Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Joseph Hickey
Respondent:	Canada Employment Insurance Commission
Representative:	Rebekah Ferriss

Decision under appeal:	General Division decision dated April 7, 2023 (GE-22-2365)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	October 9, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	April 28, 2025
File number:	AD-24-13

Decision

[1] The appeal is dismissed.

Overview

[2] The General Division issued two decisions: the first on April 7, 2023, and the second, on November 23, 2023. The Appellant, Joseph Hickey (Claimant), is appealing both decisions. This decision relates only to the appeal of the General Division decision of April 7, 2023.[1]

[3] At its very core, the Claimant's appeal is about whether he committed any misconduct. The Claimant had applied for Employment Insurance (EI) benefits, after being suspended from his job for not complying with his employer's vaccination policy. The Respondent, the Canada Employment Insurance Commission (Commission), refused his application, on the basis that he had committed misconduct.

[4] The Claimant denies any misconduct and says that he was entitled to receive benefits. The Claimant argues that the term "misconduct" set out in sections 30(1) and 31 of the *Employment Insurance Act* (Act) is unconstitutionally vague and that the sections therefore are inapplicable and inoperative in his particular case.

[5] The Claimant filed a notice of appeal at the General Division, challenging the constitutionality of sections 30(1) and 31 of the Act. In its April 7, 2023, decision, the General Division determined that the Claimant had not fulfilled the notice requirements under the *Social Security Tribunal Regulations*, 2022 (Regulations, 2022) when he filed an amended notice of constitutional question. So, the General Division did not consider the Claimant's constitutional arguments when it examined whether he had committed any misconduct under the Act.

[1] See General Division decision, dated April 7, 2023, at GD27.

[6] The Regulations, 2022 say that a party who wants to challenge the constitutional validity, applicability or operability of a provision of the Act has to file a notice with the Social Security Tribunal (Tribunal) that sets out the following:

> (a) the provision that will be challenged
>
> (b) the material facts relied on to support the constitutional challenge
>
> (c) a summary of the legal argument to be made in support of the constitutional challenge[2]

[7] The General Division accepted that the Claimant fulfilled the first two requirements under the 2022 Regulations. But it found that he had not fulfilled the third requirement.

[8] The General Division determined that the legal argument under section 1(1)(c) of the 2022 Regulations has to have at least a minimal chance of success. The General Division determined that the Claimant did not meet this threshold.

[9] The General Division determined that unwritten constitutional principles such as the doctrine of vagueness could not be used to invalidate the Act. For that reason, it found that the Claimant did not have a valid constitutional argument that had a reasonable chance of success.

[10] Because the General Division found that the Claimant had not fulfilled the notice requirements, it determined that the appeal before it would continue as a "regular appeal." As a result, in its November 23, 2023, decision, the General Division did not consider whether the term "misconduct" found in sections 30(1) and 31 of the Act is "unconstitutionally vague"[3] and that the sections therefore are of no force or effect in his case.

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[2] See section 1(1) of the *Social Security Tribunal Regulations*, 2022.
[3] See General Division decision at paras 4 and 33.

[11] The General Division concluded that the Commission had proven that the Claimant had been suspended from his job because of misconduct. The General Division found that the Claimant was disentitled from receiving EI benefits for the period when he was suspended.[4]

[12] The Claimant continues to challenge the constitutionality of sections 30(1) and 31 of the Act, under the rule of law and the doctrine of vagueness.[5] As an aside, I note that the Supreme Court of Canada has held that the doctrine of vagueness "can be summed up in one proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance…."[6]

[13] The Claimant argues that the term "misconduct" is overly vague and lacking in precision and that, because it is so vague, the General Division should not have found that he had committed misconduct.

[14] In the appeal before me, the Claimant argues that the General Division made a legal error in determining that his constitutionally based arguments had to have a minimal or reasonable chance of success. He is asking the Appeal Division to give the decision that he says the General Division should have given, which is to find that his amended notice of constitutional question fulfilled the notice requirements. He asks for an order directing the General Division to allow him to advance his constitutional arguments.

[15] In other words, the Claimant argues that the General Division misinterpreted section 1(1)(c) of the 2022 Regulations by imposing more rigorous obligations for a party to meet than the section requires.

