

File No. AD-24-13

SOCIAL SECURITY TRIBUNAL OF CANADA – APPEAL DIVISION

BETWEEN:

JOSEPH HICKEY

Appellant

and

CANADIAN EMPLOYMENT INSURANCE COMMISSION (CEIC)

Defendant

**AMENDED APPLICATION FOR LEAVE TO APPEAL THE GENERAL DIVISION’S DECISION NOT TO
GRANT EMPLOYMENT INSURANCE BENEFITS**

Appellant’s amended request for leave to appeal General Division Member Angela
Ryan Bourgeois’ November 23, 2023 decision to deny the appellant EI benefits

SUBMITTED BY EMAIL ON SEPTEMBER 27, 2024

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1. Summary

1. My employer demanded that I receive injections of a COVID vaccine. The General Division decided that my refusal constituted misconduct justifying denial of employment insurance (EI) benefits, pursuant to the *Employment Insurance Act* (“EI Act”).¹
2. In my case, I entered extensive documentary proof that the COVID vaccines are medically not benign and are in fact dangerous, including the risk of death. The decision maker cannot presume that the COVID vaccines are benign and they are not at liberty to disregard the said dangerousness in judging whether or not refusing the injection constitutes misconduct.
3. The personal decision to decline a dangerous medical intervention involving injecting a substance into the individual’s body, which is known to produce irreversible adverse effects including permanent disability and death, cannot be “misconduct” justifying depriving a citizen of government assistance or service, pursuant to the *EI Act* or in our constitutional monarchy and parliamentary democracy, founded on the rule of law and respect for rights and freedoms.

2. Chronology of my request for EI benefits

4. 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 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.

¹ Decision below: *JH v Canada Employment Insurance Commission*, 2023 SST 1786 (CanLII), <https://canlii.ca/t/k26z0>.

- 2021-11-18 At a Microsoft Teams meeting with my employer's Human Resources (HR) representative, I was informed that my request for accommodation had been denied.
- 2021-11-19 I received an email from my employer's HR representative informing me that my request for accommodation had been denied and that I would be placed on unpaid leave beginning on November 22, 2021.
- 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.
- 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 vaccination 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 vaccination 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 *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.
- 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.
- 2023-12-23 I duly filed my applications for leave to appeal both of the April 7, 2023 and November 23, 2023 decisions by the SST GD.
- 2024-04-30 SST AD member Janet Lew issued her decision granting me leave to appeal the April 7, 2023 decision of SST GD member Nathalie Léger. That appeal is moving forward and a hearing date has been scheduled for October 9, 2024.

- 2024-05-30 I informed the SST AD of my intention to request permission to amend my application for leave to appeal the November 2023 General Division decision (merits decision), as follows:²
- “In a separate submission filed forthwith, I plan to request permission to file an amended version of my application for leave to appeal of the November 23, 2023 General Division decision, made pursuant to section 8(3) of the Social Security Tribunal Rules of Procedure (<https://laws.justice.gc.ca/eng/regulations/sor-2022-256/FullText.html>).”
- 2024-06-03 The SST AD member assigned to my file placed my application for leave to appeal the November 23, 2023 SST GD decision in abeyance, pending the outcome of my appeal of the SST GD’s decision of April 7, 2023, by agreement of the parties.
- The SST AD member assigned to my file also acknowledged my announcement of my intention to request permission to amend my application for leave to appeal, but incorrectly wrote in their endorsement that I intended to amend my application for leave to appeal the April 2023 General Division decision (constitutional claim), rather than the November 2023 General Division decision (merits decision).
- 2024-06-04 I wrote to the SST AD to clarify that my announced intention to request permission to amend my leave to appeal application pertained only to the November 2023 General Division decision, and not to the April 2023 General Division decision.
- 2024-07-12 I filed my written submissions to the SST AD, for the appeal of the April 7, 2023 General Division decision.
- 2024-08-06 The Respondent CEIC filed its response submissions to the SST AD, for the appeal of the April 7, 2023 General Division decision.
- 2024-09-06 I filed my reply submissions to the SST AD, for the appeal of the April 7, 2023 General Division decision.
- 2024-09-27 I submitted a request to amend my application for leave to appeal the November 23, 2023 General Division decision (merits decision) with the instant Amended Application for Leave to Appeal in attachment.

² Item coded as AD09 in SST file no. AD-24-13.

3. Grounds for appeal

5. 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.³
6. The statutory grounds of appeal are that the General Division:⁴
 - (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;
 - (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.
7. The specific grounds for appeal are:
 - i. Member Bourgeois incorrectly applied ss. 30(1) and 31 of the *EI Act* by not considering the employer's directive refused by the employee in judging whether there was misconduct.
 - ii. Member Bourgeois failed to recognize that the CEIC's decision to deny me EI benefits for not being vaccinated violates my rights under sections 2 and 7 of the *Charter*.

³ *JH v Canada Employment Insurance Commission*, 2023 SST 1786 (CanLII), <https://canlii.ca/t/k26z0>.

⁴ *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).

4. (FIRST GROUND OF APPEAL) Member Bourgeois incorrectly applied ss. 30(1) and 31 of the *EI Act* by not considering the employer’s directive refused by the employee in judging whether there was misconduct

4.1 Judging misconduct pursuant to the *EI Act* must include consideration of the actual specific conduct

8. Sections 30(1) and 31 of the *EI Act* (the “misconduct sections”) allow the government to withhold EI benefits based on impugned employee conduct.
9. The said sections give the decision-maker the duty and responsibility to judge whether the impugned employee conduct justifies barring EI.
10. Therefore, the decision-maker must determine what the said impugned employee conduct is, and consider the said impugned employee conduct in deciding whether it constitutes misconduct and justifies denying EI.

4.2 In judging misconduct pursuant to the *EI Act*, consideration of the impugned conduct of refusing an employer’s directive cannot exclude consideration of the said directive

11. When the said impugned employee conduct is to refuse to follow an employer’s order or directive, then determining and considering the said impugned employee conduct must necessarily include determining and considering the said employer’s order or directive that is refused by the employee.
12. The decision maker’s consideration of the order or directive being refused by the employee would include all factors that can impact the judgment of misconduct pursuant to the *EI Act*. The said factors may include whether following the order would infringe the employee’s *Charter* rights, expose the employee to health risks, lead to violation of laws, and so on.
13. Logically, the act of refusal or said conduct to refuse is not defined sufficiently to permit due consideration pursuant to the *EI Act* unless one appreciates what is being refused.
14. Failing to consider what is being refused by the employee, as potentially relevant to a determination of misconduct, is a failure to consider the impugned refusal pursuant to

the *EI Act*, which is a denial of jurisdiction. It amounts to applying the absurd proposition that “disobeying any order or directive is misconduct justifying denial of EI”.

