Citation: *MN v Canada Employment Insurance Commission*, 2022 SST 960

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. N.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated August 24, 2022 (GE-22-998)

Tribunal member:	Charlotte McQuade
Decision date:	September 29, 2022
File number:	AD-22-628

Decision

[1] I am refusing permission (leave) to appeal. The appeal will not proceed.

Overview

[2] M. N. is the Claimant. She worked from home as a palliative care coordinator for a health care organization. The Claimant's employer put her on an unpaid leave of absence and then dismissed her because she did not comply with its Covid-19 vaccination policy.

[3] The Claimant applied for EI regular benefits but the Canada Employment Insurance Commission (Commission) refused her those benefits because it decided she was dismissed for misconduct.

[4] The Claimant appealed to the Tribunal's General Division who dismissed her appeal. The General Division decided the Claimant had first been suspended and then dismissed for misconduct.

[5] The Claimant is now asking to appeal that decision to the Tribunal's Appeal Division. However, she needs permission for her appeal to move forward. The Claimant argues the General Division breached procedural fairness, erred in law and in jurisdiction and based its decision on an error of fact.

[6] I am refusing permission to appeal as I am satisfied this appeal has no reasonable chance of success. This means the Claimant's appeal cannot proceed.

Issues

[7] Is there an arguable case that the General Division made any reviewable errors when it decided the Claimant was suspended and dismissed for misconduct?

Analysis

[8] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is

given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[9] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[1]

[10] The law says that I can only consider certain types of errors.[2] There errors are:

- The General Division hearing process was not fair in some way.
- The General Division made an error of jurisdiction (meaning that it did not decide an issue that it should have decided or it decided something it did not have the power to decide).
- The General Division based its decision on an important error of fact.
- The General Division made an error of law.

[11] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[3]

Background

[12] The Claimant worked from home as a palliative care coordinator for a health care agency. She was a unionized employee.

[13] On August 17, 2021, the Ontario Chief Medical Officer of Health issued a directive under section 77.7 of the *Health Protection and Promotion Act* (Directive 6). This directive obligated various health care providers to implement a vaccination policy by September 7, 2021.[4]

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[1] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I have to apply.
[2] Section 58(1) of the DESD Act describes the only errors that I can consider when deciding whether to give permission to proceed with an appeal.
[3] See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.
[4] See GD3-61 to GD3-62.

[14] In response to Directive 6, the Claimant's employer implemented a policy that required all employees to obtain the Covid-19 vaccination.[5] The policy allowed for exemptions from vaccination for valid medical reasons in accordance with the requirements of Directive 6, and on valid human rights grounds with evidence acceptable to the employer and in accordance with the *Ontario Human Rights Code*.[6]

[15] The policy required that all employees report their vaccination status in accordance with four options. The first option was having received one dose and being scheduled for a second dose by October 31, 2021. The second option was having received two doses. The third option was being unable to be vaccinated for medical reasons, which required documentation meeting the criteria of Directive 6.

4) The fourth option had to do with human rights grounds. It stated:

> "4. I am unable to be vaccinated at this time on human rights grounds (includes religious grounds: documentation acceptable to (the employer) is required)."

[16] The policy required that employees who declared option 4 had to participate and complete the employer prescribed Covid-19 education e-learning module called "Making an Informed Decision Regarding the Covid-19 Vaccine."[7] As well, all employees who had declared not having had two doses were required to undergo Rapid Antigen Screening tests as set out in the policy.[8]

[17] The policy provided for discipline measures for failure to comply. It said, "Employees who fail to comply with this policy and/or the requirements of Directive 6 will be subject to progressive discipline up to and including an unpaid leave and/or termination."[9]

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[5] See GD23-3.
[6] See GD23-3.
[7] See GD23-3.
[8] See GD23-3.
[9] See GD23-4.

[18] The Claimant reported option 4 and requested an exemption from vaccination based on creed.[10]

[19] The Claimant's employer refused her exemption for reason that the policy did not interfere with any religious belief articulated in her request and any interference would be justified, given the unique circumstances in which they were operating.[11]

[20] After learning her exemption request was refused, the Claimant continued to refuse vaccination. On October 1, the Claimant was suspended effective October 4, 2021. She was advised it was expected she would comply with the policy by October 15, 2021, and until compliance was reached, she would remain on unpaid leave and subject to further discipline up to and including termination.[12] The Claimant was terminated on November 1, 2021, for not complying with the policy by October 31, 2021.[13]

[21] The Claimant applied for EI benefits after her suspension. The Claimant told the Commission she refused the vaccine, as it was experimental and violated her human rights based on creed. [14]The Commission decided that the Claimant had lost her employment due to misconduct and disqualified her from benefits from October 3, 2021.

