

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Appellant
(Intervener)

-AND-

THE REGIONAL MUNICIPALITY OF WATERLOO

Appellant
(Applicant)

-AND-

**JOSEPHINA DUGAS, TERRA-LYNN WEBER,
AVERY AMENT, AARON PRICE, JEREMY
LINTON, JEREMY NICHOL, JAMES HAMMOND,
JAKOB STUBBS, JAMES DAVIS, JASON PAUL,
NOAH HELSBY, JOSEPH BRADLEY, JOSEPH
SADLER, JULIE YOUNG, KYLE YORK, MEGAN
LOPES, STEPHANIE MCMILLAN, JEFFREY
COUTO, JORDAN CAMM, TERRANCE COLE,
XANDER HARKER, CHARLES KOCHER, ALINE
JEFFERY, MICHAEL JEFFERY, and PERSONS
UNKNOWN AND TO BE ASCERTAINED**

Respondents
(Respondents/Cross-Applicants)

**FACTUM OF THE APPELLANT/INTERVENER,
ATTORNEY GENERAL OF ONTARIO**

August 7, 2026

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PART I – THE APPELLANT AND DECISION APPEALED FROM

1. The Attorney General of Ontario (“**Ontario**”) appeals from the Judgment of the Honourable Justice Gibson of the Superior Court of Justice dated May 21, 2026. Ontario intervened in the Superior Court to make submissions on the constitutional issues and is thereby deemed to be a party to the proceeding for the purpose of any appeal.¹ Ontario’s appeal is joined with the appeal of the Regional Municipality of Waterloo (the “**Region**”), who commenced the application below.

2. Justice Gibson declared that Regional Municipal By-law Number 25-021 dated April 23, 2025 of the Regional Municipality of Waterloo, as amended by By-law Number 26-001 on January 9, 2026 (collectively, the “**by-law**”), unjustifiably infringed s. 7 and s. 15(1) of the *Charter* and is therefore of no force and effect.

3. Justice Gibson also granted an injunction preventing the Region from enforcing the by-law to evict persons encamping at 100 Victoria Street in Kitchener and from prohibiting entry to any persons seeking to join the encampment. He retained jurisdiction and ordered that the Region may seek further direction upon implementing either a “safe tenting protocol” or providing an alternative encampment site.²

PART II – OVERVIEW

4. Homelessness is a complex issue that requires a range of policy responses. Local governments must reconcile competing social interests, allocate public resources, mitigate risks to public safety, and manage the use of public property for the public benefit.

¹ *Courts of Justice Act*, RSO 1990, c C.43, ss 109(4) and 109(5).

² *The Regional Municipality of Waterloo v Named Respondents and Persons Unknown*, 2026 ONSC 2971, ¶259 [“**Waterloo 2026**”], Appeal Book and Compendium of the Appellant/Intervener [“**ABC**”], Tab 4, pp113-114.

5. Many local governments including the Region have made a deliberate policy choice not to endorse encampments as a solution to homelessness because encampments are hazardous living environments. The Region has instead devoted significant resources to shelter alternatives and long-term affordable housing and other supports.

6. Beneath the overarching debates over homelessness policy lies the specific issue in this case: how can the Region regain the exclusive use of a single property that it owns, located at 100 Victoria Street, for a specific public purpose? An encampment has existed on this property since December 2021. The Region unsuccessfully sought to remove the encampment in 2023 under its general Code of Use By-Law prohibiting all structures on public property.³ Since then the Region’s need for the property has only become more immediate. The Region must deliver the property to Metrolinx to construct a landmark public transportation project that will benefit both current and future residents.

7. The Region adopted a specific plan to wind down the encampment over time. It passed a by-law identifying the persons living there (the “**Existing Residents**”) as of April 16, 2025 (the date of public notice of the by-law), developed individualized housing plans for those persons, and offered them alternative accommodation according to their needs. To effect a gradual closure, the by-law prohibited newcomers from joining the encampment.

8. This plan was frustrated by judicial intervention. On August 21, 2025, the application judge granted an interim injunction restraining the Region from enforcing the

³ See *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670, ¶¶155-159 [**“Persons Unknown 2023”**], ABC, Tab 6, pp208-209.

by-law to prevent newcomers from joining the encampment.⁴ As a result, a continuous stream of new persons has flowed through the property, despite the Region having already transitioned over 50 persons into alternative accommodation. If it were not for the interim injunction, the encampment would currently be vacant.

9. The application judge then concluded on the merits that *Charter* ss. 7 and 15 prohibited the Region from vacating the encampment because the property had become the “shelter of last resort” for all homeless persons in the Region.⁵ He found that, short of solving homelessness, the Region could only comply with the *Charter* by providing an alternative encampment site or adopting a safe tenting protocol to permit and regulate outdoor sheltering at other locations.⁶ The application judge’s reasons create a new constitutional baseline for governments to positively appropriate public property for singular use as an authorized permanent encampment site unless they can solve homelessness.

10. The application judge’s reasons contain many errors. His s. 7 analysis conflates the claim of homeless persons for freedom from state interference with a positive obligation to provide a place to shelter. He failed to differentiate the by-law’s impact on persons living at the encampment on the effective date versus those who were not. He imported the analysis of the principles of fundamental justice from a different case about a different by-law and disregarded how the Region’s new by-law sought to mitigate the harms of eviction.

⁴ See *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2025 ONSC 4774, ¶118 [“*Waterloo 2025 – Injunction*”], ABC, Tab 5, pp155-156.

⁵ *Waterloo 2026*, ¶¶149, 162, ABC, Tab 4, pp77, 81.

⁶ *Waterloo 2026*, ¶¶190, 259, ABC, Tab 4, pp90, 113-114.

11. The application judge's s. 15 analysis is similarly flawed. His conclusion that homelessness is an analogous ground was unnecessary and contrary to binding precedents. He also disregarded precedents which held that by-laws prohibiting encampments do not have a disproportionate impact on protected groups that exists independently from the disadvantage related to homelessness itself.

12. At the justification stage, the application judge conducted a stunted s. 1 analysis and failed to defer to the Region as the elected local government with primary responsibility for managing the use of public property for the public good. Rather than consider whether the by-law was within a reasonable range of options, he conceived of a less restrictive alternative that was contrary to the Region's own policy objectives. He dismissed the benefits of the transit project as "speculative" and demanded definitive scientific evidence before considering them in the balance.

13. This Court should allow the appeal and correct the flawed reasoning of the application judge below.

PART III – FACTS

A. Encampments are dangerous places to live

14. There is no dispute that the encampment at 100 Victoria poses serious health and safety risks to the persons living there. There is evidence of overcrowding, widespread drug use and discarded needles, fires and fire hazards including barbeques and propane tanks, garbage accumulation, rodent infestation, human urine and feces, violence between residents, reports of weapons, and unsafe sandbag structures.⁷ There have been at least five

⁷ *Waterloo 2026*, ¶¶75, 79, ABC, Tab 4, pp55-56; Affidavit of Peter Sweeney, affirmed June 6, 2025, Exhibit Book ["EB"] Tab 1 ["Sweeney Affidavit"], ABC, Tab 12, pp279-280.

deaths at the encampment since January 2022.⁸

15. These risks persist despite the Region devoting over \$66,000 per month to ameliorate conditions, including by hiring on-site security, pest control, arranging for regular cleaning, providing waste disposal and servicing portable toilets.⁹ The application judge agreed that the encampment is “a miserable and desperate place.”¹⁰

16. The evidence of Dr. Koivu, an addiction physician practicing in Ontario who regularly treats patients experiencing homelessness, was that “[e]ncampments pose extensive health and safety risks” and “are not a safe alternative to housing or to a shelter.”¹¹ Dr. Koivu has personally treated patients who developed frostbite, hypothermia, trench foot, and infections leading to amputation as a result of living in encampments.¹² She has observed severe burns from tent fires and exploding propane tanks.¹³ She has also observed patients suffering from heat stroke and dehydration, often complicated by drug use.¹⁴ She also described the risk of infection from unsanitary conditions and the risk of developing communicable diseases.¹⁵

17. Dr. Koivu explained that persons living in encampments are at risk of being victims of violent attacks as well as sexual violence and trafficking.¹⁶ She has treated patients with mental illness who have been sexually exploited or been the targets of violence and theft.¹⁷

⁸ *Waterloo 2026*, ¶74, ABC, Tab 4, p55.

⁹ *Waterloo 2026*, ¶¶73, 79, ABC, Tab 4, pp54-56.

¹⁰ *Waterloo 2026*, ¶250, ABC, Tab 4, p110.

¹¹ Affidavit of S. Koivu, affirmed September 11, 2025, EB Tab 6 [“**Koivu Affidavit**”], ABC, Tab 17, pp296-297.

¹² Koivu Affidavit, ABC, Tab 17, pp297-299.

¹³ Koivu Affidavit, ABC, Tab 17, p298.

¹⁴ Koivu Affidavit, ABC, Tab 17, pp299-301.

¹⁵ Koivu Affidavit, ABC, Tab 17, pp301-304.

¹⁶ Koivu Affidavit, ABC, Tab 17, p309.

¹⁷ Koivu Affidavit, ABC, Tab 17, p310.

18. Dr. Koivu also explained that persons with addiction are at greater risk in encampments. She has treated patients who left housing to live in encampments to get easier access to diverted opioids and avoid restrictions on drug use.¹⁸

19. Dr. Koivu concluded that despite the “false and even dangerous narrative” that encampments are safe and desirable places to live, they are in fact “extremely dangerous places to live” and “are not a safe alternative to housing or to a shelter.”¹⁹

20. The application judge found Dr. Koivu’s evidence to be “of assistance to the Court.”²⁰ The Respondents’ witnesses gave consistent evidence.²¹ Dr. Koivu’s evidence was also consistent with several judicial decisions describing the dangerous conditions in encampments.²²

21. These dangerous conditions are an important reason why many Ontario municipalities have not sanctioned encampment sites as a solution to homelessness. The Region expressly considered providing an alternative encampment site but decided against it, in part because the Region believes encampment living to be “inconsistent with the Region’s own commitments to addressing chronic homelessness”.²³ Encampment living is also inconsistent with the recommendation of the National Working Group of

¹⁸ Koivu Affidavit, ABC, Tab 17, pp310-312.

¹⁹ Koivu Affidavit, ABC, Tab 17, pp319-320.

²⁰ *Waterloo 2026*, ¶¶99, ABC, Tab 4, p62.

²¹ See e.g. Affidavit of C. Sharpe, sworn May 30, 2025, EB Tab 14 [“**Sharpe Affidavit**”], ABC, Tab 31, p457; Affidavit J. Young, sworn June 13, 2025, EB Tab 24, ABC, Tab 32, p459; Affidavit of T. Cole, sworn October 10, 2025, EB Tab 57, ABC, Tab 33, p461.