4.3 Member Bourgeois severed consideration of the conduct of refusing vaccination to exclude consideration of the directive (mandatory vaccination) being refused, which is an error of law

15. In my case, Member Bourgeois of the SST General Division incorrectly severed the impugned refusal to be vaccinated into two separate parts:

- (1) The part not considered determinative of or relevant to judging misconduct: the reality and implications of what was being demanded (vaccination), and
- (2) The part considered determinative for judging misconduct: the essentially generic notion of refusing the employer’s directive.

16. The Member explicitly decided not to consider what was being demanded by the employer and refused by the employee (vaccination) and in-effect only considered that there was a refusal by the employee.

17. The Member by implication thus presumed without due or expressed consideration that the employer demand (vaccination) was benign, that no danger or risk or violation of fundamental rights needed to be considered, despite the extensive record before her of relevant scientific and other evidence.⁵

⁵ See the Affidavit of Joseph Hickey of July 14, 2022, in the record of this appeal (pages GD2-65 to GD2-896 in SST file GE-22-2365). Extensive scientific evidence of harms from COVID vaccines is documented in my Affidavit at: Sections 2e and 3d of Exhibit A (pages GD2-88 to GD2-157 and GD2-166 to GD2-173) and Exhibit F (pages GD2-860 to GD2-877). In particular:

- A plethora of dangerous adverse events, including death, have been associated with the COVID-19 vaccines in the scientific literature. See, for example, “Over 1000 peer-reviewed articles showing evidence of harm from COVID-19 vaccine products” at Section 2e (vi) of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-112 to GD2-150 in SST file GE-22-2365).
- The COVID-19 vaccines have been proven to have caused death in autopsy studies. See Section 2e (iv) of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-101 to GD2-104 in SST file GE-22-2365).
- Significantly elevated risk of potentially fatal heart inflammation (myocarditis or pericarditis) following COVID-19 vaccination for males under age 40 has been demonstrated in many countries and jurisdictions, including in publications in the highest-level peer-reviewed academic journals. For example, the reference by M. Oster et al. “Myocarditis Cases Reported After mRNA-Based COVID-19 Vaccination in the US From December 2020 to August 2021”, *Journal of the American Medical Association* 327 (2022) 331-340, <https://doi.org/10.1001/jama.2021.24110>, cited at pages GD2-109, GD2-150, GD2-151 and GD2-168 in Exhibit A of the Affidavit of Joseph Hickey (SST file GE-22-2365), which reports a rate of myocarditis 11.3

18. The Member's reasons on these points are as follows:⁶

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. Footnote23
- 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. Footnote24
- 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. Footnote25

[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

times higher than normal following the second dose of the Pfizer COVID-19 vaccine and 12.6 times higher than normal following the Moderna COVID-19 vaccine, for males aged 30-39. In this regard, I am personally in a high-risk category, being male and under age 40, as affirmed at para. 19 of my Affidavit (page GD2-71 in SST file GE-22-2365).

⁶ SST General Division decision of November 23, 2023: *JH v Canada Employment Insurance Commission*, 2023 SST 1786 (CanLII), <https://canlii.ca/t/k26z0>, paras. 42-50.

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. Footnote26

[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*.Footnote27 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.Footnote28 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.Footnote29 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.Footnote30 [emphasis added]

19. As such, in my case, the General Division misdirected itself in its application of the *EI Act*, failed to consider all the essential elements of the actual impugned conduct, and denied its jurisdiction to consider the actual conduct.

4.4 The strict and explicitly stated methodology applied by Member Bourgeois can lead to injustice and even absurdity

20. It is undeniable that there are 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 irreparably violate the employee's *Charter* or human rights, or
- acts that directly harm or injure others, or
- acts of self-harm, or
- acts (including returning to the workplace) exposing the employee or others to unnecessary risk of bodily or psychological harm, or
- acts (including returning to the workplace) exposing the employee to sexual or racist harassment.

21. Such refusals by the employee are legitimate, and arguably would not constitute "misconduct" disqualifying the employee from EI benefits for loss of income due to refusing the employer's demand. The SST must consider the characteristics and consequences of the employer demand, or it would not be considering the actual employee conduct that is a refusal.

22. The SST cannot, in such said circumstances, misdirects itself to apply a strict equation "disobey demand = misconduct, irrespective of what is demanded", thereby not considering the actual employee conduct of refusal, as required by the *EI Act*. Nor can the SST incorrectly presume that the employer demand is justified and benign.

23. This is not to say that the SST must consider employer conduct. This is not about subjective employer conduct. Rather, this is about the objective nature of the employer's demand or directive that is being refused by the employee.

24. Equivalently, the employer order or directive being refused by the employee can be an employer policy.

4.5 Government support for the employer policy of mandatory vaccination is irrelevant to the judgment of misconduct pursuant to the *EI Act*

25. In this case of refusing to follow an employer policy, it is not determinative that the government would be advising or recommending the said policy. The government position and role in developing the said policy does not remove or constrain the SST's

statutory obligation pursuant to the *EI Act* to judge whether the impugned conduct of refusing to follow the employer policy is “misconduct”.

26. There are 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. For example:
- iii. The Quebec government banned the wearing of clothing or objects deemed to be religious in many workplaces, which infringes individuals’ *Charter* rights.⁷ 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 incorrect methodology for determining misconduct applied by Member Bourgeois (carving out the employer directive being refused by the employee).
 - iv. It was formerly a criminal offence in Canada for a woman to have an abortion.⁸ 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 incorrect methodology for determining misconduct applied by Member Bourgeois (carving out the employer directive being refused by the employee). The same can be said about same-sex sexual activity, which was a criminal offence in Canada until 1969,⁹ and could be argued to put employees at risk of disease.
 - v. 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.¹⁰
27. 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

⁷ *Hak c. Procureur général du Québec*, 2021 QCCS 1466 (CanLII), <https://canlii.ca/t/jff8f>.

⁸ K. Ackerman and S. Stettner, “‘The Public Is Not Ready for This’: 1969 and the Long Road to Abortion Access”, *The Canadian Historical Review*, 100 (2019) 239-256, <https://www.utpjournals.press/doi/abs/10.3138/chr.2018-0082-3>.

⁹ D. Kimmel and D.J. Robinson, “Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1949–1969”, *Canadian Journal of Law and Society*, 16 (2014) 147-165, <https://doi.org/10.1017/S082932010000661X>.

¹⁰ 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>.

insurance benefits to impose its policy schemes of the day. The *EI Act* must be applied independently of government.

