Citation: *Canada Employment Insurance Commission v RL*, 2024 SST 609

Social Security Tribunal of Canada
Appeal Division

Interlocutory Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Marcus Dirnberger
Respondent:	R. L.
Representative:	Christine Davies

Decision under appeal:	General Division decision dated October 23, 2023 (GE-21-2151)

Tribunal member:	Shirley Netten
Decision date:	April 30, 2024
File number:	AD-23-1069

Interlocutory decision

[1] Employment Insurance (EI) benefits are not payable to R. L. (Claimant) at this time. The Canada Employment Insurance Commission's (Commission's) application is not moot.

Overview

[2] As a temporary measure, section 153.17 of the *Employment Insurance Act* (Act) gave claimants a credit of insurable hours, allowing them to qualify more easily for EI benefits. The credit applied to the first claim on or after September 27, 2020, and could only be used once.

[3] The General Division decided that the one-time limit violated the *Canadian Charter of Rights and Freedoms* (Charter) and was of no force and effect for the Claimant's September 2021 EI claim. This meant that the Claimant would receive the extra hours credit, and would qualify for maternity and parental benefits under her September 2021 claim.

[4] The Commission applied for permission to appeal the General Division decision. The parties agree that I should determine, as a preliminary question, whether benefits are payable to the Claimant regardless of the outcome on appeal.[1] I have the power to decide any question of law necessary to dispose of the application, and the question of whether benefits are payable is relevant to the question of whether the Commission's application is moot.[2]

[5] I have concluded that benefits are not payable to the Claimant at this time.

Analysis

[6] The Act says that benefits are payable to a claimant in accordance with the General Division decision even if an appeal is pending.[3] This general rule doesn't apply

[1] This approach was discussed at a case conference in December 2023.
[2] See section 64(1) of the *Department of Employment and Social Development Act*.
[3] See section 114(1) of the *Employment Insurance Act* (Act).

in three situations.[4] In the most common situation, payment is suspended when the Commission seeks permission to appeal for a possible error of law, within 21 days.[5]

[7] Here, the Commission didn't file its application within 21 days of the General Division decision. The parties agree that benefits are payable to the Claimant unless the third situation applies. It is found in section 82(1) of the *Employment Insurance Regulations* (Regulations):

82 (1) If a decision of the General Division of the Social Security Tribunal that declares a provision of the Act or these Regulations to be *ultra vires* is appealed by the Commission to the Appeal Division of that Tribunal, benefits are not payable in respect of the claim for benefits that is the object of the decision — nor in respect of any other claim for benefits made after the decision of the General Division, if benefits would not be payable except for that decision — until **(a)** the final determination of the appeal by the Appeal Division; or **(b)** the final determination of any application made by the Commission under the *Federal Courts Act* for judicial review of the final determination of the appeal by the Appeal Division, if the final determination of the appeal declares the provision of the Act or these Regulations to be *ultra vires*.	**82 (1)** Si la Commission interjette appel de la décision de la division générale du Tribunal de la sécurité sociale déclarant invalide une disposition de la Loi ou du présent règlement devant la division d'appel de ce tribunal, aucune prestation n'est versée à l'égard de la demande de prestations qui fait l'objet de la décision — ni à l'égard des autres demandes de prestations présentées après celle-ci qui, n'eût été cette décision, ne donneraient pas lieu au versement de prestations — tant que, selon le cas : **a)** une décision définitive n'a pas été rendue dans l'appel par la division d'appel; **b)** une décision définitive n'a pas été rendue à l'égard de la demande de contrôle judiciaire, présentée par la Commission en vertu de la *Loi sur les Cours fédérales*, à l'égard de la décision définitive rendue dans l'appel par la division d'appel, si celle-ci déclare invalide une disposition de la Loi ou du présent règlement.

[4] These are found at section 114(2)(a) of the Act; and sections 80 and 82(1) of the *Employment Insurance Regulations* (Regulations).
[5] See section 80 of the Regulations.

[8] The Commission argues that section 82(1) applies in this case, and the Claimant argues that it does not.

