Federal Court of Appeal  Cour d'appel fédérale

Date: 20220513

Docket: A-198-21

Citation: 2022 FCA 82

CORAM: **PELLETIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JENNIFER HULL

Respondent

Heard by online video conference hosted by the Registry

on March 24, 2022.

Judgment delivered at Ottawa, Ontario, on May 13, 2022.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] This is an application for judicial review of the decision of the Appeal Division of the Social Security Tribunal (Appeal Division) dated June 22, 2021 (2021 SST 292). The Appeal Division upheld the decision of the General Division dated February 26, 2021 (2021 SST 293),

which found on a balance of probabilities that Ms. Jennifer Hull (the respondent) elected to receive the option of standard parental employment insurance (EI) benefits when she applied for benefits. This factual finding was made notwithstanding the respondent having selected the option of extended parental employment insurance benefits on the application form and having received the payment of extended parental benefits for several months. The Appeal Division summarized that the General Division did not find that Ms Hull's election was invalid. It should be noted that the General Division never held that the election was invalid, rather, it found that Ms. Hull had elected standard benefits, even though her application form indicated that she had elected extended benefits.

[2] The notice of application and other materials were served on the respondent in accordance with the *Federal Courts Rules*, S.O.R./98-106 but she did not participate in this judicial review.

[3] The issue in this application for judicial review is whether the decision of the Appeal Division that the General Division did not make any error of law in how it interpreted "elect" for the purposes of subsection 23(1.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the EI Act) is reasonable. The General Division interpreted "elect" as meaning what a person intended to elect and not necessarily what that person indicates as their election in their application form.

II. Background

[4] A brief factual backdrop is important for context.

[5] The respondent applied online for maternity benefits and extended parental benefits on November 17, 2019. Her child was born at the time of her application. On the electronic application form, she indicated that she wanted extended benefits and 52 weeks of parental benefits following her 15 weeks of maternity benefits.

[6] On December 5, 2020, approximately nine months after she started receiving the extended parental benefits, the respondent contacted the Canada Employment Insurance Commission (Commission) and asked it to amend her election of parental benefits from extended to standard benefits. The respondent claimed she only discovered that she had elected extended benefits when she returned to work in November 2020, and received a parental benefit payment. The respondent did not allege that she had been explicitly misdirected, but rather that she was confused by the information in the application form.

[7] The Commission relied on the language of subsection 23(1.2) of the EI Act which sets out that the election she made was irrevocable because she had started to receive payments on her claim, and denied her request.

[8] The respondent appealed the Commission's decision to the General Division.

[9] The General Division disagreed with the Commission's position. It determined that the respondent did not intend to elect extended parental benefits on her application form. The General Division determined that the respondent was confused by the information on the application form. It noted that the respondent immediately contacted the Commission when she

received a benefit payment after returning to work. The General Division made a finding of fact that the respondent did not want to opt for extended EI parental benefits, but rather wanted standard EI parental benefits. The General Division made a distinction between whether the respondent has elected extended parental benefits "in the first place". That is, it evaluated evidence to determine which type of benefit the respondent intended to elect at the time she was applying for parental benefits. This, according to the General Division, is not the same question as whether the respondent changed her election.

[10] The Commission appealed.

[11] The Appeal Division agreed with the General Division. The Appeal Division concluded that the General Division did not err in law when it found that the respondent did not elect extended parental benefits, contrary to the choice she made on the application form. The Appeal Division also found that the General Division did not exceed its jurisdiction by giving a decision that the Commission itself could not have given.

III. Standard of Review

[12] The standard of review in this application for judicial review is reasonableness. This Court need only consider whether the Appeal Division's reasons and conclusion are reasonable (*Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109, [2020] F.C.J. No. 738 (QL) at para. 11; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 83, 86 [*Vavilov*]; *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6, [2020]

F.C.J. No. 15 (QL) at para. 34). The exercise of statutory interpretation is also reviewed on a reasonableness standard (*Vavilov* at para. 115).

