 18, 2021. I could not have known that my internal appeal of the denial of my accommodation request would be denied until I was informed so on May 26, 2022. I could not have known *a priori* what the result of my supplementary appeal of the denial of my accommodation request would be, and indeed no answer was ever provided to me because my employer suspended its Policy six days following my submission supplementary appeal, and did not provide a response to me other than confirming receipt of my submissions.

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[55] SST General Division Decision of Angela Ryan Bourgeois in file GE-22-2365, dated November 23, 2023 (Tab 3), para. 32.

115. When an employer provides an open-ended accommodation stream and the employee attempts to the best of his ability to pursue that stream without exhausting the internal appeal process, the employee should not be disqualified from receiving government benefits if he is placed on involuntary unpaid leave by the employer while pursuing the accommodation process.

116. The choice whether or not to be vaccinated is irrelevant: the issue is whether I was wilfully non-compliant with the accommodation stream of the Policy (stream #2 in paragraph 72 of these submissions). Only an employee who intentionally refused to authentically and duly engage with the employer's open-ended accommodation process could be considered wilfully non-compliant with the accommodation stream of the Policy. There were such employees at the Bank of Canada. I was not one of them.

3.5 My decision to pursue the accommodation stream of the Policy, and my decision not to be vaccinated, did not impair my ability to complete my work duties in any way

117. At para. 27 of her decision, Member Bourgeois stated:[56]

> [27] The Appellant opted to remain unvaccinated after November 22, 2021, even though the employer hadn't approved an accommodation for his unvaccinated status under its policy. The Appellant was suspended under the policy. <u>He knew that he couldn't perform his duties while suspended.</u> His decision to remain unvaccinated when he hadn't been approved for an accommodation was a deliberate, intentional, and willful act. He knew that his decision would get him suspended under the policy, and he decided to continue on that course. He knew that his suspension would continue until he was vaccinated, received accommodation under the policy, or the policy was revoked or changed. [emphasis added]

118. The Member's statement that "He knew that he couldn't perform his duties while suspended" is incorrect and is an error of fact. Rather, as I explained to the Tribunal, and as I affirmed in my affidavit,[57] I had been working entirely from home for 20 months at the time of suspension, and there was no reason that I could not continue to do all of my work entirely from home. Furthermore, none of my departmental colleagues were required to return to the office in-person at any time between the date of my suspension (November 22, 2021) and the date the Policy was lifted (June 20, 2022).[58] I knew that I could continue my work without any

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[56] SST General Division Decision of Angela Ryan Bourgeois in file GE-22-2365, dated November 23, 2023 (Tab 3), para. 27.
[57] Affidavit of Joseph Hickey affirmed on July 14, 2022 (beginning at page GD2-65 in SST file GE-22-2365).
[58] Affidavit of Joseph Hickey affirmed on July 14, 2022 (beginning at page GD2-65 in SST file GE-22-2365).

interruption or difficulty from home, as I had been doing for 20 months up to the point that I was placed on unpaid leave.[59]

119. At para. 41 of the Bourgeois Decision, the Member states:[60]

> [41] As I explained above, misconduct under the law doesn't mean that the Appellant had wrongful intent. But in the Appellant's case, he made a deliberate decision to follow a certain path despite knowing that he would be suspended. There was a direct link to his employment because it was a policy implemented by his employer to cope with the COVID-19 pandemic. His conduct affected his ability to do his job because he was suspended from work. This is misconduct under the law.

120. As I have stated above in these submissions, I did not know what the outcome of the various internal appeals of my accommodation request would be, and at no point was the door closed by my employer on continuing to appeal and provide additional information. My employer continuously invited additional information to support my accommodation request. It is incorrect, unreasonable, and illogical to conclude that I could have known I would remain suspended at each stage.

121. The Member also conflates the employer's decision to suspend me with my ability to do my job. My decision to exclusively pursue the accommodation stream of the Policy did not affect my ability to do my job in any way: I had been working from home for 20 months continuously, and could have simply continued working from home for the entire period that the Policy was in place. I repeat that none of my colleagues who were allowed to continue working were ever required to attend the workplace in-person during the entire 7-month period that the Policy was active. They were all allowed to work entirely from home the whole time; likewise, I could have simply continued working from home the entire time that I was placed on unpaid leave.

122. My decision not to be vaccinated, and my decision to pursue the accommodation stream of the Policy (stream #2 in paragraph 72 of these submissions) did not impair my ability to perform my job duties in any way. Member Bourgeois erred in finding that "his conduct affected his ability to do his job",[61] which is a necessary element in the definition of misconduct applied by Member Bourgeois.[62]

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[59] *Ibid.*
[60] SST General Division Decision of Angela Ryan Bourgeois in file GE-22-2365, dated November 23, 2023 (Tab 3), para. 41.
[61] *Ibid.*, at para. 41.
[62] *Ibid.*, at para. 13.

3.6 Member Bourgeois in-effect incorrectly found that I could have chosen to receive the vaccination after my employer informed me that my initial request for accommodation was denied

123. At paras. 39-40 of the Bourgeois Decision, the Member states:[63]

> [39] The conduct that led to his suspension was his decision not to be vaccinated by the deadline despite his employer's denial of his accommodation request.
>
> [40] The policy is clear that employees who weren't vaccinated and hadn't received an accommodation by the deadline would be suspended. The result of his decision not to be vaccinated by the deadline when his accommodation request had been refused, meant that he was suspended. It was his conduct that led to his suspension. And being suspended meant that he couldn't carry out his duties to his employer.

124. The "deadline" referred to by the Member was November 22, 2021. I was informed by my employer that my initial accommodation request was denied in the evening of November 18, 2021. To become "fully vaccinated" required several weeks (two doses with a time interval between each dose). Therefore, it would have been impossible for me to become "fully vaccinated" by the November 22, 2021 "deadline".