[16] The Claimant asserts that if the General Division had accepted his constitutional arguments, then it would have agreed that "misconduct" under the Act is vague. He

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[4] See General Division decision dated November 23, 2023. The Claimant's appeal of that decision is on hold, pending the outcome of this matter.
[5] See Appellant's submissions on appeal, at AD17-5.
[6] See *R. v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC).

argues that it would have concluded that there was no basis to consider whether he had committed any misconduct.

[17] The Commission argues that the General Division properly dismissed the Claimant's notice of constitutional question. The Commission asks the Appeal Division to dismiss the appeal.

Issues

[18] The issues in this appeal are as follows:

1. Did the General Division make an error of law when it interpreted section 1(1)(c) of the *Regulations, 2022*, as requiring a legal argument in support of a notice of constitutional challenge to have a reasonable chance of success?

2. If the answer is "no," did the General Division make a legal error in misinterpreting *Toronto (City) v Ontario (Attorney General)* and then applying it to the circumstances of that case?[7] (In applying the case, the General Division determined that the Claimant's legal argument did not have a reasonable chance of success.)

3. Is *Sullivan v Canada (Attorney General)* relevant?[8]

Analysis

[19] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[9] The Claimant argues that the Appeal Division's intervention is appropriate since he contends that the General Division made legal errors.

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[7] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.
[8] *Sullivan v Canada (Attorney General)*, 2024 FCA 7.
[9] See section 58 (1) of the *Department of Employment and Social Development Act* (DESD Act).

Issue 1: The Claimant argues that the General Division misinterpreted section 1(1)(c) of the *Regulations, 2022*

– History of the notice requirements

[20] The General Division reviewed the history of the notice requirements. Before the 2022 Regulations came into force, section 20(1)(a) of the *Social Security Tribunal Regulations*, 2013, applied. Under section 20(1)(a), a party had to file a notice that i) "sets out the provision that is at issue" and ii) "contains any submissions in support of the issue that is raised."[10] The General Division determined that:

> …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. [Citation omitted] 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.[11]

[21] As I mentioned in paragraph 6, under the Regulations, 2022, a party must file a notice that sets out "the provision that will be challenged," "the material facts relied on to support the constitutional challenge," and "a summary of the legal argument to be made in support of the constitutional challenge."

– History of proceedings

[22] The General Division held a pre-hearing conference in October 2022 to clarify the issues and to discuss the requirements set out in section 1 of the Regulations, 2022.[12] The General Division informed the parties that the Tribunal did not have any jurisdiction to decide whether any of the Claimant's rights under the *Canadian Charter of Rights and Freedoms* had been violated.[13] The General Division noted that the Claimant still intended to pursue this issue.

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[10] See section 20(1)(a)(ii) of the *Social Security Tribunal Regulations,* SOR/2013-60.
[11] See General Division decision at para 11.
[12] See General Division letters dated October 4 and 7, 2022, at GD8 and GD10.
[13] The Claimant's arguments do not relate to any specific provisions (such as section 7, for example) of the *Canadian Charter of Rights and Freedoms per se*. But he is arguing that there are constitutional principles at stake in his case.

[23] The General Division allowed both parties to file arguments on the Charter-related issues. It advised both parties that once they had filed their submissions, it would determine whether a hearing was necessary. The member advised that she would then either issue a written decision on the sufficiency of the notice of constitutional question or hold a hearing to clarify some points. The member wrote:

> If my decision is to the effect that I do have jurisdiction and that the s.20 notice is sufficient, the appeal will proceed as a *Charter* appeal. […] If my decision is to the effect that I do not have jurisdiction, I will render a decision rejecting the s.20 notice and the appeal will proceed with the regular process.[14]

[24] The Claimant filed an amended notice of constitutional question in January 2023, shortly after the Regulations, 2022 came into force on December 5, 2022.[15] The General Division determined that the notice requirements under the Regulations, 2022 applied.

[25] The General Division rejected the Claimant's section 1 notice, on the basis that his constitutional arguments did not have a reasonable chance of success.

