

PART I – OVERVIEW & STATEMENT OF FACTS

“This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press – the eyes and ears of the public – is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.”

~ *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 1

1. This case asks whether tribunals and courts can order sworn whistleblower evidence, filed in a live proceeding, to be destroyed and never used again without treating that order as a limit on the open court principle under section 2(b) of the *Canadian Charter of Rights and Freedoms*¹ and without applying the test established in this Court’s decision in *Sherman Estate*.² This is the first known case dealing with the legal limits of a tribunal’s authority to destroy and suppress evidence within a proceeding where the evidence appears to substantiate institutional bias of the tribunal itself. This question goes directly to public confidence in the transparency and independence of administrative tribunals across Canada.
2. This application for leave arises from a long-running, high-conflict battle between the applicant, Ms. Lucia Derenzis, her insurer Gore Mutual, and the Licence Appeal Tribunal (“LAT”). Since 2017, this dispute has resulted in more than twenty reported decisions at the LAT and in the Superior Court, as well as a separate ongoing constitutional challenge to the LAT’s exclusive jurisdiction under section 280 of the *Insurance Act, R.S.O. 1990, c. I.8*.³

¹ *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s. 2(b).

² *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38 [*“Sherman Estate”*].

³ *L.D. v. Gore Mutual Insurance Company*, 2017 CanLII 152935 (ON LAT); 17-002762/AABS v. Gore Mutual Insurance Company, 2017 CanLII 142564 (ON LAT); *L.D. v. Gore Mutual Insurance Company*, 2019 CanLII 76994 (ON LAT); *Applicant v. Gore Mutual Insurance Company*, 2019 CanLII 101509 (ON LAT); *L.D. v. Gore Mutual Insurance Company*, 2019 CanLII 122372 (ON LAT); *L.D. v. Gore Mutual Insurance Company*, 2020 CanLII 35471 (ON LAT); *L.D. v. Gore Mutual Insurance Company*, 2020 CanLII 98721 (ON LAT); *L.D. v. Gore Mutual Insurance Company*, 2020 CanLII 98747 (ON LAT); *L.D. v. Gore Mutual Insurance*

3. In the herein case, the LAT ordered in decisions September 20, 2023, that the affidavit of a former adjudicator turned whistleblower, Dr. Korina Kowal – filed in an ongoing proceeding and tendered as evidence of institutional bias at the LAT – be physically destroyed and never again used by the parties, their counsel, or the affiant herself (the “Destruction and Gag Orders”).^{4 5}
4. On the Divisional Court’s own description of the impugned portions, the affidavit exposes institutional directions and practices including that:
 - a. Vice-Chairs triaged and reassigned files, including matters involving the applicant’s counsel’s firm, Campisi LLP, to particular adjudicators;⁶
 - b. adjudicators were under mandatory instructions to always consult with a Vice Chair before granting an adjournment but not to mention the consultation in their orders;⁷ and
 - c. “motions duty team” bulletins directed adjudicators on how to decide motions and directed that when a party was known to be “high conflict”, their motion request was to be denied or forced into a written motion process.⁸
5. Dr. Kowal’s affidavit and exhibits in *Derenzis* reveal that Tribunal adjudicators are not exercising independent judgment but operating under the control of institutional masters.⁹ Mandatory directives and enforced consultation protocols reduce adjudicators to mere

Company, 2021 CanLII 28704 (ON LAT); *Derenzis v. Ontario*, 2021 ONSC 3164; *Derenzis v. Gore Mutual Insurance Company*, 2021 ONSC 6575; *Derenzis v. Gore Mutual Insurance Company*, 2022 CanLII 46845 (ON LAT); *Derenzis v. Gore Mutual Insurance Company*, 2023 CanLII 58532 (ON LAT); *Derenzis v. Gore Mutual Insurance Company*, 2023 ONSC 6266; *L.D. v. Gore Mutual Insurance Company*, 2023 CanLII 74649 (ON LAT); *Derenzis v. Gore Mutual Insurance Company*, 2024 CanLII 2662 (ON LAT); *Derenzis v. Gore Mutual Insurance Company*, 2024 CanLII 2670 (ON LAT); *Derenzis v. Gore Mutual Insurance Company*, 2024 ONSC 1226; *Derenzis v. Gore Mutual et al*, 2024 ONSC 5367; *Derenzis v. Gore Mutual Insurance Company*, 2025 CanLII 16016 (ON LAT); *Derenzis v. Gore Mutual Insurance Co.*, 2025 ONSC 2732 [“*Derenzis*”]; *Derenzis et al v. His Majesty the King et al*, 2025 ONSC 2761; *Derenzis v. Gore Mutual Insurance Company*, 2025 CanLII 116984 (ON LAT).

