Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

PAUL TAYLOR

Applicant

- and -

PIVOTAL INTEGRATED HR SOLUTIONS

Respondent

FACTUM OF THE MOVING PARTY, WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

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Applicant

FACTUM OF THE MOVING PARTY,
WORKPLACE SAFETY & INSURANCE APPEALS TRIBUNAL

PART I. OVERVIEW

1. The Workplace Safety and Insurance Appeals Tribunal ("WSIAT" or "Tribunal"), moves for the following relief:

(a) An Order adding the Tribunal as a party to the Application;

(b) An Order dismissing the Application as an abuse of process; and

(c) In the alternative, an Order that the Application be stayed until the Applicant satisfies unpaid costs orders against him in a related action, described below.

2. The Applicant has commenced and abandoned two previous applications seeking judicial review of the Tribunal decisions at issue, in which he named the Tribunal as respondent. He also brought an action in the Superior Court against the Tribunal and the Workplace Safety and Insurance Board ("WSIB"), arising out of the same Tribunal decisions ("Prior Action"). The Prior Action was dismissed by the Superior Court, and the Applicant's appeal to the Court of Appeal and further application for leave to appeal to the Supreme Court of Canada were also dismissed.

3. In the present Application, the Applicant has resisted naming the Tribunal as a party, perhaps seeking to avoid the participation of a party that is aware of this prior history. The Tribunal, however, has a clear statutory right to party status under s.9(2) of the *Judicial Review Procedure Act* ("*JRPA*"), as has been explained to the Applicant.

4. The Tribunal decisions at issue were made in 2008 and 2013, respectively. The Tribunal seeks to have the Application to judicially review these decisions dismissed for

extreme delay. Tribunal counsel advised the Applicant in 2013 that the proper procedural route to challenge the Tribunal decisions was an application for judicial review to this Court. The Applicant ignored this advice, and instead commenced the Prior Action – leading the Tribunal on a 7-year wild goose chase through the courts, before ultimately commencing this Application – exactly what Tribunal counsel advised was the proper procedure 7 years ago. This conduct, and the extreme delay, rise to the level of an abuse of process.

5. The Applicant, now a licensed paralegal, is quick to claim entitlement to special consideration as a self-represented litigant. Yet there is a clear pattern of him ignoring straightforward procedural information, whether provided by Tribunal counsel or the courts. He should not be permitted to litigate endlessly and repetitively, without consequences.

6. Further, it appears that the Applicant seeks to rely in this Application on a surreptitious recording he made of the Tribunal's panel members having a private in-caucus discussion, during hearings held in 2007. In the Prior Action, the courts unanimously ruled that the recording was inadmissible, as a violation of deliberative secrecy. His apparent attempt to relitigate issues determined in the Prior Action is also an abuse of process.

7. In addition, there are unpaid costs orders against the Applicant from the Prior Action, in favour of the Tribunal ($5500) and the WSIB ($5000). As an alternative to dismissal of the Application, the Tribunal seeks an order that the Application be stayed until these costs orders are paid.

PART II. FACTS

A. The Applicant's Initial Injury and Benefits

8. The Applicant was injured on the job on February 6, 1997, while unloading a large shipment of goods from a truck.[1] His claim for Loss of Earnings ("LOE") benefits was allowed by the WSIB for the period from February 6 to April 30, 1997. He had a second accident on August 20, 1997, which aggravated his injury. His claim for LOE benefits arising from the second accident was allowed for the period from August 20, 1997 to August 1998. At that time, he was assessed and advised that he should be able to return to work with restrictions on repetitive bending and heavy lifting.[2] From August 17, 1998 to October 2, 1998 he participated in a modified work program with his previous employer at reduced hours. He left work again on October 2, 1998.

9. The WSIB subsequently determined that the modified work the Applicant was performing from August to October 1998 was not physically suitable. For the period from October 2 to December 16, 1998, the WSIB found that the Applicant was not working, and there was no proof that he was searching for work. Therefore, he was awarded benefits limited to 50% of his weekly compensation for that period.

10. The Applicant returned to work with his previous employer on December 16, 1998, and worked until January 13, 1999, when he discontinued his work due to back problems. From January 13, 1999 to March 8, 2000, he was again awarded benefits limited to 50% of his weekly compensation, on the basis that there was no evidence that he was involved in a self-directed job search during this time. He worked for his

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[1] WSIAT Decision No. 691/05, para.1, Affidavit of Michelle Alton sworn Sept. 18, 2020 ("Alton Affidavit"), Ex. A, *Motion Record* ("*MR*") Tab 2A.

