

Court File No. DC-24-00000718-00JR

WRITTEN SUBMISSION (NON-PRESCRIBED FORM
BUT ELIGIBLE DOCUMENT FOR FILING AND SERVING IN JSO PORTAL)

ONTARIO SUPERIOR COURT OF JUSTICE (DIVISIONAL COURT)

BETWEEN:

KEVIN ALEXANDER MCLEAN

APPLICANT

- and -

**TD HOME AND AUTO INSURANCE COMPANY, SECURITY NATIONAL
INSURANCE COMPANY, TD GENERAL INSURANCE COMPANY, EXECUTIVE
DIRECTOR, LICENCE APPEAL TRIBUNAL,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, REPRESENTED BY
EXECUTIVE CHAIR OF TRIBUNALS ONTARIO IN MR. SEAN WEIR, THE
ATTORNEY GENERAL OF ONTARIO**

RESPONDENTS

***APPLICANT'S WRITTEN SUBMISSION
RE: APPLICANT'S MOTION #1
HEARING DATE: JANUARY 30, 2025 VIA TELECONFERENCE***

BRIEF OVERVIEW/SUMMARY

The document is a written submission by Mr. Kevin Alexander McLean regarding his Motion #1 in a judicial review proceeding against several respondents, including TD Home and Auto Insurance Company and the Licence Appeal Tribunal.

- **Overview of Motion #1:** The Applicant seeks orders related to the compliance of the Licence Appeal Tribunal with statutory duties in forthwith filing of the record of proceeding before the Tribunal from December 24, 2023 to September 12, 2024.
- **Orders Sought:** The Applicant requests several specific orders, including the identification of the presiding motion judge, the Tribunal's compliance with filing requirements, and the prohibition of Tribunal participation until strict statutory compliance is achieved by it.
- **Legal and Factual Issues:** The submission delineates issues of law and fact, such as the Tribunal's duty to compile and file the record of proceedings and the timeline of the Applicant's interactions with the Tribunal.
- **Answers to Issues of Fact:** The Applicant provides detailed answers to the issues of fact, including the dates of filing applications, hearings, and decisions by the Tribunal.
- **Legal Bases:** The submission discusses relevant statutes such as the Judicial Review Procedure Act and the Statutory Powers Procedure Act, and their application to the case with reference to the Divisional Court's inherent jurisdiction which has been codified by the Legislature in the CJA.
- **Jurisprudence References:** The Applicant cites various legal precedents to support his arguments, including decisions from *Payne*, *Rol-Land Farms Limited*, and *Reflection Productions*.
- **Conclusion and Orders Sought:** The Applicant concludes that he is entitled to the relief sought due to the Tribunal's non-compliance with statutory duties, and requests the court to grant the orders as specified including leave to speak to costs.

VOLUME # #1: ORDERS SOUGHT

1. These are the Applicant's written submissions for the teleconference hearing for his Motion #1 herein.
2. The Applicant seeks the orders in his draft order of January 29, 2025. For ease of reference, they are as follows:
 1. THIS COURT ORDERS, DECLARES AND CONFIRMS THAT the delegated or presiding motion judge (not an "associate judge" pursuant to 37.02(2)(f) of the *Rules Of Civil Procedure* and section 4 of the *JRPA*) for this motion was not the Honourable Madam Justice Shore and/or any other justice of the ONSC Superior Court, in his or her rotation with the Divisional Court pursuant to the *Courts of Justice Act*, that was employed by Epstein Cole and/or was a partner in the limited liability partnership of Epstein Cole LLP during the time from Fall of 2017 to present;
 2. THIS COURT DECLARES THAT the Licence Appeal Tribunal (the "**Tribunal**") has failed or neglected to comply with section 10 of the *JRPA* and section 20 of the *SPPA* and THIS COURT ORDERS THAT the Tribunal forthwith file the record of proceeding, in accordance with section 10 of the *JRPA* and section 20 of the *SPPA*, before Vice Chair Morrisette as it was from December 24, 2023¹, to the date of September 12, 2024, inclusive² ;
 3. THIS COURT ORDERS THAT the Tribunal is prohibited from any form of participation, where permissible by law, in this *JRPA* Proceeding until it strictly and fully complies with Order #2;
 4. THIS COURT ORDERS THAT if the Tribunal is unable to comply with Order #2 herein, it shall advise this Court, with a copy to the Applicant, the respondents, and any other interested persons as to the reasons why it is unable;
 5. THIS COURT ORDERS THAT the Applicant is entitled to seek any ancillary or consequential relief relating to the above if the Tribunal does not comply with Order #2 by written submissions to the presiding motion judge, with service upon the Tribunal with a copy to the respondents, by way of email to the ONSC Div. Ct. Registrar to my attention; and
 6. THIS COURT ORDERS THAT that the Applicant is entitled to costs of this motion in any event of the cause and payable forthwith with the amount to be determined by agreement between he and the Tribunal or if no agreement is reached between them, this COURT ORDERS THAT that the Applicant may provide written submissions, limited to three pages, on such quantum entitlement within two days of not reaching

