Court File No: T-1769-25

FEDERAL COURT

BETWEEN:

JOSEPH HICKEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

RESPONDENT'S MEMORANDUM OF FACT AND LAW

JOSEPH HICKEY

[redacted]

Applicant

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
ESDC Legal Services
140 Promenade du Portage
Phase IV, 11th Floor
Gatineau, QC K1A 0J9

Per: Rebekah Ferriss & Lucky Ingabire
Tel: 343-572-4776/416-523-2628
Fax: 819-994-2291
Email: rebekah.ferriss@hrsdc-rhdcc.gc.ca; lucky.ingabire@hrsdc-rhdcc.gc.ca; and NC-LS-SJ-Admin-GD@hrsdc-rhdcc.gc.ca

Counsel for the Respondent

INDEX

OVERVIEW

1. The Appeal Division's decision was reasonable. The Applicant's employer implemented a COVID-19 vaccination policy requiring its employees to get vaccinated or obtain an exemption. The Applicant was aware of the consequences of non-compliance and chose to not follow the policy. The Applicant was suspended from his employment for misconduct and disentitled to employment insurance.

2. This Court and the Federal Court of Appeal have been resoundingly clear about the law on misconduct. Misconduct occurs when and employee knowingly acts in a way that will impair duties owed to an employer and could result in suspension or termination. The Appeal Division based its decision on this well-established definition and made no error. The Applicant did not raise an arguable case that the General Division committed a reviewable error. This application for judicial review should be dismissed.

PART I — FACTS

i. Statutory Framework

3. The *Employment Insurance Act* (*EI Act*)[1] establishes a public insurance program to preserve economic security and ensure Canadian workers' re-entry into the labour market.[2] It supports them by providing Employment Insurance (EI) benefits during periods of interrupted earnings. Sections 29 to 31 govern the principle that a claimant's lost employment is not insurable if it is lost due to their misconduct.[3]

---

[1] *Employment Insurance Act, SC 1996, c 23 [EI Act],* Respondent's Record [RR], Book of Authorities [BOA], Vol XII, Appendix A, Tab 1
[2] *Canada (Attorney General) v Lafrenière, 2013 FCA 175 [Lafrenière]* at para 33, RR, BOA, Vol XII, Appendix B, Tab 1.
[3] *EI Act, supra* note 1 at ss 29–33; see also *Lafrenière, supra* note 2 at para 35.

4. "Misconduct" is not defined in the *EI Act*, but this Court defines it as occurring when a claimant knew or ought to have known that their conduct would impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility. When the employee's actions are conscious, deliberate, or intentional, and causally linked to their employment, it is misconduct.[4]

ii. The Applicant was denied EI benefits because of his misconduct

5. The Applicant worked for the Bank of Canada (employer) and during the COVID-19 pandemic, the employer implemented a COVID-19 Vaccination Policy (Policy) effective October 6, 2021. It required all employees to get vaccinated or obtain an exemption on medical, religious, or human rights grounds, by November 22, 2021.[5]

6. The Applicant requested an exemption on November 12, 2021.[6] He said the policy was arbitrary because other employers offered alternatives to immunization.[7] The Applicant explained that there was no medical basis to require vaccination while he worked remotely.[8] He also cited "deep personal conviction[s]" informed by his Catholic education and family experience with pharmaceuticals, and referenced philosophical objections rooted in personal conscience.[9] The Applicant offered no evidence of a condition that would prevent him from receiving the vaccine. Instead, his exemption request largely relied on news articles to represent that he, as a male in his 30s, was at the highest risk of adverse impacts from the vaccine.[10]

---

[4] *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 *[Mishibinijima]* at para 14, RR, BOA, Vol XII, Appendix B, Tab 2*; Wong v Canada (Attorney General),* 2025 FCA 63 [*Wong*], at para 5, RR, BOA, Vol XII, Appendix B, Tab 3.
[5] COVID-19 Vaccination Policy, October 6, 2021, RR, Vol III, Tab 1 at pages 2074-2077.
[6] Exemption Request, November 12, 2021, RR, Vol III, Tab 1 at pages 2078 to 2081.
[7] *Ibid,* at page 2078.
[8] *Ibid.*
[9] *Ibid,* at page 2077.
[10] *Ibid,* at pages 2077 to 2081.