[2] WSIB Decision dated Sept. 28, 2001, Alton Affidavit, Ex. C, *MR* Tab 2C.

previous employer for a brief period from May 26, 1999 (packing cassettes), but was taken off the job roster in August 1999.[3]

11. In January 2000, the WSIB awarded the Applicant a 14% “non-economic loss” (“NEL”) award, based on the conclusion that he had suffered a permanent partial disability in his lower back.[4]

12. In March 2000, the WSIB referred the Applicant for labour market re-entry (“LMR”) assistance. He was recommended for retraining in the area of Technical Occupations and Computer and Information Systems. He had expressed interest in the field of computers himself, and agreed to this area as a suitable employment or business (“SEB”) for him. From July to November 2000, he undertook academic upgrading at Career Essentials. From January to December, 2001, he attended and completed a WSIB-funded 52-week Network Engineering Diploma Program at Trios College, followed by a 12-month WSIB-supported job search program from January to December 2002. He secured employment as a systems support specialist with the City of Mississauga on Dec. 16, 2002.[5] He worked in that position until March 2003.

13. In or about 2002, after completing his diploma, the Applicant began to question whether he could meet the physical demands of network engineering, but was reassured that there were few physical demands inherent in the job, and any restrictions

[3] WSIB Decision dated Sept. 28, 2001, Alton Affidavit, Ex. C, *MR* Tab 2C.
[4] WSIB Decision dated Sept. 28, 2001, Alton Affidavit, Ex. C, *MR* Tab 2C.
[5] WSIB Decision dated Dec. 7, 2004, Alton Affidavit, Ex. D, *MR* Tab 2D.

on lifting could easily be accommodated.[6] In or about 2004, during the appeal process, the Applicant also raised colour-blindness as an impediment to working in this field.[7]

B. The Decisions of the WSIB

14. The Applicant appealed a number of issues to the Appeals Services Division of the WSIB, which ruled as follows in a series of decisions:

15. First, in a decision dated September 28, 2001, the WSIB determined:

- That the Applicant had not established entitlement for an upper back and neck injury (in addition to the lower back injury that the WSIB had already accepted) on his original injury date of Feb. 6, 1997;
- That the Applicant was not entitled to permanent injury benefits for his mid-back (in addition to the lower back NEL award that the WSIB had already granted);
- That the Applicant was not entitled to reimbursement for physiotherapy treatments under WSIB guidelines;
- That the Applicant was not entitled to the full 100% LOE benefits he claimed for the periods from Oct. 2, 1998 to Dec. 16, 1998 and from Jan. 13, 1999 to March 8, 2000, during which time he had been awarded 50% LOE benefits;
- However, he was entitled to be reimbursed for certain examinations he was required to re-write during his Trios College Retraining.[8]

16. Second, in a decision dated Dec. 7, 2004, the WSIB determined:

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[6] WSIB Decision dated Dec. 7, 2004, Alton Affidavit, Ex. D, *MR* Tab 2D.
[7] WSIB Decision dated Dec. 7, 2004, Alton Affidavit, Ex. D, *MR* Tab 2D.
[8] WSIB Decision dated Sept. 28, 2001, Alton Affidavit, Ex. C, *MR* Tab 2C.

- That the Applicant did not meet the criteria for a Labour Market Re-entry (LMR) reassessment, and a new SEB;
- That the Applicant was not entitled to LOE benefits for the periods from April 2003 to February 2004, and from June 2004 to the date of the decision; and
- That the WSIB had correctly determined his future economic loss awards.[9]

17. The Applicant sought reconsideration of and/or amendment to these decisions from the WSIB, which denied his requests in three further decisions.[10]

C. The WSIAT's Decisions

18. There are two Tribunal decisions at issue in this case ("Tribunal Decisions"). First, the Applicant appealed all of the above WSIB decisions to the Tribunal, which held hearings on January 10, and July 3, 4, and 5, 2007. In a 61-page decision dated February 11, 2008 ("*Decision No. 691/05*"), the Tribunal allowed the Applicant's appeals in part as follows, but otherwise dismissed his appeals:

- The Applicant was granted initial entitlement to benefits for an injury to his neck on Feb. 6, 1997 (in addition to the award for his lower back already recognized by the WSIB); and
- The Applicant was granted entitlement for 100% LOE benefits for the periods from Oct. 2, 1998 to Dec. 16, 1998 and from Jan. 13, 1999 to March 8, 2000 (where the WSIB had granted entitlement for only 50%).[11]

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[9] WSIB Decision dated Dec. 7, 2004, Alton Affidavit, Ex. D, *MR* Tab 2D.
[10] Alton Affidavit, para 5.
[11] Tribunal *Decision No. 691/05* dated Feb. 11, 2008, Alton Affidavit, Ex. A, *MR* Tab 2A.

19. Second, some 4½ years later, in the fall of 2012, the Applicant sought reconsideration of the Tribunal's *Decision No. 691/05*.[12] The application was dismissed on June 13, 2013 ("*Decision No. 691/05R*"), with written reasons.[13]

D. The Applicant's Prior Action for Damages Against WSIAT and WSIB

20. The Applicant initially filed a notice of application under Rule 14 in the Superior Court, seeking relief in the nature of judicial review of the Tribunal Decisions, with no claim for damages.[14] Tribunal counsel wrote to advise him that an application for judicial review had to be brought in the Divisional Court.[15] The Applicant then abandoned his Rule 14 application.