⁴ Tribunal Order in LAT file number: 18-011978/AABS, released September 20, 2023 at paras. 6, and 38-40.

⁵ Tribunal Order in LAT file number: 21-000394/AABS, released September 20, 2023 at paras. 6, and 39-41.

⁶ *Derenzis* at para. 157(a).

⁷ *Ibid* at para. 157(d).

⁸ *Ibid* at para. 157(i).

⁹ *Ibid* at paras. 74 and 157.

puppets of the state, executing decisions predetermined behind the scenes. What appears outwardly as independent adjudication is, in substance, the performance of adjudication.

6. The Tribunal did not confront this whistleblower evidence in open proceedings or through the lens of *Sherman Estate*. Instead, a Vice-Chair who was not seized of the matter intercepted the applicant's submissions before the assigned adjudicator ever saw them,¹⁰ ¹¹ struck most of Dr. Kowal's affidavit and exhibits from the record, ordered that the impugned materials to be physically destroyed, and "not further disseminated in any form", and required written undertakings of compliance from the parties, their counsel, and the affiant.¹²
7. Court and tribunal proceedings are presumptively open. An order for the parties and affiant to destroy evidence filed in a proceeding limits that openness engaging section 2(b) of the Charter, and must therefore be justified under *Sherman Estate*. The LAT gave no consideration to the *Charter* right. It treated the destruction and non-dissemination order as a consequence of a finding that the affidavit was covered by solicitor-client privilege and deliberative secrecy.¹³ It did not consider, as required by *Sherman Estate*, whether destroying the evidence and gagging the affiant, the parties and their counsel – rather than, at most, sealing it or redacting specific passages – was necessary or proportionate in light of the open court principle.¹⁴
8. On judicial review, the Divisional Court upheld the destruction and non-dissemination orders as reasonable applications of deliberative secrecy, solicitor-client privilege, and the Tribunal's power to control its own processes.¹⁵ It also ordered that its own court file

¹⁰ Tribunal Order in LAT file number: 18-011978/AABS, released September 1, 2023 at paras. 2-5.

¹¹ Tribunal Order in LAT file number: 21-000394/AABS, released September 1, 2023 at paras. 2-5.

¹² *Tribunal Order*, *supra* note 4 at paras. 6, and 38-40; *Tribunal Order*, *supra* note 5 at paras. 6, and 39-41.

¹³ *Tribunal Order*, *supra* note 4 at paras. 14, 19, 32-33; *Tribunal Order*, *supra* note 5 at paras. 15, 20, and 33-34.

¹⁴ *Sherman Estate* at para. 38.

¹⁵ *Derenzis* at paras. 53, 100-109, 127-133, and 157-175.

remain sealed permanently, without treating its sealing order as a limit on the open court principle or applying the *Sherman Estate* framework.¹⁶