7. His employer denied his request for an exemption. The Applicant did not take steps to get vaccinated, and, as a result, his employer placed him on an administrative leave without pay, effective November 22, 2021.[11]

8. Shortly afterwards, the Applicant applied for EI.[12] The Canada Employment Insurance Commission (Commission) determined that he took a leave from his job without just cause and denied his application for benefits.[13]

9. The Applicant requested a reconsideration of this decision and filed a Notice of Constitutional Question.[14] The Commission upheld its decision to deny him EI on reconsideration but changed the reason from taking a leave without just cause to suspension for misconduct.[15]

---

[11] E-mail from Employer, November 19, 2021, RR, Vol III, Tab 1 at pages 2082-3082.
[12] Application for Employment Insurance, effective November 26, 2021, RR, Vol IV, Tab 1 at pages 1005-1019
[13] Notice of Decision, April 4, 2022, RR, Vol IV, Tab 1 at page 1028.
[14] Reconsideration Request, May 3, 2022, RR, Vol IV, Tab 1 at pages 1030 to 1041 and RR, Vol VIII, Tab 1 at 2609 to 2614; see also Notice of Constitutional Question, May 3, 2022, RR, Vol IV, Tab 1 at pages 2616 to 2619.
[15] Reconsideration Decision, June 17, 2022, RR, Vol IV, Tab 1 at 1044 to 1045.

iii. The General Division did not hear the Applicant's constitutional question and dismissed his appeal

10. The Applicant appealed to the Social Security Tribunal–General Division (General Division) and filed another Notice of Constitutional Question (Notice).[16] The Applicant initially argued that sections 30(1) and 31 of the *EI Act* violated sections 2 and 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*).[17] The General Division informed the Applicant that it could not hear challenges that were about his employer's policy, as the *EI Act* did not require him to get vaccinated.[18] The Applicant amended his Notice to instead rely on the rule of law and constitutional doctrine against vagueness to challenge the constitutionality of sections 30(1) and 31 of the *EI Act* (Amended Notice).[19]

11. The General Division issued an interlocutory decision that held that his Amended Notice did not meet the requirements of subsection 1(1) of the *Social Security Tribunal Regulations* (*SST Regulations*).[20] It found that the Applicant properly identified a contested provision in the EI *Act* and provided enough facts to support his claim but did not outline a valid constitutional argument.[21] The General Division concluded that the Applicant's reliance on the rule of law and the principle against vagueness—without expressly invoking *Charter* rights—constituted an attempt to advance a *Charter*-based constitutional challenge indirectly, which it found to be impermissible.[22]

---

[16] Notice of Appeal July 15, 2022, RR, Vol VIII, Tab 1 at pages 1866 and 1976 to 1882; see also Notice of Constitutional Question, July 15, 2022, RR, Vol VIII, Tab 1 at pages 1871 to 1875 and 1883 to 1928 [2022 Notice of Constitutional Question].
[17] 2022 Notice of Constitutional Question, *Ibid*, at pages 1891 to 1923.
[18] Letter from Tribunal Member Nathalie Léger, October 19, 2022, RR, Vol III, Tab 1 at pages 905 to 908.
[19] Amended Notice of Constitutional Question, January 24, 2023, RR, Vol III, Tab 1 at pages 822 to 833 [2023 Amended Notice].
[20] General Division Decision, April 7, 2023, GE-22-2365, RR, Vol III, Tab 1 at pages 733 to 745 [GD Decision #1].
[21] *Ibid*, at page 745, para 42.
[22] *Ibid*, at pages 743 to 744, paras 33 to 39.