125. In a previous decision of the SST General Division (which is not available on the SST's website or on CanLII),[64] the Appellant, who was a federal government employee, asked for an exemption to his employer's mandatory COVID-19 vaccination policy. The Appellant's accommodation request was verbally denied on January 21, 2022, and he was placed on an unpaid leave of absence three days later on January 24, 2022. The SST found that the Appellant had not committed misconduct because the employer did not give him an adequate amount of time following the communication of the denial of accommodation to become vaccinated if he had chosen to do so. The SST granted the appeal and found that there was no misconduct, despite the fact that the Appellant did not receive the vaccination at any time. My case is the same: three days after learning that my request for an accommodation not to be vaccinated was denied, I was placed on involuntary unpaid leave.

126. Aside from the impossibility of becoming fully vaccinated within three days (between November 19, 2021 and November 21, 2021) Member Bourgeois' statements in paras. 39-40 of her decision amount to saying "Once he learned his initial accommodation request was denied, he could have simply chosen to become vaccinated". This is incorrect and unreasonable. Receiving the vaccine would have infringed my *Charter* rights to freedom of religion and conscience and to life, liberty, and security of the person, and my human rights

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[63] *Ibid.*, paras. 39-40.

[64] Decision by SST General Division Member Marisa Victor dated May 25, 2023 in SST file GE-22-3918 (Tab 4).

including the right not to be discriminated against on the basis of age and sex.[65] I made extensive submissions on all of the said infringements of my rights, and my submissions are included in the SST's record in my appeal.[66]

127. I was unable to take the vaccine do to my sincerely-held beliefs and my scientifically-founded concerns for my personal health and safety. The only option available to me that did not infringe my *Charter* rights was to pursue the accommodation stream of the Policy, which I did fulsomely and duly. There was no wilful non-compliance with the Policy: I followed the only available avenue to me which was the accommodation and open-ended internal appeal stream.

128. If the Member's decision is allowed to stand, this would mean that any employee who is denied an accommodation to a workplace policy that forces them to act against their religious or conscientious belief and is suspended or fired for not executing the action required by the policy will be considered to have committed "misconduct" and will be barred from receiving governmental employment insurance benefits for the loss of income. The Tribunal would not find a person guilty of misconduct for having refused to eat a food that is disallowed by their religion despite their employer's policy or order requiring them to do so. My case is analogous.

129. Again, like the religious employee who declines to eat a food disallowed by his religion, the mere fact of being suspended by the employer is not in itself a valid basis for depriving employment insurance benefits. The employee has already lost his income due to the suspension. Employment insurance is an insurance program that one pays into while working in the event one loses work for reasons beyond one's control.[67] Being unable to accept an employer's demand that violates one's fundamental rights and that leads to suspension is not a valid, reasonable, or justifiable basis for denying EI benefits.

130. In *AL v. Canada Employment Insurance Commission*), the SST General Division correctly found that an employee's decision not to receive the COVID-19 vaccination was not misconduct because it would have violated her right to bodily integrity.[68] This is the correct approach. Not applying this approach is an error of law.

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[65] Affidavit of Joseph Hickey affirmed July 14, 2022, beginning at page GD2-65 in SST file GE-22-2365, including Exhibit A of the said Affidavit; Appeal of Denial of Employment Insurance Benefits of Joseph Hickey, submitted to the SST by email on July 15, 2022 (pages GD2-19 to GD2-64 in SST file GE-22-2365).
[66] *Ibid.*
[67] "The EI program, which is insurance-based, is designed to protect individuals who have lost their job for reasons outside their control, while they look for new employment or upgrade their skills." Government of Canada, Digest of Benefit Entitlement Principles Chapter 1 - Section 1. Last updated: 19 December 2022. Available at: https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-1/authority.html#a1_1_1.
[68] *AL v Canada Employment Insurance Commission*, 2022 SST 1428, https://decisions.sst-tss.gc.ca/sst-tss/ei-ae/en/item/522171/index.do, paras. 72-80.

3.7 Member Bourgeois incorrectly decided that the nature of the employer's Policy is irrelevant to her decision as to whether or not there was misconduct

131. At paras. 46-47 of the Bourgeois Decision, the Member states:[69]

> [46] In the *Astolfi* case, the claimant stopped going to work. The issue was whether this was misconduct (job abandonment). The court said that in such a case, a reasonable decision requires some consideration of the employer's conduct before the "misconduct" in order to properly assess *whether the employee's conduct was intentional or not*. It differentiated between an employer's conduct after the alleged misconduct, and an employer's conduct that might have actually led to the "misconduct." In that case, the employer had allegedly harassed the claimant. The court decided that this alleged harassment had to be considered in the context of deciding whether there was misconduct. [italic emphasis in the original]
>
> [47] I find that the *Astolfi* case means that I have to look at the employer's conduct to see if it affected the willfulness of the Appellant's conduct. In doing so, I see nothing in the employer's conduct that would lead me to believe that the Appellant's conduct might not have been intentional. Looking at the employer's conduct in this way isn't the same as looking into the reasonableness of the policy. [underline emphasis added]

132. Member Bourgeois' reading of the decision in *Astolfi*[70] is limited incorrectly and unreasonably to only looking at how the employer's conduct affected the employee's intentionality.