any agreement between he and the Tribunal and within five days after the pronouncement of this order. THIS COURT FURTHER ORDERS THAT that the Tribunal may provide any responsive quantum costs submissions, limited to three pages, within three days of being served with the same.

3. Order #1 is relief that is being sought by the Applicant's NOM #2 but provided herein for pre-emptive, precautionary and pre-emptive purposes.
4. Order #2 is the primary order sought herein which has remained the Licence Appeal Tribunal's (AABS Division) statutory duty(ies³) since November 15, 2024. It is now January 30, 2025, and the Tribunal, through its counsel in Mr. Boyce, have not filed a single document from the record of proceeding (as defined under the *SPPA*).
5. Orders #3 and #4 is an order that invokes this Court's inherent jurisdiction to control its processes and prevent abuses of its processes.
6. Order #5 seeks anticipatory relief in the event the Tribunal continues on its course of breaching its statutory duties.
7. Order #6 seeks leave of this ONSC Divisional Court to provide submissions on costs in the event that the Applicant is successful.
8. The Applicant provides these written submissions as a courtesy to this ONSC Honourable Court such that any teleconference hearing time is well utilized, efficient, cost-effective and productive for all involved. If the Tribunal does not have a full and accurate record of proceeding, it is crucial that the Applicant, the respondents other than the Tribunal, the Divisional Court et al know the same as that will affect the entire course and outcome of this *JRPA* Proceeding.
9. Where double underlining has been used in the quotations from statutes, regulations and jurisprudence, the emphasis is that of the *JRPA* Applicant.

<u>VOLUME #2: STATEMENT OF ISSUES</u>
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10. The issues are delineated into the following issues of law, issues of fact and issues of mixed fact and law.
11. The issues of law are:
- a. When is a Tribunal's duty to compile a record of proceeding triggered?*
 - b. When is the Tribunal's duty to file the Record Of Proceeding with the ONSC Divisional Court triggered?*
 - i. Is a tribunal or administrative decision maker required to file the record of proceeding even if it is not participating in a JRPA Proceeding?*
 - c. Is the Tribunal required, by statutes, to serve the Record of Proceeding?*
 - d. What is the purpose of the record of proceeding?*
 - e. From what time period is a Tribunal required to file a record of proceeding?*
 - f. How should a tribunal's right to participate be limited when it does not comply with its statutory duties at first instance?*
12. The issues of fact are:
- a. When did the Applicant file his statutory application for auto insurance dispute resolution with the Tribunal?*
 - b. When was the first hearing held before the LAT?*
 - c. When did the Tribunal receive a copy of the Applicant's JRPA Application?*
 - d. When did the Tribunal file and serve its Notice of Appearance?*
 - e. When did Vice Chair Morrisette issue and sign her decision that was subject to reconsideration by the LAT and now judicial review?*

<u>VOLUME #4</u>: Answers to the Issues of Fact
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13. The Applicant filed his section 280(2) of the Insurance Act for automobile insurance dispute resolution on December 24, 2023. The Applicant served the fax number of 416.774.3120. on the same date.

14. The first hearing, which was a “written hearing”, was heard and decided on January 16, 2024, by Vice Chair Lake.
15. The *JRPA* Applicant, after paying for and filing his *JRPA* Application on November 15, 2024, provided copies to the Tribunal (LAT), Vice Chair Morrisette and Vice Chair Lake.
16. The Tribunal filed its Notice of Appearance on November 27, 2024, by Mr. Boye signing on behalf of (or “as per”) the Tribunal.
17. Vice Chair Morrisette signed the final decisions and final orders involving the Applicant’s motions #13 to #15 on September 12, 2024. Only four orders from NOM #14 and one order from NOM #15 are being challenged on judicial review herein as they are final orders and final decisions within that 11 page document issued and signed by VCM.