– The Claimant's notice

[26] The Claimant argued in his notice that the Commission interpreted misconduct in his case to mean refusing vaccination against COVID-19. He describes vaccination as "an unwanted and dangerous medical intervention."[16] The Claimant argued that the Commission's interpretation of misconduct "defies reasonable anticipation or fair notice of any citizen, and amounts to arbitrary state action to deny [him] a government service or benefit."[17]

[27] The Claimant argued that the Commission's interpretation of misconduct in his case had no connection or relationship to any past misconduct in Canadian labour law

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[14] See General Division letter dated October 19, 2022, at GD12-2.
[15] See Claimant's amended notice of constitutional question, filed January 24, 2023, at GD18.
[16] See Claimant's amended notice of constitutional question, at GD18-20.
[17] See Claimant's amended notice of constitutional question, at GD18-20.

or employment benefits law. The Claimant argued that, because of this, sections 30(1) and 31 of the Act offend the rule of law and the doctrine of vagueness, making them unconstitutional.

[28] The Claimant argued in the alternative that if sections 30(1) and 31 of the *Employment Insurance Act* are not unconstitutional under the doctrine of vagueness, then their application to him is unconstitutional. He argued that the sections violate his right not to be subjected to an unconstitutionally vague law.[18]

[29] The Claimant maintains these arguments in the appeal before me.

– **The General Division's interpretation of section 1(1) of the Regulations, 2022**

[30] The General Division determined that the Regulations, 2022 imposed a higher threshold on a party. The General Division found that one had to consider that most appellants who appear before the Tribunal are not represented and may not use the proper legal terms or explain the applicable legal test in all their nuances.[19] The General Division then wrote the following:

> But the change in the wording of the Regulations [2022] 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." [Citation to *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] But it does mean that it is necessary to evaluate if the argument brought forward has at least a minimal chance of success.[20]

[18] See Claimant's amended notice of constitutional question, at GD18-21.
[19] See General Division decision at para 12.
[20] See General Division decision at para 13.

[31] The General Division relied on *FU2 Productions* and the *Director of Public Prosecutions c Jetté* in determining that the Claimant's constitutional argument had to have a reasonable chance of success.

– **The FU2 Productions decision**

[32] The respondent in *FU2 Productions* sought an order striking out parts of the appellant's notice of appeal. These parts related to the constitutional argument of the appellant, FU2 Production Ltd.

[33] The respondent made the application under paragraphs 53(1)(a) and (d) of the *Tax Court of Canada Rules (General Procedure).* Under paragraph 53(1)(d), the Tax Court was permitted to strike out all or part of a pleading with or without leave (permission) to amend on the ground that the pleading or other document "discloses no reasonable grounds for appeal or opposing the appeal."

[34] The Tax Court set out principles for disposing of an application under paragraph 53(1) of the Rules. These include the following:

1. To strike out a pleading or part of a pleading, it must be plain and obvious that the position has no reasonable prospect of success.

2. In a motion to strike a pleading, the burden to show it is plain and obvious that the pleading has no prospect of success rests on the applicant.

3. The test to grant a motion to strike is stringent, and the power to strike a pleading must be exercised with great care. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[35] In the *FU2 Productions* case, the Rules specifically provided that the pleadings had to disclose a reasonable ground for appeal, which the Tax Court defined as having a reasonable chance of success.

[36] The Tax Court determined that the appellant's constitutional arguments did not have a reasonable chance of success. It struck those parts of the appellant's notice of appeal.

[37] The Claimant argues that the General Division's reliance on *FU2 Productions* was misguided. He submits that the decision is distinguishable. The *Tax Court of Canada Rules (General Procedure)* explicitly allows the Tax Court to strike part of a pleading or other document if it discloses no reasonable grounds for appeal or opposing the appeal. Unlike the *Tax Court of Canada Rules (General Procedure)*, section 1(1) of the Regulations, 2022 does not include this language or any specific requirement saying that a pleading or document must have a reasonable ground of appeal.

[38] But the General Division did not rely on *FU2 Productions* alone in concluding that the legal argument had to have a reasonable chance of success. The General Division also relied on *Director of Public Prosecutions c Jetté*.

– **The Director of Public Prosecutions cases**

[39] The General Division also relied on *Director of Public Prosecutions c Jetté* in dismissing the Claimant's constitutional challenge.

[40] In that case, the Attorney General of Québec filed a motion for summary dismissal of the defendant's notice to have an order in council declared in part inoperative. The Attorney General argued that the defendant's notice failed to identify the precise nature of the constitutional and legal arguments. It argued that these were mandatory thresholds under sections 76 and 77 of the *Code of Civil Procedure*.