133. In contrast, the court in *Astolfi* found that the Appellant in that case believed the employer had created an unsafe workplace. The creation of the unsafe workplace is the employer action that is relevant in *Astolfi*. Likewise, in my case, I believed, supported by overwhelming scientific evidence, that the COVID-19 vaccination was dangerous for me,[71] and that is one of the reasons that I elected the accommodation stream of the Policy, which is pursued diligently and fulsomely. My choice not to pursue the vaccination stream of the Policy cannot be considered misconduct, similar to the fact that the Appellant in *Astolfi*'s decision not to attend an unsafe workplace was not misconduct. My actions in attempting to pursue the accommodation stream of the Policy are not misconduct, because if I was non-compliant with that stream of the Policy, it was not wilful, which is a required element in the test for misconduct.

134. At paras. 53-54 of the Bourgeois Decision, the Member states:[72]

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[69] SST General Division Decision of Angela Ryan Bourgeois in file GE-22-2365, dated November 23, 2023 (Tab 3), paras. 46-47.
[70] *Astolfi v. Canada (Attorney General)*, 2020 FC 30 (CanLII), https://canlii.ca/t/j4rm8.
[71] Affidavit of Joseph Hickey affirmed July 14, 2022 (beginning at page GD2-65 of SST file GE-22-2365), including Exhibit A of the said Affidavit.
[72] SST General Division Decision of Angela Ryan Bourgeois in file GE-22-2365, dated November 23, 2023 (Tab 3), para. 54.

> [53] The Appellant says that the recent Federal Court case called Kuk doesn't apply. He says that his employer's policy had an open-ended avenue for getting accommodations that wasn't available to the claimant in the Kuk case.
>
> [54] I am not persuaded that the facts in Kuk were significantly different from those before me. As explained above, the issue isn't whether he did everything he could to get an accommodation, the question is whether he did or failed to do something and knew that his action or inaction would likely lead to his suspension. [emphasis added]

135. If the Member's statement that "the question is whether he did or failed to do something and knew that his action or inaction would likely lead to his suspension" were to be applied to the decision in *Astolfi*, then the Appellant in that case would have been guilty of misconduct, because he did not attend his workplace, which he deemed to be unsafe due to his employer's harassment of him. *Astolfi* demonstrates that knowing that one's action might lead to suspension is not enough to establish misconduct.

136. Nevertheless, I did not know that pursuing the open-ended accommodation stream of my employer's Policy would lead to my suspension. Otherwise, it would have been futile to engage in the extensive communication with my employer and its third-party firm (RCGT) to seek the reasons my accommodation request was denied and ascertain the procedure for submitting an internal appeal, to prepare and submit my internal appeal, and to prepare and submit my supplementary appeal. It is an error of fact to have decided that I knew that pursuing the accommodation stream of the Policy would cause me to be suspended throughout the entire 7-month period that the Policy was active.

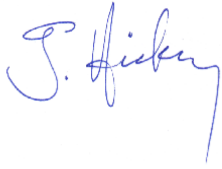
137. I also submit that Member Bourgeois erred in finding that the case *Kuk*[73] is not distinguished form my case. *Kuk* concerns different circumstances in which the employer did not offer an open-ended, non-exhaustive accommodation stream as part of its mandatory vaccination policy. Rather than being placed on unpaid leave while being invited to submit additional information to support the accommodation request, with no end to that process (as I was), the Appellant in *Kuk* was simply terminated from his employment once his initial accommodation request was denied.

3.8 Request

138. I request leave to appeal the November 23, 2023 decision of SST General Division Member Angela Ryan Bourgeois denying my claim for Employment Insurance benefits.

[73] *Kuk v. Canada (Attorney General)*, 2023 FC 1134 (CanLII), https://canlii.ca/t/k0l4p.

RESPECTFULLY SUBMITTED ON DECEMBER 23, 2023



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

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Tab 2	Decision of SST General Division Member Nathalie Léger in SST file GE-22-2365, dated April 7, 2023
Tab 3	Decision of SST General Division Member Angela Ryan Bourgeois in SST file GE-22-2365 dated, November 23, 2023
Tab 4	Decision of SST General Division Member Marisa Victor in SST file GE-22-3918, dated May 25, 2023,

Tab 1

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

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April 11, 2023

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Appellant: Joseph Hickey
Tribunal File Number: GE-22-2365
Commission Record Identifier: 483650

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.

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Kind regards,

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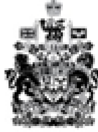
Tab 2



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.

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[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.

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[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

[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

[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

[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

Tab 3

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:	Angela Ryan Bourgeois
Type of hearing:	Videoconference
Hearing date:	September 12, 2023
Hearing participants:	Appellant Respondent's Representative
Decision date:	November 23, 2023
File number:	GE-22-2365

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from his job because of misconduct. The Appellant is disentitled from receiving Employment Insurance (EI) benefits during the period of the suspension.[1]

Overview

[3] The Appellant's employer had a COVID-19 vaccination policy. The policy said that if an employee wasn't vaccinated and hadn't been approved for an accommodation by November 22, 2021, they would be suspended.[2]

[4] The Appellant didn't get vaccinated by the deadline and his reasons for refusing were not approved by his employer, so he was put on a mandatory unpaid leave of absence (suspension).

[5] The Appellant applied for EI regular benefits.

[6] The Commission decided that the Appellant was suspended from his job because of misconduct.[3] Its decision meant the Appellant was disentitled from receiving EI benefits.[4]

[7] The Appellant says that the Commission hasn't proven misconduct under the *Employment Insurance Act* (Act). He says that the Commission has to prove that he willfully failed to comply with the policy. He says he wasn't vaccinated, but he

[1] Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are not entitled to receive benefits until the suspension ends, the claimant loses or voluntarily leaves the job, or the claimant qualifies for benefits from another job.
[2] See page GD2-210.
[3] The Commission's original decision was that the Appellant had taken a voluntarily leave of absence without just cause. See initial decision letter on page GD3-26. Upon reconsideration, the Commission decided that the Appellant was suspended from his job because of misconduct. See reconsideration decision letter on page GD3-42.
[4] The disentitlement is under section 31 of the Act.

deliberately and intentionally followed the policy through his continued efforts to have his accommodation request approved.