[22] The Claimant appealed the Commission's decision to the Tribunal's General Division, who dismissed her appeal. The General Division decided the Claimant was suspended on October 4, 2021, and dismissed on October 31, 2021, both for reasons of misconduct.

[23] The Claimant now asks for permission to appeal that decision to the Appeal Division. She says the General Division breached procedural fairness, based its decision on an important error of fact, and erred in law and jurisdiction. I understand her arguments to be:

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[10] See GD3-53 for the Claimant's request for exemption based on creed.
[11] See GD3-93.
[12] See GD3-84.
[13] See GD3-49.
[14] See GD3-19.

- The General Division misapplied the test for misconduct because it did not apply the four elements required to show misconduct from the Commission's Digest of Entitlement Principles (Digest), which the Claimant had referred to in her submissions.[15]

- The General Division made an error of law when it concluded the Claimant's failure to comply with the vaccination policy interfered with her duties to the employer, given she worked from home.

- The General Division made an error of law by failing to consider that the employer's policy was unreasonable in requiring vaccination in her situation, given she worked from home.

- The General Division made an error of law or based its decision on an important error of fact by failing to consider all relevant facts when it decided that the Claimant willfully chose not to comply with the employer's policy for her own personal reasons. Specifically, the General Division did not consider that:

    1) the Claimant was exercising her right to refuse the vaccine for fear of harm to her body and spiritual wellness;
    2) the employer failed to accommodate her under the *Ontario Human Rights Code* and had predetermined that it would not provide exemptions;
    3) the employer's policy violated the laws of informed consent, the *Charter* and other laws;
    4) the employer's policy violated the collective agreement.

[15] See GD20-477 to GD20-484, where the Claimant refers to four elements of misconduct as described in the Commission's Digest of Entitlement Principles.

- The General Division based its decision that she was suspended and terminated for misconduct on an erroneous finding of fact that the employer's policy complied with the requirements of Directive 6. The Claimant submits that Directive 6 asked employers to develop a vaccination policy with a third option to allow for testing and education, which her employer's policy did not provide.

- The General Division breached procedural fairness because the General Division's decision to agree with the Commission demonstrated an unjust political motivation.[16]

It is not arguable that the General Division made a reviewable error

General Division decision

[24] The General Division had to decide whether the Claimant was suspended and then lost her job due to misconduct.[17]

[25] The General Division found as a fact that the reason the Claimant was put on an unpaid leave on October 4, 2021, and then dismissed on October 31, 2021, was because she did not comply with the employer's Covid-19 vaccination policy.[18]

[26] The General Division also found as a fact that the Claimant was aware of the employer's policy and had enough time to comply after being made aware that her exemption based on creed was refused on September 30, 2021.[19]

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[16] See AD1-12.
[17] See section 31 of the *Employment Insurance Act* (EI Act) which provides for disentitlement from benefits where a claimant is suspended due to their misconduct. See section 30(1) of the EI act, which provides for disqualification from benefits where a claimant loses their job due to misconduct or voluntarily leaves their employment without just cause.
[18] See paragraph 16 of the General Division decision.
[19] See paragraphs 38 and 39 of the General Division decision.

[27] The General Division decided that the employer's Covid-19 vaccination policy became a condition of the Claimant's continued employment and she breached that condition when she chose not to comply with the policy.[20]

[28] The General Division decided that the Claimant acted willfully when she chose not to comply with the policy for her own personal reasons.

[29] The General Division concluded that the Claimant knew or ought to have known the consequences of not complying with the policy would lead to an unpaid leave of absence and dismissal as the consequences were outlined in the policy and were communicated to the Claimant by the employer when she was put on a leave of absence on October 4, 2021. The General Division reasoned the Claimant ought to have known the employer would follow through on termination when she had been placed on a mandatory unpaid leave of absence.[21]

It is not arguable that the General Division misinterpreted the test for misconduct

[30] It is not arguable that the General Division misinterpreted the law concerning misconduct.

[31] The Claimant submits that the General Division did not apply the correct legal test for misconduct, as it did not apply the four elements required for misconduct as described in the Commission's Digest.[22]

[32] However, as the General Division pointed out, the Digest is not law but sets out guidelines for interpreting the law, as determined by the Commission. The General Division must follow the law.