9. The Court of Appeal of Ontario refused leave to appeal without reasons.¹⁷
10. With leave refused, the Divisional Court's reasons now stand in Ontario for two broad propositions: that a tribunal may order sworn evidence destroyed without considering the open court principle, and that courts may uphold such destruction and permanent non-dissemination without any analysis under s. 2(b) or *Sherman Estate*. Left uncorrected, those reasons can be read as inviting tribunals to treat destroying evidence and gagging parties and affiants as routine process management rather than a constitutionally limited restriction on section 2(b), even where the evidence goes directly to adjudicative independence. That, in turn, risks the perception that destruction orders, if left unsupervised, may serve to erase evidence of institutional bias, undermining public confidence in the administration of justice.
11. In a separate proceeding involving Ms. Derenzis and the LAT, the Superior Court took a sharply different approach to the LAT's use of deliberative secrecy and privilege claims over the Tribunal's internal documents. In *Derenzis et al. v. His Majesty the King et al.*, 2025 ONSC 2761, Mandhane J. ordered Tribunals Ontario to produce adjudicators' notes, draft decisions, and hundreds of internal emails among adjudicators, counsel, and staff, despite the Tribunal's claims of deliberative secrecy and solicitor-client privilege.¹⁸ She held that these records are relevant and necessary to Ms. Derenzis' constitutional challenge to the LAT's independence, and that while some communications attract privilege, deliberative secrecy must give way where there are serious natural justice concerns about executive interference and adjudicator independence.¹⁹

¹⁶ *Ibid* at paras. [104](#) and [175](#).

¹⁷ Order of the Court of Appeal for Ontario by Justices Tulloch C.J.O, Lauwers and Dawe, dated October 2, 2025.

¹⁸ *Derenzis et al v. His Majesty the King et al.*, 2025 ONSC 2761 at paras. [1](#) and [41-43](#).

¹⁹ *Ibid* at paras. [5-6](#), [21](#), [23-24](#), and [28-36](#).

12. In one branch of her litigation, Ms. Derenzis is told that internal LAT records must be disclosed so that adjudicative independence can be tested. In another, she is told that a former adjudicator's affidavit describing those practices may be erased from the evidentiary record, ordered destroyed and ordered to never be used again by the parties, their counsel or the affiant herself.
13. This case meets the criteria for leave under s. 40(1) of the *Supreme Court Act*. It raises a novel and important constitutional question about the limits that s. 2(b) and *Sherman Estate* place on the power of tribunals and courts to destroy and suppress sworn evidence. Notwithstanding the Court of Appeal of Ontario's denial of leave, the issues herein transcend the interests of the parties, affect the transparency and independence of administrative tribunals across Canada, and has already produced conflicting approaches within the Ontario Superior Court in proceedings involving the same applicant and tribunal.

A. Statement of Facts

(1) The accident benefits dispute

14. The underlying merits of Ms. Derenzis' benefits claims are not in issue on this application.
15. Ms. Derenzis was struck as a pedestrian by a motor vehicle on November 24, 2015. She applied to her insurer, Gore Mutual Insurance Company ("Gore Mutual"), for statutory accident benefits under the *Statutory Accident Benefits Schedule*.
16. The Tribunal later heard Ms. Derenzis' applications regarding medical/rehabilitation ("Med-Rehab Decision") and income replacement benefits ("IRB Decision") and, on June 27, 2023, dismissed both applications.²⁰ Ms. Derenzis sought reconsideration of both decisions, which the Tribunal directed would proceed in writing.

²⁰ *L.D. v. Gore Mutual Insurance Company*, 2023 CanLII 74649 (ON LAT) at para. 7; *Derenzis v. Gore Mutual Insurance Company*, 2023 CanLII 58532 (ON LAT) at para. 5.

(2) Reconsideration and the Kowal whistleblower affidavit

17. In her reply submissions on reconsideration, Ms. Derenzis filed an affidavit sworn by Dr. Korina Kowal, a former adjudicator, attaching Tribunal memoranda and bulletins obtained during her tenure.²¹ The affidavit and exhibits described institutional practices mandating adjudicators to consult with Tribunal staff before ruling on certain motions, and directives prescribing how to decide specific matters, including automatically denying or triaging motions involving “high-conflict” parties.²²

(3) The Tribunal intercepts the reply and orders destruction of the Kowal affidavit

18. On August 31, 2023, before the reconsideration adjudicator saw them, the applicant’s reply submissions were redirected within the Tribunal to Vice-Chair McGee, who was not the reconsideration adjudicator.²³
19. In two decisions dated September 11 and 18, 2023 (the “Destruction and Gag Orders”), Vice-Chair McGee held that specified paragraphs and exhibits of Dr. Kowal’s affidavit were protected by solicitor-client privilege and deliberative secrecy, struck those portions from the record, and directed that only redacted reply materials go to the reconsideration adjudicator.²⁴ She further ordered that all copies of the impugned materials be destroyed and “not further disseminated in any form”, and required every party, every lawyer of record, and the affiant to confirm in writing that all physical copies had been destroyed and all electronic copies deleted.²⁵

²¹ *Derenzis* at paras. [33](#), [74](#) and [157](#).

