Court File No.:

FEDERAL COURT OF APPEAL

MICHAL ZAGOL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

(APPLICATION UNDER SECTIONS 18.1 AND 28(1)(g) OF THE *FEDERAL COURTS ACT*, RSC 1985, C F-7)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard virtually.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date:

Issued by: _____
(*Registry Officer*)

Address of local office:
Calgary Local Office
Canadian Occidental Tower
635 Eighth Avenue SW
3rd Floor
Calgary, AB T2P 3M3

TO: Attorney General of Canada
c/o Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

and

Prairie Regional Office - Edmonton
Department of Justice Canada
10423 101 Street
3rd Floor, Epcor Tower
Edmonton, AB T5H 0E7

AND TO: Canada Employment Insurance Commission
ESDC Legal Services
140 Promenade du Portage
Phase IV, 11th Floor
Gatineau, QC K1A 0J9

AND TO: Social Security Tribunal of Canada
Appeal Division
PO Box 9812
Station T
Ottawa, ON K1G 6S3

APPLICATION

This is an application for judicial review in respect of the decision of the Appeal Division ("AD") of the Social Security Tribunal ("SST" or "Tribunal"), numbered AD-23-670, dated and communicated to Michal Zagol January 18, 2024, by which the SST AD dismissed Mr. Zagol's appeal of the decision of the General Division ("GD") of the SST.

The applicant makes application for an order granting this application for judicial review, setting aside the decision of the SST AD and sending the matter back to the SST AD for redetermination with the benefit of the Court's reasons; and costs of this application.

The grounds for the application follow.

BACKGROUND

1. The Applicant is religious.

2. The Applicant was employed by the Canadian Armed Forces ("CAF") between March 30, 2016 and June 13, 2022, most recently as a helicopter pilot.

3. On November 15, 2021, the CAF introduced a covid vaccination policy (the "Policy").

4. The Policy contemplated and invited applications for exemption from vaccination on religious grounds.

5. The Applicant applied for exemption from vaccination on religious grounds.

6. The Applicant's employer acknowledged the reason for the Applicant's abstention from vaccination was the Applicant's religion.

7. The Applicant's employer denied the Applicant exemption from vaccination stating, "The member is unable to be vaccinated due to religious beliefs"; "All potential methods of accommodation were considered and ultimately could not be implemented because they would constitute undue hardship"; and "There are only two COVID-19 vaccines available to the member and thus in my opinion, there are no alternatives available to the member now and into the foreseeable future that will have not been subject to the same Health Canada fetus [*sic*] cell line testing protocols".

8. The Applicant's religion did not change.

9. The Applicant was honourably released on June 13, 2022, due to his unit's stated inability to accommodate his religious abstention from vaccination.

10. On June 19, 2022, the Applicant applied to the Canada Employment Insurance Commission ("Commission") for employment insurance ("EI") benefits.

11. On September 6, 2022, the Commission denied the Applicant EI benefits on the basis of "misconduct".

12. On or about September 8, 2022, the Applicant requested reconsideration of the Commission's decision.

13. On October 27, 2022, the Commission upheld its decision to deny the Applicant EI benefits on the basis of "misconduct".

14. On November 22, 2022, the Applicant appealed the Commission's decision to the SST GD. The appeal was heard May 24, 2023.

15. The SST GD acknowledged the reason for the Applicant's abstention from vaccination was the Applicant's religion.

16. The SST GD acknowledged that the Commission acknowledged the reason for the Applicant's abstention from vaccination was the Applicant's religion.

17. On June 9, 2023, the SST GD denied the Applicant's appeal on the basis of "misconduct".

18. On July 4, 2023, the Applicant applied for leave to appeal the decision of the SST GD to the SST AD.

19. On August 24, 2023, the SST AD granted the Applicant leave to appeal.

20. The SST AD heard the Applicant's appeal on November 30, 2023.

21. The SST AD dismissed the Applicant's appeal on January 18, 2024.

STANDARD OF REVIEW

22. All administrative decisions are subject to the reasonableness standard imposed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Among other criteria, a reasonable decision must "meaningfully grapple" with the "key issues" and "central arguments" raised by the applicant; demonstrate the decision maker was "actually alert and sensitive to the matter before it"; demonstrate the decision maker "actually listened" to the applicant; discharge the "decision maker's responsibility" to "discern meaning and legislative intent, not to 'reverse-engineer' a desired outcome"; and "explain why [the] decision best reflects the legislature's intention" where the applicant's dignity hangs in the balance.