[33] The test for misconduct is settled in the law. The General Division stated this test. [23]That is, for misconduct to occur, the conduct must be wilful, meaning conscious,

[20] See paragraph 44 of the General Division decision.
[21] See paragraphs 46 and 47 of the General Division decision.
[22] See GD20-478 to GD20-484.
[23] See paragraphs 33 to 35 of the General Division decision.

deliberate, or intentional.[24] Misconduct also includes conduct, which is so reckless to amount to wilfulness.[25]

[34] The Federal Court of Appeal has said that, put another way, there will be misconduct where the claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility.[26]

[35] The General Division applied this test. The General Division considered whether the Claimant's actions in refusing to comply with the policy were wilful. The General Division decided they were because the Claimant was aware of the employer's vaccination policy and had time to comply with the policy but did not do so for her own personal reasons.

[36] The General Division decided the Claimant knew or ought to have known the consequences of not complying would lead to an unpaid suspension and dismissal as those consequences were outlined in the policy and communicated to the Claimant when she was suspended on October 4, 2021. This meant her actions were misconduct.

[37] The Claimant says the General Division overlooked the fact she worked from home when it decided that failing to comply with the policy would have interfered with her job duties. She says failing to comply with the policy would not have affected her ability to perform her job duties.

[38] However, duties owed to an employer are broader than just the performing of work-related tasks. The law says that misconduct includes a breach of an express or

[24] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[25] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[26] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.

implied duty resulting from the contract of employment.[27] A deliberate violation of the employer's policy is considered to be misconduct.[28]

[39] The General Division decided that complying with the policy was a condition of the Claimant's continued employment. [29]This finding of fact was consistent with the terms of the policy that said employees who failed to comply with the policy and/or the requirements of Directive 6 would be subject to progressive discipline up to and including an unpaid leave and/or termination.[30]

[40] So, it is not arguable that the General Division made an error of law when it concluded the Claimant had breached a duty to her employer, even though she worked from home. The duty the Claimant breached was the duty to comply with the vaccination policy, which was a condition of continued employment. Whether or not the Claimant worked from home was irrelevant.

[41] The Claimant says the General Division failed to consider that it was not reasonable for the policy to be applied to her, given she worked from home.

[42] It is not arguable that the General Division was required to consider the reasonableness of the employer's policy. There are several reasons for this. First, as above, a breach of an express or implied duty resulting from the contract of employment, knowing that breach could result in termination is sufficient to amount to misconduct. The legal test for misconduct does not ask a decision maker to look behind the duty or policy and decide whether it was reasonable for the employer to impose that duty or policy.

[43] Secondly, by asking whether the policy was reasonable, the focus of the enquiry shifts to the employer's behaviour, rather than the employee's. However, the courts have said that it is the conduct of the employee that is in question when deciding

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[27] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA). See also *Canada (AG) v Lemire*, 2010 FCA 314.
[28] See *Attorney General of Canada v Secours*, A-352-94. See also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[29] See paragraphs 42 to 44 of the General Division decision.
[30] See GD23-4.

whether misconduct has occurred, not the conduct of the employer.[31] So, the reasonableness of the policy cannot be a consideration.

[44] It is also not arguable that the General Division failed to consider all the relevant facts when it decided the Claimant's conduct was wilful.

[45] As above, for misconduct to be found there must be a mental element of wilfulness on the part of the Claimant or the conduct must be so negligent or reckless as to approach wilfulness. Wilfulness generally requires the claimant to have acted consciously, deliberately, or intentionally.

[46] An employer's behaviour may be relevant, in some circumstances, to deciding whether an employee's refusal of a direction from their employer is wilful.[32] For example, conduct of an employer such as whether the employer communicated the policy to an employee, gave the employee time to comply with the policy or communicated the consequences of violating that policy would be relevant to deciding whether the employee's conduct was wilful.

[47] The Claimant submits that the General Division failed to consider the relevant fact that her employer improperly refused her request for a human rights exemption and failed to accommodate her.

[48] However, there is very specific direction from both the Federal Court and Federal Court of Appeal that says the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct which is in issue and such an issue can be dealt with in other forums.[33]

[49] This is binding law on the Tribunal. This means the question of whether the employer improperly denied the Claimant's request for accommodation or failed to

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[31] See *Paradis v Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[32] See *Astolfi v Canada (Attorney General),* 2020 FC 30.
[33] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General),* 2016 FC 1282.

properly accommodate her is not the type of employer conduct that the General Division could have considered when it decided whether the Claimant's conduct was wilful.