[13] According to the principles enunciated in *Vavilov*, in this judicial review:

1) the reviewing Court must determine "…whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (at para. 99);

2) "[w]hether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.… What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting." (at para. 110);

3) While "[a]dministrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case." (at para. 119); and "… the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretative exercise …" (at para. 120);

4) "The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome." (at para. 121); and

5) "Finally, even though the task of a court conducting a reasonableness review is not to perform a de novo analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue" (at para.124).

IV. Issues

[14] Regarding the interpretation of subsection 23(1.1) of the EI Act, the General Division made a finding of fact that the respondent had elected standard benefits in the first place rather than extended benefits. Therefore, according to the General Division, as upheld by the Appeal Division, the actual election was for standard benefits all along. The respondent did not "change" her election in that sense. Having made this finding of fact, neither the Appeal Division nor the General Division substantially addressed the issue of what Parliament meant by "elect" in subsection 23(1.1) of the EI Act and neither grappled with the impact of the respondent having been paid extended benefits for several months and the application of those facts to subsection 23(1.2) of the EI Act.

[15] Appeals of the General Division are brought to the Appeal Division, on leave being granted. Subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the DESD Act) sets out the grounds of appeal that allow the Appeal Division to interfere with the decision of the General Division. The Appeal Division must be satisfied that the General Division: (1) failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction; (2) erred in law in making its decision; or (3) 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. The only errors alleged by the Commission before the Appeal Division were that the General Division erred in law or exceeded its jurisdiction. Before this Court, the Commission (represented by the Attorney General of Canada) focuses its

argument on errors of law made by the General Division and the Appeal Division, rendering the Appeal Division's decision unreasonable.

[16] Therefore, this being a reasonableness review of the Appeal Division's decision, the issue is whether it was reasonable for the Appeal Division to conclude that the General Division had not erred in law in its statutory interpretation of subsections 23(1.1) and 23(1.2) of the EI Act. Here, the question of "what is the election contemplated by subsection 23(1.1) of the EI Act" is a question of law.

[17] In addition, the Appeal Division's failure to follow binding jurisprudence will be examined.

[18] For the following reasons, I am of the view that the Appeal Division decision is unreasonable on both of these issues and I would grant the application for judicial review.

V. Relevant Provisions of the EI Act

[19] Under the EI Act, parental benefits are calculated separately from maternity benefits. A claimant who is pregnant can claim maternity benefits for a maximum number of 15 weeks prior to receiving parental benefits.

[20] Parental benefits are paid to a claimant who is caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption.

Regarding parental benefits, there are two options a claimant can elect, either standard (see subparagraph 12(3)(*b*)(i) of the EI Act) or extended (see subparagraph 12(3)(*b*)(ii) of the EI Act). Standard benefits are available for up to 35 weeks for one parent at 55% of the claimant's weekly insurable earnings (40 weeks if sharing) while extended benefits are available for up to 61 weeks for one parent at 33% of the claimant's weekly insurable earnings (69 weeks if sharing).

[21] Importantly for this judicial review, the payment of parental benefits is subject to the election of either standard or extended benefits as required under subsection 23(1.1) of the EI Act. After the election is made, subsection 23(1.2) provides that the election is irrevocable once benefits are paid.

[22] Subsections 23(1.1) and 23(1.2) are reproduced here:

Election by claimant	**Choix du prestataire**
23 (1.1) In a claim for benefits made under this section, a claimant shall elect the maximum number of weeks referred to in either subparagraph 12(3)(b)(i) or (ii) for which benefits may be paid.	**23 (1.1)** Dans la demande de prestations présentée au titre du présent article, le prestataire choisit le nombre maximal de semaines, visé aux sous-alinéas 12(3)b)(i) ou (ii), pendant lesquelles les prestations peuvent lui être versées.
Irrevocability of election	**Irrévocabilité du choix**
(1.2) The election is irrevocable once benefits are paid under this section or under section 152.05 in respect of the same child or children.	**(1.2)** Le choix est irrévocable dès lors que des prestations sont versées au titre du présent article ou de l'article 152.05 relativement au même enfant ou aux mêmes enfants.