<u>VOLUME #4: LEGAL BASES</u>

<u>VOLUME #4(A):</u> <u>Judicial Review Procedure Act</u> (“ <i>JRPA</i> ”), the Statutory Powers Procedure Act (“ <i>SPPA</i> ”)
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18. The *JRPA* was passed in 1990. It appears to have been amended several times since 1990 but the provisions or subsections at issue herein have remained the same since 1990: ss. 9(2) of the *JRPA* and s. 10 of the *JRPA*.
19. 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: [section 9\(2\)](#) of the *JRPA*. “May” is permissive. The statutory subsection herein does not clearly resolve the Licence Appeal Tribunal’s scope of participation. As such, the scope of the Tribunal’s participation herein (if any) is determined by reference to the jurisprudence like Ontario (Energy Board), *Drewlo Holdings*, *Hutchinson v. Aviva*, and others (addressed *infra*).
20. Section 10 of the *JRPA* states:

“Record to be filed in court

10 When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith FILE in the court for use on the application the record of the proceedings in which the decision was made. R.S.O. 1990, c. J.1, s. 10.

21. While the *SPPA* underwent some substantial and significant amendments in 2006, by reference to the omnibus bill known as the Access to Justice Act, 2006, section 20 of the *SPPA* has remained the same since 1990.
22. Section 20 of the *SPPA* defines the content of the record of proceeding by way of reference to its compiling duties in which a hearing has been held. Section 20 of the *SPPA* states:

“20 A tribunal shall compile a record of any proceeding in which a hearing has been held which shall include,

- (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
- (b) the notice of any hearing;
- (c) any interlocutory orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- (e) the transcript, if any, of the oral evidence given at the hearing; and
- (f) the decision of the tribunal and the reasons therefor, where reasons have been given. R.S.O. 1990, c. S.22, s. 20.”

23. “Hearing” under the *SPPA* is defined under section 1 of the *SPPA* which states: “hearing” means a hearing in any proceeding.
24. The Ontario Rules of Civil Procedure use the word “forthwith” in relation to the required filing of a ‘Notice of Appearance’ if any administrative decision maker or other respondent wishes to receive notice of every step in a judicial review proceeding (see: [Rule 38.07](#) “(1) A respondent who has been served with a notice of application shall FORTHWITH deliver a notice of appearance (Form 38A). R.R.O. 1990, Reg. 194, r. 38.07 [\(1\)](#)).
25. “Deliver” is defined under the *Rules of Civil Procedure* as: “deliver” means serve and file with proof of service, and “delivery” has a corresponding meaning: [Rule 1.03\(1\)](#).

Volume #4(A)(I): Application of the above statutory subsections to the uncontroverted facts herein
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26. The Tribunal was required to compile a record of proceeding from the date of January 16, 2024 and onwards.
27. The Tribunal was required to file (not necessarily serve) the record of proceeding immediately after receipt of the *JRPA* Application. For mathematical and dating purposes, the Tribunal was required to file the record of proceeding in the week of November 18 to 22, 2024.
28. The duty of the Tribunal to file the record of proceeding is an independent one from its right of an undefined scope of participation as a party in an application for judicial review or judicial review proceeding.
29. It is easily discernible why the Legislature, which passed sections 10 and 20 of the *SPPA* in the same year, requires a statutory administrative body to forthwith file the record of proceeding without any reference to the size, volume or complexity of the record of proceeding. The obvious inference or easy discernment for the forthwith filing requirement is that an administrative body would have had initial and ongoing compiling duties in the

underlying proceeding before an inferior decision maker or decision making body to that of the ONSC Divisional Court.

30. In this modern day of technology, along with the specific filings herein that it involve a LAT/AABS e-filing portal, all of the filed materials would be compiled and organized in a manner that it could not take the LAT more than a day to prepare an index with tabulations for the delineated different classes of filed documents and then enumerate the same before filing the record of proceeding with the ONSC Divisional Court.
31. As per the definition of “deliver” under the Rules of Civil Procedure versus the sole requirement of forthwith “filing” under the *JRPA*, the LAT is only required to file the same with the ONSC Divisional Court.
32. But for any sealing orders, even the public can obtain certified copies of each and every document filed in a proceeding: combination of [section 137](#) of the *CJA* and [Rule 4.03\(1\)](#) of the *Rules of Civil Procedure*.
33. Therefore, any administrative tribunal in this province that is subject to being served with a ‘notice of application for judicial review’ is only required to file the record of proceedings forthwith, after having compiled the same if there was a hearing before it. Put another way, there is no requirement upon any administrative body to participate in any judicial review after it has filed the record of proceeding forthwith. It is not even required, by statute, to serve the applicant with a copy of the same or any other respondents or interested persons.