²² *Black et al v City of Toronto*, 2020 ONSC 6398, ¶¶104-109; *Poff v City of Hamilton*, 2021 ONSC 7224, ¶¶190-212; *Heegsma v Hamilton (City)*, 2024 ONSC 7154 [“*Heegsma*”], ¶¶56-61; *Matsqui-Abbotsford Impact Society v Abbotsford (City)*, 2024 BCSC 1902, ¶¶20-30, 37-38, 147-149; *Vancouver Board of Parks and Recreation v Williams*, 2014 BCSC 1926, ¶¶9-12.

²³ Sweeney Affidavit, ABC, Tab 12, pp277-278. Other considerations were that the Region owns no other vacant land nearby and prefers to redirect the significant resources spent mitigating encampment conditions towards finding alternative accommodation.

Homelessness that “encampments will rarely satisfy the requirements of the human right to housing, and thus should not be understood as a solution to homelessness and should not be permanent.”²⁴

22. Instead, the Region has devoted significant resources towards temporary shelter options and a long-term plan for affordable housing.²⁵ The Region adopted a Plan to End Chronic Homelessness (“**PECH**”) by 2030 and within three years doubled its operating budget for homelessness programs and services from \$30.9 million to \$65.5 million.²⁶ The Region plans to create 2,500 affordable housing units over the next five years.²⁷

23. Despite the dangers of encampment living and the difficult policy and resource decisions made by the Region, the application judge found that the Region ought to have sanctioned an alternative encampment site or a tenting protocol permitting and regulating outdoor sheltering at other locations.²⁸ No other court in Canada has reached this conclusion.

B. Living indoors in temporary shelter is safer than living in an encampment

24. The Respondents’ experts confirmed the negative health impacts of living outdoors.²⁹ They did not refer to any studies comparing encampments to indoor temporary shelters or recommending encampment living over living in a shelter.³⁰ Nor did they opine

²⁴ Cross-Ex of S. Escobar, July 11, 2025, Ex 3, EB Tab 75C, p2, ABC, Tab 34, p463.

²⁵ *Waterloo 2026*, ¶¶16-20, 61-64, 71, 132, 172-175, ABC, Tab 4, pp35-36, 49-51, 54, 72, 85.

²⁶ *Waterloo 2026*, ¶¶16-17, 61, 69, 132, 172-175, ABC, Tab 4, pp35, 49-50, 53, 72, 85.

²⁷ Cross-Ex of Peter Sweeney, July 11, 2025, EB Tab 77, Q98, ABC, Tab 16, p294.

²⁸ *Waterloo 2026*, ¶¶251, 256, ABC, Tab 4, pp110, 113.

²⁹ Affidavit of Dr. Hwang, sworn May 6, 2025, EB Tab 49 [“**Hwang Affidavit**”], ABC, Tab 18, pp322-323; Affidavit of Dr. Gupta, sworn August 15, 2025, EB Tab 51 [“**Gupta Affidavit**”], ABC, Tab 21, pp344-346; Cross-Ex of Dr. Gupta, EB Tab 86, Q50-58 [“**Gupta Cross**”], ABC, Tab 22, pp348-353.

³⁰ Koivu Affidavit, ABC, Tab 17, pp305-319.

that the alternative accommodation offered by the Region was less safe than the encampment itself.

25. Dr. Gupta gave evidence about the harms of living unsheltered and admitted that “living in a permanent, physical structure provides more elements and more safety than living in an encampment.”³¹ Dr. Hwang relied on an article about the harms of evicting encampments in San Francisco but admitted that the article focused on “sweeps”, i.e. forced evictions with little notice and no offer of alternative shelter.³² He admitted that he did not address “the nature or the adequacy of the efforts that are being made on the ground” by the Region.³³

26. Dr. Koivu, by contrast, squarely addressed the health and safety benefits of indoor shelters compared to encampments. She explained that tents are not effective at preventing significant injury from exposure to harsh conditions.³⁴ Shelters have sinks and running water to provide access to basic hygiene and sanitation.³⁵ Shelters can also implement safeguards to mitigate disease transmission, such as social distancing, masks, clean linens, and medical supports.³⁶

27. Dr. Koivu referred to studies showing that shelters provide more protection from violence than encampments.³⁷ Shelters can implement safeguards against sexual violence,

³¹ Gupta Cross, Q195, ABC, Tab 22, pp354-355.

³² Hwang Affidavit, Ex J, ABC, Tab 19, pp326-335; Cross-Ex of Dr. Hwang, July 11, 2025, EB Tab 76, Q53, 64, 75-76, 79 [**“Hwang Cross”**], ABC, Tab 20, pp337-342; See also Koivu Affidavit, ABC, Tab 17, p313.

³³ Hwang Cross, Q69, ABC, Tab 20, pp339-340.

³⁴ Koivu Affidavit, ABC, Tab 17, pp297, 305.

³⁵ Koivu Affidavit, ABC, Tab 17, p319.

³⁶ Koivu Affidavit, ABC, Tab 17, pp304-305.

³⁷ Koivu Affidavit, ABC, Tab 17, p307.

including age and gender restrictions as well as on-site staff to monitor activity.³⁸

28. The application judge accepted that “being unhoused, including in encampments, is associated with significant risks and negative health outcomes as compared to being housed.”³⁹ However, he was critical of the alternative accommodation being offered by the Region, including at emergency shelters and motels, and pointed to safety and accessibility concerns such as disease transmission, lack of accessible supports, and incidents of violence, including sexual violence.⁴⁰ There was no evidence before the judge that these concerns were more prevalent at shelters or motels than at encampments.

29. For example, the application judge relied on a national survey co-authored by Dr. Schwan in which women and gender-diverse persons self-reported avoiding using co-ed spaces because of safety concerns.⁴¹ This survey was of no assistance as the encampment is itself a co-ed space. In any event, the survey did not compare the safety risk of temporary shelters to encampments or even report on the participants’ experiences in encampments.⁴²

30. The judge also relied on what he referred to as “Dr. Schwan’s research” that “encampment living provided relative safety in comparison to the other available options.”⁴³ This statement was not based on any research study comparing safety but rather on anecdotal hearsay evidence of Dr. Schwan’s “conversations” with unidentified women residing in encampments who self-reported “feeling safer”.⁴⁴

³⁸ Koivu Affidavit, ABC, Tab 17, p309.

³⁹ *Waterloo 2026*, ¶88, ABC, Tab 4, pp58-59.

⁴⁰ *Waterloo 2026*, ¶145, ABC, Tab 4, pp75-76.

⁴¹ *Waterloo 2026*, ¶¶218-220, ABC, Tab 4, pp102-103.

⁴² Affidavit of Dr. Schwan, sworn August 15, 2025, Ex B, EB Tab 54B [“**Schwan Affidavit**”], ABC, Tab 23, pp357-359.

⁴³ *Waterloo 2026*, ¶¶219-221, ABC, Tab 4, pp102-103.

⁴⁴ Schwan Affidavit, ABC, Tab 23, pp357-359.

31. Dr. Schwan admitted that she had not visited 100 Victoria or undertaken any work comparing rates of violence in Waterloo shelters with violence at the encampment.⁴⁵ She also admitted that being able to control access to one's space, including having a locked door (e.g. in a motel) is "critical" to personal safety, including for homeless women and gender-diverse persons, and that being able to exclude a violent intimate partner from one's physical space is important to escaping that violence.⁴⁶

32. With respect to persons with mental illness, the application judge adopted an unsupported statement from the factum of *Amicus Curiae* that "in some cases the Alternative Accommodation may be less safe than the Encampment."⁴⁷ *Amicus* cited no evidence to support this statement, and there was none.

33. On the contrary, Dr. Koivu opined that persons with mental illness are often exploited at encampments and are more likely to be victims of sexual assault, violence and theft.⁴⁸ Her patients with addiction also reported increased drug use in encampments, progressing from prescription opioids to illicit fentanyl, and a high use of stimulants such as methamphetamine to stay awake at night and be alert to assault or theft.⁴⁹ The encampment is also not physically accessible, provides no mental health supports, and provides no support to persons addicted to drugs.⁵⁰

34. Any finding that the alternative accommodation offered by the Region was less safe

⁴⁵ Cross-Ex of Dr. Schwan, EB Tab 89, Q6-8, 14-15 [**"Schwan Cross"**], ABC, Tab 25, pp422-424.

⁴⁶ Schwan Cross, Q23-25, 33-39, 43-45, ABC, Tab 25, pp425-429.

⁴⁷ *Waterloo 2026*, ¶231, ABC, Tab 4, pp105-106; *Amicus* SCJ Factum, ¶73(c), ABC, Tab 37, pp473-474.

⁴⁸ Koivu Affidavit, ABC, Tab 17, p310.

⁴⁹ Koivu Affidavit, ABC, Tab 17, pp311-312.

⁵⁰ Cross-Ex of A. Allt, EB Tab 70, Q50-54, 96-99, ABC, Tab 35, pp465-468.

than living in the encampment was therefore based on “the unsupported hypotheses of enthusiastic counsel” rather than on the evidence and constitutes a palpable and overriding error.⁵¹

35. Nor did the application judge find that the location of 100 Victoria had any unique health or safety benefit compared to any other location. The evidence was that the supports being offered at the encampment (harm reduction, donated clothing, firewood, blankets, food, and water) were provided on-site by health services and community volunteers; all such supports could be provided elsewhere.⁵² The only benefit ascribed to 100 Victoria was that it was “the only lawful sheltering site in the Region.”⁵³ Sheltering on 100 Victoria was not in fact “lawful” according to the Region’s own by-laws, which could not be enforced due to a series of court orders including the judge’s own interim injunction order.⁵⁴

C. The Region needs the property for a specific purpose and for the public benefit

36. The location of 100 Victoria does have significance to the Region. The Region has an immediate and important need for exclusive use of 100 Victoria to construct the Kitchener Central Transit Hub, a landmark public project that has been in development for almost a decade.⁵⁵

37. The property is needed as a staging and laydown site to position and organize

⁵¹ *Mackay v Manitoba*, 1989 CanLII 26 (SCC) pp361-362; *Ernst v Alberta Energy Regulator*, 2017 SCC 1, ¶22.

⁵² *Waterloo 2026*, ¶¶37, 52, ABC, Tab 4, pp42, 46; Second Affidavit of Peter Sweeney, affirmed July 2, 2025, EB Tab 4, ABC, Tab 14, pp289-290; Affidavit of Aaron Moss, affirmed January 16, 2026, EB Tab 9, ABC, Tab 26, pp431-432.

⁵³ *Waterloo 2026*, ¶242, ABC, Tab 4, pp107-108.