21. The Applicant, however, ignored the advice of Tribunal counsel. On February 20, 2014, he issued a statement of claim, seeking the amount of $6,460,455 in damages, broken down into six categories, five of which related exclusively to the benefits he had been denied by the WSIB and Tribunal.[16] In response, the WSIB and Tribunal brought motions to strike the claim. On July 23, 2014, the Applicant substantially amended his statement of claim, in part to increase his claim to $16,710,455 (including a claim for $15 million in punitive damages). After several delays, the motion was heard by Justice Price on August 15, 2016.[17]

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[12] Tribunal *Decision No. 691/05R*, Alton Affidavit, Ex. B, *MR* Tab 2B.. The reconsideration motion was decided by a Vice-Chair who was not involved in the original hearing.
[13] Tribunal *Decision No. 691/05R*, paras. 18, 21-23, Alton Affidavit, Ex. B, *MR* Tab 2B.
[14] Notice of Application dated July 14,2013, Alton Affidavit, Ex. E, *MR* Tab 2E.
[15] Letter from WSIAT to P. Taylor dated July 11, 2013, Alton Affidavit, Ex. F, *MR* Tab 2F.
[16] Statement of Claim dated February 14, 2014, Alton Affidavit, Ex. G, *MR* Tab 2G..
[17] Reasons of Price J. dated Feb. 22, 2017, ("SCJ Reasons"), Alton Affidavit, Ex. H, *MR* Tab 2H.

22. Price J. analyzed the Amended Statement of Claim, and concluded that in essence, it sought relief that only the WSIB and Tribunal could grant. Accordingly, the court had no jurisdiction over the claim:

> [28] Mr. Taylor's action challenges the Tribunal's Appeal and Reconsideration Decision by alleging procedural and substantive errors. The proper process for asserting such errors is by an application for judicial review before the Divisional Court. This Court does not have jurisdiction to engage in a judicial review of the Tribunal's decisions in the context of an action.
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> [29] This Court has no jurisdiction to order some categories of relief which Mr. Taylor seeks in his action, including loss of earnings, future economic loss, and non-economic loss benefits, retraining expenses, costs of medical care, and interest on benefits that were not paid – all of which are within the exclusive jurisdiction of the Tribunal and the WSIB.[18]

23. His Honour referred to s.179 of the *Workplace Safety and Insurance Act* ("*WSIA*"), and further concluded that an action cannot be brought against the Tribunal for its actions in carrying out its quasi-judicial functions.[19] He also found that the action was frivolous, vexatious and an abuse of process, because the Applicant was attempting to relitigate claims that had been fully adjudicated by the WSIB and Tribunal,[20] and that the Amended Statement of Claim failed to disclose a reasonable cause of action.

24. With respect to the Applicant's surreptitious recording of the Tribunal panel's in-caucus conversation, Price J. reviewed the evidence and held that the recording was made while the Applicant was excused from the hearing room to allow the panel members to deliberate in private. Therefore, the recording breached the principle of deliberative secrecy. He further found that the Applicant had "failed to articulate any

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[18] SCJ Reasons, paras. 28-29, Alton Affidavit, Ex. H, *MR* Tab 2H.
[19] SCJ Reasons, paras. 30-33, Alton Affidavit, Ex. H, *MR* Tab 2H.
[20] SCJ Reasons, paras. 34-39, Alton Affidavit, Ex. H, *MR* Tab 2H.

compelling reasons to justify admitting his surreptitious recording of the panel's private, in-caucus discussion." As such, its prejudicial effect outweighed its probative value, and it was inadmissible in evidence.[21] In the result, he struck the claim without leave to amend. He ordered that the Applicant pay costs to WSIAT and the WSIB in the amount of $3000 each.[22]

25. The Applicant's appeal to the Court of Appeal for Ontario was dismissed, on the following grounds:

- Price J. had properly dismissed the Applicant's claim for lack of jurisdiction, because in substance his complaints were about the decisions made and processes followed by the WSIB and Tribunal in determining benefits, which were matters within their exclusive jurisdiction. A claimant cannot circumvent the statutory scheme by bringing a civil action.[23]
- The Amended Statement of Claim did not disclose a reasonable cause of action for "bad faith" or misfeasance in public office. There is no tort of "bad faith" denial of benefits.[24] The elements of the tort of misfeasance in public office were not pleaded, nor was there any basis to plead them. The Applicant's complaints were "replete with generalized complaints about the Board and Tribunal, none of which are actionable."[25] His allegations based on the "recording he surreptitiously and improperly made of the Tribunal's