²² *Derenzis* at para. [32](#).

²³ *Tribunal Order*, *supra* note 10 at paras. 2-5; *Tribunal Order*, *supra* note 11 at paras. 2-5.

²⁴ *Tribunal Order*, *supra* note 4 at paras. 5-6, 14, 19, and 36-37; *Tribunal Order*, *supra* note 5 at paras. 5-6, 15, 20, and 37-38.

²⁵ *Tribunal Order*, *supra* note 4 at paras. 36-40; *Tribunal Order*, *supra* note 5 at paras. 37-41.

20. The Divisional Court later temporarily suspended the destruction requirement and ordered that the impugned materials be sealed and held by counsel, not to be distributed in any way pending further order.²⁶

(4) The judicial review and statutory appeal

21. Ms. Derenzis brought a statutory appeal from the LAT's IRB and Med-Rehab decisions, and an application for judicial review of the Destruction and Gag Orders to the extent that they required destruction and non-dissemination of the Kowal materials.²⁷
22. The Attorney General of Ontario and the Ontario Trial Lawyers Association ("OTLA") intervened. The Attorney General supported the Tribunal, while OTLA opposed the destruction orders.²⁸
23. The appeal and judicial review were heard together on March 4, 2025. On May 6, 2025, the Divisional Court dismissed both. It held that the Destruction and Gag Orders requiring document destruction and non-dissemination were reasonable.²⁹

(5) The Divisional Court's endorsement of the destruction power

24. The Divisional Court upheld the Destruction and Gag Orders on the basis of deliberative secrecy, solicitor-client privilege, and the Tribunal's power to control its own processes.³⁰ It ordered that the materials in its own file remain sealed permanently.³¹ Although the Court referred to s. 2(b) when summarizing Ms. Derenzis' submissions, it upheld the destruction and non-dissemination orders solely on those grounds, without treating them as limits on the open court principle or applying the *Sherman Estate* framework.³²

²⁶ Directions of the Ontario Superior Court of Justice (Divisional Court) by Justice Matheson, dated October 19, 2023; *Derenzis v. Gore Mutual Insurance Company*, 2024 ONSC 1226 at paras. 11-12.

²⁷ *Derenzis* at paras. 40, 51-52 and 71.

²⁸ *Ibid* at paras. 79-80 and 145-146.

²⁹ *Ibid* at paras. 53, 100-109, 127-133, and 157-175.

³⁰ *Derenzis* at paras. 53, 100-109, 127-133, and 157-175.

³¹ *Ibid* at paras. 104 and 175.

³² *Ibid* at para. 136.

25. Following the Divisional Court’s decision, Ms. Derenzis brought a motion for leave to appeal to the Court of Appeal for Ontario. In a further Notice of Constitutional Question filed in the Court of Appeal, she described the Kowal affidavit as evidence of institutional practices and internal directives within the Tribunal that usurped adjudicative independence, directly engaging the open court principle in s. 2(b).³³
26. On October 2, 2025, without any reasons, the Court of Appeal for Ontario dismissed the applicant’s leave for appeal.³⁴

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

27. This application for leave to appeal raises two questions of law of national importance:

(1) Open court, s. 2(b), and destruction orders:

Does the open court principle protected under s. 2(b) of the *Charter* require administrative tribunals and reviewing courts to apply the *Sherman Estate* framework before ordering the destruction or permanent non-dissemination of sworn evidence filed in a proceeding, particularly where that evidence appears to substantiate institutional bias and lack of adjudicative independence?