28. In the instant case, it makes no difference that the employer demand refused by the employee is made using a “policy”, or that the policy is supported by the government. The crux of the demand is mandatory vaccination, which carries the risk of permanent disability or death. Regarding death, this risk is proven by several autopsy studies and by adverse effect vigilance.¹¹

4.6 Failure to consider the objective nature and consequences of the employer directive being refused by the employee was a denial of jurisdiction in my case

29. Like the examples above, my case is one where it is necessary to consider what is being demanded by the employer and refused by the employee, in order to appreciate the impugned conduct and judge whether the refusal constitutes misconduct. Otherwise, one is judging a shadow of the conduct, not the actual conduct itself.
30. The incorrect and explicit methodology for determining misconduct applied by Member Bourgeois¹² (carving out the employer directive being refused by the employee) leads to absurd results when one considers cases that go beyond traditional workplace misconduct such as theft or consuming alcohol or illegal drugs during working hours.
31. In my case, Member Bourgeois’ erroneous application of the equation “disobey demand = misconduct, irrespective of what is demanded”, leads the misdirected Member 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 irreversible adverse effects including death,¹³ while the individual’s decision does not in fact hinder the individual’s ability to fulfill his contractual obligations, is misconduct. This is an absurd result on its face.
32. Many cases that analyze misconduct are not helpful or relevant in the instant case because they do not consider the nature of the directive being refused to be relevant in the calculus of whether or not the refusal constituted misconduct. This includes the

¹¹ See footnote 5 of the instant submissions, above.

¹² SST General Division decision of November 23, 2023: *JH v Canada Employment Insurance Commission*, 2023 SST 1786 (CanLII), <https://canlii.ca/t/k26z0>, paras. 42-50.

¹³ See footnote 5 of the instant submissions, above.

many recent cases in which employees who refused employer directives to receive COVID vaccine injections were denied EI benefits on the basis of misconduct.¹⁴

33. The said cases expressly or *de facto* apply a constricted definition of misconduct that excludes considering the possible deleterious nature of the employer's directive in judging whether there is misconduct. These cases in-effect apply the equation "disobey demand = misconduct, irrespective of what is being demanded," which is not provided by or intended in the *EI Act*. Even though the said equation may give the correct answer in some circumstances, it can produce unjust or even absurd results in other circumstances.

4.7 The case *Astolfi v. Canada* stands for the obligation to consider the actual specific conduct of refusing an employer directive (including what is being ordered) when judging misconduct pursuant to the *EI Act*

34. Regarding the case of *Astolfi v. Canada*,¹⁵ in which an employee's decision not to attend a workplace in which he was being harassed was found not to be misconduct under the *EI Act*, the relevant consideration is the objective reality that the workplace being ordered to attend was unduly unsafe, not the subjective malfeasance in the employer's conduct itself (harassment of the employee). A distinction must be made between irrelevant and subjective conduct of the employer versus the relevant and objective nature of the demand being refused. *Astolfi* stands for the decision maker's obligation to consider the actual specific impugned conduct (refusing to go into an unduly

¹⁴ *Kuk v. Canada (Attorney General)*, 2024 FCA 74 (CanLII), <https://canlii.ca/t/k44d7>; *Cecchetto v. Canada (Attorney General)*, 2024 FCA 102 (CanLII), <https://canlii.ca/t/k4xjs>; *Spears v. Canada (Attorney General)*, 2024 FC 329 (CanLII), <https://canlii.ca/t/k39k1>; *Davidson v. Canada (Attorney General)*, 2023 FC 1555 (CanLII), <https://canlii.ca/t/k1b22>; *Butu v. Canada (Attorney General)*, 2024 FC 321 (CanLII), <https://canlii.ca/t/k38sw>; *Abdo v. Canada (Attorney General)*, 2023 FC 1764 (CanLII), <https://canlii.ca/t/k25db>; *Boskovic v. Canada (Attorney General)*, 2024 FC 841 (CanLII), <https://canlii.ca/t/k5179>; *Milovac v. Canada (Attorney General)*, 2023 FC 1120 (CanLII), <https://canlii.ca/t/jztrm>; *Wong v. Canada (Attorney General)*, 2024 FC 686 (CanLII), <https://canlii.ca/t/k4fqg>; *Hazaparu v. Canada (Attorney General)*, 2024 FC 928 (CanLII), <https://canlii.ca/t/k5c0x>; *Palozzi v. Canada (Attorney General)*, 2024 FCA 81 (CanLII), <https://canlii.ca/t/k48gd>; *Khodykin v. Canada (Attorney General)*, 2024 FCA 96 (CanLII), <https://canlii.ca/t/k4m47>; *Sullivan v. Canada (Attorney General)*, 2024 FCA 7 (CanLII), <https://canlii.ca/t/k269v>; *Matti v. Canada (Attorney General)*, 2023 FC 1527 (CanLII), <https://canlii.ca/t/k16rf>; *Zhelkov v. Canada (Attorney General)*, 2023 FCA 240 (CanLII), <https://canlii.ca/t/k1qs1>; *Murphy c. Canada (Procureur général)*, 2024 CF 1356 (CanLII), <https://canlii.ca/t/k6jms>; *Francis v. Canada (Attorney General)*, 2023 FCA 217 (CanLII), <https://canlii.ca/t/k0xf0>.

¹⁵ *Astolfi v. Canada (Attorney General)*, 2020 FC 30 (CanLII), <https://canlii.ca/t/j4rm8>. Following the Federal Court decision 2020 FC 30, this case was sent back to the SST. The General Division then disqualified the claimant from EI benefits on a basis distinct from misconduct (voluntarily leaving employment without just cause), and this was subsequently overturned by the Appeal Division, which lifted the disqualification.

dangerous workplace, in *Astolfi*) when deciding whether or not there was employee misconduct pursuant to section 30(1) or 31 of the *EI Act*.

35. In the case of *HL v Canada Employment Insurance Commission*,¹⁶ the claimant argued that the General Division must consider the legality and reasonableness of an employer's policy, in deciding whether an employee refusal constitutes misconduct. The claimant asserted that "surely misconduct does not arise if an employer requires an employee to kill someone or if an employee has to submit to being sexually assaulted". The claimant went on to propose a new legal test for misconduct under the *EI Act*, which the Appeal Division rejected in denying the claimant leave to appeal. *HL v Canada Employment Insurance Commission* is distinguishable from my case because I am not asking the Tribunal to accept a new definition of misconduct under the *EI Act*: rather, I submit that judging whether an employee's refusal to follow an employer's order or directive amounts to misconduct necessarily requires consideration of what was being refused.