[21] SCJ Reasons, paras. 57, 60-64, Alton Affidavit, Ex. H, *MR* Tab 2H.
[22] Reasons of Price J. on costs dated Dec. 14, 2017 ("SCJ Costs Reasons"), para 43, Alton Affidavit, Ex. I, *MR* Tab 2I..
[23] Reasons of Court of Appeal dated Feb. 6, 2018 ("CA Reasons"), paras. 7-9, Alton Affidavit, Ex. J, *MR* Tab 2J.
[24] CA Reasons, paras. 13-15, Alton Affidavit, Ex. J, *MR* Tab 2J.
[25] CA Reasons, paras. 16-18, Alton Affidavit, Ex. J, *MR* Tab 2J.

deliberations" could not give rise to a reasonable cause of action, because admitting the recording would violate the principle of deliberative secrecy.[26]

26. The Court of Appeal ordered the Applicant to pay costs to WSIAT in the amount of $2500, and to the WSIB in the amount of $2000.[27]

27. The Applicant's further application for leave to appeal to the Supreme Court of Canada was dismissed on April 16, 2020.[28] While the Applicant has suggested in correspondence that he intends to seek reconsideration of the Court's decision, and if this is unsuccessful seek Parliament's intervention, and if this is unsuccessful pursue his case before the United Nations,[29] to date no reconsideration request has been filed.[30] The Applicant has not paid the costs awarded against him by the Superior Court or Court of Appeal.[31]

E. The Applicant's March 13, 2020 Application to Superior Court

28. On March 13, 2020, the Applicant commenced another application in the Superior Court, styled "Notice of Application to the Superior Court of Justice for Judicial Review – Certiorari", returnable on March 24, 2020. His Notice of Application named the Tribunal as the only respondent, and relied upon s.6(2) of the *JRPA*.[32] He did not serve the Tribunal, but advised counsel for the WSIB of the application, who passed it on to counsel for the Tribunal. On March 16, 2020 the Applicant advised counsel for the

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[26] CA Reasons, para. 19, Alton Affidavit, Ex. J, *MR* Tab 2J.
[27] CA Reasons, para. 24, Alton Affidavit, Ex. J, *MR* Tab 2J.
[28] *Taylor v. WSIB*, 2020 CanLII 27698 (SCC), Alton Affidavit, Ex. K, *MR* Tab 2K.
[29] Letter from P. Taylor letter dated August 19, 2020, Alton Affidavit, Ex. X, *MR* Tab 2X.
[30] Alton Affidavit, para. 25.
[31] Alton Affidavit, paras. 10, 11.
[32] Notice of Application issued March 13, 2020, Alton Affidavit, Ex. L, *MR* Tab 2L.

WSIB that he was not proceeding with the March 24, 2020 return date because of coronavirus.[33]

29. On June 3, 2020, the Applicant wrote to WSIAT, advising that he would be bringing a motion in writing to the Guelph Superior Court on June 15, 2020, seeking various procedural orders including an order authorizing electronic service. By letter dated June 9, 2020, counsel for the Tribunal advised the Applicant that the matter had been improperly brought in the Superior Court, and that it should have been commenced in Divisional Court, as it did not meet the test for urgency. Counsel further advised that even if the application was properly brought in Divisional Court, the Tribunal would seek to have it dismissed under Rule 2.1, based on extreme delay, the unpaid costs awards, and the Applicant's apparent reliance on arguments that had been dismissed in his action.[34] By response dated June 10, 2020, the Applicant disputed the Tribunal's position, and asserted that the application met the test for urgency.[35]

30. By letter dated June 12, 2020, counsel for the Tribunal reiterated the Tribunal's position that the matter was not urgent, and addressed procedural issues, confirming *inter alia* that the Tribunal would accept service by electronic means, and referring the Applicant to the procedures for serving the Attorney General during Covid.[36] By letter dated June 17, 2020 to Tribunal counsel, the Applicant disputed his liability to pay the costs awards, asserting that because the courts had ruled that the Tribunal had

[33] Email exchange dated March 13-16, 2020, Alton Affidavit, Ex. M, *MR* Tab 2M.
[34] Letter dated June 9, 2020, Alton Affidavit, Ex. N, *MR* Tab 2N.
[35] Letter dated June 10, 2020, Alton Affidavit, Ex. O, *MR* Tab 2O.
[36] Letter dated June 12, Alton Affidavit, Ex. P, *MR* Tab 2P.

statutory immunity for the exercise of its adjudicative functions, it lacked the status to be awarded costs.[37]

