Court File No.: COA-26-CV-0836
COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Appellant
(Applicant/Cross-Respondent)

-AND-

THE ATTORNEY GENERAL FOR ONTARIO

Appellant
(Intervener)

-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

Respondents
(Respondents/Cross-Applicants)

-AND-

ABORIGINAL LEGAL SERVICES

Proposed Intervenor

MOTION RECORD OF THE PROPOSED INTERVENOR ABORIGINAL LEGAL SERVICES

October 21, 2026

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AND TO: **REGISTRAR OF THIS HONOURABLE COURT**
Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2N5

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TAB 1

Court File No.: COA-26-CV-0836
COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Appellant
(Applicant/Cross-Respondent)

-AND-

THE ATTORNEY GENERAL FOR ONTARIO

Appellant
(Intervener)

-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

Respondents
(Respondents/Cross-Applicants)

NOTICE OF MOTION FOR LEAVE TO INTERVENE

Aboriginal Legal Services will make a motion to Justice Huscroft on November 10, 11, or 12, 2026, at 10:00am at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5, or as soon after that time as the motion can be heard.

THE PROPOSED METHOD OF HEARING:

The motion is to be heard by video conference.

THE MOTION IS FOR:

1. An order granting Aboriginal Legal Services ("ALS") leave to intervene on the following terms:
   a. As a friend of the court, pursuant to Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure*;
   b. That ALS may file a factum not exceeding 10 pages;
   c. That ALS may make oral submissions not exceeding 15 minutes, or other such time as the panel may direct at the hearing of the appeal;
   d. That ALS will not seek costs and will not be liable for costs to any other party on this appeal; and
   e. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

1. ALS is a non-profit, incorporated organization assisting Indigenous people to gain access to, and control over, justice-related issues that affect them;
2. ALS is governed by a community-based Board of Directors and operates the following main programs: the Courtworker Program; the Gladue Program; the Indigenous Justice Program; the Ki-ne-go zon-gah-zay mani-do Program (Victim Rights Program); and the Legal Representation Program;
3. Through each of these programs, ALS is made aware of various systemic problems Indigenous people are faced with;
4. The Legal Representation Program also participates in law reform activities, community organizing, public legal education, test-case litigation, coroner's inquests, public inquiries (the Ipperwash Inquiry, the Goudge Inquiry, the Frank Paul Inquiry, and the National Inquiry into

Missing and Murdered Indigenous Women and Girls), and interventions. ALS has been involved in many cases affecting Indigenous people before the Ontario Courts, the Federal Court and Federal Court of Appeal, and the Supreme Court of Canada;

5. The Supreme Court of Canada has granted ALS intervener status in twenty-nine cases based on ALS' interests and particular expertise;
6. Of those twenty-nine cases, substantive arguments about s. 15 of the Charter were made in *Canadian Human Rights Commission v Attorney General of Canada*, 2018 SCC 31; *R v Sharma*, 2022 SCC 39; *Ewert v Canada*, 2018 SCC 30; *R v Kokopenace*, 2015 SCC 28; *Her Majesty the Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development), et al. v. Barbara Cunningham, et al.*, 2011 SCC 37; and *Sauvé et al. v Attorney General for Canada*, [2002] 3 SCR 519;
7. Of the characteristics that would cause the Court to grant leave for intervener status, ALS meets more than one;
8. ALS is a well-recognized group with special expertise in advocating for the legal rights of Indigenous peoples;
9. Through the stated goals of the organization, and the years of experience in advocating for Indigenous rights, it is seen that ALS has a real, identifiable interest in the subject matter of this appeal, which raises issues concerning the assessment of equality claims arising from the interpretation of s. 15(1) and Indigenous people across Canada;
10. ALS would bring an Indigenous-focused perspective to the proceedings distinct from the parties, and distinct from the other proposed interveners;
11. As a result of the foregoing, ALS meets the test for leave to intervene;
12. If granted intervener status, ALS would make submissions on the following:

a. Justice Gibson did not err in making any factual findings as they related to s. 15;

b. Justice Gibson correctly found that horizontal *stare decisis* does not apply due to the analysis in *Kanyinda*, such that he was not bound by Justice Valente's findings regarding s.15 of the *Charter* made in *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670; and

c. Justice Gibson correctly found that the by-law concerning the Encampment infringed s.15 of the *Charter*, and in doing so, made the correct factual findings regarding the evidence before him.

13. ALS will not seek to adduce new evidence and its participation will not delay proceedings or prejudice the parties;

14. Rules 13.02, 13.03, 37, 39, and 61.16 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194;

15. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Paul-Emile McNab, affirmed October 20, 2026;
2. The factum of the proposed intervener Aboriginal Legal Services, dated October 21, 2026;
3. The draft factum of Aboriginal Legal Services on appeal; and
4. Such further and other evidence as counsel may advise and this Honourable Court may permit.

Dated at the City of Toronto, in the Province of Ontario, this 21st day of October, 2026

Asha James

Counsel for the Proposed Intervener,
Aboriginal Legal Services

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AND TO: **REGISTRAR OF THIS HONOURABLE COURT**
Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2N5

REGIONAL MUNICIAPLITY OF WATERLOO Applicant (Appellant)	-and-	JOSEPHINA DUGAS et al. Respondents (Respondents in Appeal)	-and-	ABORIGINAL LEGAL SERVICES Proposed Intervenor

Court File No.: COA-26-CV-0836; COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION OF THE PROPOSED INTERVENER: ABORIGINAL LEGAL SERVICES

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Aboriginal Legal Services

TAB 2

Court File No.: COA-26-CV-0836

COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Appellant

(Applicant/Cross-Respondent)

-AND-

THE ATTORNEY GENERAL FOR ONTARIO

Appellant

(Intervener)

-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

Respondents

(Respondents/Cross-Applicants)

AFFIDAVIT OF PAUL-EMILE McNAB

Motion of the Proposed Intervener, Aboriginal Legal Services, pursuant to Rule 13.02 of the Rules of Civil Procedure

---

I, Paul-Emile McNab, of the City of Toronto, in the Province of Ontario, **AFFIRM AND SAY:**

1. I am the President and Chair of the Board of Directors of Aboriginal Legal Services ("ALS") and therefore have knowledge of the information contained herein.

2. I am advised that ALS is seeking intervener status as a friend of the Court for the herein Appeal proceedings to protect the rights of the Indigenous residents of the encampment located at 100 Victoria Street North in Waterloo, Ontario (the "Encampment").

3. ALS requests to intervene in this matter as a friend of the Court on the following terms:

    a. That ALS may serve and file a single factum of no more than 10 pages, or such a length as this Court may deem appropriate;

    b. That ALS may make oral submissions at the hearing of the Appeal not longer than 15 minutes, or such a length as this Court may deem appropriate; and

    c. That no legal costs be awarded either for or against ALS if they are granted intervenor status in this proceeding.

A. Aboriginal Legal Services

4. ALS is a multi-service legal agency that provides services to Indigenous communities in Ontario. ALS was established in February of 1990 and presently encompasses two provincially incorporated, non-profit organizations.

5. ALS has multiple satellite offices throughout Ontario, allowing them to serve both urban and rural Indigenous populations. With offices in both Guelph and Brantford, ALS can serve Indigenous peoples both in those municipalities and within the surrounding regions, including Waterloo.

6. ALS' Indigenous name, received by way of a traditional naming ceremony, is "Gaa kina gwii waabamaa debwewin" meaning, "All those who seek the truth." One of the main reasons for ALS' incorporation was to assist Indigenous community members in exercising control over the justice-related issues and factors that affect them.

7. Consistent with this mandate, ALS commences proceedings and, where warranted, seeks standing and participation in proceedings before the courts and quasi-judicial and administrative tribunals where it is determined that those proceedings will have a significant effect on Indigenous communities both in Ontario, and across Canada. ALS has worked diligently to protect the rights of Indigenous communities by addressing laws, policies, and practices that have a potential impact on Indigenous communities.

8. ALS is governed by a community-based Board of Directors and operates the following main programs: the Courtworker Program; the Gladue Program; the Indigenous Justice Program; the Ki-ne-go zon-gah-zay mani-do Program (Victim Rights Program); and the Legal Representation Program. Through the Gladue Program, Aboriginal Legal Services prepares Gladue Report for Indigenous peoples in multiple regions, including Waterloo-Wellington. The Gladue Program has been operating in the Waterloo-Wellington Region since 2008. Through each of these programs, ALS is made aware of various systemic problems facing Indigenous people.

9. The Legal Representation Program provides free legal advice and representation to low-income Indigenous peoples. ALS serves clients in many areas of law including housing and tenant rights; social assistance and disability benefits; human rights; and *Indian Act*

matters. The legal work of the program is informed by an awareness of Indigenous traditions, culture, and law.

10. The Legal Representation Program also participates in law reform activities, community organizing, public legal education, test-case litigation, coroner's inquests, public inquiries (examples - the Ipperwash Inquiry, the Goudge Inquiry, the Frank Paul Inquiry, and the National Inquiry into Missing and Murdered Indigenous Women and Girls), and legal interventions. ALS has been involved in many cases affecting Indigenous people before the Ontario Courts; the Court of Appeal in Nova Scotia, Quebec, Saskatchewan, Nunavut, and British Columbia; the Federal Court and Federal Court of Appeal; and the Supreme Court of Canada. ALS also seeks standing and participation in proceedings before quasi-judicial and administrative tribunals where it is determined that those proceedings will have a significant effect on Indigenous communities.