4.8 Specific and distinguishing circumstances of the instant case

36. In contrast to the many cases mentioned above, in which EI benefits were denied pursuant to the misconduct sections of the *EI Act* for refusing vaccination, in my particular case:

- i. I worked exclusively from home, and I was not asked to be present in person in the workplace while my employer's vaccination mandate was in place. All of my colleagues continued working from home the entire time the vaccination mandate was in place, such that there was never any need to bring me back to the physical workplace. Working from home would not have impaired my ability to perform my work duties in any way, and I had been working from home for 20 months (from March 2020 to November 2021) at the time I was removed from work for not being vaccinated. The facts in this regard are not contested, and are clear from the record of the instant proceedings.¹⁷

¹⁶ *HL v Canada Employment Insurance Commission*, 2024 SST 140, <https://decisions.sst-tss.gc.ca/sst-tss/ei-ae/en/item/524965/index.do/>. No judicial review decision in this case has been released to date, to my knowledge.

¹⁷ See the Affidavit of Joseph Hickey (pages GD2-65 to GD2-72 in SST file GE-22-2365).

- ii. I submitted extensive and conclusive scientific evidence about the dangers of the vaccine, which include permanent disability, serious injury and death.¹⁸ The said scientific evidence is not contested and includes:
- More than 1000 peer-reviewed scientific articles demonstrating harm from COVID vaccines.¹⁹
 - Autopsy reports of death caused by COVID vaccines.²⁰
 - Government health agency studies of serious adverse event reports following COVID vaccination using pharmacovigilance systems such as the Vaccine Adverse Event Reporting System (VAERS) in the United States, Public Health Ontario's adverse events database, and Pfizer's database of adverse event reports made following injection with its COVID-19 vaccine products.²¹
 - The significantly increased risk of dangerous heart inflammation following injection with a COVID-19 vaccine, especially for younger males, which danger is heightened for those who engage in strenuous sports activity that places a large demand on the cardiovascular system.²²
 - Government public health and infectious disease prevention agencies in many countries removing authorization for COVID vaccines due to serious and fatal adverse events.²³
- iii. I am a trained interdisciplinary scientist with the capacity to gather and knowledgably present the said extensive scientific evidence.²⁴ For example, I

¹⁸ See footnote 5 of the instant submissions, above.

¹⁹ See Section 2e (vi) of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-112 to GD2-150 in SST file GE-22-2365).

²⁰ See Section 2e (iv) of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-101 to GD2-104 in SST file GE-22-2365).

²¹ See Section 2e (v) of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-104 to GD2-112 in SST file GE-22-2365).

²² See Section 2e (vii) of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-150 to GD2-152 in SST file GE-22-2365) and Exhibit F of the Affidavit of Joseph Hickey (pages GD2-860 to GD2-877). I affirmed that I regularly engage in strenuous sports activity that places a large demand on my cardiovascular system at para. 20 of my Affidavit (page GD2-71 in SST file GE-22-2365).

²³ See Tab 2 of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-214 to GD2-217 in SST file GE-22-2365).

²⁴ Affidavit of Joseph Hickey, paras. 9-11 (pages GD2-69 to GD2-70 in SST file GE-22-2365).

recently published two scientific research articles on epidemiological modeling related to COVID-period measures, in peer-reviewed scientific journals.²⁵

- iv. I am a male under age 40, and therefore at significantly elevated risk of myocarditis or pericarditis (heart inflammation) following vaccination, as is overwhelmingly demonstrated by the scientific evidence on the record in my appeal.²⁶
- v. I squarely put it to the General Division that I could not take the vaccine because it was dangerous and that there was no valid reason I could not work from home.
- vi. I explicitly invoked my *Charter* rights (ss. 2 and 7), which are violated by the employer's directive of mandatory vaccination.^{27,28} The said *Charter* violations are an inseparable part of the nature of the employer demand being refused by the employee.

37. All of the above characteristics of my case were before the General Division.

38. The said extensive and conclusive scientific evidence about COVID vaccine harms has only accelerated during the two years since I submitted my notice of appeal to the SST on July 15, 2022, and includes:

- Many additional detailed autopsy studies.²⁹

²⁵ J. Hickey and D.G. Rancourt, "Predictions from standard epidemiological models of consequences of segregating and isolating vulnerable people into care facilities", *PLOS ONE* 18 (2023) e0293556, <https://doi.org/10.1371/journal.pone.0293556>; J. Hickey and D.G. Rancourt, "Viral Respiratory Epidemic Modeling of Societal Segregation Based on Vaccination Status", *Cureus* 15 (2023) e50520, <https://doi.org/10.7759/cureus.50520>.

²⁶ Affidavit of Joseph Hickey (see footnote 5 of the instant submissions, above).

²⁷ Notice of Appeal of Denial of Employment Insurance Benefits, July 15, 2022 (pages GD2-12 to GD2-64 in SST file GE-22-2365).

²⁸ Affidavit of Joseph Hickey, July 14, 2022 (pages GD2-65 to GD2-896 in SST file GE-22-2365).

²⁹ N. Hulscher et al., "Autopsy findings in cases of fatal COVID-19 vaccine-induced myocarditis", *ESC Heart Failure* (2024), <https://doi.org/10.1002/ehf2.14680>; N. Hoshino et al., "An autopsy case report of fulminant myocarditis: Following mRNA COVID-19 vaccination", *Journal of Cardiology Cases* 26 (2022) 391-394, <https://doi.org/10.1016/j.jccase.2022.06.006>; M. Takahashi et al., "An autopsy case report of aortic dissection complicated with histiolymphocytic pericarditis and aortic inflammation after mRNA COVID-19 vaccination", *Legal Medicine* 59 (2022) 102154, <https://doi.org/10.1016/j.legalmed.2022.102154>; M. Mörz, "A Case Report: Multifocal Necrotizing Encephalitis and Myocarditis after BNT162b2 mRNA Vaccination against COVID-19", *Vaccines* 10 (2022) 1651, <https://doi.org/10.3390/vaccines10101651>; H. Suzuki et al., "Autopsy findings of post-COVID-19 vaccination deaths in Tokyo Metropolis, Japan, 2021", *Legal Medicine* 59 (2022) 102134, <https://doi.org/10.1016/j.legalmed.2022.102134>; L.J Tan et al., "A systemic review and recommendation for an autopsy approach to death followed the COVID 19 vaccination", *Forensic Science International* 340 (2022) 111469, <https://doi.org/10.1016/j.forsciint.2022.111469>; P. Manu, "Fatal Myocarditis After COVID-19 Vaccination:

- Additional population-based studies of COVID-vaccine-induced myocarditis and pericarditis, including in Ontario, Canada.³⁰
- Many additional studies of COVID-vaccine-induced pathologies.³¹
- Secondary analysis of serious adverse events reported in placebo-controlled, industry phase III randomized clinical trials for the COVID vaccines.³²
- Payments made by government vaccine-injury compensation programs for deaths and injuries induced by COVID vaccination.³³