31. By email dated June 26, 2020, the Applicant advised Tribunal counsel that he was abandoning his application in the Superior Court, on the basis that "the WSIAT is not a legal party, which makes my application mute" [*sic*], and that he would be filing a corrected notice. Tribunal counsel replied that day, advising that any "corrected" notice should be in Divisional Court, and that the Tribunal should be named as a respondent, bringing his attention to s.9 of the *JRPA*. The Applicant replied by email dated June 27, 2020, disputing the Tribunal's position and reasserting his position that the matter was urgent.[38] By further email dated June 28, 2020, the Applicant appeared to advise that he would be bringing a further court application in which the Tribunal would not be named, seeking to set aside the Tribunal's decisions as well as various sections of the *WSIA*, and that the Tribunal was obliged to reconsider its decisions on the basis of his email. He further advised that he would be "asking the Court to award substantial costs order against the WSIAT, for both myself and my employer, whether the WSIAT is a party to the proceeding or not".[39]

32. By email dated July 29, 2020, the Applicant advised that he was submitting a formal second request to the Tribunal for reconsideration of the Tribunal's 2008 *Decision No. 691/05*, and purported to set a deadline of August 14, 2020 for the Tribunal to decide the reconsideration application. Counsel for the Tribunal responded on July 30, 2020, advising that if the reconsideration request had been properly filed, it

[37] Letter dated June 17, 2020, Alton Affidavit, Ex. Q, *MR* Tab 2Q.
[38] Email exchange dated June 26-27, 2020, Alton Affidavit, Ex. R, *MR* Tab 2R.
[39] Email dated June 28, 2020, Alton Affidavit, Ex. S, *MR* Tab 2S.

would be dealt with according to the Tribunal's statutory procedures.[40] By email dated August 10, 2020, the Applicant reasserted his position that an urgent application for judicial review to the Superior Court was the proper procedure, and that the Tribunal should not be a respondent.[41]

F. The Present Application

33. On August 14, 2020, the Applicant commenced the within application for judicial review in the Divisional Court, naming his former employer (as of the date of his injuries in 1997) as respondent, and serving the Attorneys General. He provided a courtesy copy to counsel for the Tribunal. He asserted that the matter is urgent.[42] By letter dated August 19, 2020, counsel for the Tribunal wrote to the Court, setting out some of the procedural background and requesting that the matter be case-managed, *inter alia* to deal with an anticipated motion by the Tribunal to be added as a party and to have the application dismissed under Rule 2.1.[43] The Applicant responded that same day, disputing the Tribunal's position on numerous grounds, including his interpretation of s.9(2) of the *JRPA*.[44] By letter dated August 24, 2020, Tribunal counsel explained why the Applicant's interpretation of s.9(2) was incorrect.[45]

34. Case management calls were held with Justice Corbett on September 8 and 10, 2020.[46] His Honour advised that the Court would not entertain a written motion from the

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[40] Email exchange dated July 29-30, 2020, Alton Affidavit, Ex. T, *MR* Tab 2T.
[41] Email dated August 10, 2020, Alton Affidavit, Ex. U, *MR* Tab 2U.
[42] Notice of Application and covering email dated August 14, 2020, Alton Affidavit, Ex. V, *MR* Tab 2V.
[43] Letter from A. Lokan dated August 19, 2020, Alton Affidavit, Ex. W, *MR* Tab 2W.
[44] Letter from P. Taylor dated August 19, 2020, Alton Affidavit, Ex. X, *MR* Tab 2X.
[45] Letter from A. Lokan dated August 24, 2020, Alton Affidavit, Ex Y, *MR* Tab 2Y.
[46] Endorsement of Corbett J. dated Sept. 9, 2020, Alton Affidavit, Ex. Z, *MR* Tab 2Z; Endorsement of Corbett J. dated Sept. 14, 2020, Alton Affidavit, Ex. AA, *MR* Tab 2AA.

Tribunal to dismiss the Application under Rule 2.1, but that the Tribunal could move to be added as a party and to dismiss the application as an abuse of process. He set an expedited schedule for the Tribunal's motions to be heard orally on October 5, 2020. The Applicant has sent various emails to the Court appearing to object to this procedure, and advising that he will or may bring his own motions.[47] The Tribunal's position is that any motions brought by the Applicant are not properly before the Court, as they were not raised during the case management conferences, nor were they the subject of scheduling orders.

35. The Respondent former employer has confirmed receipt of the Applicant's emails, but has not participated in the case to date. Counsel for the Attorney General of Ontario has not indicated that the Attorney General will participate, and the Department of Justice has indicated that it will not.[48]

PART III. ISSUES AND ARGUMENT

A. The Tribunal Should be Added as a Party

36. The Tribunal has a statutory right to be a party on this application, pursuant to s.9(2) of the *JRPA*, which provides:

> **Exerciser of power may be a party**
>
> (2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.

37. "Statutory power" is in turn defined as including "statutory power of decision", which is defined as follows in s.1:

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[47] Emails from P. Taylor to Court dated Sept. 9, 12, 14, Alton Affidavit, Ex. BB, *MR* Tab 2BB

[48] Alton Affidavit, para. 30 and Ex. CC and DD, *MR* Tab 2CC and 2DD.

> "statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,
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> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
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> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,
>
> and includes the powers of an inferior court.