⁵⁴ *Persons Unknown 2023*, ¶¶155-159, ABC, Tab 6, pp208-209; *Waterloo 2025 – Injunction*, ¶118, ABC, Tab 5, pp155-156.

⁵⁵ *Waterloo 2026*, ¶¶47-51, ABC, Tab 4, pp44-46; Affidavit of Douglas Spooner, affirmed June 6, 2025, EB Tab 2, [“**Spooner Affidavit**”], ABC, Tab 28, pp435-436.

construction materials, equipment, large machines and vehicles, and to hold temporary structures for workers.⁵⁶ The Region's evidence was that it must provide the property to Metrolinx by the end of 2026 to begin construction and needs several months to remediate the site.⁵⁷ While the construction start date has been subject to change, site remediation and construction cannot begin until the Region has vacant possession of the property.⁵⁸

38. The Region owns no other available property for laydown that is proximate, large enough, and on-grade with the construction site.⁵⁹ The option of purchasing additional land is impractical because the available land is unsuitable, prohibitively expensive, and the purchase would delay the project.⁶⁰

39. The Region's Director of Transit Services, Douglas Spooner, described the benefits of the Transit Hub for current and future residents. The Hub will act as a gateway between the Region and other urban areas, connecting various transit services including light rail, bus service, car shares, cyclists and pedestrians into one central location.⁶¹ The Hub will reduce commuting times and make transit more accessible for vulnerable community members such as seniors, lower income residents, and persons with disabilities.⁶²

40. Mr. Spooner described these benefits based on his knowledge and experience working on multiple transit projects.⁶³ The application judge dismissed the benefits as

⁵⁶ *Waterloo 2026*, ¶¶49, ABC, Tab 4, p45; Spooner Affidavit, ABC, Tab 28, p440.

⁵⁷ Spooner Affidavit, ABC, Tab 28, p443; Cross-Ex of Douglas Spooner, March 6, 2026, EB Tab 94, Q142 [**"Spoooner Cross"**], ABC, Tab 29, pp449-450.

⁵⁸ Spooner Affidavit, ABC, Tab 28, pp443-444.

⁵⁹ *Waterloo 2026*, ¶¶50-51, ABC, Tab 4, pp45-46; Spooner Affidavit, ABC, Tab 28, p440-442.

⁶⁰ Spooner Affidavit, ABC, Tab 28, p442.

⁶¹ Spooner Affidavit, ABC, Tab 28, pp437-438.

⁶² Spooner Affidavit, ABC, Tab 28, pp437-439.

⁶³ Spooner Affidavit, ABC, Tab 28, pp435-436; Spooner Cross, Q121-126, ABC, Tab 29, pp446-448.

“speculative” because they “were not based on any specific modeling or empirical data that was projected for this project.”⁶⁴

D. The Region adopted a site-specific plan to wind down the encampment

41. The application judge noted the “transitory nature of homelessness” and found that “the majority of the Region’s homeless move in and out of homelessness”.⁶⁵ The Respondents reported moving in and out of homelessness and having different reasons for sheltering at the encampment and reported a desire to change their experience of homelessness.⁶⁶

42. The Region, however, cannot immediately solve homelessness. Despite more than doubling its operating budget for homelessness supports, homelessness has more than doubled in the Region in the last three years.⁶⁷ The Region cannot offer shelter to every homeless person in the jurisdiction.⁶⁸

43. The Region therefore adopted a site-specific plan to address the needs of persons living at 100 Victoria while winding down the encampment.⁶⁹ Regional Council passed a by-law which provided that the approximately 40 “Existing Residents” living at the encampment as of April 16, 2025 – the date of public notice of the by-law – would not be evicted before December 1, 2025. The Region then sent a team of licensed professional unsheltered support workers (“USWs”), including a registered nurse, to work with the existing residents and develop individual housing plans (“IHPs”) tailored to their specific

⁶⁴ *Waterloo 2026*, ¶243, ABC, Tab 4, pp108-109.

⁶⁵ *Waterloo 2026*, ¶¶52, 60, 165, 207, ABC, Tab 4, pp46, 49, 82, 99.

⁶⁶ *Waterloo 2026*, ¶¶150, 155, 169, ABC, Tab 4, pp77, 79, 84.

⁶⁷ *Waterloo 2026*, ¶¶16, 58, 69, 164, ABC, Tab 4, pp35, 48-49, 53, 82.

⁶⁸ *Waterloo 2026*, ¶59, ABC, Tab 4, p49.

⁶⁹ Sweeney Affidavit, Ex B, ABC, Tab 13, pp282-287.

needs.⁷⁰ The Region also directed additional funding towards alternative accommodation through 2026 and towards new supportive housing units.⁷¹ To effect a gradual closure over time, the by-law provided that newcomers were not permitted to join the encampment.

44. The Region later amended the by-law on January 9, 2026 to extend the date for vacant possession and adopt a specific transition protocol requiring that existing residents be offered alternative accommodation in accordance with their IHP before they could be evicted from the encampment.⁷²

45. The Region was ultimately prevented from implementing this plan. On August 21, 2025, the application judge granted an interim injunction restraining the Region from preventing newcomers from joining the encampment. As a result, a stream of new persons has continued to flow through the encampment, despite the Region having already transitioned over 50 individuals (both existing residents and new persons who arrived after the effective date) into alternative accommodation.⁷³

46. By the time the application was heard in mid-April 2026, none of the existing residents who lived on the encampment as of the effective date remained.⁷⁴ They either successfully transitioned into alternative accommodation or left the encampment without accepting the Region's offer.⁷⁵ If the Region had not been prevented from implementing its plan, the property would currently be vacant.

⁷⁰ *Waterloo 2026*, ¶¶19-20, 40, 71, ABC, Tab 4, pp35-36, 43, 54.

⁷¹ *Waterloo 2026*, ¶¶64, 71, ABC, Tab 4, pp51, 54.

⁷² *Waterloo 2026*, ¶¶179-180, ABC, Tab 4, p86; Affidavit of Dilupneet Kang, affirmed January 9, 2026, Ex A, EB Tab 8A [**"Kang Affidavit"**], ABC, Tab 30, pp452-455.

⁷³ *Waterloo 2026*, ¶67, ABC, Tab 4, pp51-52; Answers to Undertakings of A. Moss, Answer #2, EB Tab 99 [**"Moss Undertakings"**], ABC, Tab 27, p433.

⁷⁴ *Waterloo 2026*, ¶67, ABC, Tab 4, pp51-52.

⁷⁵ Moss Undertakings, Answer #2, ABC, Tab 27, p433.

PART IV – ISSUES AND THE LAW

A. The standard of review is correctness

47. Questions of law and mixed fact and law in connection with a constitutional question are reviewed on a standard of correctness.⁷⁶ The application judge struck down the by-law based on the following constitutional questions:

1. Whether the by-law violated the claimants’ rights to life, liberty and security of the person under *Charter* s. 7;
2. Whether homelessness ought to be recognized as a new analogous ground under *Charter* s. 15;
3. Whether the by-law discriminated against the claimants based on enumerated or analogous grounds; and
4. Whether the by-law is demonstrably justified under s. 1.

48. Ontario submits that the answer is “no” to the first three questions and “yes” to the fourth.

49. The judge’s conclusions on questions of mixed fact and law are not owed deference.⁷⁷ While findings of social and legislative fact may attract deference, the constitutional conclusions drawn from those facts are reviewed for correctness.⁷⁸

B. No infringement of *Charter* section 7

50. The application judge erred by conflating the s. 7 claim of existing residents of the encampment against state-imposed eviction with the positive claims of homeless persons

⁷⁶ *Housen v Nikolaisen*, 2002 SCC 33, ¶¶8, 26-27; [“*Housen*”]; *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, ¶¶94-97 [“*Société des casinos*”]; *Animal Justice v Ontario (Attorney General)*, 2026 ONCA 380, ¶41 [“*Animal Justice*”].

⁷⁷ *Société des casinos*, ¶¶94-97; *Animal Justice*, ¶41.

⁷⁸ *Canada (Attorney General) v Bedford*, 2013 SCC 72, ¶¶48-49, 56 [“*Bedford*”].

seeking to enter and live on the encampment as a “shelter of last resort”.⁷⁹

51. Section 7 restricts the state’s ability to deprive persons of life, liberty and security of the person. It does not create a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person.⁸⁰ In the context of homeless encampments, the jurisprudence differentiates between the freedom to erect temporary outdoor shelter without state interference, and the imposition of positive obligations on the state to appropriate public property to be used for encampments.⁸¹

52. In *Adams*, the BC Court of Appeal recognized a narrow right under s. 7 not to be prevented from erecting “temporary overhead shelter at night” in public parks when the total number of homeless persons exceeds the number of available shelter beds.⁸² The Court expressly noted that this conclusion did not “impose positive obligations on the City to provide adequate alternative shelter, or to take any positive steps to address the issue of homelessness.”⁸³

53. Ontario courts have also held that, whatever limits s. 7 may impose on prohibiting encampments, those limits do not equate to a “right to shelter” under s. 7, or a positive right to enter and shelter on public property.⁸⁴ In *Tanudjaja*, the Superior Court held (and this Court affirmed) that “there can be no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the ‘life, liberty and

⁷⁹ *Waterloo 2026*, ¶¶37, 152-153, ABC, Tab 4, pp42, 78.

⁸⁰ *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, ¶81 [“*Gosselin*”].

⁸¹ *Victoria (City) v Adams*, 2009 BCCA 563, ¶¶74, 94-101 [“*Adams*”]; See also *Johnston v Victoria (City)*, 2011 BCCA 400, ¶¶10-13 [“*Johnston*”]; *Heegsma*, ¶¶69-70, 76; *The Corporation of the City of Kingston v Doe*, 2023 ONSC 6662, ¶¶57, 64-67, 95, 112-112 [“*Kingston*”].

⁸² *Adams*, ¶¶1, 100.

⁸³ *Adams*, ¶95; See also *Johnston*, ¶¶10-13.

⁸⁴ *Kingston*, ¶¶57, 64-67, 95, 112-112; *Heegsma*, ¶¶69-70, 74.

security of the person’...there is no fundamental right to affordable, adequate and accessible housing provided through s. 7 of the *Charter*”.⁸⁵ The Divisional Court in *Deskin* also recently affirmed a long line of authority holding that “the protection offered by s. 7 does not ‘include and require provision for the economic satisfaction of basic human needs.’”⁸⁶

i) No deprivation of life or security of the person

54. The application judge was required to differentiate between the by-law’s impact on existing residents versus its impact on other persons in the s. 7 analysis. The impact of the by-law was very different depending on whether a person was living at the encampment on the effective date, and it was an error of law for the application judge to ignore this difference.