[23] Also at issue in the EI Act are subsections 48(1), (2) and (3):

Claim required	**Nécessité de formuler une demande**
48 (1) No benefit period shall be established for a person unless the person makes an initial claim for benefits in accordance with section 50 and the regulations and proves that the person is qualified to receive benefits.	**48 (1)** Une personne ne peut faire établir une période de prestations à son profit à moins qu'elle n'ait présenté une demande initiale de prestations conformément à l'article 50 et aux règlements et qu'elle n'ait prouvé qu'elle remplit les conditions requises pour recevoir des prestations.
Information required	**Renseignements requis**
(2) No benefit period shall be established unless the claimant supplies information in the form and manner directed by the Commission, giving the claimant's employment circumstances and the circumstances pertaining to any interruption of earnings, and such other information as the Commission may require.	**(2)** Aucune période de prestations ne peut être établie à moins que le prestataire n'ait fourni, sous la forme et de la manière fixées par la Commission, des précisions sur son emploi et sur la raison de tout arrêt de rémunération, ainsi que tout autre renseignement que peut exiger la Commission.
Notification	**Notification**
(3) On receiving an initial claim for benefits, the Commission shall decide whether the claimant is qualified to receive benefits and notify the claimant of its decision.	**(3)** Sur réception d'une demande initiale de prestations, la Commission décide si le prestataire remplit ou non les conditions requises pour recevoir des prestations et lui notifie sa décision.

[24] Finally, subsection 50(3) of the EI Act is considered. It reads as follows:

Form	**Formulaire**

50 (3) A claim for benefits shall be made by completing a form supplied or approved by the Commission, in the manner set out in instructions of the Commission.	**50 (3)** Toute demande de prestations est présentée sur un formulaire fourni ou approuvé par la Commission et rempli conformément aux instructions de celle-ci.

VI. Analysis

[25] At the outset, I recognize that the outcome of this judicial review may be financially harsh for the respondent. I note with concern that she was not provided with a copy of her completed application form or any confirmation from Services Canada when it received and accepted her claim for extended parental benefits, which might have allowed her to reconsider her request for extended parental benefits during the 15-week window she was paid maternity benefits. As mentioned at paragraph 56 of the decision of the Appeal Division, it would be useful if the Commission could send a statement to each claimant before they send the first parental benefit payment, as a matter of practice. This statement could be sent electronically to confirm the date the first payment of the parental benefit is to be made, the type of benefit, the number of weeks of parental benefits to be paid, and the rate and amount of each payment.

[26] Turning to my analysis, while the Commission advances several arguments in support of its position, in my view, there are two main areas where the Appeal Division decision is unreasonable:

1) It did not follow binding jurisprudence (*Karval v. Canada (Attorney General)*, 2021 FC 395 [*Karval*]); and

2) It upheld the General Division despite the error in law in the General Division's statutory interpretation of subsections 23(1.1) and 23(1.2) of the EI Act.

A. *Failure to follow binding jurisprudence: Karval*

[27] I understand that there are several conflicting Tribunal decisions issued by the General Division and the Appeal Division in matters involving the application of subsections 23(1.1) and 23(1.2) of the EI Act. Indeed, the General Division was persuaded by Tribunal decisions that allowed claimants to argue that the Commission misinterpreted their choice of election of parental benefits in the first place. These reasons may help clarify the law in this area.

[28] Turning to the binding jurisprudence, *Karval* was released after the General Division issued its decision and therefore the General Division cannot be faulted for not considering it.

[29] Contrary to what the Appeal Division stated, *Karval* does not stand for the proposition that a claimant can change her election once benefit payments have started flowing to her. In *Karval*, the Federal Court judge confirmed, at paragraph 8, that a claimant cannot change her mind once benefits have been paid to her because subsection 23(1.2) of the EI Act prohibits such a change.

[30] Further, the Federal Court judge stated that lack of knowledge on the part of the claimant of the limitation set in subsection 23(1.2) of the EI Act is not indicative of an error by the Commission. The online application was clear that benefits under the standard option will be calculated at 55% of weekly insurable earnings and, if the extended option is chosen, at the

reduced rate of 33%. Moreover, the Federal Court judge found that the application included the following information: once parental benefits have been paid on the claim, the choice between standard and extended parental benefits is irrevocable (*Karval* at para. 9).