Issue

[8] Was the Appellant suspended from his job because of misconduct?

Analysis

[9] The law says that you can't get EI benefits while you are suspended from your job because of misconduct.[5]

[10] To decide if the Appellant was suspended from his job because of misconduct, I must look at why he was suspended, then I have to look at whether that conduct is misconduct under the law. But first I'll explain what misconduct is under the law.

What is misconduct?

[11] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) tells us how to determine whether the Appellant's suspension is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[12] Case law says that to be misconduct the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost willful.[7] The Appellant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[8]

[13] There is misconduct where a claimant's conduct was willful in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. The Federal Court of Appeal says that this means that there is misconduct where the claimant knew

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[5] See section 31 of the Act.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[8] See *Attorney General of Canada v Secours*, A-352-94.

or ought to have known that his conduct was such as to impair the performance of duties owed to his employer and that, as a result, dismissal was a real possibility.[9] Some cases describe this subjective part of the test as whether the claimant could have normally foreseen that their conduct would be likely to result in dismissal.[10]

[14] In most misconduct cases, the claimant has been dismissed from their job. So caselaw talks about whether the claimant knew or should have known that there was a real possibility of being "dismissed." When, as in the Appellant's case, the discipline is a suspension, not a dismissal, I have to consider whether he knew or ought to have known that a suspension was a real possibility.

[15] The Commission has to prove that the Appellant was suspended from his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant was suspended from his job because of misconduct.[11]

[16] Now I'll look at why the Appellant was suspended from his job.

Why was the Appellant suspended?

[17] I find that the Appellant was suspended from his job because by the deadline set in the policy, he was neither vaccinated nor approved for an accommodation. So, he hadn't complied with the policy by the deadline. There isn't any dispute about the reason for his suspension.

Is the reason for his suspension misconduct under the law?

[18] Yes, the reason for the Appellant's suspension is misconduct under the law. My reasons for this decision follow.

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[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, paragraph 14.
[10] See, for example, *Canada (Attorney General) v. Pearson*, 2006 FCA 199.
[11] See *Minister of Employment and Immigration v Bartone*, A-369-88.

– **What the Commission says**

[19] The Commission argues that there was misconduct because there was a causal link between the Appellant's conduct and his suspension. It says that I must not decide if the suspension is justified under labour law. I have to decide if the Appellant could have normally foreseen that his refusal to comply with his employer's vaccination policy was likely to result in his suspension. The Commission says that I have to focus on the Appellant's conduct. I shouldn't focus on the employer's conduct or whether the accommodation request should have been allowed. [12]

[20] The Commission says that the Appellant knew about the policy and the consequences of non-compliance. It says he chose not to comply, and his direct actions led to his suspension.[13]

– **What the Appellant says**

[21] The Appellant says that to prove misconduct, the Commission has to show that he willfully failed to provide a legitimate reason for not being vaccinated. He says that he followed the vaccination policy. There were two distinct ways to follow the policy. An employee could be vaccinated, or he could ask for an accommodation. He chose the accommodation path. He asked for an accommodation for legitimate reasons based in medicine, religion and human rights.

[22] The Appellant says that his decision not to be vaccinated isn't relevant because he followed the accommodation path of the policy. He says his actions can only be considered misconduct if he didn't get vaccinated and didn't ask for an accommodation. He wasn't in breach of the policy because he fulsomely and genuinely sought to comply with the policy to the best of his ability. He was engaged with and in contact with his employer about his accommodation until his suspension ended.

[12] For example, see pages GD4-3 and GD4-4 and the Respondent's oral arguments.
[13] See page GD4-4.

[23] The Appellant says that I can't decide misconduct without considering the policy itself. He argues it can't be misconduct if he refuses an employer's unreasonable policy.[14] He explained why he believes the employer's policy wasn't reasonable.

[24] The Appellant also says that mandatory medical interventions were not and are not part of his employment contract. So, by not being vaccinated, he didn't breach an explicit or implicit condition of his employment.

– **The vaccination policy**

[25] The employer had a policy about COVID-19 vaccinations.[15] The policy said that

- employees would be suspended on November 22, 2021, if they failed to attest to and provide proof of **one** of the following:

  1. They have been fully vaccinated against COVID-19 or would be by November 22, 2021.

  2. A legitimate medical, religious, or other human-rights based reason for not being vaccinated against COVID-19.

- Where an employee cannot receive a COVID-19 vaccine due to protected grounds under the *Canadian Human Rights Act*, such as medical, religious or other protected reasons, and where the employee requires workplace accommodation as a result, the employer will accommodate to the point of undue hardship. Accommodations could include COVID-19 testing at regular intervals, observation of enhanced health and safety protocols, modified job duties, reassignment to other duties, or other appropriate measures.[16]

- Employees who opted not to get fully vaccinated as "required by the policy," and did not have "a requirement for accommodation," would be placed on special

[14] He relies on *A.S. v Canada Employment Insurance Commission*, 2022 SST 215, paragraph 18.
[15] See policy starting on page GD2-210.
[16] See page GD2-212.

leave without pay or benefits as of November 22, 2021.[17] The status of employees on COVID-19 leave would be reviewed regularly.

- The duration of the COVID-19 leave could be limited by the employer at its discretion considering factors such as public health environment, the risk to other individuals in the workplace, the impact on the bank's operations, and any other considerations relevant to the objectives of the policy.[18]

– **The Appellant's actions led to his suspension**

[26] I find that the Commission has proven that there was misconduct.