Fourteen Autopsy-Confirmed Cases”, *American Journal of Therapeutics* 30 (2023) e259-e260, <https://doi.org/10.1097/MJT.0000000000001631>; H. Nushida, “A case of fatal multi-organ inflammation following COVID-19 vaccination”, *Legal Medicine* 63 (2023) 102244, <https://doi.org/10.1016/j.legalmed.2023.102244>; N. Onishi et al., “Fulminant myocarditis with complete atrioventricular block after mRNA COVID-19 vaccination: A case report”, *Journal of Cardiology Cases* 27 (2023) 229-232, <https://doi.org/10.1016/j.jccase.2023.01.004>; C. Schwab et al., “Autopsy-based histopathological characterization of myocarditis after anti-SARS-CoV-2-vaccination”, 112 (2023) 431-440, <https://doi.org/10.1007/s00392-022-02129-5>

³⁰ S. Heymans et al., “Myocarditis Following SARS-CoV2 mRNA Vaccination Against COVID-19: Facts and Open Questions”, *Journal of the American College of Cardiology* 80 (2022) 1363-1365, <https://doi.org/10.1016/j.jacc.2022.08.003>; S. Buchan et al., “Epidemiology of Myocarditis and Pericarditis Following mRNA Vaccination by Vaccine Product, Schedule, and Interdose Interval Among Adolescents and Adults in Ontario, Canada”, *JAMA Network Open* 5 (2022) e2218505, <https://doi.org/10.1001/jamanetworkopen.2022.18505>; Z. Naveed et al., “Open Access Observed versus expected rates of myocarditis after SARS-CoV-2 vaccination: a population-based cohort study”, *Canadian Medical Association Journal* 194 (2022) E1529-E1536, <https://doi.org/10.1503/cmaj.220676>; M. Massari et al., “Postmarketing active surveillance of myocarditis and pericarditis following vaccination with COVID-19 mRNA vaccines in persons aged 12 to 39 years in Italy: A multi-database, self-controlled case series study”, *PLOS Medicine* 19 (2022) e1004056, <https://doi.org/10.1371/journal.pmed.1004056>; A. Husby and L. Køber, “COVID-19 mRNA vaccination and myocarditis or pericarditis”, *The Lancet* 399 (2022) 2168-2169, [https://doi.org/10.1016/S0140-6736\(22\)00842-X](https://doi.org/10.1016/S0140-6736(22)00842-X); S.H. Bots et al., “Myocarditis and pericarditis associated with SARS-CoV-2 vaccines: A population-based descriptive cohort and a nested self-controlled risk interval study using electronic health care data from four European countries”, *Frontiers in Pharmacology* 13 (2022) 1038043, <https://doi.org/10.3389/fphar.2022.1038043>.

³¹R. Edmonds et al., “Vaccine-induced immune thrombotic thrombocytopenia (VITT) after SARS-CoV-2 vaccination: Two cases from Germany with unusual presentation”, *Clinical Case Reports* 11 (2023) e6883, <https://doi.org/10.1002/ccr3.6883>; H.-L. Wong et al., “Surveillance of COVID-19 vaccine safety among elderly persons aged 65 years and older”, *Vaccine* 41 (2023) 532-539, <https://doi.org/10.1016/j.vaccine.2022.11.069>; H. Sano et al., “A case of persistent, confluent maculopapular erythema following a COVID-19 mRNA vaccination is possibly associated with the intralesional spike protein expressed by vascular endothelial cells and eccrine glands in the deep dermis”, *The Journal of Dermatology* 50 (2023) 1208-1212, <https://doi.org/10.1111/1346-8138.16816>.

³² J. Fraiman et al., “Serious adverse events of special interest following mRNA COVID-19 vaccination in randomized trials in adults”, *Vaccine* 40 (2022) 5798-5805, <https://doi.org/10.1016/j.vaccine.2022.08.036>.

³³ J. Wise, “Covid-19: UK makes first payments to compensate injury or death from vaccines”, *BMJ* 377 (2022) o1565, <https://doi.org/10.1136/bmj.o1565>; The Japan Times, “Japan grants first payment for death related to COVID vaccination”, 26 July 2022, <https://www.japantimes.co.jp/news/2022/07/26/national/science-health/japan-first-covid-19-vaccine-compensation>, archived here: <https://archive.ph/OfUhm>; N. Corbett, “Maple Ridge woman compensated for mother’s death from COVID-19 vaccine”, *Maple Ridge-Pitt Meadows News*, 6 September 2022,

4.9 The *Charter* violations of the employer directive being refused by the employee are not academic

39. The *Charter* violation dimension of the vaccination mandate is not an academic point. There is extensive relevant caselaw regarding *Charter* violations related to medical interventions:

- i. Justice Wilson of the Supreme Court of Canada, in *R. v. Morgentaler*:³⁴

I agree with the Chief Justice and with Beetz J. that the right to 'security of the person' under s. 7 of the *Charter* protects both the physical and psychological integrity of the individual. State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. [emphasis added.]

- ii. Justice Sopinka of the Supreme Court of Canada, in *Rodriguez v. British Columbia*:³⁵

In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, Lamer J. also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.

[...] That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to

<https://www.mapleridgenews.com/news/maple-ridge-woman-compensated-for-mothers-death-from-covid-19-vaccine>, archived here: <https://archive.is/wNoYF>.

³⁴ Wilson J. in *R. v. Morgentaler*, 1988 CanLII 90 (SCC), <https://canlii.ca/t/1ftjt>, at pgs. 173.

³⁵ *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), <https://canlii.ca/t/1frz0>, at pgs. 587-588.

demand that medical treatment which would extend life be withheld or withdrawn. [emphasis added.]

iii. Justice Binnie of the Supreme Court of Canada, in *A.C. v. Manitoba*:³⁶

[198] There is a strong consensus among common law countries regarding the right to refuse medical treatment, even if this leads to death. [...]

[199] In Canada, this was recognized by the Ontario Court of Appeal in the *Malette* case. [...] The court stated:

A competent adult is generally entitled to reject a specific treatment or all treatment, or to select an alternate form of treatment, even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor's opinion, it is the patient who has the final say on whether to undergo the treatment. . . . The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care. For this freedom to be meaningful, people must have the right to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others

...

The state's interest in preserving the life or health of a competent patient must generally give way to the patient's stronger interest in directing the course of her own life. . . . Recognition of the right to reject medical treatment cannot, in my opinion, be said to depreciate the interest of the state in life or in the sanctity of life. Individual free choice and self-determination are themselves fundamental constituents of life. To deny individuals freedom of choice with respect to their health care can only lessen, and not enhance, the value of life. [Emphasis added; pp. 424 and 429-30.]