12. The General Division proceeded to hear the Applicant's appeal on the merits.[23] It decided that the Applicant was suspended from his job due to misconduct and dismissed his appeal.[24] The General Division identified and applied the correct test for misconduct.[25] It found that, contrary to his employer's policy, the Applicant was neither vaccinated nor approved for an exemption before the deadline.[26] The General Division held that the Applicant acted deliberately and knew or ought to have known that his conduct would lead to suspension or dismissal because, on November 19, 2021, his employer warned that it would place him on unpaid leave if he remained non-compliant.[27]

iv. The Appeal Division did not grant the Applicant leave to appeal to the General Division decision

13. The Applicant appealed both the General Division's interlocutory decision dismissing his Amended Notice and its decision on the merits of his appeal. The Appeal Division bifurcated the proceeding and heard the appeal of the interlocutory decision prior to determining whether his leave to appeal application had merit.[28]

---

[23] General Division Decision, November 23, 2023, GE-22-2365, RR, Vol II, Tab 1 at pages 562 to 574 [GD Decision #2]
[24] *Ibid,* at pages 573 to 574, at paras 55 to 58.
[25] *Ibid*, at pages 564 to 565, paras 11 to 16.
[26] *Ibid*, at page 568, para 27.
[27] *Ibid*, at pages 568 to 569, paras 29 to 31.
[28] Appeal Division Decision, April 28, 2025, AD-24-13, RR, Vol I, Tab 1 at pages 44 to 64 [AD Decision]; see also Leave to Appeal Decision, May 7, 2025, AD-24-13, RR, Vol I, Tab 1 at pages 27 to 39 [LTA Decision].

14. The Appeal Division determined that the General Division made no errors when it dismissed his Amended Notice. It appropriately found that the Applicant was required to provide arguments that had a sliver of hope of success – merely filling out the form was not enough to satisfy subsection 1(1) of the *Social Security Tribunal Regulations*.[29] The Appeal Division considered whether the General Division erred in dismissing the argument that the majority reasons (*i.e.,* that unwritten constitutional principles cannot invalidate legislation) in *Toronto (City) v Ontario (Attorney General)*[30] are obiter dicta and not binding. It found the General Division made no errors in dismissing these arguments and concluded the majority reasons applied.[31]

15. The Applicant has not sought to judicially review this decision to the Federal Court of Appeal. The Federal Court of Appeal has the jurisdiction over decisions on the merits from the Appeal Division.[32]

16. Having dispensed with the appeal of the interlocutory decision, the Appeal Division considered the Applicant's leave to appeal application on the merits. The Appeal Division determined that the Applicant did not have an arguable case that the General Division erred in law and jurisdiction. The Applicant argued that the General Division failed to apply *Astolfi v. Canada (Attorney General)* (*Astolfi*)[33] misinterpreted sections 30(1) and 31 of the EI *Act and* failed to address whether the Policy violated his section 2 and 7 *Charter* rights.[34] The Appeal Division rejected these arguments and denied him leave to appeal.

---

[29] AD Decision, *supra* note 28, at pages 51 to 57, at paras 30 to 59.
[30] *Toronto (City) v Ontario (Attorney General),* 2021 SCC 34, at para 5, RR, BOA, Vol XII, Appendix B, Tab 4
[31] AD Decision, *supra* note 28, at pages 57 to 64, paras 60 to 91.
[32] *Federal Courts Act* (R.S.C., 1985, c. F-7) ss 28(1)(g.1), RR, BOA, Vol XII, Appendix A, Tab 2
[33] *Astolfi v Canada (Attorney General),* 2020 FC 30 *[Astolfi],* RR, BOA, Vol XII, Appendix B, Tab 5
[34] LTA Decision, *supra* note 28, at page 29, para 8.

PART II — ISSUE

17. Is the Appeal Division's decision to deny the Applicant leave to appeal reasonable?

PART III — LAW AND SUBMISSIONS

A. THE STANDARD OF REVIEW IS REASONABLENESS

18. The presumptive standard of review applicable to decisions of the Appeal Division is reasonableness.[35] A reasonable decision is one "that bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision."[36] To succeed in his appeal, the Applicant needs to demonstrate that the Appeal Division's decision was unreasonable. In other words, that it contained "sufficiently serious shortcomings such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency."[37] The Applicant has not done so.