55. For existing residents, the application judge erred in finding that the by-law deprived them of life or security of the person. There can be no deprivation where persons living on the encampment were offered alternative indoor accommodation and exercised the choice to either accept or decline that offer.

56. This case is distinguishable from *Adams* and other encampments cases where courts have held that persons subject to eviction have “nowhere else to go” and therefore must be

⁸⁵ *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410, ¶59 [*“Tanudjaja”*]; aff’d 2014 ONCA 852, ¶30.

⁸⁶ *Deskin v Ontario*, 2023 ONSC 5584, ¶94 [*“Deskin”*], citing *Masse v Ontario (Ministry of Community and Social Services)* (1996), 1996 CanLII 12491 (ON CTGDDC), ¶73 [*“Masse”*]; *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140, ¶¶32-33 [*“Barbara Schlifer”*]; *Sagharian (Litigation guardian of) v Ontario (Minister of Education)*, 2008 ONCA 411, ¶¶52-53, leave to appeal refused, *Sagharian v Ontario (Education)*, 2008 CanLII 63481 (SCC), and *Gosselin*, ¶81. See also *Flora v Ontario (Health Insurance Plan)*, 2008 ONCA 538, ¶109 [*“Flora”*] and *Ontario Health Coalition and Advocacy Centre for the Elderly v His Majesty the King in Right of Ontario*, 2025 ONSC 415, ¶¶213-215 [*“Ontario Health Coalition”*].

permitted to shelter themselves from the elements.⁸⁷ The existing residents in this case did have a place to go. They were offered alternative accommodation in accordance with an IHP and could not be evicted unless they declined that offer or otherwise engaged in prohibited activities that endangered their own health and safety or that of others. Indeed, the Region successfully transitioned 29 existing residents to alternative accommodation. The 11 others declined the offer and left of their own accord.⁸⁸

57. The application judge's suggestion that the alternative accommodation was inadequate, inaccessible, or less safe than the encampment itself was not supported by the evidence. In any event, no court has held that the *Charter* requires municipalities to provide permanent housing to homeless persons before vacating an encampment on public property.

58. Nor did the by-law engage the life or security of the person of persons not living at the encampment as of the by-law's effective date. These persons were not required by the by-law to leave the places where they were sheltering or to remove any shelters they had erected. Had the by-law been allowed to operate as intended, these persons would have been in no worse position than they were before the by-law was adopted.

59. The application judge erred in finding a deprivation of life and security of the person on the basis that homeless persons would no longer be able to access the encampment as a "shelter of last resort".⁸⁹ Despite his statement that the Respondents were "not seeking to impose free-standing positive obligations on the Region", the judge effectively constitutionalized a positive right to appropriate 100 Victoria for use as a permanent

⁸⁷ *Adams*, ¶¶72, 75, 104; *Kingston*, ¶87.

⁸⁸ *Moss Undertakings*, Answer #2, ABC, Tab 27, p433.

⁸⁹ *Waterloo 2026*, ¶¶37, 152-153, ABC, Tab 4, pp42, 78.

homeless encampment, contrary to longstanding judicial precedents.⁹⁰ If there is no positive obligation on the state to use public property to provide shelter, ceasing to make this property available as an encampment cannot constitute a “deprivation” within the meaning of s. 7.⁹¹

60. The application judge further erred in analogizing to *Mathur* and concluding that the Region must take positive steps because it had “committed itself to the obligations set out in its PECH”.⁹² In *Mathur*, the target required by the impugned statute was the very subject of the constitutional challenge.⁹³ By contrast, the PECH is not the legal instrument being challenged, and the Respondents do not allege that the Region acted unconstitutionally by adopting the PECH.⁹⁴ Nor can the Region, by adopting the PECH, expand its constitutional obligations under s. 7.⁹⁵

ii) No deprivation of liberty

61. The application judge erred in holding that the impugned by-law deprived anyone of liberty. The by-law creates no offences and imposes no punishments. No-one may be imprisoned under the by-law.⁹⁶

62. The application judge erred in holding that the by-law engaged the Respondents’ liberty interests by “permit[ting] them to be arrested without warrant if they shelter on the

⁹⁰ See Footnote 86.

⁹¹ *ETFO et al v Her Majesty the Queen*, 2019 ONSC 1308, ¶¶138-140 [“*ETFO*”], citing *Flora*, *Barbara Schlifer*, and *Dunmore v Ontario (Attorney General)*, 1997 CanLII 16229 (ON CTGD).

⁹² *Waterloo 2026*, ¶138, ABC, Tab 4, p73.

⁹³ *Mathur v Ontario*, 2024 ONCA 762, ¶1.

⁹⁴ Respondents' Amended Notice of Application, July 29, 2025, ¶1(a)-(d), pp5-6, ABC, Tab 10, pp242-244.

⁹⁵ See Footnote 91.

⁹⁶ There is no prospect of imprisonment for a violation of a by-law made under the *Municipal Act, 2001*, SO 2001, c.25, s 11(2), except for one involving adult entertainment establishments (s 430): see *Mississauga (City) v Chudzicki*, 2018 ONCJ 858, ¶¶30-32.

property.”⁹⁷ The by-law does not create any arrest authority. While the *Trespass to Property Act* allows police or an occupier of property to arrest a trespasser without warrant,⁹⁸ there was no constitutional challenge to the validity of this provision. In any event, the hypothetical availability of this separate enforcement power is too remote to conclude that the by-law deprives anyone of liberty.⁹⁹

63. The application judge further erred in applying this Court’s statement in *Drover* that “an individual’s right to decide where to live is essential to maintain personal autonomy and dignity, and it therefore falls within the core sphere of deeply personal decisions protected by s. 7.”¹⁰⁰ The correctness of *Drover* is still to be decided by the Supreme Court.¹⁰¹ In any event, this Court did not hold that the s. 7 liberty right gives individuals the “autonomy” to choose to live on someone else’s property. A choice to reside on someone else’s property over the owner’s objection is not a “deeply personal decision” within the meaning of s. 7 but rather a repudiation of a basic aspect of property ownership.¹⁰²

iii) The by-law is not grossly disproportionate

64. The application judge erred in his analysis of the principles of fundamental justice by mischaracterizing the purpose of the impugned by-law and conflating it with the purpose of the Code of Use By-Law considered in *Persons Unknown 2023*. The Code of Use By-law was not challenged in this proceeding. The judge acknowledged that this proceeding

⁹⁷ *Waterloo 2026*, ¶187, ABC, Tab 4, p89.

⁹⁸ *Trespass to Property Act*, RSO 1990, c T.21, s 9.

⁹⁹ *R v Schmidt*, 2014 ONCA 188, ¶¶43-44; *London (City) v Polewsky*, 2005 CanLII 38742 (ONCA), ¶4.

¹⁰⁰ *Drover v Canada (Attorney General)*, 2025 ONCA 468, ¶131 [“*Drover*”].

¹⁰¹ *Drover*, leave to appeal granted 2026 CanLII 58917 (SCC).

¹⁰² *Bracken v Fort Erie (Town)*, 2017 ONCA 668, ¶71.

was “more limited in scope than *Persons Unknown 2023*” but then found that the purpose of the by-law was “substantively identical” to the Code of Use By-Law.¹⁰³ He then invoked horizontal *stare decisis* to conclude that the by-law was also grossly disproportionate.¹⁰⁴

65. The analysis of the principles of fundamental justice examines “the relationship between the law’s purpose and what it actually does.”¹⁰⁵ Courts are required at the outset to correctly identify the purpose of the impugned law.¹⁰⁶ The articulation of the law’s purpose “should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms.”¹⁰⁷

66. The by-law has a distinct purpose from the Code of Use by-law considered in *Persons Unknown 2023*, and from similar by-laws considered in other encampments cases. The purpose of the Code of Use by-law is primarily to regulate the safe and shared use of public spaces like recreational parks that are open to the public and used by everyone, i.e. “to prevent the disruption of the use and enjoyment of the [property] by other people.”¹⁰⁸

67. By contrast, the purpose of the impugned by-law is not “to prevent the disruption of the use and enjoyment” of 100 Victoria by everyone. It is to exclude *all persons* from 100 Victoria so that the Region can exclusively use it as a laydown site. This purpose is clear from the by-law’s preamble, which is “the most significant and reliable indicator of

¹⁰³ *Waterloo 2026*, ¶¶18-19, 101, ABC, Tab 4, pp35, 63.

¹⁰⁴ *Waterloo 2026*, ¶¶101, 147, 153, ABC, Tab 4, pp63, 76, 78.

¹⁰⁵ *R v Moriarity*, 2015 SCC 55, ¶¶27-31 [“*Moriarity*”].

¹⁰⁶ *R v Safarzadeh-Markhali*, 2016 SCC 14, ¶24 [“*Safarzadeh-Markhali*”]; *R v Sharma*, 2022 SCC 39, ¶87 [“*Sharma*”].

¹⁰⁷ *Moriarity*, ¶26.

¹⁰⁸ *Persons Unknown 2023*, ¶¶9, 112, ABC, Tab 6, pp161, 196.

legislative purpose”.¹⁰⁹

68. The application judge erroneously concluded that the by-law had the same purpose as the Code of Use by-law because it had the same effect of vacating 100 Victoria.¹¹⁰ But the fact that two by-laws apply to the same property does not mean they have the same purpose: “the law’s purpose is distinct from the means used to achieve that purpose.”¹¹¹

69. In any event, the two by-laws do not have the same effect. The Code of Use by-law applies to any structure erected on any Region-owned property “regardless of the circumstances”, including where the Region had no immediate need for the property.¹¹² By contrast the by-law applies only to 100 Victoria, identifies the immediate need for the property, and prescribes the conditions that must be met before it can be enforced, including offers of alternative accommodation and social service supports.¹¹³

70. Because the application judge failed to properly identify the purpose and scope of the by-law, he failed to conduct his own analysis of the principles of fundamental justice. He instead imported the analysis from a different case about a different by-law. This Court must therefore conduct its own analysis.

71. The only principle of fundamental justice addressed by the application judge was the principle against gross disproportionality.¹¹⁴ A law is grossly disproportionate where the seriousness of its impact is “totally out of sync” with its objective.¹¹⁵ This is a high threshold. It applies only in “extreme cases” where the impact of the law is “draconian”

¹⁰⁹ Kang Affidavit, Ex A, ABC, Tab 30, pp452-455; *Sharma*, ¶88.

¹¹⁰ *Waterloo 2026*, ¶101, ABC, Tab 4, p63.

¹¹¹ *Safarzdeh-Markhali*, ¶26.

¹¹² *Persons Unknown 2023*, ¶¶113-114, ABC, Tab 6, pp196-197.

¹¹³ Kang Affidavit, Ex A, ABC, Tab 30, pp452-455.

¹¹⁴ *Waterloo 2026*, ¶¶146-147, 192-193, ABC, Tab 4, pp76, 90-91.