[50] I note that there was no question that the employer's policy requiring vaccination applied to the Claimant, given the policy gave the employer the specific discretion to decide whether the Claimant met a human right exemption and the employer had refused her request.[34]

[51] The Claimant also submits that the General Division failed to consider the relevant fact that the employer's policy violated laws about consent to treatment. Specifically she argues that she was exercising her right to refuse vaccination for fear of harm to her body and spiritual wellness.

[52] She also says that the General Division failed to consider that the relevant fact that the policy violated other laws. In her submission to the General Division, the Claimant argued the employer's policy violated many laws such as the *Criminal Code*, privacy laws, the *Charter*, human rights laws and *Occupational Health and Safety Act.*

[53] The Claimant submits further that the General Division failed to consider the relevant fact that the policy violated the collective agreement.

[54] It is not arguable that any of these issues were relevant to the issue that the General Division had to decide.

[55] The General Division decided its role was to decide misconduct under the EI Act, not whether the employer failed to accommodate her, or whether the policy violated consent laws, or other laws or the collective agreement or whether she was wrongfully dismissed.[35] The General Division relied on case law from the Federal Court and

[34] See GD23-3 for the employer's policy. It provides that an exemption for vaccination will be allowed it if there is a valid human rights grounds (including religion) with evidence acceptable to (the employer) and in accordance with the *Ontario Human Rights Code*.
[35] See paragraphs 54 to 57.

Federal Court of Appeal that the Tribunal was not the appropriate forum to decide these issues.[36]

[56] As above, the question of wilfulness concerns whether the Claimant refused to comply with the employer's policy, knowing that refusal could result in the loss of employment.

[57] The General Division did consider the Claimant's testimony that she did not think she would be dismissed because she was protected by the union and collective agreement. However, the General Division was not persuaded that was the case because the Claimant also testified that the union told her they could not interfere with the employer until after they were all terminated. The General Division concluded that the Claimant was aware she needed to be terminated to obtain assistance from her union.[37]

[58] The evidence before the General Division was that the Claimant believed the employer's policy violated many laws and violated the terms of her collective agreement. Indeed, subsequent to her termination, the Claimant's union filed a grievance of the Claimant's termination against the employer alleging the employer contravened Directive 6, various provisions of the collective agreement, the *Occupational Health and Safety Act*, *Personal Health Information Protection Act*, *Health Care Consent Act*, common law on privacy and consent to treatment, the *Human Rights Code* and section 7 of the *Charter.*[38]

[59] However, the Claimant knew the risk in refusing to follow the policy and choosing to challenge the legality of the policy and whether the policy violated the collective agreement was possible suspension and termination. The Claimant deliberately chose to take that risk, knowing the potential consequences. But that is not the type of loss of employment that the EI benefits are intended to provide compensation for.[39] The

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[36] The General Division relied on *Paradis v Canada (Attorney General),* 2016 FC 1282 and *Canada (Attorney General) v Marion*, 2002 FCA 185.
[37] See paragraph 48 of the General Division decision.
[38] See GD2-9.
[39] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 (CanLII).

General Division had no choice but to conclude that the Claimant's conduct amounted to misconduct.

[60] The Claimant's arguments to the General Division about the policy itself essentially amount to claims that the employer wrongfully suspended and terminated her in reliance on a policy that was unlawful, discriminatory and violated the collective agreement.

[61] However, the law is clear that whether the Claimant was wrongfully suspended or wrongfully terminated by her employer are not issues relevant to the misconduct test.[40] So, it is not arguable that the General Division made an error of law or jurisdiction by declining to consider these issues.

It is not arguable that the General based its decision that the Claimant had been suspended and then terminated for misconduct on an erroneous finding of fact that that the employer's policy complied with Directive 6

[62] The General Division did not base its decision that the Claimant had been suspended and lost her job due to misconduct on an erroneous finding of fact that the employer's policy complied with Directive 6.

[63] The Appeal Division can only intervene with certain types of errors of fact. To intervene, the General Division must have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.[41]

[64] The Claimant submits that Directive 6 asked employers to develop a vaccination policy with a third option to allow for testing and education, which her employer's policy did not provide. She argues the General Division made an error of fact when it decided that the policy complied with Directive 6.

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[40] See *Canada (Attorney General) v Marion*, 2002 FCA 185 (CanLII) and *Canada (Attorney General of Canada) v McNamara*, 2007 FCA 107 (Can LII)
[41] See section 58(1)(c) of the DESD Act.

[65] The General Division decided the employer's policy was consistent with Directive 6 because Directive 6 gave the employer discretion to decide whether they wanted to allow employees to do rapid testing, proof of educational session and ultimately the consequences of non-compliance.[42]

[66] I see no arguable error of fact in that conclusion.