---

[35] *Cameron v Canada (Attorney General),* 2018 FCA 100, at para. 3, RR, BOA, Vol XII, Appendix B, Tab 6*; Sturgeon v Canada (Attorney General),* 2024 FC 1888, at para 26, RR, BOA, Vol XII, Appendix B, Tab 7*; Kuk v Canada (Attorney General),* 2024 FCA 74, at para 5, RR, BOA, Vol XII, Appendix B, Tab 8*; Davidson v Canada (Attorney General),* 2023 FC 1555, at paras 35-37, RR, BOA, Vol XII, Appendix B, Tab 9*; Cecchetto v Canada (Attorney General),* 2024 FCA 102, at paras 3-4, RR, BOA, Vol XII, Appendix B, Tab 10*; Wong, supra* note 4, at para 6.

[36] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, at para 99, RR, BOA, Vol XII, Appendix B, Tab 11.

[37] *Ibid,* at para 100.

B. THE APPEAL DIVISION'S DECISION IS REASONABLE

19. The Appeal Division decision is reasonable because it is transparent, internally coherent, and justifiable. The Appeal Division defined and limited the scope of its analysis in compliance with section 58 (1) of the *Department of Employment and Social Development Act* (*DESDA*).[38] It explained its role on appeal was not to re-adjudicate the Applicant's claim on the merits, but to identify any reviewable errors.

20. The Appeal Division properly dismissed the Applicant's appeal because he did not raise an arguable case that the General Division erred in law, fact, or natural justice. The Appeal Division, like the General Division, followed the applicable laws and rendered a decision that is consistent with the jurisprudence and statutory scheme of the *EI Act*.

v. No reasonable chance of success that the Appeal Division erred in its application of *Astolfi*

21. The Appeal Division properly concluded that the General Division made no errors in its treatment of the *Astolfi* decision and the Applicant's leave to appeal arguments on this point had no reasonable chance of success. The Appeal Division reasonably found that the decision is distinguishable on the facts. *Astolfi* dealt with an employer who was harassing his employee. As a result, the Court held that the employer's actions impacted the employee's behaviour and his failure to attend work was not misconduct.[39] In contrast to *Astolfi*, the Applicant deliberately chose to not follow his employer's policy that applied to all employees.[40]

---

[38] *Department of Employment and Social Development Act,* SC 2005 c 34, [DESDA], RR, BOA, Vol XII, Appendix A, Tab 3.
[39] LTA Decision, *supra* note 28, at page 30, para 13.
[40] *Ibid*, at pages 30 to 33, paras 11 to 24.

22. The decision is transparent and intelligible because the Appeal Division, like the General Division, considered the Applicant's arguments and explained why *Astolfi* did not apply. It concluded that it is distinguishable where an applicant has deliberately chosen to not follow an employer's policy that applies to *all* employees.[41] Whereas, in *Astolfi*, the applicant was the sole targeted employee, here, the Applicant refused a policy that applied to all employees. The Applicant argues against the reasonableness of that policy to liken himself to *Astolfi*, but the reasonableness of his employer's policy is outside the scope of what the Tribunal's legislative powers.

23. The Applicant's argument amounted to dissatisfaction with the application of *Astolfi* to his matter. Dissatisfaction with the application of law to the facts is an error of mixed fact and law. In *Garvey*,[42] *Cameron*,[43] and *Quadir*,[44] the Federal Court of Appeal held that a disagreement with the application of settled principles to the facts of the case does not afford the Appeal Division a basis for intervention. An error of law, whether obvious on its face or extractible, or a factual finding made in a perverse or capricious manner without regard to the evidence, is required for the Appeal Division to interject. Errors of mixed fact and law are not grounds of appeal upon with the Appeal Division can intervene with the General Division's decision.[45]

vi. No reasonable chance of success the Appeal Division erred in its interpretation of sections 30(1) and 31 of the EI Act

24. The Appeal Division reasonably dismissed the Applicant's arguments that the General Division misinterpreted sections 30(1) and 31 of the *EI Act* as having no reasonable chance of success. The Appeal Division determined that the General Division identified the correct test for misconduct and made no misinterpretations.