<u>VOLUME #4(B):</u> How does the decision in Payne clarify the above statutory requirements

34. The content of the court record for an application for judicial review is defined by the [Judicial Review Procedure Act](#), R.S.O. 1990, c. J-1 and by the Rules of Civil Procedure. The process begins with the notice of application: r. 68.01(1). Upon being served with the notice of application for judicial review, the decision-maker is required by [s. 10](#) of the *Judicial Review Procedure Act*, to file with the Divisional Court "the record of the proceedings in which the decision was made". The "record" is not defined by the *Act*: Payne, at [paragraph 160](#).

VOLUME #4(C): While the Record Of Proceeding is for the Court's use in the *JRPA* Application
– Applicant's Rights to Record of Proceeding

35. An applicant for judicial review has the right to have a full and accurate record of what went on before the tribunal put before the court: Payne at [paragraph 161](#).
36. The reason for the Applicant being entitled to the same is not grounded in the statutory sections but the ONSC Divisional Court's inherent jurisdiction: Payne at [paragraph 161](#) (sentence 2)⁴.

VOLUME #4(D): Underlying reasons for the ONSC Divisional Court derived inherent jurisdiction – ordering production of the record of proceeding

37. As early as 1952, Lord Denning in *R. v. Medical Appeal Tribunal ex p. Gilmore*, [1957] 1 Q.B. 574 at 583 (C.A.) found the following as a basis the common law and/or equitable powers of the English courts upon which our common law and courts of equity are founded "The court has always had power to order an inferior tribunal to complete the record ... [A] tribunal could defeat a writ of *certiorari* unless the courts could order them to complete or correct an imperfect record. So the courts have the power to give such an order".
38. The ONCA adopted the same in 2000 in its decision in Payne at paragraph 161 where it also cited other jurisprudence: See also *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw*, [1952] K.B. 338 at 352–54 (C.A.); *Canadian Workers Union v. Frankel Structural Steel Ltd.* (1976), [1976 CanLII 829 \(ON SC\)](#), 12 O.R. (2d) 560 at 577 (Div. Ct.) per Reid J.; *F.G. Spencer Ltd. v. Prince Edward Island (Labour Relations Board)* (1970), [1970 CanLII 960 \(PE SCAD\)](#), 16 D.L.R. (3d) 670 (P.E.I.S.C.); *Battaglia v. British Columbia (Workmen's Compensation Board)* (1960), [1960 CanLII 334 \(BC SC\)](#), 22 D.L.R. (2d) 446 (B.C.S.C.). The ONCA further beautifully articulated the following statement of law which has been the law in Ontario for the last 25 years:

“A statutory body subject to judicial review cannot immunize itself or its process by arriving at decisions on considerations that are not revealed by the record it files with the court.”

(see: [paragraph 161](#) of Payne (ONCA)).

39. The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario: [ss. 11\(2\)](#) of the *CJA*.
40. Courts shall administer concurrently all rules of equity and the common law: [section 96\(1\)](#) of the *CJA*.
41. Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails: [section 96\(2\)](#) of the *CJA*.

Volume #4(E): Divisional Court’s statement of law: the temporal period of a “Record of Proceeding

42. The erudite justices in *Rol-Land Farms Limited* for the Divisional Court in 2008 reaffirmed the legal precedent that the temporal period for which documents, evidence, and decisions must be included in the forthwith filing by an administrative decision maker with the ONSC Div. Ct. at paragraphs 37 and 38:

“[37] As indicated in an oral ruling during the hearing, volume 3 of the Record of Proceedings is not admissible. [Section 10](#) of the [JRPA](#) requires a tribunal to file its record of proceedings when served with an application for judicial review of a decision. It is the record of proceedings relating to the particular decision that is to be filed, as is clear from the words of s. 10:

When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application, the record of proceedings **in which the decision is made.** (emphasis added)

[38] Thus, the content of volume 3 is not properly part of the record required to be filed pursuant to [s. 10](#) of the [JRPA](#), as it post-dates the decisions under review.”

VOLUME #4(F): What is a JRPA Applicant to do when a Tribunal is non-compliant with its statutory duties?