B. Intervener Experience

11. The Supreme Court of Canada has granted ALS intervener status in twenty-nine cases based on ALS' interest and particular expertise: *R v Williams*, [1998] 1 SCR 1128; *Corbiere v Canada (Minister of Indian and Northern Affairs*); [1999] 2 SCR 203; *R v Gladue,* [1999] 1 SCR 688; *R v Wells*, [2000] 1 SCR 207; *R v Golden*, [2001] 3 SCR 679; *Sauvé et al. v Attorney General for Canada*, [2002] 3 SCR 519; *R v Powley*, [2003] 2 SCR 207; *R v BWP*, [2006] 1 SCR 941; *Hill v Hamilton Wentworth Regional Police Services Board et al.*, [2007] 3 SCR 129; *Vancouver (City) v Ward*, [2010] 2 SCR 28; *Her Majesty the Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development), et al. v. Barbara Cunningham, et al.*, [2011] 2 SCR 670; *R v Ipeelee*, 2012 SCC 13; *Wood v*

Schaeffer, 2013 SCC 71; *Attorney General of Canada, et al. v Terri Jean Bedford, et al.*, 2013 SCC 72; *R v Anderson*, 2014 SCC 41; *R v Kokopenace*, 2015 SCC 28; *Her Majesty the Queen v Hamidreza Safarzadeh-Markhali*, 2016 SCC 14; *R v Boutilier*, 2017 SCC 64; *Ewert v Canada*, 2018 SCC 30; C*anadian Human Rights Commission v Attorney General of Canada*, 2018 SCC 31; *R v Boudreault*, 2018 SCC 58; *R v Bird*, 2019 SCC 7; *R v Barton*, 2019 SCC 33; *R v Reilly*, 2020 SCC 27; *R v Chouhan*, 2021 SCC 26; *R v Parranto*, 2021 SCC 46; *R v Sharma*, 2022 SCC 39; *John Howard Society of Saskatchewan v Government of Saskatchewan (Attorney General for Saskatchewan)* (Docket 40608, appeal heard October 8, 2024 and October 9 2024, Judgement reserved); and *J.W. v His Majesty the King* (Docket 40956, appeal heard December 3, 2024, Judgement reserved).

12. Of the above cases wherein ALS has intervened, substantive arguments about s. 15 of the *Charter* were made by ALS in the following: C*anadian Human Rights Commission v Attorney General of Canada*, 2018 SCC 31; *R v Sharma*, 2022 SCC 39; *Ewert v Canada*, 2018 SCC 30; *R v Kokopenace*, 2015 SCC 28; *Her Majesty the Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development), et al. v. Barbara Cunningham, et al.*, 2011 SCC 37; and *Sauvé et al. v Attorney General for Canada*, [2002] 3 SCR 519.

13. Over the past 33 years, ALS has worked to convey Indigenous perspectives in justice-related matters. ALS has conducted training for various audiences, including Judges, crown attorneys, lawyers, students, police officers and the public on a variety of issues including the application of Gladue principles and cross-cultural issues.

C. ALS' Interest in the Case at Bar

14. I am aware that this Appeal is about the decision and alleged errors made by Justice Gibson in *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, 2026 ONSC 2971.

15. If granted leave to intervene, I am aware that that ALS will focus its submissions on whether Justice Gibson erred in finding that the Regional Municipality of Waterloo's by-law[1] concerning the Encampment infringed s.15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

i. ALS Intervened at the Application Proceedings and the Appellants Directly Addressed the Submissions of ALS

16. On July 15, 2025, ALS filed a motion record to intervene at the Application proceedings for the herein matter. I affirmed an affidavit, dated July 15, 2025, in support of granting ALS leave to intervene.

17. On August 15, 2025, by way of endorsement, Justice Gibson granted leave for ALS to intervene as a friend of the court, finding that ALS has a real, substantial and identifiable interest in the subject matter, and it can offer a useful contribution, distinct from the other parties. A true copy of this endorsement is attached to this affidavit as **Exhibit A**.

18. ALS submitted a factum on April 9, 2026. A true copy of this factum is attached to this affidavit as **Exhibit B**. ALS appeared at the hearing of the Application proceedings on April 16, 17, and 20, 2026, and made submissions that the Regional Municipality of Waterloo's

[1] By-law Number 25-021 of the Regional Municipality of Waterloo dated April 23, 2025, as amended by By-law Number 26-001 on January 9, 2026 (collectively, the "By-law").

By-law concerning the Encampment infringed s.15 of the *Charter* as it had a disproportionate impact on the Encampment's Indigenous residents and exacerbates their ongoing harms and existing disadvantages.

19. I am aware that Justice Gibson partly relied on submissions made by ALS to make a finding that the By-law discriminates, in contravention to s.15 of the *Charter*, on the basis of Indigenous identity.[2]

20. The Factum of the Appellant the Regional Municipality of Waterloo (the "Region") alleges that Justice Gibson erred in finding discrimination on the basis of Indigenous identity. A true copy of the Region's factum is attached to this affidavit as **Exhibit C**. The Factum of the Appellant the Attorney General of Ontario (the "AGO") alleges the same error, and specifically references the submissions made by ALS. A true copy of the AGO's factum is attached to this affidavit as **Exhibit D**. The intervention of ALS at this Appeal would address the Appellants' claims.

ii. Proposed Submissions of ALS

21. ALS' submissions will address Justice Gibson's correct application of the equality test under s.15 of the *Charter* and how the Supreme Court's s.15 analysis in the case *Quebec (Attorney General) v. Kanyinda,* 2026 SCC 7 ("*Kanyinda*"), eliminates the application of horizontal *stare decisis*.

22. If granted leave to intervene, ALS' submissions would focus on the following:

---

[2] *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, 2026 ONSC 2971, at para 236.

a. Justice Gibson did not err in making any factual findings as they related to s. 15;

b. Justice Gibson correctly found that horizontal *stare decisis* does not apply due to the analysis in *Kanyinda*, such that he was not bound by Justice Valente's findings regarding s.15 of the *Charter* made in *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670; and

c. Justice Gibson correctly found that the By-law concerning the Encampment infringed s.15 of the *Charter*, and in doing so, made the correct factual findings regarding the evidence before him.

D. Conclusion

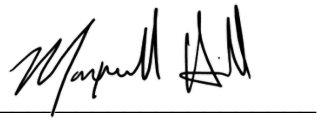
23. An Indigenous perspective should be before the Court on any issue that will directly affect Indigenous people. The perspective of ALS is that of the broader Indigenous community. ALS has the experience and expertise to provide a unique contribution to the determination of the issues before this Honourable Court.

24. To its knowledge, ALS is the only Indigenous organization seeking leave to intervene. If granted leave, ALS will communicate with other interveners to ensure that its submissions are different from those of other parties.

25. ALS will not file any additional evidence, unduly expand the issues, raise new issues, or unreasonably delay or lengthen the hearing of the appeal. ALS will not seek costs and ask that no costs be awarded against ALS.

26. I make this Affidavit in support of an Order granting ALS leave to intervene in these proceedings and for no other or improper purpose.

AFFIRMED BEFORE ME remotely) over videoconference on October 20,) 2026, by Paul-Emile McNab, at the City) of Toronto, in the Province of Ontario,) before me at the City of Toronto, in the) Province of Ontario, in accordance with) O. Reg. 431/20, *Administering Oath or*) *Declaration Remotely.*)

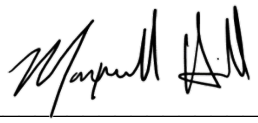


A Commissioner for taking Affidavits, etc.

Paul-Emile McNab

Maxwell Hill
LSO# 86427T

This is Exhibit “A” referred to in the
Affidavit of Paul-Emile McNab sworn
before me, at the City of Toronto,
in the Province of Ontario
on this 20th day of October 2026.



A Commissioner for taking affidavits, etc.
Maxwell Hill (LSO# 86427T)

Superior Court of Justice
KITCHENER

Court File Number/Numéro de dossier du greffe
CV-25-750

Civil Endorsement Sheet/
Page d'inscription

DATE: 08/15/2025

Plaintiff(s)/Applicant(s): THE REGIONAL MUNICIPALITY OF WATERLOO
Counsel: G. Capern, A. Lokan, K. Thavaraj, G. Hoaken

Defendant(s)/Respondent(s): PERSONS UNKNOWN AND TO BE ASCERTAINED
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I have considered the motion of the proposed Intervener, Aboriginal Legal Services ("ALS") for an order granting the ALS leave to intervene as a friend of the court in this application pursuant to Rule 13.02.

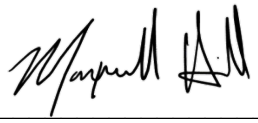
I am satisfied that the ALS has a real, substantial and identifiable interest in the subject matter of the proceedings; that it can offer an important perspective distinct from the immediate parties; and that it can make a useful contribution on the jurisprudential issues raised by this application, as set out in its factum, without undue delay or prejudice to the determination of the rights of the parties to the proceeding.

The motion for leave to intervene is granted.