Malette was endorsed by the majority opinion in *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 598. [emphasis added.]

³⁶ Binnie J. (dissenting) in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), <https://canlii.ca/t/24432>, at paras. 198-199.

iv. The nine judges of the Supreme Court of Canada in *Carter v. Canada*:³⁷

(2) Liberty and Security of the Person

[64] Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects “the right to make fundamental personal choices free from state interference”: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses “a notion of personal autonomy involving . . . control over one’s bodily integrity free from state interference” (Rodriguez, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

[...]

[67] The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the “tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity” (para. 39). This right to “decide one’s own fate” entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of “informed consent” and is protected by s. 7’s guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient’s decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical

³⁷ *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), paras. 64 and 67, <https://canlii.ca/t/gg5z4>.

treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., *Ciarlariello v. Schacter*, 1993 CanLII 138 (SCC), [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 1990 CanLII 6868 (ON CA), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de Québec* (1992), 1992 CanLII 8511 (QC CS), 86 D.L.R. (4th) 385 (Que. Sup. Ct.). [emphasis added.]

v. Labour arbitrator John Stout:³⁸

[66] In *St. Peter's Health System v. CUPE, Local 778*, supra, Arbitrator Charney undertakes a detailed review of authorities provided to him and finds that prior to balancing the interests of the employer and the employees one must look at any common law rights issues and s.7 of the *Charter* as to whether it is permissible to enforce a mandatory medical treatment. Arbitrator Charney concludes:

'...suspending employees (non-disciplinary) for refusing to undergo medical treatment is a violation of their common law sec. 7 charter rights. Virtually all the court cases, including Supreme Court of Canada and Ontario Court of Appeal, find that enforced medical treatment, and I point out that this is not a medical examination but treatment, is an assault if there is no consent.' [emphasis added.]

vi. Madam Prothonotary Aronovitch of the Federal Court:³⁹

[41] In the Standing Court Martial of Ex-Sergeant Kipling, whose breach of command resulted in severe disciplinary proceedings, the Chief Military Judge found that the forced vaccination program did violate section 7 of the Charter, in that the accused's right to life, liberty, and security of the person was infringed. At page 2 of the minutes of the proceedings of the Standing Court Martial:

Non-consensual vaccination under the threat of disciplinary proceedings amounts to an invasion of the bodily integrity and personal autonomy of a person. [emphasis added]

[42] The plaintiff points out that the issue before the court in *Kipling* was the application of section 7 in connection with a positive law which imposed mandatory vaccination and did not involve the accused's

³⁸ *Electrical Safety Authority v Power Workers' Union*, 2022 CanLII 343 (ON LA), <https://canlii.ca/t/jlnm8>.

³⁹ *Duplessis v. Canada*, 2000 CanLII 16541 (FC), <https://canlii.ca/t/42cc>.

interaction with the judicial system.” [emphasis added in para. 41 at “the Chief Military Judge found...”.]

4.10 There was no overriding just reason to impose vaccination on me, which Member Bourgeois failed to appreciate

40. In a decision of May 6, 2024, Labour Arbitrator Michelle Flaherty held that it was unreasonable for Canada Post to have placed employees who worked exclusively remotely on unpaid leave for refusing COVID vaccination.⁴⁰ My situation is identical to the exclusively remote-working Canada Post employees, because:

- i. Canada Post is a federal Crown corporation, like my former employer, the Bank of Canada.
- ii. Federal Crown corporations, including Canada Post and the Bank of Canada, followed the federal government’s directive to implement vaccination mandates for their employees in autumn 2021.⁴¹
- iii. I worked exclusively remotely from the declaration of the COVID-19 pandemic in March 2020 until the implementation of my employer’s vaccination mandate in November 2021, like the exclusively remote-working employees in the Canada Post arbitration award.⁴²

41. My employer’s vaccination mandate policy was unreasonable as applied to me as an exclusively remote-working employee, in the same way that Canada Post’s vaccination mandate was unreasonable as applied to its exclusively remote-working employees.

42. Within the uncontested facts of my case (working exclusively from home and not asked to come in to work during the relevant time period), there was no overriding just reason to impose vaccination on me, which Member Bourgeois failed to appreciate.

43. In summary, my case is one where considering the nature and possible consequences of what was being demanded of me is necessary to fulfill the requirements of the *EI Act*, because what was being demanded (receiving multiple injections of a dangerous pharmaceutical product) infringed my *Charter* rights, subjected me to significant health

⁴⁰ *Union of Postal Communications Employees (PSAC) v Canada Post Corporation*, 2024 CanLII 38829 (CA LA), <https://canlii.ca/t/k4fkh>.

⁴¹ Affidavit of Joseph Hickey, Exhibit A (pages GD2-807 to GD2-834 in SST file GE-22-2365).

⁴² Affidavit of Joseph Hickey (pages GD2-65 to GD2-73 in SST file GE-22-2365).

risk including the risk of death, and was objectively and demonstrably unnecessary for the performance of my work.

5. (SECOND GROUND OF APPEAL) Member Bourgeois failed to recognize that the CEIC’s decision to deny me EI benefits for not being vaccinated violates my rights under sections 2 and 7 of the Charter

44. The Canadian Employment Insurance Commission (CEIC)’s decision to deny me Employment Insurance (EI) benefits for my refusal to be injected with a COVID-19 vaccine violates my fundamental rights including the rights to freedom of conscience,⁴³ freedom of religion⁴⁴ and life, liberty and security of the person,⁴⁵ which are enshrined in the *Charter*.

45. The public health context is one in which the imposed vaccine by injection has proven significant risks of harm, including death.⁴⁶

46. The social and political context is one in which:

⁴³ *Canadian Charter of Rights and Freedoms*, s. 2(a), <https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-40>.

⁴⁴ *Ibid*.

⁴⁵ *Canadian Charter of Rights and Freedoms*, s. 7, <https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-40>.