¹¹⁵ *Bedford*, ¶120.

and “entirely outside the norms accepted in our free and democratic society.”¹¹⁶ The Supreme Court has illustrated the threshold using the specific hypothetical of “a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk.”¹¹⁷

72. The impugned by-law does not approach the “draconian impact” of a law that imprisons people for life for spitting on the sidewalk. It is not “totally out of sync” to require individuals occupying public property to transition into alternative accommodation so that the property can be used for a specific and important public purpose. Nor is it “draconian” to prevent individuals from taking up new residence at a site that is needed to build transit infrastructure. To find otherwise would trivialize the important protections of the *Charter*.

73. The application judge mischaracterized the by-law’s impact by finding that it harmed persons who were not already living at the encampment. The harm alleged by the Respondents, however, related to being forced to live unsheltered outdoors, not to being prevented from taking up residence at 100 Victoria, which has no particular health or safety benefit.

74. The application judge incorrectly described 100 Victoria as the only “lawful” sheltering location of last resort.¹¹⁸ However, living at 100 Victoria is not “lawful” under the Region’s by-laws. The only reason 100 Victoria has become a “shelter of last resort” is because of cascading judicial interventions that have frustrated the Region’s attempts to wind down the encampment over time. If not for these interventions, the property would be vacant.

¹¹⁶ *Bedford*, ¶¶109, 120.

¹¹⁷ *Bedford*, ¶120.

¹¹⁸ *Waterloo 2026*, ¶¶153, 162, 190, ABC, Tab 4, pp78, 81, 90.

75. For existing residents of the encampment, the application judge ignored how the by-law mitigated the potential harms of eviction. The judge adopted statements from the Respondents' factum that the Region was making the same "assurances" it did in 2023 but ignored the by-law's actual provisions requiring offers of alternative accommodation before the Region could vacate the property.¹¹⁹

iv) Federal policies and international instruments cannot expand the scope of Charter rights

76. To the extent the application judge's reliance on federal policy statements and international instruments led him to read a "right to adequate housing" into *Charter* s. 7 as a "fundamental human right that is inextricably linked to other rights, including the rights to life, security of the person, and equality,"¹²⁰ the judge erred in law.

77. The scope of interests protected by s. 7, the legal tests to be applied, and the application of s. 7 to the issue of encampments on public land were not matters of first impression. These matters were largely addressed by binding precedents, including *Tanudjaja* and *Deskin*. The application judge's task was to apply those precedents to the impugned by-law. He did not cite to *Tanudjaja* or *Deskin*, attempt to distinguish those cases or explain why he was not bound by them.

78. Instead, in concluding that "the *Charter* accords rights which can only be fully enjoyed by people who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income," the judge improperly used federal policy statements and international instruments to greatly expand the scope of the Region's obligations under the *Charter*.

¹¹⁹ *Waterloo 2026*, ¶193, ABC, Tab 4, p91; Respondents' Factum, ¶21, ABC, Tab 36, p470.

¹²⁰ *Waterloo 2026*, ¶¶106-134, 139, ABC, Tab 4, pp64-74.

79. The judge’s extensive reliance on the federal *National Housing Strategy Act* (“*NHSA*”)¹²¹ and the views of the Federal Housing Advocate was extraneous to his task of reviewing the by-law under the *Charter*. The federal government has no constitutional authority to regulate municipalities or housing policy, both of which are matters of exclusive provincial competence.¹²² Aspirational or hortatory statements of housing policy by federal legislators or appointees cannot be used to define the *Charter* limits on provincial or municipal action. To do so would be contrary to the division of powers and the unwritten constitutional principle of federalism.

80. It would also defeat the purpose of s. 31 of the *Charter*, which provides that “Nothing in this *Charter* extends the legislative powers of any body or authority”, to use statements of policy by federal legislators or appointees to establish new constitutional baselines for provincial or municipal action under the *Charter*.¹²³ Neither Parliament through the *NHSA* nor the Federal Housing Advocate through its publications can amend the *Constitution* of Canada to confer a *Charter* right to adequate housing.¹²⁴

81. Nor can statements of policy by Parliament or federal appointees expand the scope of the *Charter* to “establish a basic human right to adequate shelter centered in human dignity.”¹²⁵ This Court has held repeatedly that “in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or

¹²¹ *National Housing Strategy Act*, SC 2019, c 29, s 313 [“*NHSA*”].

¹²² *The Constitution Act, 1867*, 30 & 31 Vict, c 3, ss 92(8), (13) and (16).

¹²³ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, ss 31; compare *Barbra Schlifer*, ¶¶39-45.

¹²⁴ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, ss 38 and 52(3).

¹²⁵ *Waterloo 2026*, ¶110, ABC, Tab 4, p66.

enhance *Charter* values.”¹²⁶

82. The application judge erred by invoking the “presumption of conformity” to effectively incorporate into the law of the *Charter* various international instruments dealing with a human right to adequate housing. While international law can play a role in *Charter* interpretation, that role is “to support or confirm an interpretation arrived at through the *Big M Drug Mart* approach; the Court has never relied on such tools to define the scope of *Charter* rights.”¹²⁷

83. International instruments “can shed light on the purposes behind analogous *Charter* protections”¹²⁸ but it does not follow that any right recognized in an international instrument must therefore find its analogue in the *Charter*. There are no *Charter* provisions that are analogous to the far-ranging social and economic “right to adequate housing” found in the international instruments relied on by the application judge.

84. The principal international instrument relied on by the judge was the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) and its subsequent Comments and Protocols promulgated by various UN bodies. The application judge noted that Article 11(1) of the *ICESCR* “recognizes the right to adequate housing as a necessary component of an adequate standard of living.”¹²⁹ Of course, the *ICESCR* right to “an adequate standard of living” does not mean that the *Charter* guarantees a right to an

¹²⁶ *Flora*, ¶104; *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA), ¶¶92-95 [“*Lalonde*”]; *ETFO* ¶153.

¹²⁷ *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32, ¶28 [emphasis in original]; *Ontario (Minister of Health) v Grassroots for Affordable Jewish Education Inc*, 2024 ONSC 4905, ¶27, aff’d 2026 ONCA 70, ¶40.

¹²⁸ *Taylor v Newfoundland and Labrador*, 2026 SCC 5, ¶82.

¹²⁹ *Waterloo 2026*, ¶116, ABC, Tab 4, p67.

adequate standard of living, as multiple judicial precedents make clear.¹³⁰

85. The same may be said of the *ICESCR* rights to remuneration for public holidays, the enjoyment of the highest attainable standard of physical and mental health, the improvement of all aspects of environmental and industrial hygiene, the progressive introduction of free post-secondary education, or the benefits of the moral and material interests resulting from authorship of any scientific, literary or artistic production.¹³¹ As laudable as these social and economic rights may be, their presence in an international instrument ratified by Canada does not mean that the *Charter* protects these rights.

C. No infringement of *Charter* section 15

i) *Homelessness is not an analogous ground*

86. The application judge erred in law in finding that homelessness is an analogous ground under *Charter* s. 15. This far-reaching conclusion was unnecessary to the judge's disposition of the case, contrary to authority, and unsupported by principle.

87. Binding authority establishes that an analogous ground is “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.”¹³² As this Court held in *Banks*, “in determining whether a personal characteristic qualifies as an analogous ground under s. 15, one must consider whether it cannot be changed without

¹³⁰ See Footnote 86.

¹³¹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, arts 7(d), 12(1), 12(2)(b), 13(2)(c), 15(1)(c) (entered into force 3 January 1976) [*ICESCR*].

¹³² *Withler v Canada (Attorney General)*, 2011 SCC 12, ¶33; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), ¶13 [*Corbiere*]. See also Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) (loose-leaf 2025 supplement), §55:26 at 54-55, ABC, Tab 39, pp477-483: “A personal characteristic will be *constructively immutable* for this purpose if, although changeable, the personal characteristic is changeable only at an unacceptable cost to personal identity, and therefore the government has no legitimate interest in expecting people to change it.”

unacceptable cost to one’s identity and dignity.”¹³³ Homelessness does not satisfy this central criterion.

88. Homelessness is not actually immutable, as the application judge recognized when he referred to the “transitory nature of homelessness”.¹³⁴ No one suggests that homelessness is literally unchangeable in a manner analogous to a person’s race or national origin.

89. Nor is homelessness a “personal characteristic” that is “changeable only at unacceptable cost to personal identity.” The Federal Housing Advocate writes that “Homelessness is a profound assault on dignity, social inclusion and the right to life.”¹³⁵ Such statements would be inconceivable if applied to personal characteristics that truly cannot be changed without unacceptable cost to personal identity, such as religion, citizenship, residence on reserve¹³⁶ or marital status.

90. Neither can it be said that homelessness is a personal characteristic that “the government has no legitimate interest in expecting us to change.”¹³⁷ Governments have every legitimate interest in changing a person’s experience of being homeless, and indeed in eliminating homelessness altogether.¹³⁸ The same cannot be said of any enumerated or

¹³³ *R v Banks*, 2007 ONCA 19, ¶100 [“**Banks**”]; *Platnick v Bent*, 2018 ONCA 687, ¶116.

¹³⁴ *Waterloo 2026*, ¶¶60, 165 and 207, ABC, Tab 4, pp49, 82, 99.

¹³⁵ See Office of the Federal Housing Advocate, *Upholding Dignity and Human Rights: The Federal Housing Advocate's Review of Homeless Encampments, Final Report* (Ottawa: Office of the Federal Housing Advocate, 2024) at 10. See also Office of the Federal Housing Advocate, *Guide to Meaningful Engagement and Integrating a Human Rights-Based Approach into Encampment Responses: Factsheets*, (Ottawa: Office of the Federal Housing Advocate, 2025) at 12.

¹³⁶ This has been described as “Aboriginality-residence” in *Corbiere* and subsequent judicial decisions.

¹³⁷ *Corbiere*, ¶13.

¹³⁸ See e.g. *NHSA*; compare *Toussaint v Canada (Attorney General)*, 2011 FCA 213, ¶99 [“**Toussaint**”]: “Finally “immigration status” — in this case, presence in Canada illegally — is a

analogous ground.