[27] The Appellant opted to remain unvaccinated after November 22, 2021, even though the employer hadn't approved an accommodation for his unvaccinated status under its policy. The Appellant was suspended under the policy. He knew that he couldn't perform his duties while suspended. His decision to remain unvaccinated when he hadn't been approved for an accommodation was a deliberate, intentional and willful act. He knew that his decision would get him suspended under the policy, and he decided to continue on that course. He knew that his suspension would continue until he was vaccinated, received accommodation under the policy, or the policy was revoked or changed.

[28] I will now explain these findings.

– **The Appellant knew that he would be suspended because of his choices**

[29] The Appellant knew about and understood the policy. He wasn't vaccinated. He applied for an accommodation and continued to make efforts to receive an accommodation until his suspension was lifted.[19]

[17] See page GD2-212.
[18] See page GD2-211.
[19] For example, see the chronology in the Appellant's affidavit on page GD2-22.

[30] His employer denied his accommodation request on November 18, 2021, and told him he would be put on unpaid leave as of November 22, 2021.[20]

[31] So, the Appellant knew that he would be suspended on November 22, 2021. He wasn't vaccinated and his accommodation request hadn't been approved.

[32] In the circumstances, the Appellant could have normally foreseen that his decision to stay unvaccinated when his accommodation request hadn't been approved would result in his suspension. In other words, he knew or ought to have known that his conduct would impair the performance of the duties he owed to his employer. He couldn't perform his duties if he was suspended. [21]

[33] This means he was suspended by reason of his own misconduct. The conduct that led to his suspension was willful, intentional and deliberate.

[34] Next, I will explain why I don't agree with the Appellant's position.

– **The Appellant's position**

[35] I accept that the Appellant continued to make efforts to receive an accommodation.[22] But accepting this doesn't change my decision. As I explain in the next paragraphs, his conscious and deliberate conduct still led to his suspension from work.

– **The conduct that led to the suspension**

[36] The Appellant says that:

- the Commission hasn't shown that he willfully failed to provide a legitimate reason for not being vaccinated

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[20] As per the Appellant's affidavit on page GD2-22. See also the employer's email to the Appellant dated November 19, 2021, on page GD2-218.
[21] See *Nelson v Canada (Attorney General),* 2019 FCA 222, which was recently cited by the Federal Court in *Kuk v Canada (Attorney General),* 2023 FC 1134, paragraph 25.
[22] For example, he submitted an appeal in March 2022 (GD2-75) and provided additional submissions in June 2022 (GD2-861). See page GD2-22. See also pages GD2-230 and GD2-707.

- he didn’t go against the policy – he took the accommodation path
- his vaccination status isn’t the issue because he chose to follow the accommodation path

[37] The Appellant is focusing on the wrong question. I have to decide if the Appellant did or didn’t do something that led to his suspension from work.

[38] To do this, I have to make sure I focus on the actual conduct that led to his suspension.

[39] The conduct that led to his suspension was his decision not to be vaccinated by the deadline despite his employer’s denial of his accommodation request.

[40] The policy is clear that employees who weren’t vaccinated and hadn’t received an accommodation by the deadline would be suspended. The result of his decision not to be vaccinated by the deadline when his accommodation request had been refused, meant that he was suspended. It was this conduct that led to his suspension. And being suspended meant he couldn't carry out his duties to his employer.

[41] As I explained above, misconduct under the law doesn’t mean that the Appellant had wrongful intent. But in the Appellant’s case, he made a deliberate decision to follow a certain path despite knowing that he would be suspended. There was a direct link to his employment because it was a policy implemented by his employer to cope with the COVID-19 pandemic. His conduct affected his ability to do his job because he was suspended from work. This is misconduct under the law.

– **Looking behind the policy, and other labour law arguments**

[42] I am not looking behind the policy. I am not going to make a finding about whether the policy was reasonable, or whether the employer should have accommodated the Appellant.

[43] The Appellant says I have to consider whether the policy was reasonable. He says:

- The policy wasn't reasonable because it didn't allow for rapid antigen testing or remote work instead of vaccination.[23]

- Refusing a potentially deadly medical intervention isn't misconduct under the Act, just as refusing to adopt a religion or commit an illegal act at an employer's insistence, isn't misconduct.[24]

- I can't ignore the nature of the employer's policy because doing so would lead to absurd results. The case law around misconduct evolved around workplace activities like theft and missing work. This is completely different from a policy that requires a person to be subjected to dangerous medical interventions. The definition of misconduct in the case law is wrong when it comes to mandatory vaccinations.

- The employer didn't explain what was needed to get his accommodation approved.

[44] To support this position, the Appellant relies on a Federal Court decision called Astolfi and a decision of the General Division of this Tribunal.[25]

[45] I don't agree with the Appellant about the application of the Astolfi decision to his case.

[46] In the *Astolfi* case, the claimant stopped going to work. The issue was whether this was misconduct (job abandonment). The court said that in such a case, a reasonable decision requires some consideration of the employer's conduct before the "misconduct" in order to properly assess *whether the employee's conduct was intentional or not.* It differentiated between an employer's conduct after the alleged misconduct, and an employer's conduct that might have actually led to the "misconduct." In that case, the employer had allegedly harassed the claimant. The court

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[23] See recording at about 1:04:41. He explains that during the period of his suspension, none of his colleagues who continued working ever had to go to the office. See also GD2-65.
[24] This alternative argument starts about 1:02:02 of the hearing recording.
[25] See *Astolfi v Canada (Attorney General)*, 2020 FC 30 and *AS v Canada Employment Insurance Commission,* 2022 SST 215.

decided that this alleged harassment had to be considered in the context of deciding whether there was misconduct. [26]

[47] I find that the *Astolfi* case means that I have to look at the employer's conduct to see if it might have affected the willfulness of the Appellant's conduct. In doing so, I see nothing in the employer's conduct that would lead me to believe that the Appellant's conduct might not have been intentional. Looking at the employer's conduct in this way isn't the same as looking into the reasonableness of the policy.