[41] Section 77 of the *Code of Civil Procedure* reads, "To be validly given, the notice to the Attorney General of Québec must clearly state the contentions the person intends to assert and the grounds on which they are based…." The Court noted that it had to "exercise prudence in order to avoid putting an end prematurely to the argument sought in the *Notice* and in the event of doubt, [had to] continue to a full hearing."[21]

[21] See *Director of Public Prosecutions c Jetté*, 2022 QCCQ 8113 (CanLII) at para 18.

[42] The Court of Québec determined that if a notice had no basis on which it could reasonably succeed, then it was the trial judge's duty to dismiss applications when it became apparent that they were frivolous. The Court of Québec also determined that summary dismissals were to be used only in cases where the constitutional challenge was, on its face, frivolous.

[43] Section 77 of the *Code of Civil Procedure* did not include specific language that there had to be a reasonable ground of appeal. At most, it said that the notice had to state the contentions (arguments) the person intended to assert and the grounds on which the applicant's contentions were based. The Court of Québec determined that this meant that the notice had to have a basis on which it could reasonably succeed.

[44] The judge in *Jetté* delivered the same outcome in a string of other decisions:

- *Director of Public Prosecutions c Sinha*[22]
- *Director of Public Prosecutions c Miller*[23]
- *Director of Public Prosecutions (AGQ) c Kelley*[24]
- *Director of Public Prosecutions c Miller*[25]

[45] In each of these cases, the Court determined that the applicant's arguments in the constitutional notice had to have a reasonable chance of success. The Court of Québec accepted the Attorney General of Québec's arguments that notices of constitutional questions could be dismissed summarily if they were deemed unfounded in law.

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[22] See *Director of Public Prosecutions c Sinha*, 2022 QCCQ 6322 (CanLII).
[23] See *Director of Public Prosecutions c Miller*, 2022 QCCQ 6291 (CanLII).
[24] See *Director of Public Prosecutions c Kelley*, 2022 QCCQ 6293 (CanLII).
[25] See *Director of Public Prosecutions c Miller*, 2022 QCCQ 6294 (CanLII).

[46] However, unlike in the *FU2 Productions* case, section 77 of the *Civil Code of Procedure* did not require any pleadings or documents to disclose a reasonable chance of success.

[47] In addition to the string of *Director of Public Prosecution* cases, case law supports the General Division's interpretation of section 1(1)(c) as requiring a legal argument that establishes a reasonable chance of success.

– **The Courts favour efficiency**

[48] The Supreme Court of Canada in *R v Cody* held that there is an important role for trial judges to reduce unnecessary delay.[26] The Court said that trial judges, for example, should consider whether an application has a reasonable chance of success, and beyond that, they should not hesitate to summarily dismiss applications or requests the moment it becomes apparent that they are frivolous.

[49] The Court also said that "a proactive approach is required that prevents unnecessary delay by targeting its root causes."[27] And, "trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success."[28]

[50] And in *R v Haevischer*, the Supreme Court noted that judges—in both the civil and criminal contexts—perform a "gatekeeping role" and can summarily dismiss applications without a hearing on the merits.[29] The threshold for summarily dismissing a matter in the criminal law context has to be rigorous and focus on whether the application is manifestly frivolous.

[26] See *R v Cody*, 2017 SCC 31, citing *R v Jordan*, 2016 SCC 27 at para 63.
[27] See *Cody* at para 36.
[28] See *Cody* at para 38.
[29] See *R. v Haevischer*, 2023 SCC 11.

[51] As for civil matters, the Court wrote:

> [48] A civil claim will be struck "if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" or, alternatively phrased, if the claim has no reasonable prospect of success [Citation omitted]. Striking such claims 'unclutters the proceedings', 'promotes litigation efficiency, reducing time and cost', and allows litigants to focus on serious claims (paras. 19-20).

[52] While the interest of justice is paramount, it is clear that the principles of efficiency, effectiveness, and judiciousness of resources are as equally important in the civil and administrative law context, as they are in the criminal law setting.

[53] In *Taylor v Pivotal*, the Ontario Divisional Court found that the Claimant's motion for interim relief and notice of constitutional question had no chance of success and were frivolous, vexatious, and an abuse of process.[30] The Court dismissed the motion and notice of constitutional question. Under the Ontario *Rules of Civil Procedure*, the Court can summarily dismiss proceedings that appear to be frivolous, vexatious, or an abuse of process.