⁴⁶ See the Affidavit of Joseph Hickey of July 14, 2022, in the record of this appeal (pages GD2-65 to GD2-896 in SST file GE-22-2365). Extensive scientific evidence of harms from COVID vaccines is documented in my Affidavit at: Sections 2e and 3d of Exhibit A (pages GD2-88 to GD2-157 and GD2-166 to GD2-173) and Exhibit F (pages GD2-860 to GD2-877). In particular:

- A plethora of dangerous adverse events, including death, have been associated with the COVID-19 vaccines in the scientific literature. See, for example, “Over 1000 peer-reviewed articles showing evidence of harm from COVID-19 vaccine products” at Section 2e (vi) of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-112 to GD2-150 in SST file GE-22-2365).
- The COVID-19 vaccines have been proven to have caused death in autopsy studies. See Section 2e (iv) of Exhibit A of the Affidavit of Joseph Hickey (pages GD2-101 to GD2-104 in SST file GE-22-2365).
- Significantly elevated risk of potentially fatal heart inflammation (myocarditis or pericarditis) following COVID-19 vaccination for males under age 40 has been demonstrated in many countries and jurisdictions, including in publications in the highest-level peer-reviewed academic journals. For example, the reference by M. Oster et al. “Myocarditis Cases Reported After mRNA-Based COVID-19 Vaccination in the US From December 2020 to August 2021”, *Journal of the American Medical Association* 327 (2022) 331-340, <https://doi.org/10.1001/jama.2021.24110>, cited at pages GD2-109, GD2-150, GD2-151 and GD2-168 in Exhibit A of the Affidavit of Joseph Hickey (SST file GE-22-2365), which reports a rate of myocarditis 11.3 times higher than normal following the second dose of the Pfizer COVID-19 vaccine and 12.6 times higher than normal following the Moderna COVID-19 vaccine, for males aged 30-39. In this regard, I am personally in a high-risk category, being male and under age 40, as affirmed at para. 19 of my Affidavit (page GD2-71 in SST file GE-22-2365).

- i. the state expressed that denial of EI was part of its planned coercion that state employees be injected:⁴⁷

Employment Minister Carla Qualtrough says it's likely that people who lose their jobs for not complying with employer COVID-19 vaccine policies will not be eligible for employment insurance (EI).

"It's a condition of employment that hasn't been met," Qualtrough said in an interview with CBC's Power & Politics. "And the employer choosing to terminate someone for that reason would make that person ineligible for EI.

"I can tell you that's the advice I'm getting, and that's the advice I'll move forward with."

- ii. The government's use of EI denial as an instrument to coerce employees to become vaccinated was widely criticized by civil society, including the Canadian Civil Liberties Association (CCLA):⁴⁸

"Dear Minister Qualtrough,
I am writing on behalf of the Canadian Civil Liberties Association (CCLA) regarding comments you have made in the media and information on the Employment Insurance (EI) website about eligibility for EI. As you know, the position stated is that if an individual is terminated for failing to comply with an employer's vaccination mandate, the individual will not be considered eligible for employment benefits. In effect, a refusal to be vaccinated, or to disclose one's vaccination status to an employer, is treated as misconduct. In our view, this policy is wrong-headed, counter-productive, and may well conflict with the government's constitutional and human rights obligations. We strongly urge you to reconsider this position.

(...)

Sincerely,

Cara Faith Zwibel

Director, Fundamental Freedoms Program" [emphasis added]

⁴⁷ "Don't expect EI if you lose your job for not being vaccinated, minister says", CBC News, 21 October 2021, <https://www.cbc.ca/news/politics/ei-vax-status-1.6220287>.

⁴⁸ Letter from the Canadian Civil Liberties Association (CCLA) to Employment Minister Carla Qualtrough, "RE: Denial of Employment Insurance based on vaccination status", 1 November 2021, <https://ccla.org/wp-content/uploads/2021/11/2021-10-25-Ltr-re-EI-denial-vaccination-status.pdf>.

47. The CEIC denied me EI benefits on the basis that my decision not to be vaccinated constituted “misconduct” under the *EI Act*.⁴⁹
48. The act of refusing a dangerous medical intervention cannot be “misconduct” justifying depriving a citizen of government assistance or service (here, EI benefits), in our constitutional monarchy and parliamentary democracy, founded on the rule of law and respect for rights and freedoms.
49. The CEIC's decision, in the instant specific case, is logically equivalent to denying me access to EI benefits because I refused to be injected with a dangerous pharmaceutical product.
50. The CEIC's decision to frame my choice not to be injected with a COVID-19 vaccine as “misconduct” and to thus deny me EI benefits is a violation of my fundamental rights, specifically sections 2 and 7 of the *Charter*.
51. The CEIC made this decision despite the uncontested facts that I worked entirely from home, and that I duly pursued an internal appeal of my employer's decision not to grant me an accommodation throughout the entire time period during which my employer's vaccination policy was in effect, in a political context in which the Minister of Employment (who has authority over the CEIC) had publicly stated that individuals who lost work for refusing vaccination would be ineligible for EI benefits.
52. In the case of *HF v Canada Employment Insurance Commission* [2023 SST 373],⁵⁰ the appellant filed a Notice of Constitutional Question claiming that the CEIC violated her rights under s. 7 of the *Charter* using s. 30(1) of the *Employment Insurance Act*. The Tribunal dismissed the appellant's constitutional claim at the notice stage on the basis that it did not satisfy the requirements of s. 1(1) of the *Social Security Tribunal Regulations*.⁵¹ My instant argument that the CEIC's decision to deny me benefits infringed my *Charter* rights is distinguished from the case of *HF v Canada Employment Insurance Commission* [2023 SST 373], because I am not hereby targeting the constitutionality of any law or statutory provision. Rather, I argue that the CEIC's decision (which is government action) infringed or denied my *Charter* rights, and the appropriate remedy is to overturn the CEIC's decision.
53. I have made extensive submissions regarding my rights under sections 2 and 7 of the *Charter* in my filings on the record of my appeal, including in my Notice of Appeal dated

⁴⁹ Notice of Decision sent by CEIC to Joseph Hickey on June 17, 2022 (item coded GD3-42 in SST file GE-22-2365).

⁵⁰ *HF v Canada Employment Insurance Commission*, 2023 SST 373 (CanLII), <https://canlii.ca/t/jx5gh>.

⁵¹ *Social Security Tribunal Regulations*, 2022 (SOR/2022-255), <https://laws.justice.gc.ca/eng/regulations/SOR-2022-255/FullText.html>, s. 1(1).

July 15, 2022,⁵² and in my affidavit dated July 14, 2022 and the exhibits thereto.⁵³ The following two sections of the instant submissions (sections 5.1 and 5.2) summarize my arguments in this regard.

5.1 Life, liberty and security of the person (*Charter* s. 7)

54. It is clear and obvious that imposing on a non-consenting individual a medical procedure with known risks as severe as death violates the individual's *Charter* rights to life, liberty and security of the person (s. 7 of the *Charter*). Canadian case law contains explicit statements to this effect, as follows.

55. Justice Wilson of the Supreme Court of Canada, in *R. v. Morgentaler*:⁵⁴

I agree with the Chief Justice and with Beetz J. that the right to 'security of the person' under s. 7 of the *Charter* protects both the physical and psychological integrity of the individual. State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. [emphasis added.]

56. Justice Sopinka of the Supreme Court of Canada, in *Rodriguez v. British Columbia*:⁵⁵

In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, Lamer J. also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.