[48] The Appellant also relies on a decision of one of my colleagues in the General Division of the Tribunal called *AS v Canada Employment Insurance Commission.*[27] In that decision, the Tribunal member wrote that:

> "misconduct according to the EI Act is, as explained in paragraphs 11 and 12 above, means that an employee does something that goes against a *reasonable* employer policy willfully and deliberately, knowing that it might result in dismissal" [*emphasis mine*].

[49] Respectfully, I can't agree with my colleague's summary of the law.[28] The case law summarized and footnoted in paragraphs 11 and 12 of that decision, is the same case law I summarized above under the heading, "What is misconduct?" Those cases do not say that for there to be misconduct the violated policy must be reasonable.[29] And if I did look into the reasonableness of the vaccination policy, I'd be going against the law as set by the Federal Court.

[50] Recent Federal Court decisions, as well as a decision of this Tribunal's appeal division, explain that I shouldn't look behind vaccination policies.[30]

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[26] See paragraph 33, *Astolfi v Canada (Attorney General)*, 2020 FC 30.
[27] *AS v Canada Employment Insurance Commission,* 2022 SST 215, specifically paragraph 18.
[28] Other Tribunal decisions aren't binding on me. In other words, I don't have to follow decisions made by other Tribunal members.
[29] See *Canada Employment Insurance Commission* v *AL*, 2023 SST 1032, paragraph 36. This decision is on page GD31-3.
[30] *Canada Employment Insurance Commission* v *AL*, 2023 SST 1032. See also *Kuk v Canada (Attorney General),* 2023 FC 1134 and *Milovac v Canada (Attorney General)*, 2023 FC 1120.

[51] The Appellant put forth other arguments that are based in labour law. For example, he pointed out that mandatory vaccinations weren't part of his employment contract. But arguments based in labour law are beyond the scope of this appeal. Arguments about the employer's duty to accommodate, the contractual language, and whether the suspension was justifiable under labour laws and principles, are not relevant to the question of misconduct under the Act.[31] The Appellant's arguments about the policy may be relevant in another forum, but they don't change my decision that he was suspended due to misconduct.

[52] Further, the law says that it doesn't matter that the employer's written vaccination policy didn't exist when the Appellant was hired.[32] It is enough that the employer notified the Appellant about the new policy and the Appellant had time to comply with the policy.

[53] The Appellant says that the recent Federal Court case called Kuk doesn't apply.[33] He says that his employer's policy had an open-ended avenue for getting accommodations that wasn't available to the claimant in the Kuk case.

[54] I am not persuaded that the facts in Kuk were significantly different from those before me. As explained above, the issue isn't whether he did everything he could to get an accommodation, the question is whether he did or failed to do something and knew that his action or inaction would likely lead to his suspension.

The Appellant was suspended from his job because of misconduct

[55] Based on my findings above, I find that the Appellant was suspended from his job because of misconduct.

[56] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that his conduct would lead to his suspension. He continued in his chosen course of not being vaccinated despite having not been approved for an

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[31] See *Kuk v Attorney General of Canada*, 2023 FC 1134, paragraphs 34 to 41. See also *Canada Employment Insurance Commission* v *AL*, 2023 SST 1032 (page GD31-3).
[32] See *Kuk v Attorney General of Canada*, 2023 FC 1134. See also *Canada Employment Insurance Commission* v *AL*, 2023 SST 1032 (page GD31-3).
[33] Hearing recording about 2:30.

accommodation. He knew that these decisions would cause him to be suspended from his job.

Conclusion

[57] The Commission has proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[58] This means that the appeal is dismissed

Angela Ryan Bourgeois

Member, General Division – Employment Insurance Section

Tab 4

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	[redacted]
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (543725) dated November 2, 2022 (issued by Service Canada)

Tribunal member:	Marisa Victor
Type of hearing:	In person
Hearing date:	May 25, 2023
Hearing participant:	Appellant
Decision date:	June 8, 2023
File number:	GE-22-3918

Decision

[1] The appeal is allowed.

[2] The Appellant has shown that there were exceptional circumstances causing his delay in applying for benefits. In other words, the Appellant has given an explanation that the law accepts. This means that the Appellant's application can be treated as though it was made earlier.[1]

[3] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant was suspended from his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant isn't disqualified from receiving Employment Insurance (EI) benefits.[2]

Overview

[4] There are two issues in this appeal. First, whether the Appellant can antedate, or backdate, his application. Second, whether the Appellant was suspended from his job due to misconduct.

<u>Antedate</u>

[5] The Appellant applied for Employment Insurance (EI) benefits on May 5, 2022. He is now asking that the application be treated as though it was made earlier, on January 24, 2022. This is called antedating (or, backdating) the application. The Canada Employment Insurance Commission (Commission) has already denied this request.

[6] I have to decide whether the Appellant has proven that he had good cause for not applying for benefits earlier or whether exceptional circumstances existed.

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[1] See section 10(5) of the *Employment Insurance Act* (EI Act).
[2] Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

[7] The Commission says that the Appellant didn’t have good cause because throughout the delay period he did not act like a reasonable person in order to verify his rights and obligations. It also says there were no exceptional circumstances.

[8] The Appellant disagrees and says that he acted as soon as he became aware that he could apply for EI benefits even though he had not lost his job. The Appellant states he was suspended from his job but not terminated and was in the process of appealing that suspension when he discovered he could apply for EI benefits.