38. There is no doubt whatsoever that the Tribunal Decisions are an exercise of the Tribunal's power to make a decision under the *WSIA* to determine the eligibility of the Applicant for benefits. It is clear under the statutory scheme that the Tribunal is therefore a party as of right.[49]

39. The Applicant has suggested in correspondence that allowing the Tribunal to participate is unfair, and offends the "rule of law".[50] However, the ability of tribunals to participate on judicial review applications is well-established. The proper *scope* of such participation may be open to debate – for example, the courts have held that too aggressive a defence of the merits of a tribunal's decision may not be appropriate. However, particularly where the tribunal is the only party opposing the application, the court benefits from adversarial presentation. As the Supreme Court of Canada held in *Ontario (Energy Board) v. Ontario Power Generation Inc.*,

> Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.[51]

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[49] *Children's Lawyer for Ontario v. Goodis*, 2005 CanLII 11786 (ON CA), para. 26; *Hydro Ottawa v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2019 ONSC 4898 (Div.Ct.), paras. 6-7.

[50] Notice of Constitutional Question dated Sept. 14, 2020 and covering email, Alton Affidavit. Ex. BB, *MR* Tab 2BB.

[51] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para. 54.

40. Generally, this Court will entertain submissions from tribunals explaining the record, the tribunal's processes and the procedures followed in the case, policy and jurisdictional considerations, and standard of review. In some but not all circumstances, tribunals may also make submissions on the reasonableness of their decisions.[52]

41. In the present case, as in many judicial review applications from WSIAT decisions, the Tribunal is the only party opposing the Applicant. The named Respondent, the Applicant's former employer, has not participated to date. This is not surprising, as the Respondent did not appear before the Tribunal, and the Applicant has not had any real connection to the Respondent for over 20 years. Neither Attorney General has suggested that they will participate.

42. Further, only the Tribunal is in a position to advise the Court as to the twisted procedural history of this matter over the last 23 years. Neither the Respondent former employer nor the Attorneys General are able to provide this information to the Court.

43. For these reasons, the Court should add the Tribunal as a party, in accordance with s.9(2) of the *JRPA*.

B. The Application should be Dismissed as an Abuse of Process

44. The Applicant has delayed for over 12 years in bringing this application. For this reason alone, it should be dismissed.

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[52] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para. 60.

45. The substantive Tribunal decision that he seeks to review, *Decision No. 691/05*, was made on February 11, 2008. This Application was commenced almost exactly 12.5 years later, on August 14, 2020. By any measure, this delay is extreme.

46. There was an unexplained delay of 4.5 years before the Applicant even brought his first reconsideration application to the Tribunal, resulting in *Decision No. 691/05R* in 2013. Making a reconsideration request does not "stop the clock" on delay – otherwise, parties could circumvent time limits and delay unreasonably without consequence, by the simple expedient of asking the tribunal to reconsider its impugned decision, regardless of the passage of time.

47. Even making due allowances for the Applicant being self-represented, the delay is extreme and inexcusable. As noted above, Tribunal counsel wrote to the Applicant in 2013 to advise him of the proper procedure to challenge the Tribunal Decisions – a judicial review application to this Court. The Applicant, however, ignored this advice, and wasted seven years and untold resources of the courts and parties, only to conclude ultimately that he should do as Tribunal counsel advised.

48. If the Applicant had followed Tribunal counsel's advice in 2013, he might have had a stronger case that his delay since 2008 should be excused. Even if he had taken heed of the Superior Court's ruling in February 2017, or the Court of Appeal's ruling in February 2018, that he was following the wrong procedural route to attack the Tribunal's rulings, the delay would be less extreme. Instead, he chooses to litigate endlessly, repetitively, and with no sign of stopping – he has announced his intention to bring a

reconsideration motion to the Supreme Court of Canada, petition Parliament, and to complain to the United Nations.

49. An Applicant is obliged to commence and perfect an application for judicial review in a timely manner. Judicial review is a discretionary remedy which can be denied on the basis of excessive delay, regardless of the merits of the case.[53]

50. In exercising its discretion to dismiss an application for judicial review for delay, the court will consider the following factors:

(a) The length of the delay.
(b) The reasonableness of any explanation offered for the delay.
(c) Any presumed or actual prejudice suffered by the respondent as a result of that delay.[54]

51. Judicial review applications are regularly dismissed for delay where six or more months pass before the commencement of the application and/or where twelve or more months pass before the perfection of the application.[55]

52. In the present case, the Applicant has delayed 12.5 years in bringing his application.

53. The Applicant's delay in this case is far beyond what could ever be considered reasonable. The Tribunal is not aware of any case where this Court has allowed an application for judicial review brought more than a dozen years after the decision in question.