91. The Ontario Superior Court has repeatedly held that homelessness is not an analogous ground,¹³⁹ just as this Court has held that poverty and economic disadvantage are not analogous grounds.¹⁴⁰ In *Banks*, a decision not cited by the application judge, this Court noted that the claimants did not “put forward their lack of fixed addresses and the fact that they beg as components of a culture that is important to their identity. Rather they have put these matters forward as indicators of their economic status with which they have to cope... they have not established that the proposed ground is analogous to those enumerated in s. 15.”¹⁴¹

92. The application judge erred in departing from these precedents, particularly since Justice Valente in *Persons Unknown 2023* had expressly and recently held that homelessness was not an analogous ground.¹⁴² The application judge’s conclusion that he was not bound by these decisions because “In my view, the time has come that homelessness should be recognized as an analogous ground”¹⁴³ is an exception to *stare decisis* so broad that, if permitted to stand, would eclipse the rule entirely.¹⁴⁴

93. The application judge erred in concluding that these precedents had been undermined by Wagner CJC’s concurring reasons in *Kanyinda*.¹⁴⁵ In that case, Wagner

characteristic that the government has a “legitimate interest in expecting [the person] to change”. Indeed, the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada.”

¹³⁹ *Persons Unknown 2023*, ¶125, ABC, Tab 6, pp200-201; *Heegsma*, ¶82; *Tanudjaja*, ¶136.

¹⁴⁰ *Banks*, ¶¶98-104.

¹⁴¹ *Banks*, ¶¶101-102.

¹⁴² *Persons Unknown 2023*, ¶126, ABC, Tab 6, p201.

¹⁴³ *Waterloo 2026*, ¶204, ABC, Tab 4, pp93-98; See also ¶154, ABC, Tab 4, pp78-79.

¹⁴⁴ *R v Sullivan*, 2022 SCC 19, ¶¶75-80 [“*Sullivan*”].

¹⁴⁵ *Waterloo 2026*, ¶204, ABC, Tab 4, pp93-98.

CJC wrote only for himself in finding that refugee claimant status was an analogous ground. None of the other eight justices endorsed this finding, and Côté J and Rowe J specifically disagreed with it on the basis that refugee claimant status was not constructively immutable.¹⁴⁶ Wagner CJC’s concurrence is not a “subsequent appellate decision” that undermines the rationale of previous decisions finding that homelessness is not an immutable personal characteristic.¹⁴⁷

94. The application judge reasoned that homelessness was an analogous ground “because it is not a situation that is within the individual’s control; it is not readily alterable by conscious action by the individual.”¹⁴⁸ But this is equally true of poverty or economic disadvantage or having a criminal record¹⁴⁹ or being a prisoner¹⁵⁰ or many other situations that have been held not to be analogous grounds.¹⁵¹ These are all circumstances “that, while they last, are considered beyond an individual’s conscious control.”¹⁵²

95. Moreover, the application judge’s finding that homelessness is an analogous ground was unnecessary to his decision, particularly given his finding that the by-law was an unjustified breach of *Charter* s. 7. “[C]ourts should not decide issues of law, especially constitutional issues, that are not necessary to the resolution of the case before the court.”¹⁵³

¹⁴⁶ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7, ¶119 (per Rowe J., concurring) and 346 (per Cote J., dissenting) [“*Kanyinda*”].

¹⁴⁷ *Sullivan*, ¶76.

¹⁴⁸ *Waterloo 2026*, ¶207, ABC, Tab 4, p99.

¹⁴⁹ *Thibault and Ramsay v Attorney General of Ontario*, 2025 ONSC 647, ¶¶64-71.

¹⁵⁰ *Alcorn v Canada (Commissioner of Corrections)*, 2002 FCA 154, ¶7.

¹⁵¹ See e.g. immigration status rejected as an analogous ground in *Irshad (Litigation Guardian of) v Ontario (Minister of Health)*, 2001 CanLII 24155 (ON CA), ¶¶135-140; *Toussaint*, ¶99; *Almadhoun v Canada*, 2018 FCA 112, ¶28; *Bakhtiari v British Columbia (Minister of Finance)*, 2025 BCCA 67, ¶¶66-84.

¹⁵² *Waterloo 2026*, ¶207, ABC, Tab 4, p99.

¹⁵³ *R v Drury*, 2020 ONCA 502, ¶84; *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2021 ONCA 592, ¶75.

The reason for this is that “unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen.”¹⁵⁴

ii) *The by-law does not create or contribute to a disproportionate impact*

96. The application judge further erred in finding that the by-law discriminated against women, gender-diverse persons, persons with disabilities, and Indigenous persons. He declined to follow existing precedents, including *Persons Unknown 2023*, which held that municipal by-laws prohibiting encampments do not infringe *Charter* s. 15(1).¹⁵⁵

97. The application judge erred in finding that *Kanyinda* “rendered the *Persons Unknown 2023* s. 15 analysis invalid” despite also finding that “*Kanyinda* did not alter the two-step test for discrimination under s. 15(1).”¹⁵⁶ The majority in *Kanyinda* expressly endorsed the Court’s prior decisions articulating the s. 15 test, including *Sharma*.¹⁵⁷ The majority in *Kanyinda* also noted that “the recognition of a particular claimant’s intersecting identities and realities...is not novel in the s. 15(1) analysis.”¹⁵⁸

98. Nor did *Kanyinda* alter the requirement at the first step of s. 15(1) that claimants must present sufficient evidence to establish that the impugned law creates or contributes to a disproportionate impact based on a protected ground.¹⁵⁹ It is insufficient for claimants to point to the disadvantage generally faced by members of a protected group without demonstrating how the impugned law creates or contributes to that disadvantage. As the Supreme Court held in *Sharma*, adverse impacts that “exist independently of” the

¹⁵⁴ *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, 1995 CanLII 86 (SCC), ¶9.

¹⁵⁵ *Heegsma*, ¶¶80-82; *Persons Unknown 2023*, ¶¶125-127, ABC, Tab 6, pp200-201.

¹⁵⁶ *Waterloo 2026*, ¶¶103, 212, ABC, Tab 4, pp63-64, 100.

¹⁵⁷ *Kanyinda*, ¶48.

¹⁵⁸ *Kanyinda*, ¶40.

¹⁵⁹ *Kanyinda*, ¶¶42-43, 50-55; *Sharma*, ¶¶44-45.

impugned law are insufficient to satisfy step one of the s. 15(1) test.¹⁶⁰

99. There was no evidence before the application judge that the impugned by-law created or contributed to a disproportionate impact on women, gender-diverse persons, persons with disabilities, or Indigenous persons. Evidence of historical or sociological disadvantage of these protected groups in the record highlights the impacts of homelessness itself on those groups, which exist independently of the by-law.¹⁶¹ Without more, the evidence amounts only to “a web of instinct” that is insufficient to establish a disproportionate impact.¹⁶²

100. The application judge erred by conflating the disproportionate impact of homelessness on these groups with evidence of a disproportionate impact *caused by the by-law*.¹⁶³ For example, evidence that women experience “disproportionate rates of deep poverty” does not establish that a by-law that winds down an encampment by offering alternative accommodation to the persons living on it causes or contributes to the disadvantage faced by homeless women and gender-diverse persons. Nor was there any evidence to support a finding that the encampment was safer for women than alternative indoor shelter spaces.

101. Similarly, evidence of overrepresentation of Indigenous persons in the homeless population is insufficient to establish that the by-law has a disproportionate adverse impact on this group. There was no evidence that Indigenous persons were turned away from shelters in the Region at a higher rate than non-Indigenous persons, or that Indigenous

¹⁶⁰ *Sharma*, ¶44; *Fair Change v Ontario*, 2024 ONSC 1895, ¶383 [“*Fair Change*”]; *Symes v Canada*, 1993 CanLII 55 (SCC), [1993] 4 SCR 695 at 765 [“*Symes*”].

¹⁶¹ *Sharma*, ¶¶44, 52; *Fair Change*, ¶383; *Symes* at 765.

¹⁶² *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, ¶34.

¹⁶³ *Ontario Health Coalition*, ¶¶313, 317; *Fair Change*, ¶¶380-383.

persons who were existing residents living on the encampment were unable or unwilling to move into the alternative accommodation being offered by the Region.¹⁶⁴

102. The application judge further erred in finding that the by-law creates a disproportionate impact because Indigenous persons “will be denied the benefit of culturally safe housing options”.¹⁶⁵ There was no evidence before the application judge that the encampment was a more culturally safe sheltering option for Indigenous persons.¹⁶⁶ In any event, as the Supreme Court held in *Auton*, the government is under no obligation to create a particular benefit and the fact that a law does not accord a particular benefit does not in and of itself make the law discriminatory.¹⁶⁷

103. With respect to persons with disabilities, the application judge erred by relying on the statistical overrepresentation of persons with disabilities within the homeless population as evidence that the by-law has a disproportionate adverse impact on this group. There was no evidence to support the judge’s statement that living in an encampment may be a better alternative. Instead, the evidence was that persons with disabilities are more likely to be exploited in encampments.

¹⁶⁴ To the extent the application judge made a broad finding that Indigenous persons “face additional barriers due to shelter eligibility rules that disproportionately exclude them because of their Indigenous identities” (¶236), that finding was not based on the opinion of any qualified expert. Instead, it was based on the submissions the intervener Aboriginal Legal Services (ALS), who relied on the evidence of lay witnesses that did not comply with the procedural or legal requirements to provide opinion evidence: See ALS Factum ¶42 relying on the evidence of Lee Ann Hundt, ABC, Tab 38, p476; Rules 4.1.01, 53.03 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 ; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, ¶¶10, 14-15, 23, 53; *R v Daou*, 2021 ONCA 380, ¶¶69-70.

¹⁶⁵ *Waterloo 2026*, ¶236, ABC, Tab 4, p106.

¹⁶⁶ Sharpe Affidavit, ABC, Tab 31, p457.

¹⁶⁷ *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, ¶41.

iii) *The by-law does not perpetuate disadvantage*

104. The by-law does not reinforce, exacerbate or perpetuate disadvantage. For existing residents, the by-law required the Region to offer them alternative accommodation. The impact of the by-law on these individuals was not disadvantageous because the indoor accommodation offered to them was healthier and safer than living in an encampment.

105. For persons who were not living at the encampment as of the effective date, the by-law would have left them in no worse position than they had been in before it was adopted. Wherever such persons were residing as of April 16, 2025, the by-law did not prevent them from remaining there, or from relocating to any other place in the Region apart from 100 Victoria. *Charter* s. 15(1) does not impose an obligation on the Region to remedy conditions of disadvantage that pre-existed the impugned by-law.¹⁶⁸ There was no evidence demonstrating that 100 Victoria has some unique health or safety benefit such that people will experience disadvantage in a constitutional sense unless they encamp at that location rather than anywhere else.

D. In the alternative, any infringement is justified under *Charter* section 1

i) *The proper approach to section 1*

106. The application judge erred by failing to conduct a meaningful justification analysis that properly deferred to the Region's policy choices. It is the role of elected law-makers, not the courts, to make difficult choices on complex and multi-faceted issues such as homelessness.¹⁶⁹ The Region has primary responsibility for reconciling competing social

¹⁶⁸ *Sharma*, ¶63.

