

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20230308**

**Docket: A-74-22**

**Citation: 2023 FCA 51**

**CORAM: LASKIN J.A.  
MACTAVISH J.A.  
MONAGHAN J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**JOHN CALVIN PETTINGER**

**Respondent**

Heard by online video conference hosted by the Registry on March 7, 2023.

Judgment delivered at Ottawa, Ontario, on March 8, 2023.

**REASONS FOR JUDGMENT BY:**

**MONAGHAN J.A.**

**CONCURRED IN BY:**

**LASKIN J.A.  
MACTAVISH J.A.**

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**REASONS FOR JUDGMENT**

**MONAGHAN J.A.**

[1] Shortly before his child's first birthday, John Calvin Pettinger took a 15-week parental leave from his employment and applied for 15 weeks of parental benefits under the *Employment Insurance Act*, S.C. 1996, c. 23.

[2] The *Employment Insurance Act* provides that a claimant for parental benefits “shall elect” the maximum number of weeks of benefits and that the election is irrevocable once benefits are paid: subsections 23(1.1) and 23(1.2).

[3] In his application, Mr. Pettinger chose standard parental benefits. Because standard parental benefits are available only during the 52 weeks following the child’s birth, Mr. Pettinger received only two weeks of benefits.

[4] Mr. Pettinger contacted the Canada Employment Insurance Commission (Commission) and asked to change his choice to extended parental benefits. The Commission denied that request advising him that once benefits are paid, the election is irrevocable. Mr. Pettinger asked the Commission to reconsider, but it maintained its position.

[5] Mr. Pettinger successfully appealed that decision to the Social Security Tribunal General Division. Mr. Pettinger did not suggest that he had not chosen standard parental benefits, and the General Division found “his choice was clear”. Rather, Mr. Pettinger explained that when he made his choice he did not understand that standard parental benefits could only be paid during the 52 weeks following the birth of his child.

[6] The General Division found Mr. Pettinger did not make a valid election because the application form did not give him all the information he needed to make a valid choice. Because his first election was invalid, the General Division said he could make a new election for extended parental benefits.

[7] The Commission appealed that decision to the Appeal Division of the Tribunal arguing the General Division made errors of law and exceeded its jurisdiction in changing Mr. Pettinger's election after benefits had been paid and in determining the validity of his election. The Appeal Division disagreed and accordingly, in a decision dated March 8, 2022 (file number AD-21-349), dismissed the Commission's appeal.

[8] The Attorney General of Canada now seeks judicial review of that decision. The question before us is whether the Appeal Division's decision that the General Division did not make an error is reasonable: *Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109 at para. 11; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 83 and 86 [*Vavilov*]; *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6 at para. 34. If it is, then the application for judicial review must be dismissed.

[9] Although the notice of application and other materials were served on Mr. Pettinger in accordance with the *Federal Courts Rules*, S.O.R./98-106, he did not file a notice of appearance or participate in the judicial review hearing.

[10] To be reasonable, a decision must be "defensible in respect of the facts and law"; the "governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority": *Vavilov* at paras. 86 and 68.

[11] This Court has held that subsections 23(1.1) and (1.2) of the *Employment Insurance Act* allow for only one interpretation. The word "elect" means "what a claimant indicates as their

choice on the application form” 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”: *Canada (Attorney General) v. Hull*, 2022 FCA 82 at paras. 62-64 [*Hull*].

[12] Notwithstanding that the Appeal Division issued its decision before this Court’s decision in *Hull*, that decision is unreasonable for the reasons given in *Hull*. Once Mr. Pettinger made his election and benefits were paid, his election could not be changed by him, the Commission, or the Social Security Tribunal.

[13] Accordingly, I would allow the application for judicial review. Although courts should generally respect Parliament’s intention to entrust matters to administrative decision-makers, it may be appropriate to decline to remit a matter to an administrative decision-maker where it is evident to the Court that a particular outcome is inevitable: *Canada (Attorney General) v. Burke*, 2022 FCA 44 at paras. 115-117.

[14] In my view, given the law and the findings of fact in this case, no useful purpose would be served by remitting the matter back to the Social Security Tribunal (Appeal Division) for redetermination because only one reasonable conclusion would be open to it. Counsel for the applicant agrees. Accordingly, I would set aside the decision of the Social Security Tribunal

(Appeal Division) dated March 8, 2022 and, giving the order it should have given, allow the Commission's appeal of the decision of the Social Security Tribunal (General Division), all without costs.

"K.A. Siobhan Monaghan"

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J.A.

"I agree  
J.B. Laskin J.A."

"I agree  
Anne L. Mactavish J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF THE LEAVE TO APPEAL  
DECISION OF THE SOCIAL SECURITY TRIBUNAL'S APPEAL DIVISION  
("APPEAL DIVISION") DATED OCTOBER 1, 2021, NO. AD-21-349**

**DOCKET:** A-74-22

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v. JOHN CALVIN  
PETTINGER

**PLACE OF HEARING:** HEARD BY ONLINE VIDEO  
CONFERENCE HOSTED BY  
THE REGISTRY

**DATE OF HEARING:** MARCH 7, 2023

**REASONS FOR JUDGMENT BY:** MONAGHAN J.A.

**CONCURRED IN BY:** LASKIN J.A.  
MACTAVISH J.A.

**DATED:** MARCH 8, 2023

**APPEARANCES:**

Marcus Dirnberger FOR THE APPLICANT

**SOLICITORS OF RECORD:**

Shalene Curtis-Micallef FOR THE APPLICANT  
Deputy Attorney General of Canada