(2) Privilege and institutional directives to adjudicators:

Can deliberative secrecy, solicitor-client privilege, or a tribunal’s authority to control its own processes justify such destruction and gag orders without any analysis under s. 2(b) and *Sherman Estate*?

PART III – STATEMENT OF ARGUMENT

A. This Court’s jurisdiction under s. 40(1)

28. Section 40(1) of the *Supreme Court Act* gives this Court jurisdiction, with leave, to hear an appeal from “any final or other judgment” of the highest court of final resort in a province where the proposed appeal raises a question of public importance. A refusal of leave by a provincial court of appeal is such a “final or other judgment”.³⁵

³³ Notice of Constitutional Question to Court of Appeal for Ontario at paras. 2 and 7-10.

³⁴ Order of the Court of Appeal for Ontario by Justices Tulloch C.J.O, Lauwers and Dawe, dated October 2, 2025

³⁵ *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 at paras. 145-148.

29. This jurisdiction extends to refusals of leave where, without this Court’s intervention, a serious constitutional or systemic issue would be put beyond the possibility of review. In *MacDonald v. City of Montreal*, this Court held that s. 40(1) (then s. 41(1)) extends to cases in which a provincial court of appeal has refused leave to appeal, and that this jurisdiction
- “we should exercise most sparingly, in those very rare cases where, as in this case, there is a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by this Court.”³⁶ In such cases, this Court retains a “discretionary power to interfere with any final or other judgment of the intermediate appellate courts which raises an issue of national importance.”³⁷
30. In this matter, the Ontario Court of Appeal’s refusal of leave leaves unresolved, at the appellate level, the constitutional question whether the open court principle protected by s. 2(b) of the *Charter* can be treated as inapplicable when an administrative tribunal orders the destruction and permanent non-dissemination of sworn evidence, especially where that evidence alleges institutional bias within the decision-maker itself.
31. The respondents may argue that the s. 2(b) issue was not perfectly framed in the first Notice of Constitutional Question. Even if that is accepted, *Guindon v. Canada, 2015 SCC 41*, confirms that this Court may, in “rare” but appropriate cases, determine a constitutional issue where it is fair and appropriate to do so. Relevant considerations include the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision, the broader interests of the administration of justice, and the absence of prejudice to affected Attorneys General and parties.³⁸ In this case, the destruction and non-dissemination orders and their underlying record are fully before the Court; notices of constitutional question were served in the Divisional Court and again in the Court of Appeal; the Attorney General of Ontario and a public-interest intervener participated; and the compatibility of tribunal destruction and permanent suppression of adjudicative materials with s. 2(b) and *Sherman Estate* has, to the applicant’s knowledge, never been addressed by an appellate court. Those circumstances satisfy the *Guindon*

³⁶ *Ibid* at paras. [132](#) and [140-142](#).

³⁷ *Ibid* at para. [141](#).

³⁸ *Guindon v. Canada*, 2015 SCC 41, [2015] 3 SCR 3 at paras. [20-23](#) and [37](#).

criteria for exercising this Court’s discretion to determine the constitutional issue on this application.

32. If leave to the Supreme Court of Canada is refused here, the proposition that a tribunal may order sworn evidence about its own internal adjudicative practices struck, destroyed and permanently suppressed, with no s. 2(b) analysis and no *Sherman* proportionality, will stand unreviewed. That is a question of national constitutional importance about the reach of the open court principle and the limits on administrative power. It is one of the “rare occasions” when this Court must intervene.

B. The destruction and non-dissemination orders unjustifiably limit the open court principle

33. All exercises of state power must conform to the *Charter*,³⁹ which includes decisions that suppress information, restrict expression, or order the destruction of evidence.⁴⁰ Administrative decision-makers must identify and address applicable *Charter* provisions when their decisions engage *Charter* rights or values.⁴¹
34. Orders striking, destroying, and prohibiting the dissemination of sworn evidence in an adjudicative proceeding engage the open court principle protected by s. 2(b) of the *Charter*. They restrict public access to information about how adjudicative power is exercised, and therefore limit expressive and informational rights.⁴²

³⁹ *Commission scolaire francophone des T.N.-O. v. Northwest Territories*, 2023 SCC 31 at para. 65 [“*Commission scolaire*”]; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 56.