Interpretation of section 82(1)

[9] Section 82(1) applies if the Commission appeals a General Division decision **that declares a provision of the Act or the Regulations to be *ultra vires*.**

[10] To decide what this means, I have to look at the words, their context, and the purpose. As both parties pointed out, the Supreme Court of Canada put it this way:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[6]

Ultra vires includes Charter violations

[11] The parties both submit that the term *ultra vires* includes Charter violations. I accept the parties' position on this point, for the following reasons:

- The Latin term *ultra vires* means beyond, or outside, the powers. A law that is inconsistent with the Charter can fairly be described as outside Parliament's, or the enacting body's, powers. Even though *ultra vires* is typically used when considering the division of powers or the power to enact regulations, courts and academics have occasionally described Charter violations as *ultra vires* the enacting body.[7]

- While the English regulation uses the term *ultra vires*, the French regulation uses the word "invalide" (invalid). The common meaning of these two terms encompasses a Charter violation, which may be described as invalid or as

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[6] This quote is from the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para 21, citing Elmer Driedger in *Construction of Statutes*. The Supreme Court of Canada recently confirmed this approach to statutory interpretation in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
[7] The Commission provided several examples at AD3-8 and AD3-9.

ultra vires the enacting body. In other words, only the broader sense of *ultra vires* can be reconciled with the French term “invalide.”

- The precursor to section 82 was first introduced in November 1982, just months after the Charter came into force.[8] This timing makes it unlikely that the provision was designed solely to cover decisions about division of powers and power to enact regulations, without explicitly saying so.

Section 82(1) applies to a declaration of invalidity affecting the individual claim or multiple claims

[12] The Claimant says that section 82(1) was designed to prevent the payment of benefits in multiple claims, and only applies to general declarations of invalidity. The Commission says that section 82(1) simply gives it more time to consider appealing findings of invalidity in individual cases, and only applies to individual claims.

[13] After considering the suspension of benefits scheme, its history, and the words of the provision, I have concluded that the Commission (as the body making the regulation) intended to prevent the payment of benefits in any claim – individual or multiple – where there was a specific or general declaration of invalidity, until the final determination of the issue. Even though section 82(1) can’t apply to multiple claims in practice, it still applies to declarations of invalidity in individual claims.

– The scheme of benefit suspension

[14] There are three provisions on the topic of suspending benefits pending appeal or judicial review:

> **Suspension of Benefits Pending Appeal**
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> **80** Benefits are not payable in accordance with a decision of the Employment Insurance Section of the Social Security Tribunal if, within 21 days after the day on which a decision is given, the Commission makes an application for leave to appeal to the

[8] See section 70 of the *Unemployment Insurance Regulations*, SOR/82-1046.

> Appeal Division of that Tribunal on the ground that the Employment Insurance Section has erred in law.
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> **81.** If the Commission makes an application under the Federal Courts Act for judicial review of a decision of the Appeal Division of the Social Security Tribunal, benefits are not payable in respect of the claim for benefits that is the object of the decision until the final determination of the application for judicial review.
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> **82. (1)** If a decision of the General Division of the Social Security Tribunal that declares a provision of the Act or these Regulations to be *ultra vires* is appealed by the Commission to the Appeal Division of that Tribunal, benefits are not payable in respect of the claim for benefits that is the object of the decision — nor in respect of any other claim for benefits made after the decision of the General Division, if benefits would not be payable except for that decision — until
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> **(a)** the final determination of the appeal by the Appeal Division; or
>
> **(b)** the final determination of any application made by the Commission under the Federal Courts Act for judicial review of the final determination of the appeal by the Appeal Division, if the final determination of the appeal declares the provision of the Act or these Regulations to be *ultra vires*.
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> **(2)** If the Commission makes an application under the Federal Courts Act for judicial review of a decision of the Appeal Division of the Social Security Tribunal that declares a provision of the Act or these Regulations to be *ultra vires*, benefits are not payable in respect of the claim for benefits that is the object of the decision — nor in respect of any other claim for benefits made after the decision of the Appeal Division, if benefits would not be payable except for that decision — until the final determination of the application for judicial review.

[15] Benefits in an individual claim will be suspended following a General Division decision if the Commission appeals on an error of law within 21 days (section 80). Benefits in an individual claim will be suspended following an Appeal Division decision if the Commission seeks judicial review (section 81). Where there is a declaration of invalidity, benefits will be suspended in the individual claim **and** in any other claim affected by the decision on the individual claim, until a final determination of the individual claim (section 82).

[16] Yet, I can think of no situation where benefits would **have to be paid** in a different claim as a result of a General Division or Appeal Division decision on an individual claim. The Supreme Court of Canada has made it clear that an administrative tribunal's finding that a provision is unconstitutional applies only to the specific case before the tribunal.[9] Similarly, a General Division or Appeal Division decision that a regulation is *ultra vires* its statute applies to the individual case. The remedies available to the General Division and Appeal Division on an appeal are limited to that specific appeal.[10] Their decisions may be persuasive to decision-makers in other cases, but they aren't binding.[11] So, why does section 82 reference other claims for benefits?