43. It is not only that an applicant for judicial review should seek the records from the Tribunal by way of request or demand and then bring a motion if the Tribunal is non-compliant but there is also much risk for this JRPA Applicant is he did not do so.
44. In *Reflection Productions v. Ontario Media Dev. Corp.*, 2022 ONSC 64, the ONSC Div. Ct (as per **MORAWETZ C.J., VARIO, KRISTJANSON JJ.**) found as follows at paragraphs 74 and 75:

[74] [Section 10](#) of the [Judicial Review Procedure Act](#), R.S.O. 1990, c. J.1 provides:

Record to be filed in court

When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

[75] Ergo, pursuant to [s. 10](#) of the [Judicial Review Procedure Act](#), it was available to the applicant to bring a motion seeking production of documents it alleges were relied on by the decision-maker but are not contained in the record: see, for example *K.D. v. Peel Children's Aid Society*, [2017 ONSC 7392](#) (Div. Ct.) at paras. [16-17](#)). The applicant failed to do so. As a result, it is precluded from raising this issue for the first time on judicial review.

VOLUME #4: Unassailable Conclusions and Orders Sought

45. The purpose of requiring a tribunal or adjudicator to file a "[record of proceedings](#)" is to ensure that when the court reviews the tribunal's decision, it has the information and

evidence as it appeared before the tribunal in the first instance. A court reviewing an adjudicative decision may look at decisions to admit evidence, submissions of witnesses, and other evidence and may substitute its judgment for that of the court [or tribunal] of first instance: *Payne v. Ontario Human Rights Commission*, 2000 CanLII 5731 (ON CA), [2000] O.J. No. 2987, 136 O.A.C. 357 (C.A.), at para. [23](#); *Jacko v. McLellan*, 2008 CanLII 22921 (ON SCDC) at paragraph 18).

46. This very ONSC Divisional Court, but less than a year ago in [Lachance](#) (as per the Honourable Justice Myers, Stewart and Leiper), explicitly adopted the legal precedent in *Payne* in articulating the following at paragraph 37 and 38:

“[37] I agree with the finding of Ryan Bell J. that by bringing this application for judicial review the applicants became entitled to receive all documents concerning their claims. Ryan Bell J. adopted the words of Sharpe JA in *Payne v. Ontario Human Rights Commission*, [2000 CanLII 5731 \(ON CA\)](#) at paragraph 161

An applicant for judicial review has the right to have a full and accurate record of what went on before the tribunal put before the court. This is an aspect of the superior court’s inherent powers of judicial review. A superior court may insist upon the production of an adequate record of the proceedings before the tribunal being reviewed.

[38] When met by a reluctant decision-maker, the applicants always had the ability to obtain the documents that they needed to advance their claim. They just had to initiate this application.”

47. This *JRPA* Applicant has done much more than “initiate the *JRPA* Application” but that is the scope of this Motion #1.
48. As the Tribunal has not opposed this Motion #1 or challenged the sufficiency of the Motion Record so filed and served, the Applicant, his capacity as a moving party, is entitled to the relief sought with leave to speak to costs by way of written submissions.

49. The *JRPA* Applicant respectfully submits that, subject to the motions judge not being the above noted justice (through no fault of her own), the Applicant is entitled to the relief sought above at Order #2.
50. To the extent that the Tribunal now files the record of proceeding after the unnecessary expense and costs of this Motion #1, then orders #3 to #5 become moot. This leaves the issue of costs for the wasted expense on behalf of the Applicant and that of the ONSC Div. Ct. and its court staff by a statutorily non-compliant Licence Appeal Tribunal.
51. To the extent that the Tribunal does not, the *JRPA* Applicant, in his capacity as a moving party, respectfully submits that the draft order submitted should follow in substantially the same form subject to the Court's discretion as it relates to the language in those orders.
52. All of which is respectfully submitted to the ONSC (Div. Ct.) (motions judge by way of teleconference) on January 30, 2025:



Mr. Kevin A. McLean (B.A. J.D., CIM)
Self-represented, the Applicant herein

Endnotes

¹The *JRPA* Applicant, in his capacity as an applicant or appellant before the Tribunal, filed his “application pursuant to section 280(2) of the *Insurance Act* for automobile insurance dispute resolution” and served on the insurance company with the fax number of 416.774.3120 (which he defined as his “LAT Appeal” in his Factum)

²the date of Vice Chair Morissette’s decisions and orders involving the Applicant’s judicial review application (“*JRPA* Application”) certain orders sought in NOM #14 and NOM #15 that were dismissed or refused and/or not determined by the Vice Chair Morissette of the LAT (i.e. Vice Chair Morissette refused to exercise his statutory power of decision in relation to Orders #1 and #2 in NOM #14 and Order #4 in NOM #14.

³Technically, the Tribunal has duties under the *JRPA* and *SPPA*.

⁴This is an aspect of the superior court's inherent powers of judicial review.