GROUNDS

23. The SST AD's finding that the SST GD's decision was reasonable required the SST AD to miss the Applicant's overarching point, which it did with precision. The SST AD appears to have accomplished this by simply omitting from its analysis the key issue, central argument and uncontested high court precedents placed squarely before it by the Applicant.

24. For further certainty, the SST AD excluded the essential cases and the essential argument the Applicant explicitly placed before both the SST AD and the SST GD, which the Applicant made clear were absolutely critical to rendering a reasonable decision.

25. The Applicant is religious.

26. Religion is a **subjective**, **personal**, sincere, religious belief **which governs the religious adherent's conduct**: *Syndicat Northcrest v Amselem*, 2004 SCC 47. This means that at law, **religious belief is inseparable from the conduct it governs**. Religion, which includes both religious belief and religious conduct (*Amselem*), prescribes things a **religious person must do** and things a **religious person must not do**. Religious conduct is as much religion as religious belief, according to the Supreme Court of Canada (*Amselem*).

27. **Religion is an immutable characteristic**: *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 [*Corbiere*]. This means that at law, a person can no sooner change his religion than, for example, his sexual orientation or gender identity.

28. Immutable characteristics **cannot be altered**: *Corbiere*. This means that at law, a person possessing an immutable characteristic **cannot extinguish it**. He is **powerless to alter it**.

29. **Immutable characteristics are immutable across <u>all legislative contexts</u>**—"they are not deemed immutable in some legislative contexts and a matter of choice in others": *Quebec (Attorney General) v A*, 2013 SCC 5 [*Quebec v A*]. **<u>This means that immutable characteristics are immutable in the legislative context of employment insurance. For further certainty, this means that immutable characteristics are immutable under the *Employment Insurance Act* ("*EI Act*").</u>**

30. Immutable characteristics are **not a choice**: *Quebec v A*. This means that immutable characteristics are **not voluntary**.

31. Misconduct must be voluntary in the employment insurance context. This means that the Applicant's immutable characteristic of religion (*Corbiere*), which includes both religious belief and religious conduct (*Amselem*), and which does not cease to be an immutable characteristic in the context of employment insurance (*Quebec v A*), cannot be misconduct pursuant to the *EI Act*.

32. The SST AD failed to acknowledge the three crucial Supreme Court of Canada decisions the Applicant explicitly placed before it—*Corbiere*, *Quebec v A* and *Amselem*—let alone grapple with the central argument they buttress, an argument the Applicant could not possibly have advanced more clearly, before both the SST GD and the SST AD: his immutable characteristic cannot be misconduct, because misconduct must be voluntary, and immutable characteristics are not voluntary (*Corbiere*; *Quebec v A*).

33. The SST AD failed to grapple with the SST GD's legal error of deciding the Applicant made a "choice" not to change that which is unchangeable at law (*Corbiere*; *Quebec v A*).

34. The SST AD's decision is replete with statements that would not survive contact with the Applicant's central argument and the jurisprudence underpinning it.

35. At paragraph 29 of its decision, the SST AD rightly states that "'misconduct' has a specific meaning for EI purposes", but misses the point of that meaning by consistently claiming that the Applicant's **immutable characteristic**, a characteristic that by definition cannot be voluntary, is somehow voluntary. The SST AD is talking past the Applicant. The Applicant is aware the term "misconduct" has a specific meaning in EI law. That meaning necessarily includes voluntariness of conduct. An immutable characteristic cannot be voluntary in any legislative context (*Quebec v A*).

36. The Applicant specifically informed the SST AD he was not making any sort of "wrongful **intent**" argument, yet at paragraph 30, the SST AD robotically repeats that misconduct does not require wrongful intent. This calls into question whether the SST AD was paying attention. The SST AD goes on to state that "to constitute misconduct, the act complained of must have been wilful". The crux of the Applicant's argument is that his conduct was precisely ***not*** wilful, because an immutable characteristic cannot be wilful, as decided by the Supreme Court of Canada in *Corbiere* and *Quebec v A*.

37. At paragraph 39 the SST AD writes, "The evidence shows that the employer denied the Claimant's request for a religious exemption. It is not up to this Tribunal to decide whether the employer wrongfully denied his request for a religious exemption. This question is for another forum". This ignores the Applicant's central argument, which was not that the Tribunal should decide whether the employer wrongfully denied his request for religious exemption, rather that the Tribunal ought to decide his immutable characteristic cannot be misconduct because misconduct requires conduct to be voluntary, and immutable characteristics are not voluntary (*Corbiere*; *Quebec v A*).