An Order will go, as signed by me today, to this effect.

GIBSON J.

This is Exhibit “B” referred to in the
Affidavit of Paul-Emile McNab sworn
before me, at the City of Toronto,
in the Province of Ontario
on this 20th day of October 2026.



A Commissioner for taking affidavits, etc.
Maxwell Hill (LSO# 86427T)

Court File No. CV-25-00000750-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE REGIONAL MUNICIPALITY OF WATERLOO

Applicant

-and-

PERSONS UNKNOWN AND TO BE ASCERTAINED

Respondent

FACTUM OF THE INTERVENER, ABORIGINAL LEGAL SERVICES

DATE: April 9, 2026

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AND TO: **THIS HONOURABLE COURT**

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PART I – OVERVIEW

1. This Application concerns the rights of any persons that live or stay at the property at 100 Victoria Street North, Kitchener ("100 Vic" or the "Encampment"). The Encampment functions as a place for the chronically homeless or unhoused people to live in the Regional Municipality of Waterloo (the "Region"). Aboriginal Legal Services ("ALS") sought intervention status because the Region's Site-Specific By-law 25-021, and that by-law as it was amended on January 9, 2026 (together, the "By-Law"), which seeks to evict the residents of the Encampment, will have a disproportionate impact on the Encampment's Indigenous residents and exacerbate ongoing harms and existing disadvantages. ALS will assist the Court in applying the evolving jurisprudence under section 15(1) of the *Charter of Rights and Freedoms*[1] to ensure the Indigenous residents of the Encampment's protected *Charter* rights are not violated by the By-law's enactment.

2. Homelessness among Indigenous people is not simply a matter of individual misfortune. For Indigenous people, it is well established that homelessness is a consequence of colonization which dispossessed Indigenous people of their land and resources, propelling and inflicting generations of systemic racism and ongoing trauma.[2] Furthermore,"homelessness is a consequence of systemic and societal barriers, a lack of affordable and appropriate housing, the individual/household's financial, mental, cognitive, behavioral or physical challenges, and/or racism and discrimination."[3]

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[1] *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ["*Charter"*].
[2] Affidavit of Dr. Bernadette Pauly, affirmed August 14, 2025, Supplemental Responding Application Record ["Supp RAR"] Volume 2, p. 214, para. 15 ["Dr. Pauly Aff"].
[3] *Ibid*, Supp RAR V.2, p. 210, para. 7, quoting "Canadian Definition of Homelessness", Canadian Observatory on Homelessness.

3. The By-Law has the specific purpose of providing vacant possession of 100 Vic to the Region so that it may be used as a "laydown" and staging site during the construction of the proposed Kitchener Central Transit Hub ("KCTH").[4] The Region has brought this Application to ask the Court for, *inter alia*, a declaration that the By-Law complies with the *Charter.*

4. Many of the issues raised by this Application were decided in an earlier proceeding. In 2023, this Court in *Persons Unknown* refused permission to clear the Encampment, declaring that closing the Encampment would breach the s. 7 *Charter* rights of the Encampment's residents in such a way that was not justified in a free and democratic society.[5]

5. This Court also conducted a s. 15(1) *Charter* analysis and rejected the claim that homelessness constituted an analogous ground.[6] However, this Court did not conduct a s. 15 *Charter* analysis regarding the disproportionate impact that eviction would have had upon the Indigenous residents of the Encampment.

6. To prove a *prima facie* violation under s. 15(1) of the *Charter*, ALS will establish that the By-Law creates a distinction for the Indigenous residents in the Encampment, and that the By-Law will impose a burden or deny a benefit in a manner that will exacerbate their existing disadvantages. Following the Supreme Court's s.15(1) analysis in *Kanyinda*, although homelessness may not be an analogous ground under s. 15(1), the Encampment's Indigenous residents will satisfy the first part of the s. 15(1) test as a subgroup of the affected homeless

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[4] Affidavit of Douglas John Spooner, affirmed June 6, 2025, Application Record ["AR"], p. 351, paras. 5-6 ["Spooner Aff"].

[5] *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained,* 2023 ONSC 670, paras. 128-130 ["Persons Unknown"].

[6] *Ibid,* paras. 125-126.

population.[7] The adverse effects of the By-Law arise in the nexus between "homeless" and "race".[8]

7. The second part of the test is satisfied because the impacts of the By-Law are particularly severe for Indigenous people who are already unhoused and overrepresented in the homeless population. Upon eviction, Indigenous residents will be denied the benefit of culturally safe housing options and will face additional barriers due to shelter-eligibility rules that disproportionately exclude them because of their Indigenous identities.

8. Finally, the By-Law cannot be saved under s.1 of the *Charter*, as the rights of Indigenous peoples are not minimally impaired by eviction from the Encampment, and proportionally, these deleterious effects are not outweighed by the By-Law's salutary effects.

PART II – SUMMARY OF THE FACTS

9. ALS adopts and relies upon the factum of the Named Respondents, which fully sets out the relevant facts and law in this matter. The following summary of facts are in addition to, or places emphasis upon, the facts contained in the Named Respondents' factum.

A. Background

i. Aboriginal Legal Services

10. ALS is a non-profit organization that assists Indigenous people to gain access to, and control over, justice-related issues that affect them.[9] ALS commences and seeks participation in proceedings where it is determined that those proceedings will have a significant impact and effect on Indigenous communities both in Ontario and across Canada.[10] ALS has worked diligently to protect the rights of Indigenous communities by addressing laws, policies and

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[7] *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7, para. 42.
[8] *Ibid*.
[9] Affidavit of Paul-Emile McNab, affirmed July 15, 2025, Motion Record of the Proposed Intervener Aboriginal Legal Services, p. 18, para. 12.
[10] *Ibid*, para. 7.

practices that have a potential impact on Indigenous communities, and has experience making substantive arguments about s. 15 of the *Charter*.[11]

ii. The Encampment

11. Unhoused persons have lived at the Encampment since approximately December 2021.[12] As of January 15, 2026, one resident stated that there were "about thirty people still living [there]".[13] The exact number of Indigenous residents in the Encampment is unknown, although six of the Named Respondents are Indigenous.[14]

iii. The Code-of-Use By-law and *Persons Unknown*

12. In *Persons Unknown*, Justice Valente dismissed the Region's Application to close the Encampment under the Code-of-Use By-law because its enforcement would have violated s.7 of the *Charter*.[15] Justice Valente rejected the Named Respondents' s. 15 *Charter* argument on the basis that "homelessness" was not an analogous ground of discrimination under s. 15.[16] The Court did not undertake a s. 15(1) analysis with respect to Indigeneity.

B. Indigenous Homelessness is a Systemic Issue

13. Indigenous people in Canada are disproportionately under-housed, unhoused, and experience barriers to access affordable, permanent, stable, and supportive housing.[17] Indigenous people

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[11] *Ibid*, paras. 13-14.
[12] *Persons Unknown,* para. 19.
[13] Affidavit of Charles Kocher, affirmed January 13, 2026, 2nd Supp RAR, pp.41-42, para. 21 ["Kocher Aff"].
[14] Kocher Aff, 2nd Supp RAR, p. 39, para. 6; Affidavit of Josephina Dugas, affirmed May 7, 2025, RAR V.1, p. 75, para. 3; Affidavit of Jeremy Nichol, affirmed May 8, 2025, RAR V.1, p. 56, para. 3; Affidavit of Noah Helsby, sworn May 15, 2025, RAR V.1, p. 109, para. 3; Affidavit of Kyle York, sworn June 17, 2025, RAR V.1, p. 92, para. 3; Affidavit of Calvin Sharpe, affirmed May 30, 2025, RAR V.1, p. 19, para. 3 ["Sharpe Aff"]; Affidavit of Aline Jeffrey, affirmed January 21, 2026, 2nd Supp RAR, p. 45, para. 3.
[15] *Persons Unknown*, para. 101.
[16] *Ibid,* paras. 125-126.
[17] Dr. Pauly Aff, Supp RAR V.2, p.213, para 12.

are eight times more likely to experience homelessness in urban centres, and 30.6% of all homeless youth in Canada are Indigenous.[18]

14. In Canada, only 5% of the total population identify as Indigenous.[19] Indigenous people make up 41% among those living in unsheltered locations, including encampments, a significantly higher percentage than other groups, according to the National Point in Time ("PiT") Count.[20] The majority (55%) of Indigenous respondents first experienced homelessness as a child or youth, while non-Indigenous respondents tended to have first experienced homelessness as an adult.[21]

15. As it pertains to the Waterloo Region, only 1.7% of the total population identify as Indigenous.[22] However, the Region found that 17% of surveyed unhoused people in a 2024 PiT survey were Indigenous.[23] This high ratio of unhoused Indigenous people is still likely to be a low estimate, as those with experience working with the Indigenous community in the Region have seen firsthand that this population is underreported.[24] Part of this underreporting is due to the historically negative treatment that Indigenous peoples have received from government and institutions, naturally causing a distrust in self-reporting as Indigenous due to the treatment one could or would receive as a result.[25]

16. The lack of Indigenous led programs and services that emphasize cultural connections and safety is a specific concern for Indigenous people living in encampments.[26] This is salient as