⁴⁰ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para. 23.

⁴¹ *Commission scolaire* at para. 65; *York Region District School Board v. Elementary Teachers’ Federation of Ontario*, 2024 SCC 22 at para. 68.

⁴² *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at paras. 22-26; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paras. 4, 22-26, and 72; *Sherman Estate* at paras. 1 and 37-45.

35. In *Sherman Estate*, this Court held that any discretionary limit on openness over adjudicative records must satisfy a structured constitutional test under s.2(b). The decision-maker must establish that:⁴³
- (a) court openness poses a serious risk to an important public interest;
 - (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
 - (c) as a matter of proportionality, the benefits of the order outweigh its negative effects
36. The same rationale informing the open court principle informs openness for tribunals, and as such, any limit on openness must be justified through application of the *Sherman* test.⁴⁴
37. The orders at issue here go further than a sealing or publication ban. The Tribunal ordered that most of Dr. Kowal’s affidavit and exhibits be “destroyed” and “not further disseminated in any form”, and required undertakings of compliance from the parties, their counsel and the affiant.
38. The Divisional Court upheld those destruction and non-dissemination orders as reasonable and directed that the sealed materials in its own file “remain sealed permanently”.
39. Neither the Tribunal nor the Divisional Court applied the *Sherman* framework.
- a. Neither identified a “serious risk to an important public interest” that could only be addressed by destruction rather than redaction, anonymization, or sealing.
 - b. Neither considered less restrictive alternatives.
 - c. Neither weighed the impact of permanent suppression and destruction on the open court principle.
40. That failure to apply a binding constitutional test to a clear limit on s.2(b) leaves the constitutional issue unresolved.

⁴³ *Sherman Estate* at para. 38.

⁴⁴ *CBC v. Chief of Police*, 2021 ONSC 6935 at para. 26.

41. In *S.E.C. v. M.P.*, 2023 ONCA 821, the Court of Appeal held that even where solicitor-client privilege is asserted over court materials, a sealing order cannot be granted before satisfying the *Sherman* test.⁴⁵
42. The open court principle is not merely procedural; it is seen as “the very soul of justice” and acts as a guarantee that justice is administered in a non-arbitrary manner.⁴⁶ The lower court’s reasons already disclose damning aspects of the affidavit that reveal that adjudicators are being directed or controlled behind the scenes. The greater threat to the public’s confidence in the administration of justice is the lower court’s failure to scrutinize the Tribunal’s failure to consider the constitutional framework required, which reads as an endorsement of institutional cover-up. That perception, if left to stand, is corrosive to the rule of law.

C. Solicitor-client privilege does not justify the destruction orders

43. The Tribunal and reviewing courts erred in finding Dr. Kowal’s affidavit and exhibits to be protected by solicitor-client privilege.
44. Solicitor-client privilege protects the confidentiality of communications between a client and their lawyer.⁴⁷
45. Solicitor-client privilege protects communications where:
 - a. there is a communication between a solicitor and a client,
 - b. the communication entails the seeking or giving of legal advice, and
 - c. the communication is intended to be confidential.⁴⁸
46. The privilege attaches only where the content falls within the ordinary scope of the solicitor-client relationship and will not apply to communications that are operational, managerial, or policy-driven in nature.⁴⁹ For example, where in-house counsel serves in a

⁴⁵ *S.E.C. v. M.P.*, 2023 ONCA 821 at paras. 86-87.

⁴⁶ *CBC v. New Brunswick*, 1996 SCC 184 at para. 22.

⁴⁷ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 17 [“*Pritchard*”].

⁴⁸ *Ibid* at para. 15.

⁴⁹ *Pritchard* at paras. 20-21; *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras. 50-55.

mixed advisory and executive role, the decision-maker must establish that the specific communication was advisory in substance and confidential in intent.⁵⁰ Privilege is not automatically triggered by the mere presence of a lawyer or the inclusion of legal staff in procedural directives.