38. At paragraph 42 the SST AD states, "It is not really in dispute that an employer has an obligation to take all reasonable precautions to protect the health and safety of its employees in their workplace". Beyond the obvious double standard at play in this statement, since the SST after all does not poke about in employer obligations, which it constantly reminds is outside its jurisdiction, whether or not it is reasonable for an

employer to terminate an employee for safety reasons, ***what is certainly not reasonable*** is the ***Commission and SST*** calling the employee's immutable characteristic voluntary and therefore misconduct.

39. The SST AD erred in stating, at paragraph 43, that "[t]he Claimant was aware of the consequences of non-compliance with the Policy. He had the opportunity to remedy his situation after he was not given an exemption. His decision not to comply with the Policy constituted voluntary misconduct in this context".

40. This is an error because the Applicant's awareness of the "consequences" did not make his unchangeable characteristic any more changeable (*Corbiere*; *Quebec v A*); the Applicant had no "opportunity to remedy" a situation which cannot be remedied because remedying that situation would involve changing the unchangeable, which is not within his power (*Corbiere*; *Quebec v A*); the Applicant made no "decision" not to comply because the Applicant's immutable characteristic is not a choice (*Quebec v A*); having made no choice, because he does not have the power to change the unchangeable (*Corbiere*; *Quebec v A*), the Applicant can have committed no "voluntary" action, which is required to ground a finding of misconduct; and, the Applicant's inability to change his immutable characteristic does not constitute voluntary misconduct "in this context" because immutable characteristics do not vary across legislative contexts, therefore this "context" is no different than any other context where immutable characteristics are concerned (*Quebec v A*).

41. The SST AD purports at paragraph 44 to be obliged to focus on the employee's conduct. However, the employee's conduct, which is to say, the Applicant's conduct, cannot be misconduct because the Applicant's conduct is itself an immutable characteristic (*Amselem*) which is not voluntary in any legislative context, including, of course, the EI legislative context (*Corbiere*; *Quebec v A*).

42. The SST AD erred in reasoning at paragraph 48 that the Applicant's claim is a matter for another forum, because the Applicant's central argument was not that his human rights were violated, rather that his immutable characteristic (*Corbiere*), which includes both his

religious beliefs and his religious conduct (*Amselem*), is not voluntary (*Quebec v A*), and conduct must be voluntary in order to be misconduct.

43. The SST AD erred in finding at paragraph 50 that "[t]he preponderant evidence before the General Division shows that the Claimant, after being denied an exemption, voluntary [*sic*] made the decision not to follow the employer's Policy". This is an error because the Applicant's conduct-governing immutable characteristic (*Amselem*; *Corbiere*) which is not a choice (*Quebec v A*) means it was not possible for him to be vaccinated.

44. The SST AD's statement at paragraph 51 that the SST GD made "no reviewable error" by reason of "decid[ing] the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act" is misleading: the General Division did not decide the issue solely within the parameters set out by the Federal Court of Appeal, because the Federal Court of Appeal has imposed the "parameter" of ***voluntariness***; and, the Supreme Court of Canada, to which both the SST and the Federal Court of Appeal are subordinate, has ruled that immutable characteristics are ***not voluntary*** in any legislative context (*Quebec v A*). In this way, the General Division followed neither the Federal Court of Appeal nor the Supreme Court of Canada.

45. The SST AD erred in finding at paragraph 52 that "the Commission has proven on a balance of probabilities that the Claimant was dismissed because of misconduct". This is an error because misconduct must be voluntary and the Supreme Court of Canada has ruled that immutable characteristics are not voluntary in any legislative context (*Quebec v A*). This, of course, includes the *EI Act*.

46. The SST AD erred in finding at paragraph 58 that "the General Division did not fail to meaningfully grapple with the key issues or central arguments raised by the Claimant". This is an error because the key issue and central argument the Applicant raised before the SST GD was that his immutable characteristic cannot be misconduct pursuant to *Corbiere* and *Quebec v A*. The SST made no finding with reference to these crucial, on-point Supreme Court of Canada precedents and the argument attending them, which the Applicant specifically placed before both SST divisions.

47. Neither did the SST GD "correctly apply case law to the facts", because it ignored the high court case law binding both on itself and on the Federal Courts which decides unequivocally that immutable characteristics are not voluntary in any legislative context, which necessarily includes the EI legislative context (*Quebec v A*).