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[18] *Ibid*, Supp RAR V.2, p. 214, para. 14.
[19] *Ibid*, Supp RAR V.2, p. 214-215, para. 16.
[20] Affidavit of Lee Ann Hundt, affirmed on August 7, 2025, Supp RAR V.1, pp. 16-17, paras. 25-27 ["Hundt Aff"].
[21] Dr. Pauly Aff, Supp RAR V.2, pp. 214-215, para. 16.
[22] Affidavit of David Alton, affirmed June 23, 2025, Exhibit B: "Plan to End Chronic Homelessness" ["PECH"], RAR V.2, p. 70 ["Alton Aff"].
[23] Hundt Aff, Exhibit B: "2024 Point in Time Findings", Supp RAR V.1, p. 30.
[24] Hundt Aff, Supp RAR V.1, p. 11, para. 10.
[25] *Ibid*, Supp RAR V.1, p. 11, para. 10.
[26] Dr. Pauly Aff, Supp RAR V.2, p.214-215, para. 16.

homeless Indigenous people do not simply experience a loss of land and resources, but a loss of, and disconnection from, family and culture.[27]

C. Indigenous People Living in the Encampment Do Not Have an Indigenous-Focused Alternative

17. If the By-Law is passed, the Region is not prepared to permit sheltering anywhere else on its lands after the Encampment is cleared.[28] As of February 17, 2026, the Region had 351 spaces in its emergency shelter system, across eight shelters.[29] Of these 351 spaces, none are reserved for Indigenous people.[30]

18. The K-W Urban Native Wigwam Project ("KWUNWP") is an Indigenous-led organization with a mission to provide culturally safe and affordable housing for the Indigenous community in the Waterloo region.[31] The KWUNWP ran the Urban Native Transitional Housing ("UNTH") Program until its cancellation in November 2024.[32] The KWUNWP receives funding from the Region, but, crucially, this funding is not for Indigenous-specific emergency shelter beds.[33] Although it is within the Region's ability to fund Indigenous-specific emergency shelter beds, it has not.[34]

19. Approximately 15 months after *Persons Unknown*, the Region presented a new Plan to End Chronic Homelessness (the "PECH").[35] Despite acknowledging that Indigenous people in the Region experience chronic homelessness at a higher rate,[36] none of the four PECH

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[27] *Ibid*.
[28] 1st Affidavit of Peter Sweeney, affirmed June 6, 2025, AR, p. 28-29, paras. 52-55 ["1st Sweeney Aff"].
[29] 3rd Affidavit of Sara Escobar, affirmed February 20, 2026, 2nd Supp RAR, p. 71, para. 7.
[30] Hundt Aff, Supp RAR V.1, p. 12, para. 13.
[31] *Ibid*, Supp RAR V.1, pp. 14-15, paras. 17-18 and 20.
[32] *Ibid*, Supp RAR V.1, p. 15, para. 20.
[33] Transcript of the Continued 2nd Cross Examination of Peter Sweeney, held on December 12, 2025, Joint Transcript Brief ["JTB"] V.4, Tab 1, p. 94 ["2nd Cont. Sweeney XE"].
[34] *Ibid*.
[35] Alton Aff, RAR V.2, p. 27, para. 3.
[36] Alton Aff, Exhibit B: PECH, RAR V.2, p. 70.

”Interventions” created Indigenous-centred programs beyond an “acknowledgement that the system must do better with community members of Indigenous . . . groups.”[37]

D. The Region’s Planned Displacement Measures Did Not Include Consulting Indigenous Residents or Organizations

20. The Region’s Indigenous consultation efforts for the KCTH construction project were limited to meeting its federal requirements under the Canada Infrastructure Program,[38] its provincial Transfer Payment Agreement requirements,[39] and engaging with representatives of the Mississaugas of the Credit First Nation and Six Nations of the Grand River.[40] However, the Region’s homelessness initiatives and planned displacement measures did not involve any meaningful consultation or collaboration with Indigenous individuals or organizations whatsoever. The National Working Group on Homeless Encampments published “Homeless Encampments: Municipal Engagement Guidance”, which states,

> Municipal governments, working with Indigenous partners, must consult with Indigenous residents of encampments and their representatives where appropriate, securing their free, prior, and informed consent with respect to any decision or measure that will impact them.[41]

21. Despite the Region undertaking certain engagement efforts, including consultations with the Lived Experience Working Group[42] and the PECH Co-Creators Group,[43] none of these efforts, nor any other initiatives undertaken by the Region, included specific consultation with

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[37] *Ibid*, RAR V.2, p. 87.
[38] Answers to Undertakings from the Cross-Examination of Doug Spooner on March 6, 2026, Brief of Answers to Undertakings, Tab 5, Under Advisement #6.
[39] *Ibid*.
[40] Updated Answers to Undertakings from the Cross-Examination of Doug Spooner on March 6, 2026, Supplementary Brief of Answers to Undertakings, Tab 1A, pp. 29-30.
[41] 3rd Affidavit of Peter Sweeney, affirmed July 31, 2025, Exhibit A:“Homeless Encampments: Municipal Engagement Guidance”, Reply Application Record [“Region’s RAR”], p. 85 [“3rd Sweeney Aff”].
[42] 3rd Sweeney Aff, Region’s RAR, p.74, para. 26.
[43] *Ibid*, Region’s RAR, p.73, para. 25.

Indigenous residents of the Encampment.[44] This failure to consult Indigenous stakeholders occurred despite the Region's own explicit recognition that such consultation was required.

PART III – ISSUES AND LAW

22. ALS will address the following legal issues,

1. Does the By-Law violate s. 15(1) of the *Charter*?
2. If the By-Law violates s. 15(1) of the *Charter*, is the violation justified under s. 1 of the *Charter*?

A. The By-Law Violates s. 15(1) of the Charter

23. Section 15(1) of the *Charter* reads,

> 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.

24. The two-step test for assessing a s. 15(1) claim, which was recently affirmed by the Supreme Court in *Kanyinda*, requires the claimant to demonstrate that the impugned law or state action,

1. creates a distinction based on enumerated or analogous grounds on its face or its impact; and
2. imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[45]

i. The By-Law Creates a Distinction Based on an Enumerated Ground

25. The first step necessarily entails drawing a comparison between the claimant group and other groups or the general population.[46] Importantly, claimants can satisfy step one of the s. 15(1) analysis even if they only make up a subgroup experiencing adverse effects.[47]

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[44] Hundt Aff, Supp RAR V.1 p.19, para. 34.
[45] *Kanyinda*, para. 48; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 27.
[46] *R v. Sharma*, 2022 SCC 39, para. 31; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164.
[47] *Kanyinda*, paras. 42, 51 (per the majority) and 155-158 (per Rowe J., concurring).

26. There is no rigid template to govern how a disproportionate impact at step one is established.[48] Two types of evidence that are helpful in proving that a law has a disproportionate impact are: 1) evidence about the full context of the claimant group's situation,[49] and 2) evidence about the outcomes that the challenged law has produced in practice on the group.[50]

27. Substantive equality is protected under s. 15(1).[51] In contrast to formal equality, substantive equality recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages.[52]

28. Intended to promote substantive equality, s. 15(1) protects individuals from laws which explicitly or intentionally discriminate, and from laws which are facially neutral and yet still discriminate and have a negative impact on certain groups.[53] This indirect discrimination is known as adverse effects discrimination, and the same two-step test applies.[54]

29. With adverse effects discrimination, the claimant must establish a causal connection between the challenged law and the discriminatory impact.[55] The claimant need not show that the impugned law or state action was the *only* or the *dominant* cause of the disproportionate impact. Rather, they need only demonstrate that the law was *a* cause.[56]

30. Indigenous racial identity is a protected ground under s. 15(1), and the By-law creates a distinction based on its disproportionate impact on the Indigenous people living in the

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[48] *Kanyinda*, para. 51.
[49] *Kanyinda*, para. 73; *Fraser*, paras. 56-59.
[50] *Kanyinda*, para. 73.
[51] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, para. 17; *Withler v Canada (Attorney General)*, 2011 SCC 12, para 2.
[52] *Kahkewistahaw*, para. 17.
[53] *Kanyinda*, para. 37.
[54] *Procureur général du Québec c. Luamba,* 2024 QCCA 1387, para. 157; *Fraser*, para 48.
[55] *Ibid,* para. 160.
[56] *Sharma*, para. 49 [italics in original].

Encampment. The purpose of the By-Law is to evict the residents of the Encampment to facilitate the construction of the KCTH. Although the stated purpose of the By-Law is "facially neutral," its effects disproportionately burden Indigenous residents of the Encampment and therefore amounts to adverse effects discrimination.

31. The first step of the s. 15(1) inquiry requires a contextual consideration of a claimant group's intersecting identities and realities, and this assessment must be grounded in the group's unique situation.[57] The Indigenous residents of the Encampment have a unique situation. The Indigenous residents are a subset of the overall affected group – the general homeless population – yet would be disproportionately impacted *because* of their Indigenous identities.

32. The outcomes of the law can be demonstrated using statistical evidence, "especially if the pool of people adversely affected by a criterion or standard includes *both* members of a protected group *and* members of more advantaged groups,"[58] although statistical evidence is not a requirement.[59]

33. Despite the disproportionate overrepresentation of Indigenous homeless persons in the Region, there are no emergency shelters that provide exclusive support or specific spaces for Indigenous people.[60] Other subgroups such as men, women, gender-diverse, and youth, all have dedicated shelters or spaces to address their unique needs. For the Indigenous homeless population, since the UNTH shut down, there is no such space.