[31] The Appeal Division's reliance on *Karval* is misplaced. *Karval* did not support the Appeal Division's statement that "claimants do not necessarily know what it is they do not know", that being that ignorance of the law is an excuse. Rather, *Karval* determined that there is no legal remedy available to claimants who based their election on a misunderstanding of the parental benefit scheme. That is also what happened here. The respondent says she was confused by the information on the application form when she elected extended parental benefits. As in *Karval*, she attempted to amend her election through the Commission even after she started receiving extended benefit payments. *Karval* is clear that in such a case, under subsection 23(1.2) of the EI Act, she was precluded from changing her election (*Karval* at para. 16).

[32] The Federal Court judge opined, in *obiter*, that there may be recourse if a claimant is misled. *Obiter dicta* are not binding. Importantly, the Federal Court judge found that Ms. Karval was not misled by the Commission (*Karval* at para. 14). Likewise, in the present judicial review, the respondent had not been misdirected (Appeal Division decision at para. 71).

[33] Thus, I find that the Appeal Division's decision is unreasonable because it did not follow a binding precedent in which the same provision has been interpreted (*Vavilov* at para. 112).

B. *Did the General Division err in law in its statutory interpretation of subsections 23(1.1) and 23(1.2) of the EI Act? That is, was it reasonable for the Appeal Division to find that the General Division did not err in law?*

[34] The question of law for the purpose of subsection 23(1.1) of the EI Act is: does the word "elect" mean what a claimant indicates as their choice of parental benefit on the application form or does it mean what the claimant "intended" to choose?

[35] The General Division did not undertake a formal interpretive exercise when it examined the text of subsections 23(1.1) and 23(1.2) of the EI Act. I recognize that there is no requirement for an administrative decision maker to do so, however, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision (*Vavilov* at paras. 119-121).

[36] The General Division stated that, on a balance of probabilities, the respondent did not elect extended parental benefits. It found it is more likely than not that she elected standard parental benefits (General Division decision at para. 4). By making this factual finding, the General Division appears to be interpreting the term "elect" for the purposes of subsection 23(1.1) of the EI Act as meaning something other than what the person has selected on the application form.

[37] The General Division specified that a claimant's election cannot change once any amount of parental benefits are paid (General Division decision at para. 6). It did not specifically consider the context but did consider that the purpose of subsections 23(1.1) and 23 (1.2) of the EI Act was to prevent claimants from switching back and forth between the standard and

extended parental benefit options (General Division decision at para. 12). In other words, the General Division does not take issue with the operation of subsection 23(1.2) of the EI Act and the irrevocability of the election once made. It interprets the word “election” to mean what the claimant intends, rather than what the claimant actually chose on the application form. In the General Division’s view, it was within its authority to (1) consider the respondent’s intention or state of mind at the time she filled in the application form and (2) determine what the respondent’s “actual” election was, as opposed to what she indicated on the application form. This is the extent of the statutory interpretation undertaken by the General Division.

[38] The Appeal Division focused on the General Division’s fact-finding role, and reasoned that nothing prevented the General Division from considering the evidence surrounding the respondent’s intent at the time of the election.

[39] The Appeal Division stated that the term “election” was not defined in the EI Act. It noted that there was no evidence of the respondent having been misled, but found that the General Division could assess whether the respondent actually made a deliberate choice to elect the extended parental benefit (Appeal Division decision at paras. 83, 84 and 85). According to the Appeal Division, this fact-finding exercise was appropriate and it was open to the General Division to find that the respondent was confused by the information on the application form, had made a mistake, and had not intended to elect extended parental benefits. It reasoned, at paragraphs 49 and 50, that the General Division did not decide that the respondent should be permitted to change her mind nor did it find that her election was “invalid”. Rather, the General

Division found that the respondent had never intended to make the election of extended parental benefits.

[40] By interpreting the word “election” in subsection 23(1.1) as allowing the General Division to consider the respondent’s intent at the time of the election, it appears that the General Division and the Appeal Division were more concerned with the outcome, rather than the legislative text. V*avilov* has taught us that “[t]he decision maker’s responsibility is to discern meaning and legislative intent, not to “reverse-engineer” a desired outcome.” (*Vavilov* at para. 121).

[41] Neither the Appeal Division nor the General Division dealt with the application of subsection 23(1.2) of the EI Act to the fact that extended benefits had been paid for several months.