---

[41] LTA Decision, *supra* note 28, at page 32, paras 20 to 23.
[42] *Garvey v Canada (Attorney General),* 2018 FCA 118, at para 9, RR, BOA, Vol XII, Appendix B, Tab 12.
[43] *Cameron, supra n*ote 35*,* at paras 3 and 4.
[44] *Quadir v Attorney General of Canada,* 2018 FCA 21, at para 9, RR, BOA, Vol XII, Appendix B, Tab 13.
[45] LTA Decision, *supra* note 28, at pages 31 to 33, paras 17 to 19, and 24.

25. Contrary to the Applicant's assertion, the test for misconduct is not "absurd"[46] or "arbitrary",[47] it is principled, predictable, and judicially endorsed.[48] The *EI Act* does not define "misconduct," but the Courts have consistently interpreted it to mean that conduct that is wilful, deliberate, or done with awareness that it could lead to dismissal. This "objective definition,"[49] as articulated by the Appeal Division,[50] aligns with the purpose of subsections 30(1) and 31 of the *Act*—to support workers who experience involuntary job loss or who voluntarily leave employment for just cause.

26. Criminal intent or reprehensible conduct is not required to prove misconduct.[51] The Applicant's assertion that misconduct requires criminal intent, morally abhorrent or reprehensible behaviour is wrong in law.[52] The General Division and Appeal Division applied the proper test. The Applicant's argument on this point had no reasonable chance of success.

---

[46] Applicant's Memorandum of Fact and Law, September 26, 2025, Applicant Record, page 2363 [Applicant's MOFL].
[47] *Ibid*.
[48] *Besley v Canada (Attorney General)*, 2025 FCA 47, [Besley], at para 7, RR, BOA, Vol XII, Appendix B, Tab 14; *Francis v Canada*, 2023 FCA 217 at para 6, RR, BOA, Vol XII, Appendix B, Tab 15; *RF v Canada Employment Insurance Commission*, 2023 SST 185 at para 125, RR, BOA, Vol XII, Appendix B, Tab 16.
[49] *Zagol v Canada (Attorney General),* 2025 FCA 40, [*Zagol*], at para 27, RR, BOA, Vol XII, Appendix B, Tab 17.
[50] LTA Decision, *supra* note 28, at page 35, paras 29 to 31.
[51] Besley, supra *note 48*; see also *Hazaparu v Canada (Attorney General),* 2024 FC 928, para 18, RR, BOA, Vol XII, Appendix B, Tab 18; see also *Zagol, supra* note 49, para 28.
[52] LTA Decision, *supra* note 28, at page 34, para 26; *Zagol*, *supra* note 49, at para 28; see also *Hazaparu, supra* note 51, at para 18.

vii. The Applicant's *Charter* arguments had no reasonable chance of success on appeal.

27. The Appeal Division reasonably concluded that the Applicant's arguments about the constitutionality, legality, or reasonableness of his employer's policy were irrelevant. The Tribunal does not have the jurisdiction to hear these types of arguments, and they do not form part of the misconduct analysis.[53]

28. The Appeal Division was alert to the Applicant's arguments that the General Division did not adequately address whether the *EI Act* violated his section 2 and 7 *Charter* rights.[54] The Applicant had an opportunity to make his *Charter* arguments, and he did. Further, the Applicant abandoned his position on the *Charter* in favour of arguing that the unwritten constitutional principle against vagueness could invalidate sections 30 and 31 of the *EI Act.*[55] The Applicant argued that he was not invoking the *Charter* in his Amended Notice.[56] The General Division and Appeal Division rendered a decision based on these submissions.[57]

---

[53] *Sullivan v Canada*, 2024 FCA 7, [*Sullivan*] at para 4–5, RR, BOA, Vol XII, Appendix B, Tab 19; *Sturgeon, supra* note 35, at para 36.
[54] LTA Decision, *supra* note 28, at pages 36 to 38, paras 33 to 44.
[55] Appellant Reply Submissions, January 24, 2023, , RR, Vol III, Tab 1 page 0814, at para 5.
[56] *Ibid.*
[57] 2022 Notice of Constitutional Question, *supra* note 16; see also 2023 Amended Notice, *supra* note 19; see also GD Decision #1, *supra* note 20; see also AD Decision, *supra* note 28.