34. Respectfully, ALS submits that eviction would more harshly disrupt the family, community, cultural, and safety networks of Indigenous residents, and that the Encampment provides a rare space where these Indigenous residents have access to community and can foster collective

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[57] *Kanyinda*, para. 41.
[58] *Fraser*, para. 58 [italics in original].
[59] *Kanyinda*, para. 54; *Sharma*, paras. 36 and 49.
[60] Hundt Aff, Supp. RAR V.1 pp. 12-13, para. 13.

support among the Indigenous members living there. Their displacement, without sufficient Indigenous-specific alternatives to foster that community and the additional barriers to shelter access or relocation that the other Encampment residents do not face, create the disproportionate impact.

35. Additionally, the very fact that the Region previously provided funding to the KWUNWP for the UNTH Program and continues to work with its Board to support operations at 27 Cambridge,[61] demonstrates the Region's own recognition that homeless Indigenous people are disproportionately more impacted and require targeted, Indigenous-specific responses. The discontinuation of the UNTH Program, coupled with the eviction of Indigenous residents from the Encampment who will not have comparable alternatives, contributes to the unequal effects of the By-Law on Indigenous residents and the Region's recognition of the same.

36. These contextual considerations provide an evidentiary basis that create the causal connection between the By-Law and its discriminatory impact on the Indigenous residents.

ii. The By-Law Exacerbates Disadvantage

37. When the first part of the s.15(1) test is met because the law or state action creates or contributes to a disproportionate impact, the Court should proceed to the second step.[62] The key question under step two is whether the law worsens or reinforces the disadvantage experienced by the group.[63]

38. During the second step, the goal is to examine the impact of the harm caused to the affected group, which may include economic exclusion or disadvantage, social exclusion,

[61] 4th Affidavit of Peter Sweeney, affirmed on January 9, 2026, Supp AR, p.80, para 20 ["4th Sweeney Aff"].
[62] *Sharma*, para. 50.
[63] *Kanyinda*, para. 67.

psychological harms, physical harms, or political exclusion.[64] There is no need to show that the impugned provision stereotypes or causes prejudice towards the protected group.[65]

39. Race, socioeconomic status, marginalization, or an inability to integrate into society may increase one's disadvantage.[66] As a result, it is necessary to recognize that discrimination cannot be neatly packaged into a single ground; rather, the analysis should be grounded in the concrete lived realities of marginalized individuals.[67] This contextual analysis calls for the courts to consider not only the impugned law itself, but also the broader social, political, and legal context within which the law exists.[68]

a) The Social Context

40. Indigenous people have historically faced exclusion or disadvantage based on characteristics tied to their group identity, including, for example, homelessness. As a result, there is a need that is specifically aimed at protecting such groups.[69] Per Canada's 2020-2022 PiT survey, Indigenous people are twice as likely to report being a youth in care than a non-Indigenous homeless person, and more than 55% of Indigenous homeless people experienced homelessness as a youth.[70] This represents an existing disadvantage that is distinct to the Indigenous residents of the Encampment and will perpetuated by the By-Law's enactment.

41. An approach grounded in substantive equality requires a court to acknowledge that discrimination will not be felt by all members of a disadvantaged group in the same way. While all of the Encampment's residents would be disadvantaged by the By-Law's enactment and

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[64] *Sharma*, para. 52.
[65] *Kanyinda*, para. 67; *Fraser*, para. 78.
[66] *Kanyinda*, para. 63.
[67] *Kanyinda*, para. 63.
[68] *Ibid*, para. 64.
[69] *Ibid*, para. 84.
[70] Dr. Pauly Aff, Supp RAR V.2 pp. 214-215, para. 16.

their eviction, the Indigenous residents would experience those effects more severely due to their distinctive circumstances.

42. Indigenous people also face distinct and unique barriers in accessing emergency and transitional housing. Emergency shelters in the Region are operated by mainstream organizations which results in limited to a complete lack of Indigenous-specific supports or services.[71] Shelters also tend to lack Indigenous staff and volunteers, which can lead to racist actions or prejudice behaviour toward Indigenous shelter users.[72] When Indigenous people find themselves not welcome in the shelter system, they have few options but to return to the street, or encampments such as the Encampment at 100 Vic.[73]

43. Calvin Sharpe ("Mr. Sharpe"), an Indigenous person who has spent some time staying in the Encampment, has provided insight to the ways the eviction could exacerbate existing disadvantages for unhoused Indigenous peoples. Mr. Sharpe is a Status First Nation from The Chippewas of Rama First Nations who has been homeless on and off for most of his life.[74] Until April 1, 2025, he was being housed by the KWUNWP's transitional housing program.[75] The UNTH Program was cancelled in November 2024.[76] As of May 30, 2025, he stated that he mostly walks around at nighttime and sleeps when he can during the day.[77] He has experienced racism from police and shelter workers because of his race, and has been robbed, attacked, and kicked out of a shelter for standing up to these racist acts.[78] Mr. Sharpe remains

[71] Hundt Aff, Supp RAR V.1 p. 12-13, para. 13.
[72] Hundt Aff, Supp RAR V.1 pp. 12-13, para. 13; Sharpe Aff, RAR V.1, p. 21, para. 10.
[73] Hundt Aff, Supp RAR V.1 p.17, para 27.
[74] Sharpe Aff, RAR V.1, pp. 19-20, paras. 3 and 8.
[75] *Ibid*, RAR V.1, p. 20, para 8.
[76] *Ibid*, Supp RAR V.1, p. 15, para. 20.
[77] *Ibid*, RAR V.1, p. 21, para 12.
[78] *Ibid*, RAR V.1, p. 21, para 10.

near the Encampment because of its close proximity to essential services including The Working Centre and Ray of Hope.[79]

44. Mr. Sharpe's experience is sadly not unique. One outreach worker has said that a common reason that people do not leave encampments is that they cannot follow the rules that are imposed on them in shelters or supportive housing.[80] Although Mr. Sharpe does not wish to live in the Encampment,[81] as evidenced by his and the other Named Respondents' experiences with chronic homelessness, the Encampment has sadly become the best option available.

45. The eviction and displacement of homeless persons can increase stigma within society and disrupts an individual's community connections.[82] People who live in encampments may have had difficult experiences throughout their lives when interacting with school, legal, and healthcare systems.[83]

46. The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls states that Indigenous women and girls are at a heightened risk of interpersonal violence due to poverty and homelessness, and that the absence of basic economic, social, and political rights contributes to Indigenous women and girls becoming targets for violence.[84] The unwillingness of institutions to address these issues maintains this status quo.[85]

47. Threats to human security, which includes the right of people to live with dignity, free from poverty, are experienced by Indigenous women on a daily basis.[86] Indigenous peoples can be

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[79] *Ibid*, RAR V.1, p. 20, para 8.
[80] Affidavit of Angela Allt, affirmed June 20, 2025, RAR V.2, p. 22, para 19.
[81] Sharpe Aff, RAR V.1 p.21, para. 10.
[82] Dr. Pauly Aff, Supp RAR V.2 pp.216-219, para. 20.
[83] Transcript of the Cross-Examination of Dr. Bernie Pauly, December 15, 2025, JTB V.4, p.216 Q. 112 ["Dr. Pauly XE"].
[84] Affidavit of Lynn Kubis, affirmed July 7, 2025, Exhibit F: "Reclaiming Power and Place" Chapter 7: Confronting Oppression, RAR V.4 p. 199.
[85] *Ibid*.
[86] *Ibid*, pp. 203-204.

more vulnerable to the impacts of eviction or displacement from encampments because they have a different connection to the land and the people around them.[87] This kind of harm can be mitigated, or even avoided, if an individual had access to a new placement where connections could be maintained to their culture and community.[88]

b) The Political Context

48. The Supreme Court has cautioned that care must be taken not to disregard how discrimination can result from "continuing to do things 'the way they have always been done'".[89] In this case, that is precisely what has occurred. The Region has failed to meaningfully engage with Indigenous leaders or organizations in its efforts to address homelessness since *Persons Unknown*.

49. The United Nations Declaration on the Right of Indigenous Peoples ("UNDRIP") identifies "the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world."[90] In particular, Article 10 prohibits the forced removal of Indigenous Peoples from their lands or territories; Article 21 guarantees the right to the improvement of economic and social conditions, including housing; and Article 23 guarantees the right to determine and administer programs and services, including housing.[91] Per the Office of the Federal Housing Advocate, all meaningful encampment responses must integrate the rights found in UNDRIP due to the distinct housing challenges faced by urban Indigenous populations.[92]

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[87] Hundt Aff, Supp RAR V.1 p.20, para. 36.
[88] Dr. Pauly XE, JTB V.4 pp. 201-202 Q. 72; Hundt Aff, Supp RAR V.1 p.18, para. 30.
[89] *Sharma*, dissent, at para. 193, citing F. Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020), 94 *S.C.L.R.* (2d) 301, at p. 310; J. Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*" (2021), 30:2 *Const. Forum* 29, at p. 31.
[90] 2nd Affidavit of Sara Escobar, sworn July 7, 2025, Exhibit C, RAR V.3, p. 149.
[91] *Ibid*.
[92] *Ibid*, p. 142.