[67] In that regard, Directive 6 states that the vaccination policy must require employees to provide 1(a) proof of full vaccine, or 1(b) written proof of a medical reason or 1(c) proof of completing an educational session approved by the covered organization about the benefits of the Covid-19 vaccination prior to declining the vaccination for any reason other than a medical reason.

[68] However, paragraph 2 of Directive 6 said that the covered organization may decide to remove the option set out in paragraph (c) and require all employees to provide the proof required by 1(a) or 1(b). Paragraph 3 said that where option 1(c) was removed the employer shall make available the educational session to all employees.[43]

[69] In other words, Directive 6 did not require employers to provide option 1(c) as an alternative to vaccination. It did require that an educational session be available to all employees if option 1(c) was removed.

[70] The employer's policy did provide for an educational session. The policy provided for a Covid-19 Education e-learning module: "Making an Informed Decision Regarding the Covid-19 Vaccine" that was available for any employees. [44] The Claimant argued before the General Division that, in fact, it was not provided to her. But that is a different question than whether the policy provides for the educational session.

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[42] See paragraph 43 of the General Division decision. See also GD3-60 to GD3-61 where Directive 6 provides that the employer may remove the options set out in paragraph 1(c) and require all employees to provide proof of full vaccination or a medical exemption, but an education session must still also be provided.
[43] See GD3-61 to GD3-62.
[44] See GD23-3.

[71] The General Division's finding that the employer's policy complied with Directive 6 was consistent with the evidence before it.

[72] Even if the General Division was wrong about whether the policy complied with Directive 6, it is not arguable that the General Division based its decision that the Claimant's conduct amounted to misconduct on this fact.

[73] The General Division's finding that the Claimant had committed misconduct was based on the fact she had refused to comply with the policy knowing the result could be suspension and termination.[45]

It is not arguable the General Division failed to follow procedural fairness

[74] It is not arguable that the General Division breached procedural fairness by reaching a result the Claimant finds unfair.

[75] The Claimant submits that the General Division breached procedural fairness as its decision to agree with the Commission demonstrated an unjust political motivation.

[76] The Claimant appears to be arguing that the decision maker was biased.

[77] An allegation of bias is a serious allegation. The law says such an allegation cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions.[46]

[78] Bias is concerned with a decision maker who does not approach the decision-making with an open mind.

[79] The legal test for establishing bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it was more likely than not that the General Division member, whether consciously or unconsciously, would not decide the case in a fair manner.[47]

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[45] See paragraphs 46 and 47 of the General Division decision.
[46] See *Arthur v Canada (A.G.),* 2001 FCA 223.
[47] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC).

[80] The Claimant has submitted no evidence in support of her allegation.

[81] I have listened to the audio recording of the General Division hearing. The recording reveals the member gave the Claimant full opportunity to present her case. The member gave the Claimant options as to how she wanted to present her case, and when the Claimant wanted to read a prepared statement, allowed her to do so.

[82] The General Division member carefully listened to Claimant's evidence, and asked clarifying questions when necessary. The Claimant was told she could go past the scheduled hearing time, if needed, to present her case and the hearing lasted almost two hours. The Claimant was given an opportunity at the end of the hearing to make final submissions and to provide a post-hearing document.

[83] There is no evidence whatsoever that the member had prejudged the case or did not approach the decision-making in a fair manner. Indeed the Claimant at the end of the hearing thanked the member for being such a good listener, being very professional and told her she was well equipped for the job. [48]

[84] An informed person, viewing the matter reasonably and practically and having thought the matter through would not conclude that it was more likely than not that the General Division would not decide the case in a fair manner. The Claimant's allegation appears to amount to no more than a disagreement with the result. A disagreement with the result reached is insufficient to amount to bias.

[85] There is no arguable case that the General Division breached procedural fairness. The Claimant has not pointed to any other type of procedural unfairness other than her disagreement with the result and I see no evidence of any procedural unfairness.

[48] I heard this from the audio recording of the General Division hearing at approximately 0:1:54.

Conclusion

[86] In addition to the Claimant's arguments, I have reviewed the entire record, the decision and listened to the audio tape from the General Division hearing. I am satisfied the General Division did not overlook or misconstrue any key evidence when it decided the Claimant was suspended and lost her job due to misconduct.[49]

[87] I am refusing permission to appeal. It is not arguable that the General Division made any reviewable errors. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division

[49] See *Karadeolian v Canada (Attorney General),* 2016 FC 615, which recommends doing such a review.