¹⁶⁹ *McKinney v University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229 at 285 [“*McKinney*”]; see also *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, ¶53 [“*Hutterian*”]; *Quebec (Attorney General) v A*, 2013 SCC 5, ¶439; *Irwin Toy Ltd v Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927 at 993-994 [“*Irwin Toy*”].

interests and managing the use of public property for the public good.

107. The Supreme Court has distinguished between *Charter* cases where the government is best characterized as the “singular antagonist” and cases involving the government’s “reconciliation of claims of competing individuals or groups”.¹⁷⁰ In the latter category, courts have no superior expertise or legitimacy as compared to elected governments: “Democratic institutions are meant to let us all share in the responsibility for these difficult choices.”¹⁷¹

108. Ontario municipalities are not “singular antagonists” to homeless persons simply by virtue of being responsible for regulating and directing the use of public property. Rather, in regulating the use of public property and responding to homelessness, local governments must reconcile the interests of homeless persons with broader societal interests, including the allocation of public resources, mitigating risks to public safety, and preserving public spaces for the public benefit.¹⁷²

109. The application judge’s s. 1 analysis spans a mere seven paragraphs and is deeply flawed. The judge incorrectly held that a s. 7 infringement can only be justified “in cases arising out of exceptional conditions, such as disasters, the outbreak of war, epidemics and the like.”¹⁷³ This language originates in cases like *Motor Vehicle Reference*, *G(J)*, and *Charkaoui* where the state is more accurately characterized as a “singular antagonist” (i.e. criminal convictions, child custody proceedings, immigration detention) rather than a law-

¹⁷⁰ *Irwin Toy* at 994.

¹⁷¹ *Irwin Toy* at 993-994; see also *Heegsma*, ¶84.

¹⁷² *Black*, ¶¶7-8; *City of Grants Pass v Johnson*, 144 S Ct 2202 (2024) at pp34-35, ABC, Tab 40, pp484-486.

¹⁷³ *Waterloo 2026*, ¶240, ABC, Tab 4, p107, citing *Persons Unknown 2023*, ¶129, ABC, Tab 6, p202.

maker making complex policy choices that reconcile competing interests.¹⁷⁴

110. As the scope of interests protected by s. 7 has expanded to cases where law-makers must reconcile competing interests, the Supreme Court has held that s. 1 “has a role to play”.¹⁷⁵ In *Bedford*, the Supreme Court noted the different analyses under s. 7 and s. 1 and confirmed “the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.”¹⁷⁶ In *Carter*, the Supreme Court observed that “in some situations the state may be able to show that the public good – a matter not considered under s. 7, which looks only at the impact on the rights claimants – justifies depriving an individual of life, liberty or security of the person under s. 1”.¹⁷⁷

111. This Court in *Michaud* observed that s. 7’s “relentless” focus on the individual risks losing sight of the benefits of the law “across a population”, and that some infringements of s. 7 are certainly capable of justification under s. 1.¹⁷⁸ Legal scholars have similarly argued that the heightened focus on individual interests in the s. 7 analysis necessitates a more robust and meaningful consideration of societal interests at the s. 1 stage.¹⁷⁹

112. The application judge divorced the by-law from its context, mischaracterized it as “far from a ‘complex regulatory response’”, and expressly refused to defer to the Region.¹⁸⁰

¹⁷⁴ *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 SCR 486 at 518; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, ¶66; *New Brunswick (Minister of Health and Community Services) v G(J)*, 1999 CanLII 653 (SCC), ¶99.

¹⁷⁵ *Bedford*, ¶129.

¹⁷⁶ *Bedford*, ¶129.

¹⁷⁷ *Carter v Canada (Attorney General)*, 2015 SCC 5, ¶95 [“*Carter*”].

¹⁷⁸ *R v Michaud*, 2015 ONCA 585, ¶¶78-79, 83, 150-151 [“*Michaud*”].

¹⁷⁹ Debra M. Haak, “Revisiting the Analytical Distinction Between Section 7 and Section 1 of the *Charter*: Legislative Objectives, Policy Goals and Public Interests” (2023) 112 SCLR (2d) 115 [“*Haak*”], ¶27, ABC, Tab 41, pp487-488; See also Hamish Stewart, “*Bedford* and the Structure of Section 7” (2015) 60:3 McGill LJ 575–594 at 588-589, ABC, Tab 42, pp489-491.

¹⁸⁰ *Waterloo 2026*, ¶242, ABC, Tab 4, pp107-108.

He adopted these statements directly from the Respondents' factum,¹⁸¹ ignoring his own findings that: (1) the by-law was intended to regain the property so it could be used to construct the transit hub in the public interest;¹⁸² (2) the by-law was accompanied by additional funding and a plan to provide alternative accommodation to persons living on the encampment;¹⁸³ (3) the Region had "engaged in a significant effort" to move forward with the project "while respecting the *Charter* rights of the Respondents";¹⁸⁴ and (4) the case "highlights chronic public policy tensions" between the interests of homeless individuals and those of other members of the community.¹⁸⁵

ii) The by-laws are minimally impairing

113. The application judge erred in finding that the by-law did not satisfy the minimal impairment or proportionality of effects stages of the *Oakes* test.¹⁸⁶ At the minimal impairment stage, the application judge failed to consider whether the by-law, considered in the context of its limited scope and together with the transition protocol, was within a reasonable range of options to achieve the Region's objectives.

114. The government "is not required to pursue the least drastic means of achieving its objective, but must adopt a measure that falls within a range of reasonable alternatives".¹⁸⁷

A law should not fail at the minimal impairment stage because a court can conceive of an

¹⁸¹ Respondents' Factum, ¶137, ABC, Tab 36, p471.

¹⁸² *Waterloo 2026*, ¶¶18-19, 37, 47, 249, ABC, Tab 4, pp35, 42, 44, 110.

¹⁸³ *Waterloo 2026*, ¶¶18-19, 64, 71, ABC, Tab 4, pp35, 51, 54.

¹⁸⁴ *Waterloo 2026*, ¶248, ABC, Tab 4, pp109-110.

¹⁸⁵ *Waterloo 2026*, ¶¶4-5, ABC, Tab 4, pp31-32.

¹⁸⁶ *Waterloo 2026*, ¶¶242-243, ABC, Tab 4, pp107-109.

¹⁸⁷ *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, ¶149; *Hutterian*, ¶¶53-54; *Animal Justice*, ¶96.

alternative that appears to be less restrictive.¹⁸⁸ The question is not whether the law impairs rights as minimally as possible, but whether it “reasonably balances the competing social demands which our society must address.”¹⁸⁹

115. The by-law is within a reasonable range of options to vacate 100 Victoria so that it can be used for a specific infrastructure project. The by-law was narrowly circumscribed to apply to 100 Victoria and the persons actually sheltering on it. It contemplated a transition over many months to avoid the negative impacts of sudden, forced eviction.¹⁹⁰ It guaranteed alternative accommodation to encampment residents and offered to store their belongings for up to six months.¹⁹¹ The Region also worked with individuals who subsequently joined the encampment to find suitable alternative accommodation.¹⁹² The alternative accommodation, even if temporary, was an improvement to the living conditions of the encampment.¹⁹³

116. The application judge erred by dismissing the Region’s policy choices and prescribing what he conceived to be a less restrictive alternative: an alternative lawful encampment site or a tenting protocol.¹⁹⁴ He retained jurisdiction and invited the Region to return once it had provided one or both of these alternatives.¹⁹⁵

117. The Region is among several municipalities in Ontario that do not endorse

¹⁸⁸ *Hutterian*, ¶54 citing *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 (SCC) [“*RJR*”]; see also *Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC), [1991] 1 SCR 139 at 248.

¹⁸⁹ *McKinney* at 314; *Michaud*, ¶¶127-128, 136; *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30, ¶43 [citations omitted] [“*JTI*”].

¹⁹⁰ 3rd Affidavit of Peter Sweeney, affirmed July 31 2025, EB Tab 5, ABC, Tab 15, p292.

¹⁹¹ Kang Affidavit, Ex A, ABC, Tab 30, pp452-455.

¹⁹² Kang Affidavit, Ex A, ABC, Tab 30, pp452-455.

¹⁹³ Koivu Affidavit, ABC, Tab 17, pp299-303.

¹⁹⁴ *Waterloo 2026*, ¶¶242, 251, ABC, Tab 4, pp107-108, 110.

¹⁹⁵ *Waterloo 2026*, ¶256, ABC, Tab 4, p113.

encampments as a solution to chronic homelessness. Encampments are hazardous living environments and municipalities can reasonably choose to direct their efforts and resources into providing temporary alternative accommodation as well as long term housing solutions. No court has ever concluded that a municipality must appropriate public property for use as a sanctioned encampment location to comply with the *Charter*.

iii) The by-law's salutary effects outweigh any deleterious effects

118. The application judge erred in concluding that the anticipated benefits of the transit hub were “speculative” because they “were not based on any specific modeling or empirical data that was projected for this project.”¹⁹⁶ The Supreme Court has long cautioned that judges should not “place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence” of the efficacy or benefit of its actions, as this “would impose an unjustifiable limit on legislative power by attributing a degree of scientific accuracy to the art of government which...is simply not consonant with reality.”¹⁹⁷

119. In any event, the benefits of building new mass transit in the Region are not “speculative” but obvious. The Region holds its property for the benefit of the public as a whole. The by-law represents a reasonable attempt by the Region to reconcile the interests of homeless individuals with the legitimate interests of the public in a landmark transit project that will improve the quality of life of many residents. The Region was not constitutionally obligated to allow public property intended for mass transit construction to be appropriated for certain individuals’ personal use, depriving the rest of the community of the use of the property to improve transit access across the Region.

¹⁹⁶ *Waterloo 2026*, ¶243, ABC, Tab 4, pp108-109.

¹⁹⁷ *RJR*, ¶67 per La Forest J. (dissenting, but not on this point); *JTI*, ¶43.

PART V – ORDER SOUGHT

120. Ontario requests that the appeal be allowed and the judgment be set aside. Ontario does not seek costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF AUGUST, 2026.



S. Zachary Green

Andrea Bolieiro

Sara Badawi

Of Counsel for the Appellant, Attorney General of Ontario

Court of Appeal File No.: COA-26-CV-0897 and COA-26-CV-0836

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Appellant
(Intervener)

-AND-

THE REGIONAL MUNICIPALITY OF WATERLOO

Appellant
(Applicant)

-AND-

**JOSEPHINA DUGAS, TERRA-LYNN WEBER,
AVERY AMENT, AARON PRICE, JEREMY
LINTON, JEREMY NICHOL, JAMES HAMMOND,
JAKOB STUBBS, JAMES DAVIS, JASON PAUL,
NOAH HELSBY, JOSEPH BRADLEY, JOSEPH
SADLER, JULIE YOUNG, KYLE YORK, MEGAN
LOPES, STEPHANIE MCMILLAN, JEFFREY
COUTO, JORDAN CAMM, TERRANCE COLE,
XANDER HARKER, CHARLES KOCHER, ALINE
JEFFERY, MICHAEL JEFFERY , and PERSONS
UNKNOWN AND TO BE ASCERTAINED**

Respondent
(Respondents/Cross-Applicants)

CERTIFICATE

1. An order under Rule 61.09(2) is not required.
2. The Attorney General of Ontario estimates that 2 hours will be required for Ontario's oral argument.
3. The Attorney General of Ontario's factum complies with Rule 61.11(3).
4. The number of words contained in Parts I to V of the Attorney General of Ontario's factum is 11,755.