50. Neither the PECH nor the Transition Protocol contemplate the principles of UNDRIP. While the Region has stated that it provides funding to Indigenous-focused services such as Crow Shield Lodge and Healing of the Seven Generations,[93] this funding, as of December 12, 2025, does not include funding for Indigenous-specific emergency shelter beds,[94] despite it being within the Region's mandate to do so.[95]

51. This approach demonstrates that simply allocating funding, without consultation or culturally informed planning, does not address the specific needs of Indigenous residents, and in fact risks perpetuating existing disadvantage.

52. The Region has demonstrated that it has the ability to fund emergency shelter for specific equity-seeking groups. For example, the Region funds shelters that are reserved for women and persons who are gender diverse, youth, and persons with complex medical needs.[96] The existence of these shelters shows that there is capacity to provide shelter and housing services to specific groups of people within the Region.

53. Despite clear evidence that Indigenous people in the Region are disproportionately affected by homelessness, the Region proceeded without Indigenous-specific planning. This omission is not neutral in its impact. Rather, it exemplifies a failure to achieve or even attempt to achieve substantive equality under s.15(1). This political commitment to neutrality over actual responsiveness that perpetuates and exacerbates disadvantage.

c) The Legislative Context

54. To determine whether a distinction is discriminatory under the second step, courts should also consider the broader legislative context.[97] The relevance and weight of the legislative context

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[93] 4th Sweeney Aff, Supp AR pp. 77-78, para. 7.
[94] 2nd Cont. Sweeney XE, JTB V.4 pp. 93-94 Q. 241.
[95] *Ibid*, p. 94 Q. 245.
[96] Factum of the Named Respondents, pp. 15-16, para. 35.
[97] *Sharma*, para. 56.

will depend on the nature of the case.[98] In this case, there is no broader legislative context. The entire purpose of the By-Law is to evict the residents of the Encampment.

55. While the Amendments include a new "Transition Protocol" outlining steps the Region would take prior to removing those persons it deemed "Residents",[99] the Transition Protocol does not include Indigenous focused housing plans.[100] Further, the PECH does not sufficiently contemplate or implement strategies to address Indigenous homelessness.

iii. The Principles of s.15(1) are Not Achieved

56. The By-Law imposes the burden of forced displacement from an established place of safety and community and exposes the Indigenous residents to heightened risks of instability and further marginalization.

57. The By-Law denies the benefits of continued access to culturally safe shelter and community, and the eviction denies the benefit of equal access to shelter options because such options do not exist for the Indigenous residents' subgroup.

58. Section 15(1) jurisprudence emphasizes substantive equality. By treating the Indigenous residents of the Encampment as though they are in the same situation as the other residents, the By-law reflects a model of formal equality that fails to achieve the underlying principle animating s. 15(1).[101]

B. The s. 15(1) Violation is Not Justified Under s. 1

59. Section 1 of the *Charter* guarantees the rights and freedoms within the *Charter*, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and

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[98] *Kanyinda*, para. 65.
[99] Affidavit of Dilupneet Kang, affirmed January 9, 2026, Exhibit B: "Schedule "C": Transition Protocol" to By-law with Tracked Amendments ("Transition Protocol"), Supp AR, pp.116-7 ["Kang Aff"].
[100] Kang Aff, Exhibit A: the "Amended By-law", Supp AR, pp. 94-95.
[101] *Kanyinda*, para 7.

democratic society."[102] The Crown must demonstrate that the legislative objective is pressing and substantial, and that the means chosen are proportional to that objective, in that "(1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law."[103] Put simply, the government bears the burden of proving that a law that breaches the *Charter* is justified.

60. It is ALS' position that the Region's stated purpose of building the KCTH to connect rail and bus service to provide more affordable and reliable transportation options is a pressing and substantial purpose. ALS also does not dispute that there is a rational connection between the Region's objective of constructing the KCTH and the By-Law.

61. However, the means chosen to achieve this purpose are not proportional nor minimally impairing upon the Indigenous residents of the Encampment. Forcing homeless residents out of the Encampment, especially when Indigenous residents are disproportionately affected, is not a minimally impairing or proportionate means of achieving that objective.

62. The Region has said that Metrolinx, the constructor, requires 100 Vic as a staging and laydown area.[104] Staging involves organizing the sequence of construction tasks and determining how equipment, materials, and crews will move and operate safely and efficiently on-site.[105] Laydown areas are designated spaces, which are necessarily adjacent to or as proximate as possible to the construction site, where materials, tools, machinery, and temporary structures are stored before being used.[106] In other words, there is nothing actually being built at 100 Vic.

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[102] *Kanyinda*, para. 94.
[103] *Carter v Canada (Attorney General)*, 2015 SCC 5, at para. 94, citing *R. v. Oakes*, [1986] 1 S.C.R. 103.
[104] Spooner Aff, AR p.361, para. 37.
[105] *Ibid*, p. 361, para. 38.
[106] *Ibid*.

63. The Region has identified other sites in the surrounding area that it owns and could be used for laydown and staging.[107] In particular, the western adjoining lots at 70-84 Victoria Street,[108] and the northern adjoining lot at 123 Breithaupt Street, which, like 100 Victoria, is intended for equipment lay-down/staging during construction of the transit hub.[109] There are other properties owned by the Region that could be used for the same purposes. The Region's preference for 100 Vic rests on considerations of convenience, cost, or efficiency rather than necessity.[110] The Supreme Court has said the following about weighing logistical concerns against *Charter* violations,

> [C]ourts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities.[111]

64. The Region seeks vacant possession of 100 Vic not for active construction, but solely for use as a laydown and staging area. While the other options for this site may not be as ideal in proximity and grade to 100 Vic, the salutary effects of this limited use are minimal and pale in comparison to the profound deleterious effects imposed on the Indigenous residents of the Encampment.

65. The By-Law causes profound deleterious effects by depriving residents of shelter, safety, community, personal possessions, and access to essential services. These harms will be particularly severe for the Indigenous residents and will perpetuate and exacerbate their existing disadvantage.

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[107] *Ibid*, pp. 362-363, para. 42.
[108] "Kitchener Central Transit Hub Update," dated Oct. 7, 2025, Ex 1 to Transcript of the Cross-Examination of Doug Spooner, Mar. 6, 2026, JTB V.5, p.178.
[109] *Ibid*, JTB V.5, p.147, Q.76.
[110] Spooner Aff, AR pp. 362-363, paras. 42-44.
[111] *Kanyinda*, para. 99.

66. For all the above reasons, the deleterious effects on the Indigenous residents' security and dignity outweigh the salutary effects of the By-Law and the By-Law therefore cannot be saved by s. 1 of the *Charter*.

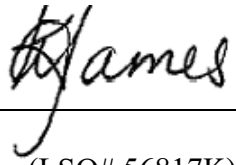
PART IV – ORDER SOUGHT

67. The Intervener Aboriginal Legal Services supports the Orders requested by the Named Respondents.

68. Additionally, the Intervener Aboriginal Legal Services requests,

    1. An Order that no legal costs be awarded against or for ALS in respect of the herein Application; and
    2. Such further and other Orders that counsel may advise and that this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of April, 2026.



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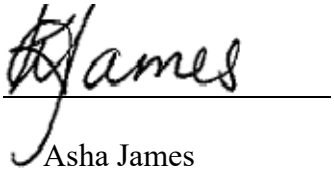
CERTIFICATE

I hereby certify, as counsel for Aboriginal Legal Services, that I am satisfied as to the authenticity of every authority cited in this factum, in accordance with Rule 4.06.1(2.1) of the *Rules of Civil Procedure*.



April 9, 2026 Asha James

SCHEDULE A – LIST OF AUTHORITIES

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Carter v Canada (Attorney General), 2015 SCC 5

Fraser v. Canada (Attorney General), 2020 SCC 28

Kahkewistahaw First Nation v. Taypotat, 2015 SCC 30

Procureur général du Québec c. Luamba, 2024 QCCA 1387

Quebec (Attorney General) v Kanyinda, 2026 SCC 7

R. v. Oakes, [1986] 1 S.C.R. 103

R v. Sharma, 2022 SCC 39

The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained, 2023 ONSC 670

Withler v Canada (Attorney General), 2011 SCC 12

SCHEDULE B – LIST OF STATUTES, REGULATIONS AND BY-LAWS

Canadian Charter of Rights and Freedoms, s 15, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 1, 7 and 15

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.

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 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.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

THE REGIONAL MUNICIPALITY OF WATERLOO Applicant	and	PERSONS UNKNOWN AND TO BE ASCERTAINED Respondents

Court File No: CV-25-00000750-0000

SUPERIOR COURT OF JUSTICE

Proceedings commenced in WATERLOO REGION

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This is Exhibit “C” referred to in the
Affidavit of Paul-Emile McNab sworn
before me, at the City of Toronto,
in the Province of Ontario
on this 20th day of October 2026.