47. The Divisional Court erred in its reasonableness review by accepting the Tribunal's claim of solicitor-client privilege over specific paragraphs of Dr. Kowal's affidavit despite the absence of any finding that:
- a. that the communications were between a solicitor and client,
 - b. made for the purpose of legal advice,
 - c. and intended to be confidential.⁵¹
48. The Tribunal claimed solicitor-client privilege over three categories of content in Dr. Kowal's affidavit, all of which the Divisional Court accepted as protected:⁵²
- a. communications described as "mandatory instructions" from legal counsel and Vice-Chairs to adjudicators on how to decide adjournments, production requests, and interlocutory decisions;
 - b. a memo from the legal department, setting out adjournment procedures and requiring legal review before an adjudicator could decide (Exhibit C to the affidavit); and
 - c. a general bulletin addressing unspecified internal topics (Exhibit F to the affidavit).
49. The Divisional Court failed to assess whether the Tribunal's in-house lawyers were acting in a legal advisory role before accepting that solicitor-client privilege applied to the "mandatory instructions" from the Tribunal's in-house lawyers to adjudicators as described in Dr. Kowal's affidavit.⁵³
50. The Divisional Court further erred in accepting that solicitor-client privilege applied to "mandatory instructions" by *Vice-Chairs* to adjudicators, without any evidence on record that the Vice-Chairs were lawyers.

⁵⁰ *Pritchard* at para. 20.

⁵¹ *Pritchard* at para. 15.

⁵² *Derenzis* at para. 127.

⁵³ *Derenzis* at para. 132.

51. The Divisional Court erred in accepting that solicitor-client privilege applied to the memo in Exhibit C to Dr. Kowal's affidavit, which imposed mandatory legal review before granting adjournments, without assessing whether the content reflected legal advice.⁵⁴
52. The improper classification of these items as solicitor-client privileged enabled the destruction of uncontroverted evidence describing institutional protocols that displaced adjudicators' independence.

D. Deliberative secrecy does not extend to institutional directives or justify destruction

53. Deliberative secrecy is a constitutional safeguard for adjudicative independence, not a blanket of institutional secrecy. It protects the "how and why" of a decision-maker's reasoning in a particular case.⁵⁵ This protection may cover notes created by adjudicators during the deliberation process,⁵⁶ post-hearing discussions by panel members with non-hearing panel members,⁵⁷ or consultative processes that have sufficient safeguards to allay fears of violations of natural justice⁵⁸.
54. Deliberative secrecy does not protect against internal directives about who gets which files, when adjournments will be granted, or how "high-conflict" parties are to be treated. Treating those institutional instructions as "deliberative" is a serious error of law and raises an unresolved constitutional question about the outer limits of deliberative secrecy for administrative tribunals juxtaposed against the presumption of transparency in independent decision making required by an open court.
55. Deliberative secrecy extends to administrative decision makers and processes. This includes a decision maker's consultative processes with other decision makers or superiors within a Tribunal.⁵⁹

⁵⁴ *Derenzis* at para. [127\(b\)](#).

⁵⁵ *Commission scolaire de Laval v. Syndicat de l'enseignement de la region de Laval*, 2016 SCC 8 at para. [57](#) ["*Commission scolaire de Laval*"].

⁵⁶ *Grogan v. Ontario College of Teachers*, 2023 ONSC 2980 at para. [17](#).

⁵⁷ *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282.

⁵⁸ *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 at para. [78](#) ["*Ellis-Don*"].

⁵⁹ *Ellis-Don* at paras. [52-53](#).