– **Historical context**

[17] Section 82(1) was introduced in 2013, when the General Division was established. It was preceded by earlier versions of sections 81 and 82(2), first introduced in 1982:

> 70(3) Where, in respect of a claim for benefit, an umpire allows an appeal from a decision of a board of referees and an application is made by the Commission in accordance with the *Federal Court Act* to review the decision of the umpire, benefits are not payable in respect of that claim until the final determination of the claim.
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> (4) Where, in respect of a claim for benefit, an umpire has declared a provision of the Act or these Regulations to be *ultra vires* and an application is made by the Commission in accordance with the *Federal Court Act* to review the decision of the umpire, benefits are not payable in respect of any claim for benefit made subsequent to the decision of the umpire until the final determination of the claim under review, where the benefit

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[9] See *Douglas/kwantlen Faculty Assn v Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; and *Nova Scotia (Workers' Compensation Board) v Martin,* 2003 SCC 54.
[10] See sections 54(1) and 59(1) of the *Department of Employment and Social Development Act.*
[11] See *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC). The Claimant seems to assume that a general declaration is possible in this situation, but this mistakenly assumes the Tribunal's ability to bind decision-makers in other claims. See also, for example, *Bell Canada v CTEA*, 2003 SCC 36, at para 47, where a tribunal should refuse to apply *ultra vires* guidelines in the specific case.

> would not otherwise be payable in respect of any such subsequent claim if the provision had not been declared *ultra vires*.[12]

[18] It's clear that the purpose of section 70(4) was solely to prevent the payment of benefits in **subsequent claims** following an umpire's general declaration of invalidity, before a final determination on the first claim was made by the court. Benefits were suspended in the individual case under section 70(3).

[19] It's important to recall that in 1982 we didn't know what the Supreme Court of Canada would decide about the constitutional remedies available to umpires (who were judges or former judges). We know now – but we didn't know then – that an administrative tribunal, including an umpire, can't make a general declaration of invalidity.

[20] Within a decade of the introduction of section 70(4), it was apparent that it could have no practical effect. It couldn't apply to appeals on constitutional issues (because the umpire had no power to declare a provision *ultra vires* in a way that affected subsequent claims). It couldn't apply to declarations that regulations were *ultra vires* since umpire decisions weren't binding on decision-makers in other cases. So, section 70(4) had a clear purpose in 1982, but that purpose lost its practical impact when the courts determined that the contemplated circumstance – a declaration of invalidity affecting other claims – couldn't occur.[13]

[21] Nevertheless, section 70(4) remained in effect, largely unchanged, for over 40 years. It was carried over from the unemployment insurance regime to the

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[12] See sections 70(3) and (4) of the *Unemployment Insurance Regulations* (SOR/82-1046). Before the Social Security Tribunal was established, the Board of Referees heard appeals of the Commission's initial EI decisions, and umpires heard appeals of Board of Referees' decisions.

[13] This problem with section 70(4) was identified by the Federal Court of Appeal in 1989. Although the provision supported the Court's conclusion that the umpire could decide constitutional questions, it was also described as "paradoxical" and "of questionable validity" because the umpire could not declare a provision invalid for all: *Tétreault-Gadoury v Canada (Canada Employment and Immigration Commission)*, [1989] 2 FC 245, at 259. This decision was overturned by the Supreme Court of Canada on a different point, in *Tétreault-Gadoury v Canada (Employment and Immigration Commission),* [1991] 2 S.C.R. 22.

employment insurance regime in 1996 with minor wording changes.[14] Then, the section was expanded when the Social Security Tribunal was established in 2013.[15]

– 2013 amendments

[22] The 2013 amendments were part of an extensive package of legislative changes designed to shift the appeal process from the Board of Referees and the umpire, to the Tribunal's General Division and Appeal Division.[16] It is possible, in this context, that the Commission (as the body making the regulation) didn't turn its mind to whether General Division or Appeal Division decisions could **ever** determine the payment of benefits in other claims by declaring a provision *ultra vires*.

[23] Indeed, I am convinced that this is what happened. The Commission expanded section 82 because both divisions of the Tribunal were given the power to decide constitutional questions.[17] But if the Commission had realized that the Appeal Division couldn't make declarations of invalidity affecting other claims, it wouldn't have included section 82(2) at all (since section 81 already precludes payment in the individual claim pending judicial review). If the Commission had realized that the General Division couldn't make findings of invalidity affecting other claims, it wouldn't have referenced "any other claim for benefits" in section 82(1). Similarly, if the goal was solely to secure a longer period to seek leave to appeal for certain decisions without payments flowing, the Commission could have drafted a much simpler provision to that effect, without referencing other benefit claims.