_____

A Commissioner for taking affidavits, etc.
Maxwell Hill (LSO# 86427T)

Court File No.: COA-26-CV-0836
COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Applicant
(Appellant)

and

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PART I. DECISION APPEALED FROM

1. The Regional Municipality of Waterloo ("**Region**") appeals from the Judgment of Justice Gibson dated May 21, 2026, declaring that By-laws to implement a phased closing of a homeless encampment (the "**By-laws**", defined below) infringed ss.7 and 15 of the *Charter* and were not saved by s.1.[1] Justice Gibson remained seized, to allow the Region to seek further direction following provision of either an alternative encampment site or a Safe Tenting Protocol.

PART II. OVERVIEW

2. The Region owns land at 100 Victoria Street North, Kitchener ("**Property**") upon which a group of unhoused individuals have erected an encampment ("**Encampment**"). The Region and its contractual partner Metrolinx require the Property to facilitate the construction of the Kitchener Central Transit Hub ("**KCTH**"), a major public infrastructure project with benefits to all residents of the region.

3. As of April 2025, there were approximately 40 persons residing at the Encampment. The Region enacted a site-specific By-law ("**Original By-law**"), accompanied by a plan ("**Transition Plan**") to ensure a phased closure in which all Encampment residents at the time of public notice of the By-law would be offered alternative accommodation, tailored to their specific needs, under individualized housing plans ("**IHP**s") developed over a 7-month period. The Region allocated new resources to create additional capacity for approximately 40 persons in its housing stability system (a combination of rent supplements, supportive housing, and motel rooms), to match the number of Encampment residents who would be displaced. Those who transitioned from the

[1] 2026 ONSC 2971 ("**Decision**").

Encampment would thereby benefit from indoor shelter in permanent structures with a roof over their heads.

4. The Region chose to provide alternative indoor accommodation options rather than a replacement encampment site or sites. The Region had a reasonable basis for preferring this policy option – Gibson J. accepted that encampments are "miserable and desperate place[s]", and this Encampment was plagued by violence, drug use, and safety hazards including substantial fires.[2] In such a complex area as homelessness, the Region's policy judgment is the kind of decision to which courts should defer.

5. What the Region did not do with the By-laws, and could never have done in the short term, is address the unmet needs of the substantial homeless population outside of the Encampment. Waterloo region, like many municipalities, has an acute overall shortage of facilities (emergency shelters, supportive housing, transitional housing, subsidized housing, tiny homes, motel rooms) for the rapidly increasing number of unhoused persons in the municipality. According to statutorily mandated 'point in time' ("**PIT**") counts, the overall homeless population in Waterloo region increased from 1,085 in September 2021 to 2,371 in October 2024, despite the Region's significant expenditures on homelessness programs, which tripled over roughly the same period. Overall capacity in the Region's system falls well short of these numbers.

6. For these longer-term issues, the Region has a Plan to End Chronic Homelessness by 2030 ("**PECH**") adopted in April 2024. However, the PECH is expressly contingent on increased involvement and resources from the federal and provincial governments and other stakeholders.

[2] Decision, paras. 4, 79, 250.

7. The Region sought a determination of the constitutionality of the Original By-law, or alternatively directions on what was required to close the Encampment in a *Charter*-compliant manner. Encampment residents obtained an interim injunction on August 20, 2025 against the By-law's enforcement,[3] which prevented the Region from limiting occupancy to those who were already there ("**Injunction Decision**"). Thus, even though the Region's unsheltered support worker ("**USW**") team of licensed professionals worked with individual residents and transitioned many of them to indoor alternative accommodation, they were largely replaced by newer arrivals.

8. Following the Injunction Decision, the parties attended a 2-day mediation with Justice Sharpe. Though the mediation did not succeed, the Region amended the By-law on January 9, 2026 ("**Amended By-law**"; together with the Original By-law, the "**By-laws**") to respond to some criticisms, adding a Transition Protocol that guaranteed a written offer of alternative accommodation to all occupants who were residing at the Encampment on April 16, 2025 ("**Existing Residents**"), extending the deadline for vacant possession to April 1, 2026, and providing that more recent arrivals would be taken into the housing stability system and offered alternative accommodation as resources permitted. By mid-February 2026, no Existing Residents remained, 22 more recent arrivals had been transitioned to alternative accommodation, and only 10-15 occupants were left at the site.[4] The Region reasonably expected that provided it could prevent further new arrivals, it could wind down the Encampment without any forced evictions.

9. The Application Judge ("**AJ**") did not analyze the By-laws and Transition Plan as a targeted response to the specific needs of the Encampment's occupants who would be displaced by the KCTH. Rather, he held that the Region must either address the needs of the entire homeless

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[3] *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2025 ONSC 4774.
[4] Decision, para. 67.

population in the municipality before the Property could be used for the KCTH, or provide another encampment. In effect, he held that when shelter spaces are insufficient to accommodate the entire homeless population, one encampment can only be replaced by another – not by creating additional capacity in the housing stability system to compensate for the closure as the Region had done, thereby replacing the Region's policy judgment with his own. This was not a proper exercise of the judicial function and amounted to an error of law.

10. The AJ further erred in concluding that he was bound as a matter of *stare decisis* by the 2023 decision of Justice Valente in *Persons Unknown*,[5] which declared that a region-wide prohibition on encampments was invalid in relation to the Encampment as a violation of s.7. That decision considered a region-wide by-law with different scope and purposes, and consequently a different analysis of arbitrariness and gross disproportionality. Justice Gibson also incorporated into his gross disproportionality analysis non-binding international law sources in a manner that effectively gives a veto to each occupant against closure of an encampment.

11. Effectively, the AJ ruled that where the homeless population exceeds accessible shelter capacity, an encampment can only be closed if it is replaced by another encampment or "safe tenting" equivalent. Increasing indoor shelter capacity to replace an encampment is ruled out. That, with respect, is not a conclusion that meets the test for gross disproportionality. It is a policy preference for encampments.

12. Further, in holding that the By-laws infringe s.15, the AJ departed from existing caselaw on encampments rejecting discrimination claims by certain groups – women, gender-diverse individuals, Indigenous persons, and those with substance-use disorder and other mental and

[5] *The Regional Municipality of Waterloo v. Persons Unknown*, 2023 ONSC 670 ("***Persons Unknown***").

physical disabilities – based on their overrepresentation in the homeless population. In so doing, he failed to distinguish between disadvantage that exists independently of the By-laws, and the effects of the By-laws themselves. His Honour went further, recognizing homelessness as a new analogous ground under s.15. These holdings conflict with the weight of precedent and constitute further errors. They make it virtually impossible for municipalities to craft practical solutions that address the complex and diverse needs of the homeless.

PART III. FACTS

A. Homelessness in the Waterloo Region

13. The Region's responsibilities and jurisdiction are generally set out in the *Municipal Act*.[6] Like other municipalities in this province, the Region is prohibited from planning budget deficits,[7] and it is heavily reliant on funding from the federal and provincial governments. The Region does not have jurisdiction beyond its territory, nor over many policy areas which affect homelessness.

14. Although the Region has no real power to address the root causes of homelessness, it has made significant investments in addressing this complex and "wicked"[8] problem. The Region almost tripled its spending on homelessness programs between 2021 and 2025, from $23 million to $65 million per year.[9] It directly operates various emergency shelters, transitional and supportive housing units, and is the primary funder of others. It is also implementing an ambitious plan to add over 2,500 new affordable housing units over 5 years.[10]

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[6] *Municipal Act, 2001*, S.O. 2001, c. 25 ["**Municipal Act**"].
[7] *Municipal Act*, s. 289.
[8] Alton Cross, AB, Tab 9, Q104-105, pp. 188-189.
[9] Decision, paras. 16, 69.
[10] 1st Sweeney Cross, AB, Tab 10, Q98, p. 191.

15. The Region's team of licensed USWs[11] work in collaboration with unhoused individuals to develop and implement IHPs, personalized plans designed to match individuals with housing options reflecting their specific needs and preferences to the greatest extent possible.[12]

16. In April 2024 the Region adopted the PECH, with a goal of ending chronic homelessness by 2030.[13] The PECH is a policy document that provides a general roadmap for strategies to end chronic homelessness in the Waterloo region over the longer term. It is expressly contingent on investment "from all sectors and all levels of government".[14]

17. Despite these efforts, however, the unhoused population in the Region continues to grow. As noted above, in September 2021, 1,085 people were counted as experiencing homelessness, with 75% classified as experiencing chronic homelessness.[15] By October 2024, those numbers had increased to 2,371 and 78% respectively.[16] This is consistent with provincial trends,[17] which show significant growth in unhoused populations over the last few years attributed to a complicated confluence of national and international factors.[18] This growth is projected to continue, with the province-wide unhoused population expected to double by 2035.[19]

18. The Region's efforts to address homelessness go well beyond provincial averages. Between 2021 and 2025, the overall homeless count in the province increased by 49.1%, with the average

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[11] A registered nurse, social workers, and social support workers.
[12] 1st Sweeney, AB, Tab 11, paras. 13-14, p. 193.
[13] Decision, para. 17.
[14] Ex. "A", 1st Sweeney ["**PECH**"], AB, Tab 12, p. 196.
[15] Decision, para. 2.
[16] Decision, para. 2.
[17] Ex. "C", 2nd Pin ["**Municipalities Update**"], AB, Tab 13, p. 198.
[18] Municipalities Update, AB, Tab 14, p. 200.
[19] Decision, para. 1. In 2025/early 2026, there were approximately 25 other encampments in the region, and approximately 57-115 people reported residing at these sites.: 3rd Sweeney Undertakings, AB, Tab 15, Q10, p. 202.

increase in municipal funding being 48.2%.[20] In the Waterloo region, however, the PIT Count increased by 118% over almost the same period, while the Region's operating budget for homelessness programs increased by 183%.[21]

19. There is no dispute that unhoused persons are vulnerable, that many suffer from addictions and/or mental and physical disabilities, or that Indigenous persons are overrepresented in this general population. The Region works constantly to ameliorate these challenges.