56. Deliberative secrecy in administrative processes cannot be relied upon to the same extent as in judicial processes because of the very nature of control that the government has over administrative decision making.⁶⁰ Moreover, deliberative secrecy can be lifted “when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice”.⁶¹
57. Deliberative secrecy has been lifted in situations where an administrative tribunal had a compulsory consultation process that could create an appearance of a lack of independence or undue pressure on decision-makers, thereby infringing on a litigant’s right to a decision by an independent tribunal.⁶²
58. The Divisional Court erred in its reasonableness review by accepting the Tribunal’s destruction of the materials listed in paragraph [157](#) without assessing how and why a decision maker reached a particular decision in a particular proceeding. Each item listed at paragraph [157](#) of the Divisional Court’s reasons was either (A) not covered by the doctrine of deliberative secrecy, or (B) was presumptively covered but met the threshold to be lifted under *Tremblay v. Quebec*, [1992] 1 S.C.R. 952 and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4.
59. First, much of the Kowal evidence is simply *not* deliberative. Mandatory Vice-Chair approval before granting adjournments, ‘no adjournments’ pronouncements, duty bulletins eliminating reconsideration of interlocutory decisions, performance admonishments of adjudicators for failing to follow mandatory consultation protocols, and a directive on how to deal with “high-conflict” parties or firms are institutional rules and supervisory decisions. Under s. [33\(1\)\(b\)](#) of the *Freedom of Information and Protection of Privacy Act*, such ‘instructions and guidelines’ for administering a statutory scheme must be made publicly available.⁶³ They cannot be retrofitted as ‘secret deliberations’ and then used to justify destruction of the very evidence that exposes them.

⁶⁰ *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 [“*Tremblay*”].

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 at s. [35](#).

60. Even where parts of the Kowal affidavit touch internal tribunal consultation – for example, team-meeting minutes and directions requiring adjudicators to consult a Vice-Chair in real time before granting adjournments, coupled with instructions not to disclose that consultation in reasons – the legal standard for deliberative secrecy was not applied.
61. *Tremblay* holds that secrecy yields where a litigant presents valid reasons to believe the process did not comply with natural justice.⁶⁴ As this Court explained in *Ellis-Don*, institutional consultation is permissible only if “the consultation proceeding could not be imposed,” is “limited to questions of policy and law,” and “even on questions of law and policy, the decision-makers had to remain free to take whatever decision they deemed right.”⁶⁵
62. *Ellis-Don* permits institutional consultation only where the panel remains free to decide, the discussion is confined to proper questions, and any new matters raised are disclosed so parties can respond. Here, a former adjudicator gave first-hand evidence of binding, undisclosed directions that appear to predetermine outcomes for certain firms and “high-conflict” parties and to require off-the-record approval from tribunal management before exercising procedural discretion. This is a constraint on adjudicative independence and precisely the kind of concern that engages the deliberative secrecy exception outlined in *Tremblay*.
63. The Divisional Court instead treated deliberative secrecy as an institutional entitlement belonging to the Tribunal: something the LAT could “own” and invoke to block use of the Kowal materials.⁶⁶ It did not ask, category by category, whether the materials fell within the limited scope of deliberative secrecy as defined in *Tremblay*, *Ellis-Don* and *Commission scolaire de Laval*, or whether the Kowal evidence met the threshold for lifting the veil. Instead, it accepted the Tribunal’s characterization and used it to uphold orders requiring that evidence to be destroyed and never used again.

⁶⁴ *Tremblay*.

⁶⁵ *Ellis-Don* at para. 29.

⁶⁶ *Derenzis* at paras. 106-107.

64. If deliberative secrecy can be used to shield tribunal directives about file assignment, adjournments, reconsideration and the treatment of “high-conflict” parties, and to justify destruction and permanent non-dissemination of evidence describing those directives, tribunals across the country will have a legal mechanism to suppress evidence of institutional bias and constraints imposed on ‘independent’ adjudicators. Whether that use of deliberative secrecy is compatible with this Court’s jurisprudence and with the open court principle in s. 2(b) is itself a question of national importance that warrants this Court’s intervention.

PART IV – SUBMISSION ON COSTS

65. The Applicant requests costs in the cause.

PART V – ORDER SOUGHT

66. The Applicant seeks an order granting leave to appeal, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st day of December, 2025



Intiaz Hosein
Joseph Campisi
Christos Kakaletis

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