– Plain meaning and purpose of section 82

[24] Having accepted that in 2013 the Commission likely did not carefully consider whether other claims could be affected by General Division and Appeal Division

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[14] Section 70(4) of the *Unemployment Insurance Regulations* became section 87(3) of the *Employment Insurance Regulations*: SOR/96-332.
[15] See SOR/2013-64.
[16] There were statutory amendments to the Act and the *Department of Employment and Social Development Act*, amendments to the legislation governing the Canada Pension Plan and Old Age Security regimes, and other consequential amendments.
[17] See section 64(1) of the *Department of Employment and Social Development Act* and section 20 of the former *Social Security Tribunal Regulations* (SOR/2013-60).

decisions, I turn my focus to the plain meaning of section 82. I conclude that section 82 was drafted to prevent the payment of benefits in **any claim affected by a decision that declares a provision invalid or beyond the powers of the enacting body or statute**, pending final determination.

[25] Yes, the Commission drafted provisions that were overbroad by referencing other claims for benefits. Yet the Commission also adopted new wording in 2013: "…benefits are not payable in respect of the claim for benefits that is the object of the decision — nor in respect of any other claim for benefits…." In my view, this means that the Commission wanted to capture individual claims on their own, as well as any other affected claims.

[26] The Claimant argues that the use of the terms *ultra vires* and invalid, rather than the word "inoperable," means that the Commission intended section 82 to apply only to a general declaration of invalidity affecting multiple claims. While it may be preferable to use the term "inoperable" for a limited declaration and the term "invalid" for a general declaration, there is no consistent approach. Indeed, the Supreme Court of Canada emphasizes that tribunals can't make general declarations of invalidity, but still uses the term "invalid" for declarations or findings applicable to the individual case:

- In *Mouvement laïque québécois*, the Court restored the tribunal's conclusion declaring a by-law inoperative **and invalid**, while limiting the declaration to the individual.[18]

- In *Martin*, the Court recognized that a tribunal could find a provision "invalid," but this couldn't be binding on future decision-makers.[19]

- In *Douglas/kwantlen* the Court noted that a tribunal can find a law to be "invalid," and the tribunal must treat the invalid law as having no force or effect.[20]

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[18] See *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, at para 164.
[19] See *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, at para 31.
[20] See *Douglas/kwantlen Faculty Assn. v Douglas College*, 1990 CanLII 63 (SCC).

[27] Since the word “invalid” can be used for both limited and general declarations, I can’t conclude that by using this word (in French) the Commission intended section 82(1) to apply **only** to general declarations of invalidity. The reality that no other claims could be affected means that, in practice, section 82(1) only applies to the individual claim (not that it doesn’t apply at all).

[28] As for whether the word “declares” means a declaration of any particular formulation or degree of formality, I find that it does not. Contextually, “declares” can’t refer to a specific remedial power because the General Division and Appeal Division don’t have an explicit power to make “declarations,” nor did the umpire.[21] The word “declares” in section 82(1) simply refers to a clear decision, statement, or finding, consistent with its ordinary meaning.[22] Section 82(1) applies whether the decision-maker declares, finds, decides, states, concludes or determines the provision to be *ultra vires* or invalid.

Section 82(1) applies in the Claimant’s case

[29] The General Division held that section 153.17 of the Act violated section 15 of the Charter and wasn’t saved by section 1 of the Charter. It concluded that section 153.17(2) had no force or effect for the purpose of the Claimant’s September 2021 claim for benefits. I find that, in doing so, the General Division declared section 153.17(2) unconstitutional and hence *ultra vires* for the purposes of the individual claim.

[30] As such, section 82(1) applies. Benefits aren’t payable “in respect of the claim for benefits that is the object of the decision” until the final determination by the Appeal Division or, if applicable, the final determination of an application for judicial review.

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[21] See sections 54(1) and 59(1) of the *Department of Employment and Social Development Act*; and section 117 of the Act as it read prior to April 2013.
[22] “**Declare.** To make known, manifest, or clear. To signify, to show in any manner either by words or acts. To publish; to utter; to announce clearly some opinion or resolution.”: Black’s Law Dictionary, 5th Ed.

Conclusion

[31] EI benefits in the September 2021 claim are not payable to the Claimant at this time. This means that the Commission's application is not moot. The next step in these proceedings is for me to decide whether to give the Commission permission to appeal. That decision will follow shortly.

Shirley Netten
Member, Appeal Division