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[53] *Ransom v Ontario*, 2010 ONSC 3156 (Div Ct) ["*Ransom*"], para. 4, affirmed 2011 ONSC 5594 (Div. Ct.).
[54] *Becker v WSIAT*, 2012 ONSC 6946 (Div Ct) ["*Becker*"], para. 4.
[55] See, e.g., *Ransom*, para. 31; *Becker*, para. 8; *Amodeo v Ontario Labour Relations Board*, 2010 ONSC 1611 (Div Ct), paras. 5-6; *Zhang v University of Western Ontario*, 2010 ONSC 6489 (Div Ct), paras. 2-3.

54. The Applicant has not provided and cannot provide a legitimate explanation for delays of this magnitude. The first 5 years of delay (until his first reconsideration request to the Tribunal) are essentially unexplained. For the following 7 years, when he was pursuing his action against WSIAT and the WSIB, he may argue that he was not aware of the proper procedure, but that explanation is hard to maintain when he was expressly advised that he should bring a judicial review application to this Court. Even when advised of the proper procedure, he ignores all advice, regardless of whether it comes from the Tribunal, the courts, or any other source. That is his prerogative, but the resultant delay is his responsibility.

55. Delays of this nature undermine the Tribunal's interest in the integrity of the workplace insurance and benefits scheme and the finality of its decisions. It is inevitable that such delays will result in some degree of prejudice. For example, to the extent that he relies upon alleged procedural defects in the Tribunal Decisions, it is difficult for the Tribunal to respond to allegations regarding the conduct of a hearing held more than a dozen years ago.

56. It is also apparent that the Applicant intends to relitigate matters that were raised and dismissed, or that could have been raised, in his Prior Action. Among other things, he alleges that the Tribunal did not follow a fair procedure, and seeks to introduce a transcript of the Tribunal's 2007 hearing that he made himself.[56] His recording of the Tribunal's proceedings was made surreptitiously, without the Tribunal's knowledge or consent, and it included a private in-caucus discussion that the courts have definitively

[56] Email dated September 14, 2020, Alton Affidavit, Ex. BB, *MR* Tab 2BB; Notice of Application dated August 14, 2020, para. 17-19, 24 Alton Affidavit, Ex. V, *MR* Tab 2V; Notice of Application issued March 13, 2020, para. 6(c), (e), Alton Affidavit, Ex. L, *MR* Tab 2L.

ruled to be inadmissible as a violation of deliberative secrecy. An attempt to relitigate a matter that has been finally determined in prior proceedings is an abuse of process.[57] It would be a colossal waste of judicial resources, and unfair to the Tribunal as the successful party in the Prior Action, to allow the Applicant to relitigate this issue after he pursued it unsuccessfully all the way to the Supreme Court of Canada.

57. For clarity, the Tribunal does not argue that the Prior Action determined whether or not the Tribunal Decisions were reasonable, in the administrative law sense. In the Prior Action, the Tribunal argued, and the courts accepted, that an application for judicial review was the appropriate procedure to challenge the merits of the Tribunal Decisions. To the extent that the Applicant seeks reasonableness review on this Application, the Tribunal relies upon his extreme delay and conduct in pursuing the Prior Action, not an attempt to relitigate issues, to establish abuse of process.

58. This Court has jurisdiction to dismiss an application as an abuse of process under Rules 2.1, 25.11, 38.12, and 68.02 and the inherent jurisdiction of the Court.[58] Although this jurisdiction is to be exercised sparingly, this is an appropriate case for such an order for the reasons set out above.

C. The Application should be Stayed Pending the Applicant's Payment of Costs

59. In the alternative, the Application should be stayed until the Applicant satisfies the costs orders made against him by the Superior Court and the Court of Appeal.

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[57] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, para. 37.

[58] *Rules of Civil Procedure*, Rules 2.1, 25.11, 38.12, 68.02; *Lochner v. WSIAT*, 2018 ONSC 1432 (Div.Ct.), affirmed 2019 ONCA 52.

60. As set out above, there is a lengthy pattern of the Applicant commencing and pursuing litigation, without facing any consequences. With respect to the Tribunal Decisions alone, he has brought four separate applications or actions:

- His initial Rule 14 application in the Superior Court in 2013, abandoned shortly after;
- His Prior Action for damages against WSIAT and the WSIB, litigated from 2014 to 2020;
- An "urgent" application under s.6(2) to the Superior Court in Guelph, brought in March 2020 to challenge the Tribunal Decisions, then abandoned in June; and
- The present Application, commenced in August 2020.

61. Along the way, he has brought multiple reconsideration requests, including three before the WSIB, and two (brought 8 years apart) before the Tribunal, and has announced his intention to bring one before the Supreme Court of Canada. Even in case management conferences in this Court, he has responded to endorsements with lengthy correspondence questioning, challenging, and/or seeking to amend matters that were decided during the conferences.

62. This is not the conduct of a reasonable litigant, even making allowances for his self-represented status. The Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons* makes clear that courts must continue to control their own processes, and that "self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it."[59]

[59] *Statement of Principles on Self-represented Litigants and Accused Persons*, p.5.