[54] In *Sackaney v The Queen* and *Shoefly-Devries v The Queen*, the respondent sought an order striking each appellants' amended notices of appeal and notice of constitutional question.[31] The respondent applied for the order on the basis that the notices did not disclose a reasonable cause of action. The Court wrote:

> [53] It is true that striking the appellants' Notice of Appeal and Notice of Constitutional Question will prevent them from making their arguments relating to alleged violations of their rights and may result in hardship to them. However, if their arguments have no chance of success, the Court is bound to strike them in order to maintain the integrity of the Court's process.

[55] The Court found that it was plain and obvious that the arguments the appellants were raising had no chance of success. The Court struck the notices.

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[30] See *Taylor v Pivotal*, 2021 ONSC 7388.
[31] See *Sackaney v The Queen*, 2013 TCC 303.

[56] In *Morrisson v Cormier Vegetation Control Ltd.*, the Court accepted that section 8(4)(d) of the *Constitutional Question Act* did not require a plaintiff to provide particulars in the nature of a full legal analysis.[32] However, there still had to be a sufficient legal basis to meet the requirements under the section.

[57] In *Chromex Nickel Mines Ltd. v British Columbia (Securities Commission)*, the Court held that it was "in the interests of economy" that the issues raised in the notice challenging the constitutional validity of the legislation be refined before hearing the matter.[33]

[58] In each of these cases, there had to be a sufficient legal basis for the notice. It is clear that, where it is plain and obvious that there is no reasonable cause of action or that there is no reasonable chance of success, there is no justification to allow the matter to continue.

[59] The General Division followed these principles. I can see no error in its analysis or in its determination that section 1(1)(c) of the Regulations, 2022 requires an applicant to provide a summary of their legal argument (in support of the constitutional challenge) that has a reasonable chance of success.

Issue 2: The Claimant argues that the General Division misinterpreted *Toronto (City)* and whether it applies in his case

[60] The Claimant argues that, even if section 1(1)(c) of the Regulations, 2022 requires the legal argument to have a reasonable chance of success, he meets this requirement.

[61] The Claimant argues that pursuant to the rule of law and the doctrine of vagueness, sections 30(1) and 31 of the Act are unconstitutional and therefore inoperable or inapplicable in the circumstances of his case. He argues the sections offend the rule of law. He argues that this argument has a reasonable chance of

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[32] See *Morrisson v Cormier Vegetation Control Ltd.*, 1999 CanLII 5838 (BC SC).
[33] See *Chromex Nickel Mines Ltd. v British Columbia (Securities Commission)*, 1992 CanLII 1145 (BC SC).

success. (To be clear, the Claimant is not arguing at this juncture that the sections violate any specific Charter provisions, such as sections 7 or 1.)

[62] The Commission argues that the Supreme Court of Canada's decision in *Toronto (City) v Ontario (Attorney General)* is a complete answer to the Claimant's appeal, in that it shows that the Claimant's arguments do not have a reasonable chance of success.[34] The Commission concedes, however, that if *Toronto (City)* does not apply, then the Claimant's appeal should be allowed, to the extent that he be permitted to pursue his arguments on the constitutionality of sections 30(1) and 31 of the Act.

[63] The Claimant argues that *Toronto (City)* does not apply in his case for various reasons. He maintains that his legal argument has a reasonable chance of success.

[64] I will consider whether the General Division misinterpreted *Toronto (City)* and in deciding whether it applied in the Claimant's case.

– ***Toronto (City) v Ontario (Attorney General)***

[65] The City of Toronto and two groups of private individuals contested the *Better Local Government Act*, which reduced the number of city wards from 47 to 25.[35] They challenged the constitutionality of the reduction, arguing that it breached guarantees of freedom of expression, freedom of association, and equality, and that it violated the unwritten constitutional principles of democracy and the rule of law. The City argued that the *Better Local Government Act* accomplished this by denying voters effective representation and by disrupting the electoral process.

[66] The Court identified two ways in which unwritten constitutional principles assist courts. One is in the interpretation of constitutional provisions. The second is in the development of structural doctrines that fill gaps and address important questions on which the text of the Constitution is silent, such as in the obligation to negotiate that would follow a declaration of secession by a province.

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[34] See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.
[35] *Better Local Government Act*, 2018, SO 2018, c 11.

[67] The Court found that neither of these functions supported the City's arguments that unwritten constitutional principles could invalidate legislation. For one, unwritten constitutional principles could encroach on legislative authority to amend the Constitution. In addition, written constitutional rights could begin to unravel under unwritten constitutional principles. And finally, unwritten principles could unduly expand legislative override.