[...] That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes

⁵² Notice of Appeal of Denial of Employment Insurance Benefits, July 15, 2022, pages GD2-12 to GD2-64 in SST file GE-22-2365.

⁵³ Affidavit of Joseph Hickey, July 14, 2022, beginning at page GD2-65 in SST file GE-22-2365.

⁵⁴ Wilson J. in *R. v. Morgentaler*, 1988 CanLII 90 (SCC), <https://canlii.ca/t/1ftjt>, at pgs. 173.

⁵⁵ *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), <https://canlii.ca/t/1frz0>, at pgs. 587-588.

battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. [emphasis added.]

57. Justice Binnie of the Supreme Court of Canada, in *A.C. v. Manitoba*:⁵⁶

[198] There is a strong consensus among common law countries regarding the right to refuse medical treatment, even if this leads to death. [...]

[199] In Canada, this was recognized by the Ontario Court of Appeal in the *Malette* case. [...] The court stated:

A competent adult is generally entitled to reject a specific treatment or all treatment, or to select an alternate form of treatment, even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor's opinion, it is the patient who has the final say on whether to undergo the treatment. . . . The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care. For this freedom to be meaningful, people must have the right to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others .

...

...

The state's interest in preserving the life or health of a competent patient must generally give way to the patient's stronger interest in directing the course of her own life. . . . Recognition of the right to reject medical treatment cannot, in my opinion, be said to depreciate the interest of the state in life or in the sanctity of life. Individual free choice and self-determination are themselves fundamental constituents of life. To deny individuals freedom of choice with respect to their health care can only lessen, and not enhance, the value of life. [Emphasis added; pp. 424 and 429-30.]

Malette was endorsed by the majority opinion in *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 598. [emphasis added.]

⁵⁶ Binnie J. (dissenting) in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), <https://canlii.ca/t/24432>, at paras. 198-199.

58. The nine judges of the Supreme Court of Canada in *Carter v. Canada*:⁵⁷

(2) Liberty and Security of the Person

[64] Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects “the right to make fundamental personal choices free from state interference”: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses “a notion of personal autonomy involving . . . control over one’s bodily integrity free from state interference” (Rodriguez, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

[...]

[67] The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the “tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity” (para. 39). This right to “decide one’s own fate” entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of “informed consent” and is protected by s. 7’s guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient’s decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., *Ciarlariello v. Schacter*, 1993 CanLII 138 (SCC), [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 1990 CanLII 6868 (ON CA), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de*

⁵⁷ *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), paras. 64 and 67, <https://canlii.ca/t/gg5z4>.

Québec (1992), 1992 CanLII 8511 (QC CS), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).
[emphasis added.]

59. Labour arbitrator John Stout:⁵⁸

[66] In *St. Peter's Health System v. CUPE, Local 778*, supra, Arbitrator Charney undertakes a detailed review of authorities provided to him and finds that prior to balancing the interests of the employer and the employees one must look at any common law rights issues and s.7 of the *Charter* as to whether it is permissible to enforce a mandatory medical treatment. Arbitrator Charney concludes:

'...suspending employees (non-disciplinary) for refusing to undergo medical treatment is a violation of their common law sec. 7 charter rights. Virtually all the court cases, including Supreme Court of Canada and Ontario Court of Appeal, find that enforced medical treatment, and I point out that this is not a medical examination but treatment, is an assault if there is no consent.' [emphasis added.]

60. Madam Prothonotary Aronovitch of the Federal Court:⁵⁹

[41] In the Standing Court Martial of Ex-Sergeant Kipling, whose breach of command resulted in severe disciplinary proceedings, the Chief Military Judge found that the forced vaccination program did violate section 7 of the *Charter*, in that the accused's right to life, liberty, and security of the person was infringed. At page 2 of the minutes of the proceedings of the Standing Court Martial:

Non-consensual vaccination under the threat of disciplinary proceedings amounts to an invasion of the bodily integrity and personal autonomy of a person. [emphasis added]

[42] The plaintiff points out that the issue before the court in *Kipling* was the application of section 7 in connection with a positive law which imposed mandatory vaccination and did not involve the accused's interaction with the judicial system." [emphasis added in para. 41 at "the Chief Military Judge found...".]

61. The Canadian case law is clear that individuals have the fundamental constitutional right to refuse medical treatments, without state interference.

⁵⁸ *Electrical Safety Authority v Power Workers' Union*, 2022 CanLII 343 (ON LA), <https://canlii.ca/t/jlnm8>.

⁵⁹ *Duplessis v. Canada*, 2000 CanLII 16541 (FC), <https://canlii.ca/t/42cc>.

62. The CEIC's decision to deny me EI benefits for refusing COVID-19 vaccination constitutes state interference against my decision not to receive the vaccine. The CEIC's decision to deny me EI benefits was part of the palpable coercion applied to me by the state to receive injections of a COVID-19 vaccine against my will.
63. Member Bourgeois erred by not recognizing that the CEIC's decision to deny me EI benefits violated my fundamental rights under s. 7 of the *Charter*. Therefore, Member Bourgeois' decision must be overturned.

5.2 Freedom of conscience and freedom of religion (*Charter* s. 2(a))

64. As I have explained in my affidavit⁶⁰ and previous submissions to the SST,⁶¹ my conscientious beliefs and my religious beliefs prevent me from receiving injections of a COVID-19 vaccine.
65. The Canadian constitution protects individuals against state coercion to engage in actions contrary to their conscience or beliefs. In the words of Chief Justice of Canada Dickson, in *R. v. Big M Drug Mart Ltd.*:⁶²

95. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [emphasis added.]

66. The CEIC's decision to deny me EI benefits for refusing COVID-19 vaccination constitutes state interference against my decision to follow my conscious and my religious beliefs in

⁶⁰ Affidavit of Joseph Hickey, July 14, 2022, beginning at page GD2-65 in SST file GE-22-2365.

⁶¹ Notice of Appeal of Denial of Employment Insurance Benefits, July 15, 2022, pages GD2-12 to GD2-64 in SST file GE-22-2365.

⁶² *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), para. 95, <https://canlii.ca/t/1fv2b>.

refusing the vaccine. The CEIC's decision to deny me EI benefits was part of the palpable coercion applied to me by the state to receive injections of a COVID-19 vaccine against my will and my beliefs.

67. Member Bourgeois erred by not recognizing that the CEIC's decision to deny me EI benefits violated my fundamental rights under s. 2(a) of the *Charter*. Therefore, Member Bourgeois' decision must be overturned.

6. Request

68. 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.

RESPECTFULLY SUBMITTED ON SEPTEMBER 27, 2024



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