63. Nor can the Applicant's conduct be attributed to difficulty in understanding the legal system. Aside from his recent qualification as a paralegal, he has been repeatedly advised of the proper procedures, but seems impervious to all such advice. He is also no stranger to the legal system – in court proceedings arising from a separate WSIB claim, he has been made aware of the requirements for bringing an urgent application to the Superior Court under s.6(2) of the *JRPA*,[60] and in proceedings before the Landlord and Tenant Board and subsequently in the courts arising from his non-payment of rent he was found to have been "gaming the system" for delay, and to have breached court orders for payment of rent.[61]

64. The Tribunal does not typically ask for costs in judicial review proceedings. In the case of the Applicant's Prior Action, given that the Tribunal had attempted in good faith to advise the Applicant of the proper procedural route, the Tribunal made an exception, and asked for modest costs that were slightly less than its disbursements, and approximately 10% of its total actual costs.[62] The Tribunal did not seek recovery of its legal fees. Costs were awarded by both the Superior Court and the Court of Appeal.

65. Where costs of a motion in the same proceeding are unpaid, the court may dismiss the proceeding or stay the proceeding until the costs are paid, under Rules 57.03(2) and 60.12.[63] Those rules do not on their terms apply to the present

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[60] *Taylor v. WSIB*, 2018 ONSC 3791, paras. 8-16, affirmed 2018 ONCA 771 (leave to appeal application to SCC pending).

[61] *Bernard Property Maintenance v. Taylor*, 2019 ONCA 830, paras. 25, 27

[62] SCJ Costs Decision, para. 10, Alton Affidavit, Ex. I, *MR* Tab 2I. At the Superior Court motion hearing, the Tribunal's legal fees were $23,586.49, and disbursements were slightly over $3000.

[63] *Rules of Civil Procedure*, Rules 57.03(2), 60.12; *Lee v. McGhee*, 2018 ONSC 6463, affirmed 2019 ONCA 99, leave to appeal refused 2019 CanLII 101519 (SCC); *Rana v. Unifund Assurance Company*, 2016 ONSC 2502, appeal quashed 2016 ONCA 906.

circumstances, strictly speaking. However, they apply strongly by analogy. Given the Applicant's conduct in launching multitudinous proceedings, and the substantial overlap between the Prior Action and this Application, this Court may exercise its statutory and inherent jurisdiction to stay the Application until the Applicant has satisfied the costs orders made in the action.[64] Unpaid costs orders from prior proceedings may be taken into account in deciding whether to make a vexatious litigant order.[65] It follows that unpaid costs may be taken into account in deciding whether to impose the less draconian remedy of a temporary stay of proceedings, where the interests of justice so require.

PART IV. ORDERS REQUESTED

66. The Tribunal therefore respectfully requests the following relief:

(a) an Order adding the Tribunal as a party to the Application;

(b) an Order dismissing the Application as an abuse of process;

(c) in the alternative, an Order staying the Application until the Applicant satisfies the unpaid costs orders against him; and

(d) costs of this motion.

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[64] *Courts of Justice Act*, s.106.

[65] *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Div.Ct.), para. 40.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 18, 2020

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Andrew Lokan

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Lawyers for the Moving Party, Workplace Safety and Insurance Appeals Tribunal

Schedule A – Authorities

1. *Children's Lawyer for Ontario v. Goodis*, 2005 CanLII 11786 (ON CA)
2. *Hydro Ottawa v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2019 ONSC 4898 (Div.Ct.)
3. *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44
4. *Ransom v Ontario*, 2010 ONSC 3156 (Div Ct), affirmed 2011 ONSC 5594 (Div. Ct.).
5. *Becker v WSIAT*, 2012 ONSC 6946 (Div Ct)
6. *Amodeo v Ontario Labour Relations Board*, 2010 ONSC 1611 (Div Ct)
7. *Zhang v University of Western Ontario*, 2010 ONSC 6489 (Div Ct)
8. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63
9. *Lochner v. WSIAT*, 2018 ONSC 1432 (Div.Ct.), affirmed 2019 ONCA 52
10. *Taylor v. WSIB*, 2018 ONSC 3791, affirmed 2018 ONCA 771 (leave to appeal application to SCC pending).
11. *Bernard Property Maintenance v. Taylor*, 2019 ONCA 830
12. *Lee v. McGhee*, 2018 ONSC 6463, affirmed 2019 ONCA 99, leave to appeal refused 2019 CanLII 101519 (SCC);
13. *Rana v. Unifund Assurance Company*, 2016 ONSC 2502, appeal quashed 2016 ONCA 906
14. *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Div.Ct.)

Schedule B – Statutory Provisions

Courts of Justice Act, RSO 1990 c. C.43, s.106

Stay of proceedings

106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.