29. It was reasonable for the Appeal Division to determine that his arguments were about his employer and not subject to the Tribunal's review. The Applicant wrote that the vaccine offended his section 2 *Charter* rights, and his employer's Policy violated his section 7 *Charter* rights.[58] These arguments are about his employer's requirement that he receive the vaccine and are not about any provisions of the *EI Act*.[59] The Commission's decision to deny benefits was an application of the law to the facts to determine EI benefit eligibility.[60] The *EI Act* does not require anyone to get vaccinated, but it does disentitle people from benefits who do not comply with employer policies.

30. The law is clear that these considerations do not form part of the misconduct analysis.[61] This Court and the Federal Court of Appeal have been clear about the limited scope of the Tribunal's role in determining benefit eligibility.[62] The Tribunal's role is circumscribed, and it cannot hear challenges to employer policies as that is more appropriately the realm of labour or employment law, and is irrelevant to a misconduct finding.[63] The Applicant's arguments on this point had no reasonable chance of success. It was reasonable for the Appeal Division to dismiss this appeal.

---

[58] LTA Decision, *supra* note 28, at pages 37 to 38, paras 42 to 43.
[59] *Ibid*, at para 44.
[60] *Ibid*, at page 38, para 45; see also *Sullivan*, *supra* note 53; see also *Zagol*, *supra* note 49, at para 22.
[61] LTA Decision, *supra* note 28, page 39, para 45.
[62] *Sullivan*, *supra* note 53.
[63] *Besley*, *supra* note 48, at para 5.

viii. The Applicant's new evidence is not admissible in this application for judicial review.

31. The Press Release filed by the Applicant is inadmissible because it was not before the Social Security Tribunal. In this communication, the United States Department of Health and Human Services announced that it was "terminating 22 mRNA vaccine development investments because the data show these vaccines fail to protect effectively against upper respiratory infections like COVID and flu."[64] It appears the Applicant is using new evidence to bolster arguments about the efficacy of the COVID-19 vaccination.

32. However, it is not the Court's role on judicial review to hear the matter afresh.[65] The "essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo,* of questions that were not adequately canvassed in evidence before the tribunal."[66] A Judicial Review is not a wide-ranging inquiry where new evidence is generally impermissible and the Applicant has not shown that this new evidence should be accepted.

33. The Applicant's evidence does not fall under the exemptions for admissibility listed in *Sharma v Canada*.[67] It does not assist in understanding the issues relevant to the judicial review, adds new evidence on the merits, does not highlight the complete absence of evidence before the Tribunal on a particular factual finding, nor does it bring to this Court's attention defects that are not in the Tribunal's evidentiary record.[68]

---

[64] Applicant's Record, *supra* note 46, at page 16, para 71.
[65] *Sturgeon, supra* note at para 35.
[66] *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22, see para 19, RR, BOA, Vol XII, Appendix B, Tab 20.
[67] *Sharma v Canada (Attorney General),* 2018 FCA 48, para 8, RR, BOA, Vol XII, Appendix B, Tab 21.
[68] *Access Copyright*, *supra* 65 at para 20; *Sharma*, *Ibid.*

PART IV — REMEDY SOUGHT

34. The Respondent requests this application be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

SIGNED in Ottawa, Ontario, on November 4, 2025

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Rebekah Ferriss & Lucky Ingabire

PART V — LIST OF AUTHORITIES

APPENDIX A: PRIMARY LAW **TAB**

APPENDIX B: CASE LAW **TAB**

Sullivan v Canada, 2024 FCA 7

Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22

Sharma v Canada (Attorney General), 2018 FCA 48