[68] For these reasons, a majority of the Court held that, "[in] short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation…"[36]

– **The General Division decision**

[69] The General Division relied on *Toronto (City)*. The General Division found that an unwritten constitutional principle could not be used to invalidate what would otherwise be valid legislation. Specifically, the General Division found that the Claimant could not rely on the doctrine of vagueness to invalidate sections 30(1) and 31 of the Act. On that basis then, it found that the Claimant's legal arguments did not have a reasonable chance of success. Therefore, it concluded that the Claimant's amended notice did not comply with the notice requirements set out in section 1(1) of the Regulations, 2022.

– **The Claimant argues that *Toronto (City)* does not apply**

[70] The Claimant argues that *Toronto (City)* does not apply in his case. The Claimant argues that the decision is distinguishable as it deals with an entirely different issue altogether. The Claimant argues that the decision deals with a court's limits in striking down a statute, or invaliding legislation, rather than an administrative tribunal's duty not to give effect to a provision it considers unconstitutional.

[71] The Claimant notes that the Supreme Court of Canada did not consider whether an unwritten constitutional principle can serve as a basis for declaring a legislative provision inoperable or inapplicable. He notes that neither of these words appear in the

[36] See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 84.

decision, whereas the words “invalidating” or “invalidate” appear numerous times. He also notes that the Court relied on decisions that dealt with invalidating legislation.

[72] The Claimant argues that there is a distinction between invalidating legislation from declaring it to be inoperable or inapplicable. In his case, he is seeking to have section 31 of the Act declared inoperable or inapplicable. He is not asking the Appeal Division to invalidate the provision, which he argues, in any event, exceeds its jurisdiction. So, he argues that *Toronto (City)* does not apply in his case.

[73] Alternatively, the Claimant argues that the majority’s findings in *Toronto (City)* on the issue of unwritten constitutional principles were said in *obiter* and therefore are not binding in his case. He argues that the findings are *obiter* because they were not essential to the outcome of the case, they conflict with the *ratio decidendi* of other decisions of the Supreme Court of Canada, and because the minority was “strenuously opposed” to the majority decision.[37] The Claimant also notes that *Toronto (City)* did not deal with the issue of the doctrine of vagueness.

[74] The Claimant argues that if the Appeal Division accepts that *Toronto (City)* applies, then effectively it amounts to saying that a statute can be entirely vague, as long as there is no Charter violation *per se*.

– **The Commission argues that *Toronto (City)* is binding**

[75] The Commission argues that the General Division was bound to follow *Toronto (City)*. It urges me to reject the Claimant’s argument that the Court’s statement on unwritten constitutional principles was made in *obiter*. The Commission argues that the matter was one of the primary issues before the Court, and the fact that there was a five-four split on the Court did not diminish the binding effect of the majority opinion.

[76] The Commission argues that other courts have applied *Toronto (City)* and have rejected any notion that unwritten constitutional principles can be used to invalidate legislation.

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[37] See Claimant’s submissions on appeal, dated July 12, 2024, at AD17-29.

[77] The Commission further argues that the notion that unwritten constitutional principles cannot invalidate legislation extends to findings of inoperability or inapplicability. The Commission argues that the practical effect of all three—invalidity, inoperability, and inapplicability—is the same, in that each renders the impugned provision of no force and effect. The Commission argues that to find otherwise would be unreasonable.

[78] The Commission submits that while the Tribunal cannot make general declarations of invalidity, it can make limited declarations of invalidity that apply only to the individual impacted by the decision.[38]

[79] For instance, in the *Mouvement laïque québécois* case, the Supreme Court of Canada determined that the Human Rights Tribunal could declare the impugned bylaw inoperative in relation to the complainant, but it could not declare the bylaw to be "inoperative and invalid" without clarifying what it meant, since that would amount to a general declaration of invalidity, which it did not have the jurisdiction to make.[39]

[80] The Commission also argues that the vagueness argument falls under the rule of law and can also be found in the second step of the section 7 test of the Charter. The Commission referred to the *Nova Scotia Pharmaceutical Society* decision, where the Supreme Court of Canada examined whether the word "unduly" in section 32(1)(c) of the *Combines Investigation Act* was so vague that it infringed principles of fundamental justice.[40]

[81] In that decision, the Court found that vagueness could also be raised under section 1 of the Charter, on the basis that an enactment was so vague as not to satisfy the requirement that a Charter limitation had to be "prescribed by law." Vagueness also had to be relevant to the "minimal impairment" stage of the *Oakes* test.