Misconduct

[9] The Appellant was suspended from his job. The Appellant’s employer says that he was suspended because he went against its vaccination policy: he didn’t say whether he had been vaccinated.

[10] I have to decide whether the Commission has shown that the Appellant committed misconduct.

[11] The Commission accepted the employer’s reason for the dismissal. It decided that the Appellant was suspended from his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[12] Even though the Appellant doesn’t dispute that this happened, he says that going against his employer’s vaccination policy isn’t misconduct.

Issue

[13] Can the Appellant’s application for benefits be treated as though it was made earlier on January 24, 2022?

[14] Did the Appellant get suspended from his job because of misconduct?

Issue 1: Antedate

Analysis

[15] The Appellant wants his claim for EI benefits to be treated as though it was made earlier, on January 24, 2022. This is called antedating (or, backdating) the claim.

[16] To get a claim antedated, the Appellant has to prove that he had good cause for the delay during the entire period of the delay.[3] The Appellant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he had good cause for the delay.

[17] And, to show good cause, the Appellant has to prove that he acted as a reasonable and prudent person would have acted in similar circumstances.[4] In other words, he has to show that he acted reasonably and carefully just as anyone else would have if they were in a similar situation.

[18] The Appellant also has to show that he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.[5] This means that the Appellant has to show that he tried to learn about his rights and responsibilities as soon as possible and as best he could. If the Appellant didn't take these steps, then he must show that there were exceptional circumstances that explain why he didn't do so.[6]

[19] The Appellant has to show that he acted this way for the entire period of the delay.[7] That period is from the day he wants his application antedated to until the day he actually applied. So, for the Appellant, the period of the delay is from January 24, 2022 to April 24, 2022.[8]

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[3] See *Paquette v Canada (Attorney General)*, 2006 FCA 309; and section 10(5) of the EI Act.
[4] See *Canada (Attorney General) v Burke*, 2012 FCA 139.
[5] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[6] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[7] See *Canada (Attorney General) v Burke*, 2012 FCA 139.
[8] This is not an initial claim for benefits because the Appellant had applied for EI parental benefits within the last year. A renewal benefit period can start the week prior to the week the claim is made. The Appellant applied in May 5, 2022 so the commencement date is April 24, 2022 if no antedate is granted.

[20] The Appellant said that he had good cause for the delay because he did not know he could apply since he was still employed by his employer. The Appellant testified that he was on leave without pay, and not terminated, therefore he didn't realise he could apply for EI benefits. He says he reviewed a "manager's toolkit" that described his situation as on leave without pay but still employed. This led him to believe he could not apply for EI benefits. He also continued to work, even on January 24, 2022, until he was told to no longer work by his employer and told his employer he was ready and willing to return at any time.

[21] The Appellant said that he spent between January 24 and May 5, 2022 researching his ability to appeal the leave of absence. He also says his research and work in appealing his work situation took a great deal of mental attention and was emotionally difficult. The result of his research was that he filed a grievance and filed documents with the Canadian Human Rights Commission. It was not until May 5, 2022, when he was having a discussion with other colleagues who were on leave without pay, that he was first learned he could apply for EI benefits. The Appellant said that he applied for EI benefits as soon as he was told he could.

[22] The Appellant said that he is not a sophisticated user. He said that he has a high school diploma. He testified that the only other time he had applied for EI was when he had gone on parental leave. At that time his employer guided him through the EI benefits system, unlike in this case.

[23] The Appellant also said that there were exceptional circumstances. The Appellant said that the government relied on the exceptional circumstances due to the pandemic to bring in the vaccine policy that is at issue here. The Appellant says that covid pandemic created an exceptional circumstance for him as well. He said that if the covid pandemic is an exceptional circumstance that allows an employer to unilaterally change a work contract, then he too can rely on the exceptional circumstance of the pandemic. He says the covid pandemic was a very confusing period. Because of covid restrictions and his location outside of the city he could not attend a Service Canada

location in person. He also said that he was the father of a newborn baby and another child under age 2 and that this added to his situation.

[24] Finally, the Appellant says that there is no prejudice to antedating his appeal because the Commission has already conceded that there is no issue with regard to his availability. He says that the initial reason the Commission gave for not antedating his application was because of the difficulty in showing availability. The Appellant states that this no longer applies to his case.

[25] The Commission says that the Appellant hasn't shown good cause for the delay. It says the Appellant was aware of the EI regime as he had previously submitted a claim for parental benefits. It says the Appellant has shown his capacity for research and the ability to take necessary steps to enquire about his rights as evidenced by his grievance and human rights application. Finally, the Commission says he has not shown any exceptional circumstances that would create obstacles to applying for EI benefits.

[26] I find that the Appellant has proven that there were exceptional circumstances for his delay in applying for benefits when considering the Appellant's situation as a whole. First, the Appellant has pointed to his lack of sophistication with the EI system and that since he was still employed did not understand that he could apply for EI benefits during his leave of absence. The Appellant's ability to discuss his situation with others was also reduced because of the pandemic: he worked remotely from home in a rural area and he could not attend a Service Canada location in person. The Appellant was also the father of a newborn and another young child. He was worried about the loss of income to support his young family and was working on researching and appealing his leave of absence. If he was allowed back to work or his appeals had been successful, he would have not been eligible for EI benefits. Further, when he found out he could apply for EI benefits he acted that day to apply for benefits. The Appellant also points out the lack of prejudice given that the Commission has acknowledged his availability. These factors combined show that there were exceptional circumstances that combined to explain the Appellant's delay period.

[27] The Appellant's application for antedating his application is granted.

Issue 2: Misconduct

[28] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.[9]

[29] To answer the question of whether the Appellant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant get suspended from his job?

[30] I find that the Appellant was suspended from his job because he went against his employer's vaccination policy.