48. At paragraph 21, the SST AD errs in relying on *Nelson v Canada (Attorney General)*, 2019 FCA 222 [*Nelson*], the case the FCA relied on in *Francis*, because the *Nelson* case did not involve an immutable characteristic as the present case does. Alcohol consumption, whether social as in *Nelson* or compulsive as in a number of EI precedents is **not an immutable characteristic**.

49. At note 11, the SST AD errs in pointing to *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140 [*Karelia*], stating that "whether the root cause of an employee's dismissal was 'blameless'" is "beside the point". This ***citation*** is beside the point; *Karelia* did not have an immutable characteristic. The desire to blow off work to drive your daughter to the airport in Buffalo is not an immutable characteristic.

50. At paragraph 49, the SST AD errs in finding that the Federal Court has rendered "similar" decisions in the cases of *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Davidson v Canada (Attorney General)*, 2023 FC 1555; and *Matti v Canada (Attorney General)*, 2023 FC 1527. This is an error because none of these cases involved an immutable characteristic.

51. The SST AD's overarching error of approving the SST GD's overarching error engages an additional error: failure to consider whether an employee could possibly owe an employer a duty to extinguish his **immutable characteristic**, which the Supreme Court of Canada has stated is not possible (*Corbiere*; *Quebec v A*).

52. At paragraph 25, the SST AD states that it is "bound by decisions rendered by the federal courts" and that it does not "see any reason why it shouldn't [*sic*] follow *Abdo* and *Francis* in deciding the present appeal". The SST AD neglects to acknowledge it is also bound by decisions rendered by the Supreme Court of Canada—as is the Federal Court of Appeal.

53. The SST AD would not have run afoul of *Abdo v Canada (Attorney General)*, 2023 FC 1764 [*Abdo*] had it followed binding Supreme Court of Canada precedent ***the Federal Court has not ruled on to date***. For further certainty, the Federal Court in *Abdo* made absolutely no finding on that applicant's immutable characteristic vis-à-vis the Supreme Court of Canada cases of *Corbiere* and *Quebec and A*.

54. On the other hand, in the present case, the Applicant placed those Supreme Court of Canada cases **squarely before the SST GD**. The SST GD **ignored the binding precedents the Applicant explicitly placed before it**, and refused to engage with the Applicant's central argument which flowed from them, which was a **legal error**. The SST AD had an **obligation to correct** that error pursuant to its mandate under the *Department of Employment and Social Development Act*, SC 2005, c 34, based on any ground of appeal enumerated at section 58(1) of the same.

55. Additionally, at paragraph 11, the SST AD obtusely states that the Court in *Abdo* responded directly to "most if not all" of the present arguments raised before the SST AD. Notably, the *Abdo* decision did not stand in the way of the **principal argument the Applicant raised before the SST AD**, and before the SST GD, and which the SST skillfully overlooked: his immutable characteristic is not voluntary in any legislative context pursuant to *Corbiere* and *Quebec v A*.

56. Neither would the SST AD, in following the incontrovertible Supreme Court of Canada decisions in *Corbiere* and *Quebec v A*, have departed from *Francis v Canada (Attorney General)*, 2023 FCA 217 [*Francis*] because the *Francis* applicant made **no** submissions, and the *Francis* court made **no** findings, regarding an **immutable characteristic** pursuant to ***Corbiere*** and ***Quebec v A***. These precedents and the attendant argument were not before the Federal Court of Appeal in *Francis*.

57. These Supreme Court of Canada precedents and the Applicant's accompanying arguments are, however, squarely before this Court. Accordingly, the Applicant expects this Court will answer the question he has placed before it, **with reference to the Supreme Court of Canada precedents supporting his argument**: whether, against all high court precedent on point, the SST AD was reasonable in approving the SST GD's

decision that the Applicant had a choice to **change** that which is neither a choice nor **changeable**, and in not **changing** that which is **unchangeable**, somehow committed misconduct.

This application will be supported by the following: the *Employment Insurance Act*, SC 1996, c 23; *Federal Courts Act*, RSC 1985, c F-7; *Federal Courts Rules*, SOR/8-106; SST record; SST hearing audio recordings; and SST AD decision.

The applicant requests the SST to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the SS Tribunal to the applicant and to the Registry: SST AD hearing audio recording.

The applicant proposes the application be heard virtually.

January 23, 2024

Jody Wells
Barrister and Solicitor

James S.M. Kitchen
Barrister and Solicitor
203-304 Main Street South
Suite 224
Airdrie, AB T4B 3C3

T: 250-319-1175
E: jody@jsmklaw.ca

Counsel for the Applicant