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[38] The Commission cited *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16; *Douglas/Kwantlen Faculty Assn. v Douglas College*, [1990] 3 SCR 570; and *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54.
[39] See *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at paras 153 and 154.
[40] See *R v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC).

[82] In other words, the Commission suggests that irrespective of whether the Claimant's vagueness argument is examined under sections 1 or 7 of the Charter or as a standalone argument, the statutory context and case law are relevant to that examination.

[83] That said, the Commission submits that if the Claimant could prove that his section 7 rights under the Charter had been violated, then he could tie it to the doctrine of vagueness. Otherwise, he cannot rely on the doctrine of vagueness on its own to invalidate, or declare inoperative or inapplicable legislation that is otherwise constitutional.

– **The principles set out in *Toronto (City)* apply**

[84] I am not persuaded that the majority's conclusions on unwritten constitutional principles were said in *obiter*. It was one of the two central issues that the Court identified.

[85] The Claimant properly points out that invalidating legislation is neither interchangeable with rendering legislation inoperative nor rendering it inapplicable even if, as the Commission claims, the practical effect is the same.

[86] Here, the distinction is significant because the Social Security Tribunal lacks the jurisdiction to make a general declaration of invalidity. As the Supreme Court of Canada held in *Martin*, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity.[41]

[87] This begs the question: Is *Toronto (City)* limited to cases where invalidating legislation is concerned, or can it also be extended to include cases in which an applicant seeks to render legislation inoperative or inapplicable?

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[41] See *Nova Scotia (Workers' Compensation Board) v Martin*, *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 31.

[88] Neither party referred me to any authorities that directly address this question as to whether an unwritten constitutional principle can be used to render legislation inoperative or inapplicable.

[89] Yet, for the same reasons that an unwritten constitutional principle cannot be used to invalidate legislation, it would run counter to and seem inconsistent if the same unwritten constitutional principle could be relied upon to render legislation inoperative or inapplicable. The effect of this would be to undermine legislative primacy, which the Supreme Court cautioned against in giving effect to unwritten constitutional principles.

[90] The majority in *Toronto (City)* held that unwritten constitutional principles do not confer powers to invalidate legislation that does not otherwise infringe the constitution. In the same vein, it would seem peculiar at best if, at the same time, those same unwritten constitutional principles were to confer powers to render any legislation inoperable or inapplicable.

– **The General Division did not make a legal error by applying *Toronto (City)***

[91] In summary, I find that the General Division did not misinterpret *Toronto (City),* nor did it make a legal error in determining that it applied in the Claimant's case.

Issue 3: *Sullivan v Canada (Attorney General)* is irrelevant

[92] During these proceedings, a question arose as to whether *Sullivan* applied or was relevant. There, the Federal Court of Appeal determined that "Charter values cannot be used to invalidate legislative provisions that administrative decision-makers must follow, such as in this case, section 30 of the *Employment Insurance Act*." This prompted the question as to whether *Sullivan* was synonymous with *Toronto (City)*. Or, put another way, whether Charter values are one and the same as (unwritten) constitutional principles?

[93] As the Claimant points out, Charter values may sound like they are the same thing as constitutional principles, but they are altogether distinct concepts. Values may represent general principles, but they directly flow from the Charter itself, linked to the

specific rights set out within. They are the values that underpin each Charter right and give it meaning.[42] Unwritten constitutional principles on the other hand "form part of the context and backdrop to the Constitution's written terms"[43]

[94] In short, *Sullivan* is not relevant to the Claimant's case, as it deals with Charter values rather than unwritten constitutional principles.

Conclusion

[95] The General Division did not err in determining that there is a threshold requirement that an applicant must meet under section 1(1)(c) of the *Regulations*, 2022.

[96] The legal argument must have a reasonable chance of success. But the Claimant's argument does not meet this requirement. Based on *Toronto (City)*, the Claimant cannot rely on unwritten constitutional principles to render sections 30(1) and 31 of the Act inapplicable or inoperable.

[97] The appeal is dismissed.

Janet Lew
Member, Appeal Division

[42] See *Loyola High School v Québec (Attorney General)*, 2015 SCC 12 at para 36.
[43] See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 50.