[31] Both parties agree that this is the reason for the Appellant's suspension.

[32] I accept as a fact that the Appellant was suspended by his employer because his employer believed he went against the vaccination policy.

Is the reason for the Appellant's dismissal misconduct under the law?

[33] The reason for the Appellant's dismissal isn't misconduct under the law.

[34] The EI Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[35] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[10] Misconduct also includes conduct that is so reckless that it is almost wilful.[11] The Appellant doesn't have to have

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[9] See sections 30 and 31 of the Act.
[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[12]

[36] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being suspended because of that.[13]

[37] The Commission has to prove that the Appellant was suspended from his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant was suspended because of misconduct.[14]

[38] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was discriminated against or whether the employer should have made reasonable accommodations for the Appellant aren't for me to decide.[15] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[39] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[16] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

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[12] See *Attorney General of Canada v Secours*, A-352-94.
[13] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[14] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[16] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[40] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[41] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General).*[17] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[18]

[42] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General).*[19] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[20]

[43] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant. Further, these same principles have been affirmed in a

[17] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[18] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[19] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[20] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

recent Federal Court case dealing directly with misconduct based on failure to follow an employer's vaccine policy: *Cecchetto v. Canada (Attorney General).*[21]

[44] Therefore, my role is not to look at the employer's conduct or policies and determine whether they were right in suspending the Appellant. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the EI Act.

[45] The Commission says that there was misconduct because:

- The employer had passed a covid vaccination policy
- The employer clearly notified the Appellant about its expectations about telling it whether he had been vaccinated
- The Appellant was aware of the policy and submitted an exception request in October 2021
- The Appellant's manager spoke to the Appellant about the policy and the exemption request. The employer communicated many times with the Appellant by phone and with follow-up emails and letters.
- The Appellant knew or should have known what would happen if he didn't comply with the policy and attest that he was fully vaccinated

[46] The Appellant says that there was no misconduct because:

- The Appellant tried to comply with the policy by not providing his consent to the policy, by asking for an exemption by the deadline provided and by submitting documents to support his exemption request in accordance with the policy

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[21] *Cecchetto v. Canada (Attorney General),* 2023 FC 102 at paras. 12, 15, 16, 17, 24. This decision is currently under appeal.

- The employer’s vaccination policy violated his right against genetic discrimination and his right to be accommodated

- Prior to the covid pandemic, the Appellant had taken a job specifically because it was a teleworking position therefore no accommodation was necessary to allow him to continue to telework

- The Appellant says he never consented to the policy and its unilateral imposition on him violates contract law

- The employer didn’t comply with its own policy and didn’t give him two weeks after his accommodation request was denied.

[47] I find that the Commission hasn’t proven that there was misconduct because the Appellant could not have known or could not reasonably have known that he could be suspended because of his conduct.

[48] There is no dispute that the Appellant was aware of the employer’s policy. He knew that he was required to attest to his vaccination status and be vaccinated against covid or have an approved exemption under the policy. But he was not given the time to comply with the policy.

[49] The Appellant’s accommodation request was verbally denied on January 21, 2022 and he was placed on a leave of absence three days later on January 24, 2022. The Appellant was not given two weeks, pursuant to the policy, to chose to comply or chose to violate the policy.

[50] It is well established that a deliberate violation of the employer’s policy is considered misconduct within the meaning of the *Employment Insurance Act*.[22]

[51] In this case, there is no indication that the Appellant deliberately violated the employer’s policy before he was suspended on January 24, 2022. Up to that point the

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[22] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

Appellant had followed the steps in the policy to apply for an exemption and had supplied his manager with the reasons for that request in accordance with the policy. This tells me that the Appellant attempted to comply with the policy.

[52] The Appellant only knew that he was not in compliance with the policy when his manager told him his request for an exemption was denied on January 21, 2022.

[53] But, the employer didn't give him an opportunity to meet the other policy requirements – attesting to being fully vaccinated – before he was suspended from his job. In addition, the Appellant's manager said he would provide him more details about the accommodation denial when he had the information. This could have meant that the Appellant would have a further opportunity to clarify his exemption request.

[54] For the Appellant's conduct to be misconduct within the meaning of the *Employment Insurance Act*, he must have wilfully committed the conduct. The conduct in question is that the Appellant did not comply with the employer's covid vaccination policy.

[55] In my view, the Appellant did not wilfully act in non-compliance with the policy before he was suspended from his job on January 24, 2022.

[56] Even though he would not disclose his vaccination status,[23] the policy considers that a non-vaccinated person can be in compliance if they have an approved exemption. The Appellant had asked for an exemption. His exemption request was denied three days before his suspension and there was communication from his manager that further information might be forthcoming.

[57] Before the Appellant's exemption request was denied, the Appellant could not have known, nor could he have reasonably known, that he could be suspended for his conduct. There was also some indication that the door to the exemption request was not fully closed. Even if it was, he should have had two weeks to consider whether or not to comply with the policy and disclose his vaccination status. So, I find the Appellant was

[23] Under the policy a person who does not disclose their vaccine status is considered to be unvaccinated.

not wilfully non-compliant with the employer’s policy at the time he was suspended from work.

So, did the Appellant get suspended from his job because of misconduct?

[58] Based on my findings above, I find that the Appellant was not suspended from his job because of misconduct.

[59] This is because the Commission has not shown that the Appellant’s actions were wilfully non-compliant with the employer’s policy.

Conclusion

[60] The Appellant has shown that there were exceptional circumstances and that therefore his EI benefits application should be antedated.

[61] The Commission hasn’t proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant isn’t disqualified from receiving EI benefits.

[62] This means that the appeal is allowed.

Marisa Victor

Member, General Division – Employment Insurance Section