5. I am satisfied as to the authenticity of every authority listed in Schedule A.

August 7, 2026



Sara Badawi
Of Counsel for the Attorney General of Ontario

SCHEDULE A – AUTHORITIES CITED

CASES

1. *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#).
2. *Alcorn v Canada (Commissioner of Corrections)*, [2002 FCA 154](#).
3. *Almadhoun v Canada*, [2018 FCA 112](#).
4. *Animal Justice v Ontario*, [2026 ONCA 380](#).
5. *Attorney General of Canada v Paul Drover*, [2026 CanLII 58917 \(SCC\)](#).
6. *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004 SCC 78](#).
7. *Bakhtiari v British Columbia (Minister of Finance)*, [2025 BCCA 67](#).
8. *Barbra Schlifer Commemorative Clinic v Canada*, [2014 ONSC 5140](#).
9. *Black et al v City of Toronto*, [2020 ONSC 6398](#).
10. *Bracken v Fort Erie (Town)*, [2017 ONCA 668](#).
11. *Canada (Attorney General) v Bedford*, [2013 SCC 72](#).
12. *Canada (Attorney General) v JTI-Macdonald Corp*, [2007 SCC 30](#).
13. *Carter v Canada (Attorney General)*, [2015 SCC 5](#).
14. *Charkaoui v Canada (Citizenship and Immigration)*, [2007 SCC 9](#).
15. *City of Grants Pass v Johnson*, [144 S Ct 2202 \(2024\)](#).
16. *Committee for the Commonwealth of Canada v Canada*, [1991 CanLII 119 \(SCC\)](#), [1991] 1 SCR 139.
17. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999 CanLII 687 \(SCC\)](#).
18. *Deskin v Ontario*, [2023 ONSC 5584](#).
19. *Drover v Canada (Attorney General)*, [2025 ONCA 468](#).
20. *Dunmore v Ontario (Attorney General)*, [1997 CanLII 16229 \(ON CTGD\)](#).
21. *Ernst v Alberta Energy Regulator*, [2017 SCC 1](#).

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23. *Fair Change v Ontario*, [2024 ONSC 1895](#).
24. *Flora v Ontario Health Insurance Plan*, [2008 ONCA 538](#).
25. *Gosselin v Québec (Attorney General)*, [2002 SCC 84](#).
26. *Heegsma v Hamilton (City)*, [2024 ONSC 7154](#).
27. *Housen v Nikolaisen*, [2002 SCC 33](#).
28. *Irshad (Litigation Guardian of) v Ontario (Minister of Health)*, [2001 CanLII 24155 \(ON CA\)](#).
29. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989 CanLII 87 \(SCC\)](#), [1989] 1 SCR 927.
30. *Johnston v Victoria (City)*, [2011 BCCA 400](#).
31. *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30](#).
32. *Lalonde v Ontario (Commission de restructuration des services de santé)*, [2001 CanLII 21164 \(ON CA\)](#).
33. *London (City) v Polewsky*, [2005 CanLII 38742 \(ON CA\)](#).
34. *Mackay v Manitoba*, [1989 CanLII 26 \(SCC\)](#).
35. *Mathur v Ontario*, [2024 ONCA 762](#).
36. *Matsqui-Abbotsford Impact Society v Abbotsford (City)*, [2024 BCSC 1902](#).
37. *Masse v Ontario (Ministry of Community and Social Services)* (1996), [1996 CanLII 12491 \(ON CTGDDC\)](#).
38. *McKinney v University of Guelph*, [1990 CanLII 60 \(SCC\)](#), [1990] 3 SCR 229.
39. *Mississauga (City) v Chudzicki*, [2018 ONCJ 858](#).
40. *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015 SCC 1](#).

41. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999 CanLII 653 \(SCC\)](#).
42. *Ontario (Education) v Grassroots for Affordable Jewish Education Inc.*, [2026 ONCA 70](#).
43. *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, [2021 ONCA 592](#).
44. *Ontario Health Coalition and Advocacy Centre for the Elderly v His Majesty the King in Right of Ontario*, [2025 ONSC 415](#).
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46. *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995 CanLII 86 \(SCC\)](#).
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52. *Re BC Motor Vehicle Act*, [1985 CanLII 81 \(SCC\)](#), [1985] 2 SCR 486.
53. *RJR-MacDonald Inc v Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#).
54. *R v Banks*, [2007 ONCA 19](#).
55. *R v Daou*, [2021 ONCA 380](#).
56. *R v Drury*, [2020 ONCA 502](#).
57. *R v Michaud*, [2015 ONCA 585](#).
58. *R v Moriarity*, [2015 SCC 55](#).

59. *R v Safarzadeh-Markhali*, [2016 SCC 14](#).
60. *R v Schmidt*, [2014 ONCA 188](#).
61. *R v Sharma*, [2022 SCC 39](#).
62. *R v Sullivan*, [2022 SCC 19](#).
63. *Sagharian (Litigation guardian of) v Ontario (Minister of Education)*, [2008 ONCA 411](#).
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65. *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, [2024 SCC 13](#).
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68. *Tanudjaja v Canada (Attorney General)*, [2014 ONCA 852](#).
69. *Taylor v Newfoundland and Labrador*, [2026 SCC 5](#).
70. *The Corporation of the City of Kingston v Doe*, [2023 ONSC 6662](#).
71. *The Regional Municipality of Waterloo v Named Respondents and Persons Unknown*, [2026 ONSC 2971](#).
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73. *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, [2025 ONSC 4774](#).
74. *Thibault and Ramsay v Attorney General of Ontario*, [2025 ONSC 647](#).
75. *Toussaint v Canada (Attorney General)*, [2011 FCA 213](#).
76. *Vancouver Board of Parks and Recreation v Williams*, [2014 BCSC 1926](#).
77. *Victoria (City) v Adams*, [2009 BCCA 563](#).

78. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23.
79. *Withler v Canada (Attorney General)*, 2011 SCC 12.

SECONDARY SOURCES

1. Debra M. Haak, “Revisiting the Analytical Distinction Between Section 7 and Section 1 of the *Charter*: Legislative Objectives, Policy Goals and Public Interests” (2023) 112 SCLR (2d) 115.
2. Hamish Stewart, “*Bedford* and the Structure of Section 7” (2015) 60:3 McGill LJ 575–594.
3. Office of the Federal Housing Advocate, *Upholding Dignity and Human Rights: The Federal Housing Advocate's Review of Homeless Encampments, Final Report* (Ottawa: Office of the Federal Housing Advocate, 2024).
4. Office of the Federal Housing Advocate, *Guide to Meaningful Engagement and Integrating a Human Rights-Based Approach into Encampment Responses: Factsheets*, (Ottawa: Office of the Federal Housing Advocate, 2025).
5. Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) (loose-leaf 2025 supplement), §55:26.

SCHEDULE B – LEGISLATION CITED

1. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*

Guarantee of Rights and Freedoms Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Legal Rights Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality Rights Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

2. *Constitution Act, 1867, 30 & 31 Vict, c 3*

Exclusive Powers of Provincial Legislatures Subjects of exclusive Provincial Legislation

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[...]

8. Municipal Institutions in the Province.

[...]

13. Property and Civil Rights in the Province.

[...]

16. Generally all Matters of a merely local or private Nature in the Province.

3. *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11*

Legislative powers not extended

31 Nothing in this *Charter* extends the legislative powers of any body or authority.

Procedure for Amending Constitution of Canada

General procedure for amending Constitution of Canada

38 (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

- **(a)** resolutions of the Senate and House of Commons; and
- **(b)** resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Amendments to Constitution of Canada

52 (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

4. *Courts of Justice Act, RSO 1990, c C.43*

Notice of constitutional question

Right of Attorneys General to be heard

109 (4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question.

5. *Municipal Act, 2001*, SO 2001, c 25

Broad authority, lower-tier and upper-tier municipalities

By-laws

11 (2) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

1. Governance structure of the municipality and its local boards.
2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.
3. Financial management of the municipality and its local boards.
4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other *Act*.
5. Economic, social and environmental well-being of the municipality, including respecting climate change.
6. Health, safety and well-being of persons.
7. Services and things that the municipality is authorized to provide under subsection (1).
8. Protection of persons and property, including consumer protection.

Additional penalty re adult entertainment establishments

430 A municipality may provide that a person who is convicted of an offence for a contravention of a business licensing by-law dealing with an adult entertainment establishment may be liable to a term of imprisonment not exceeding one year in addition to any other applicable penalties.

6. *Rules of Civil Procedure*, RRO 1990, Reg 194

RULE 4.1 DUTY OF EXPERT

Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

- (a) to provide opinion evidence that is fair, objective and non-partisan;
- (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

Expert Witnesses

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.

6.1 A statement signed by the expert certifying that the expert is satisfied as to the authenticity of every authority or other document or record referred to in the report, other than,

- i. a document or record consisting of evidence or potential evidence in the action that the expert analysed or interpreted in the report, if the document or record was provided to the expert by or on behalf of the party intending to call the expert as a witness,

- ii. an authority or other document or record cited by the expert in the report only because it was referenced in a report prepared by another expert witness in the action and the expert is commenting on the reference, and
- iii. an authority or other document or record referred to in the report the authenticity of which the expert doubts.

6.2 Details of the doubts the expert has respecting the authenticity of an authority, document or record described in subparagraph 6.1 iii, and of any doubts the expert may have respecting the authenticity of an authority, document or record described in subparagraph 6.1 i or ii.

7. An acknowledgment of expert's duty (Form 53) signed by the expert.

(2.1.1) An authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic for the purposes of paragraph 6.1, absent evidence to the contrary.

7. *Trespass to Property Act*, [RSO 1990, c T.21](#)

Arrest without warrant on premises

9 (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2.

**THE ATTORNEY GENERAL OF ONTARIO AND
THE REGIONAL MUNICIPALITY OF
WATERLOO**

Appellants

PERSONS UNKNOWN AND TO BE ASCERTAINED

Respondents

	COURT OF APPEAL FOR ONTARIO Proceedings commenced at Toronto
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