[42] In the course of my review of the General Division’s interpretation of subsection 23(1.1) of the EI Act, as upheld by the Appeal Division, it has become clear to me that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the provision. The General Division’s interpretation is not supported by the clear language of the text, the context or the purpose of the EI Act. The statutory interpretation leads me to the conclusion that there is only one right answer, and therefore the Appeal Division’s reasons are unreasonable (*Vavilov* at para. 124).

C. *Text*

[43] The plain text of subsection 23(1.1) of the EI Act requires the claimant to elect the maximum number of weeks for which parental benefits may be paid.

[44] The term “claimant” is defined under subsection 2(1) the EI Act as “a person who applies or has applied for benefits”. It is obvious that the claimant here is the respondent.

[45] The interpretation of the term “elect” is what is at issue. It is not defined in the EI Act. According to the Oxford English Dictionary (Online: https://www.oed.com), the ordinary meaning of the verb “elect” is “to pick out, choose … to make a deliberate choice…”. The ordinary meaning of the noun “election” is the act of choosing; the exercise of a deliberate choice or preference.

[46] The ordinary meaning of the text of subsection 23(1.1) provides that when applying for parental benefits, the claimant must choose between two options, either standard parental benefits (up to 35 weeks payable to one parent) or extended parental benefits (up to 61 weeks if payable to one parent).

[47] Here, the ordinary meaning of the text of subsection 23(1.1) supports the position that what the respondent elected was what the respondent chose on her application form, *i.e.* the extended parental benefits for the precise number of 52 weeks. By choosing this option, she informed the Commission of her choice of extended parental benefits, without anything to indicate that this was not her deliberate choice.

[48] Regarding the plain text of subsection 23(1.2) of the EI Act, I find that its language is also clear.

[49] According to the Oxford English Dictionary (*supra*), the ordinary meaning of the adjective “irrevocable” describes something “that cannot be revoked, repealed, annulled, or undone; unalterable, irreversible”. Therefore, once the choice of parental benefit and the number of weeks are chosen on the application form, *and upon payment of those benefits*, it is impossible to change, alter, undo or revoke the choice. Therefore, the act of the payment of benefits renders the election irrevocable. This provision is precise and unequivocal, and therefore the ordinary meaning plays a dominant role in the interpretative process (*Vavilov* at para. 120 citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10).

D. *Context*

[50] The context is important to consider. Employment benefits generally provide temporary income support to unemployed workers. The EI Act provides for special benefits to assist workers who are away from work because of a recent childbirth or adoption. In the case of new mothers, maternity benefits are available under subsection 22(2) of the EI Act. Separate from but in addition to maternity benefits, parental benefits are available to parents for the care of one or more new-born children (including through adoption) under subsection 23(1) of the EI Act.

[51] The operation of subsection 23(1.2) prevents a change in the election of parental benefits once the claimant receives her first payment of parental benefits; the election as described on the application form cannot be altered. There does however remain a window of opportunity for

claimants to verify and modify their parental benefit election up until a payment of the parental benefit is received, for example, while the claimant is still receiving maternity benefits. This change may be accomplished by the claimant checking on her individual web account “My Service Canada Account” and requesting that the Commission change her election prior to the payment of the benefit.

[52] The process of applying for parental benefits is also important to consider for context.

[53] Subsection 48(1) provides that no benefit period will be established unless the person makes an initial claim for benefits and proves that she is qualified to receive benefits. Therefore, it is evident that the respondent must make the claim and start the process to qualify and receive benefits. The election of the type of benefit and the number of weeks selected on the application form are required to commence the process.

[54] Subsection 48(2) further specifies that the claimant must supply the information in the form and manner directed by the Commission. Once again, the respondent must provide her employment circumstances and other circumstances pertaining to her interruption in earnings in accordance with the form provided by the Commission. There is nothing confusing in this process. The language is mandatory. The onus is on the respondent and she is required to provide the information because only she knows of her circumstances. The Commission will review the application only once the relevant information is provided and the form is completed, again, including the election of the specific parental benefit and the number of weeks.

[55] Subsection 48(3) of the EI Act specifies that on receiving the claim for benefits, the Commission shall decide whether the claimant is qualified to receive benefits, and then notifies the claimant of its decision. Nothing in this provision allows the Commission to initiate a change on the application form. Its mandate is to review the application and make a decision as to whether the claimant qualifies for benefits based on the information provided by the claimant.

[56] Finally, regarding the form of the application, subsection 50(3) provides that a claim for benefits shall be made in the manner directed by the Commission. In this case, the form was online, therefore, the choice of extended parental benefit made by the respondent by "clicking" that option was recorded by the Commission as having been her election, as was the number of 52 weeks that she wanted to claim. That is the evidence of the election upon which the Commission relied. Once again, the Commission is not involved in determining whether the claimant has selected the "right" option. The onus lies on the claimant to elect, and for good reason. Only she can know of her circumstances. The act of her selecting the option and the number of weeks on the application form is the election.

E. *Purpose*

[57] The purpose of subsections 23(1.1) and (1.2) of the EI Act was touched upon by the Appeal Division. The Appeal Division rightfully acknowledged Parliament's intent that the election of parental benefits not be changed simply because a claimant changed their mind (Appeal Division decision at para. 47). However, it disregarded why Parliament specifically chose to make the election irrevocable. The purpose of irrevocability allows certainty for Service Canada, certainty for the other spouse who may have also applied for benefits, certainty for the

claimant's employer and I would add certainty for the spouse's employer. All of these parties may be affected by the claimant's election once benefit payments have started.

[58] The importance of this certainty was confirmed in the Minutes of the Standing Committee on Finance (Applicant's Record, Vol. IV, Appendix C, Tab 1). Mr. Andrew Brown, the witness from Employment and Social Development Canada, testified that "if people were changing their selection of the duration of the leave, and also the payment rate, whether the lower 33% or the higher 55%, it could result in incorrect payments to claimants, which we would subsequently have to recover, and in challenges for their employers dealing with both the leave and any top-ups they needed to provide to those employees".

[59] Therefore, apart from ensuring certainty and efficiency for the Commission once payments have started, these other parties are equally deserving of certainty and efficiency in their financial planning.

[60] This purpose also supports a finding that what a claimant elects must be what is indicated in the application form (which would allow all those affected by the election to know what it is) and not what is in the claimant's head (which would lead to uncertainty for those affected).

[61] Having completed this task, I am mindful that our role, as a reviewing Court, is not to embark on our own interpretative exercise. However, in the circumstances of this case, it is appropriate having regard the failure of the General Division and the Appeal Division to grapple

with the impact of the benefit payments having started in this case, and the issue being a question of law.

[62] The Appeal Division's and the General Division's interpretation of subsection 23(1.1) of the EI Act is not justified. In my view the precise wording of the text, the surrounding context and the purpose of subsection 23(1.1) of the EI Act leaves room for a single interpretation (*Vavilov* at paras. 110 and 124).

[63] The answer to the question of law for the purpose of subsection 23(1.1) of the EI Act is the word "elect" means what a claimant indicates as their choice on the application form. The election is the choice of the parental benefit on the form.

[64] It follows, pursuant to subsection 23(1.2) of the EI Act, that once a claimant has chosen on the application form the parental benefit and the number of weeks she wishes to claim, and once payments of those benefits have started, it is impossible for the claimant, the Commission, the General Division or the Appeal Division to revoke, alter or change the election.

[65] Thus, the General Division erred in law in its interpretation of subsection 23(1.1) of the EI Act. This result renders the decision of the Appeal Division unreasonable.

VII. Conclusion

[66] The Appeal Division did not follow binding jurisprudence and did not find that the General Division erred in law in its statutory interpretation of subsection 23(1.1) of the EI Act. Therefore, I find the Appeal Division decision unreasonable.

[67] For these reasons, I would allow the application for judicial review, quash the decision of Social Security Tribunal (Appeal Division) dated June 22, 2021, and remit the matter back to the Social Security Tribunal (Appeal Division) for redetermination in accordance with these reasons, all without costs.

"Marianne Rivoalen"
J.A.

“I agree.
J. D. Denis Pelletier J.A.”

“I agree.
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Tiffany Glover	FOR THE APPLICANT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT ATTORNEY GENERAL OF CANADA