B. The Encampment and the Respondents

20. The Property is a lot devoid of permanent structures or buildings. It is not a public park, nor is it normally open for public use. Despite this, since approximately December 2021, the Property has been the site of the Encampment, comprised of unhoused individuals and the tents and other temporary structures they have erected.

21. The Named Respondents are all individuals who have recently experienced homelessness in the Region. Many (but not all) have previously resided at the Property. Some may be current occupants of the Encampment, or Existing Residents as defined above. Many attest to challenging personal and financial situations, and to addictions and/or mental and physical health difficulties.

22. The Encampment has caused significant public health and safety concerns, including overcrowding, improperly disposed of drug paraphernalia, fire hazards, violence between residents, significant garbage accumulation, rodent activity, human urine and feces, and construction of semi-permanent structures with no apparent adherence to building standards.[22]

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[20] Decision, para. 3; Municipalities Update, AB, Tab 16, p. 204.
[21] Decision, para. 3.
[22] Decision, para. 75.

Violence increased in the months before January 2026, and there were several major fires in February 2026.[23] There have been at least 5 deaths at the Encampment.[24]

23. These challenges are consistent with experiences in other encampments. The Region's expert Dr. Sharon Koivu – a physician with over 40 years of experience in Ontario, including 13 years as an addiction physician[25] – opined that encampments "pose extensive health and safety risks to the people living [in them] as well as public health and safety risks to the community".[26] These risks render encampments "not a safe alternative to housing or to a shelter".[27]

24. While Dr. Koivu recognizes that emergency shelters and motels are not perfect solutions to homelessness nor risk-free, her evidence is that encampment living carries far more risks to inhabitants than emergency shelters and motels, and that health and safety outcomes are better when individuals are staying indoors.[28] Emergency shelters typically implement safeguards to mitigate the risks associated with congregate living, including social distancing, mask wearing, cleaning of linens, and onsite medical support, such that the evidence demonstrates their ability to successfully contain outbreaks of diseases.[29] Such strategies, however, are not similarly available in encampments.[30] Shelters are also preferable because their staff have strategies for addressing and containing physical and/or sexual violence which are not available in lawless encampments.[31]

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[23] 1st Sweeney, AB, Tab 17, paras. 94, 99-104, pp. 206-209; 1st Moss, AB, Tab 18, paras. 9-10, 29-32, pp. 211-213; 5th Sweeney, AB, Tab 19, paras. 3-7, pp. 215-216; Exs. A-E, 5th Sweeney, Tab 20, pp. 219-233.
[24] Decision, para. 74.
[25] Koivu, AB, Tab 21, paras. 1-2, p. 235.
[26] Koivu, AB, Tab 22, para. 17, p. 237.
[27] Koivu, AB, Tab 23, paras. 118, 126, pp. 239-241.
[28] Koivu Cross, AB, Tab 24, Q220-233, pp. 243-254.
[29] Koivu, AB, Tab 25, paras. 59-61, pp. 256-257.
[30] Koivu, AB, Tab 25, para. 61, p. 257.
[31] Koivu, AB, Tab 26, paras. 70-73, 79-82, pp. 259-261.

25. The AJ accepted the evidence of Dr. Koivu.[32] On the health risks of encampments vis-à-vis indoor shelter, she was not substantially contradicted by the Respondents' medical experts.

26. Recognizing both the dangers of encampment living and the practical reality of the situation, the Region has taken significant steps to ameliorate the living conditions on the site, including hiring on-site security and pest control, arranging for regular cleaning, adding proper waste-bins, and installing and servicing portable toilets.[33] Monthly maintenance costs are currently approximately $66,200, exclusive of staffing costs for social supports, outreach facilities, or by-law staff who regularly attend the Property.[34]

27. The Region's efforts are consistent with the recommendations for municipalities of the National Working Group on Homelessness. Those guidelines recognize that while "[h]omeless 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", municipalities can promote health and safety in encampments while they exist.[35] Without the Region's efforts to minimize the risks of the Encampment, these substantial dangers and risks would be more acute.

C. The KCTH and the Property

28. The Region has consistently maintained the position that the Encampment will not be permitted to continue indefinitely, as vacant possession of the Property will eventually be needed for construction of the KCTH.[36] The KCTH is a landmark transit project that will combine numerous services, including expanded rail and bus GO Transit, VIA Rail, inter-city busy service,

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[32] Decision, para. 99.
[33] Decision, paras. 37, 57, 73.
[34] Decision, para. 79.
[35] Ex. 3, 1st Escobar Cross, AB, Tab 27, pp. 265-266.
[36] 3rd Sweeney, AB, Tab 28, para. 38, p. 272.

ION light rail transit, Grand River Transit, passenger vehicles and car shares, and cyclists and pedestrians, into one central and convenient transit hub in the heart of Waterloo region.[37]

29. The Region led evidence of the substantial benefits of the KCTH, including the resulting economic and social growth for residents of the Waterloo region, reduction in commuter times, and expansion of public transportation options.[38]

30. Metrolinx and the Region finalized an MOU for the KCTH in May 2025.[39] Metrolinx requires use of the Property for construction staging and laydown purposes for the KCTH.[40] Staging and laydown are critical preparation activities for the construction of a physical project.[41] They involve positioning and organizing construction materials (such as steel and concrete), equipment and tools (including large construction machines and vehicles) and other items (such as temporary structures for access during a project), to ensure worker safety and maintain workflow.[42] The proximity, size and grade of a staging and laydown site can increase the risk of injury to workers onsite and add significant additional time to a project.[43] The Property is the only space owned by the Region that is sufficiently proximate to the construction work to be conducted by Metrolinx, of an adequate size, and on-grade with the construction site.[44]

31. As is typical in large public infrastructure projects, construction takes place in many phases over multiple years. The Region has made no secret of the intended use for the Property, but it has

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[37] Spooner, AB, Tab 29, para. 18, p. 274.
[38] Spooner, AB, Tab 30, paras. 15-24, pp. 276-279.
[39] Spooner, AB, Tab 31, para. 32, p. 281.
[40] Decision, para. 49.
[41] Decision, para. 49.
[42] Decision, para. 49.
[43] Decision, para. 49.
[44] Spooner, AB, Tab 32, paras. 41-44, pp. 283-284.

only recently required vacant possession by a defined date. The Region's evidence was initially that Metrolinx required possession by March 2026, meaning that the Region required vacant possession by December 2025. More recently, Metrolinx advised that its date for vacant possession is late 2026,[45] which meant that the Region required possession by end of June 2026 to remediate and deliver the Property in a condition fit for use.[46]

D. The By-laws

32. On April 23, 2025, the Region enacted the Original By-law to provide for vacant possession of the Property by December 1, 2025, based on Metrolinx's advice that it needed vacant possession by March 2026. After Metrolinx pushed this date back to late 2026, the Region engaged in mediation in November-December 2025, and enacted amendments on January 9, 2026 that came into force on February 1, 2026 (though enjoined), to add additional protections for individuals at the Encampment, and to adjust the Region's date for vacant possession to April 1, 2026. As a result, the By-laws provided for almost a year for the phased closure.

33. The By-laws distinguish between the approximately 40 individuals residing at the Encampment as of April 16, 2025, the date of public notice of the By-law (the Existing Residents), and those who have come to the Property more recently. Both the Amended and Original By-laws provided that no newcomers may join the Encampment or remain as occupants on the Property. This was intended to allow for a gradual closure of the Encampment, similar to how emergency shelters wind down their operations over time in the event of a planned closure,[47] to avoid a forced displacement of those at the site without adequate notice or supports. This benefits both the Region

[45] Decision, para. 37.
[46] Spooner, AB, Tab 33, paras. 45-46, p. 286.
[47] 1st Sweeney, AB, Tab 34, para. 117, p. 288.

(which assists in finding individuals alternative arrangements) and occupants (for whom greater notice of the Encampment's closure helps to avoid or mitigate potential harm).

34. This gradual closedown was effective in respect of the 40 Existing Residents: none of them remained at the Property by March 2026, a testament to the Region's gradual, individualized approach for relocating unhoused individuals from the Encampment.[48] The Encampment remained populated, however, because the Injunction Decision prevented the Region from barring newcomers. Despite this, the USWs have also successfully supported the transition of at least 22 more recent arrivals to alternative housing since May 2025.[49] The Region's USW team continues to support the Encampment occupants, including by developing IHPs with cooperative participants.

35. In the Transition Plan approved with the Original By-law, Council budgeted an additional $814,333 in net new funding in 2025 to ensure that there would be additional capacity in the housing stability system for those who would need to transition to other accommodations because of the anticipated closure.[50] This was intended to ensure that other unhoused people in the Waterloo region would not be negatively affected (e.g., displaced or moved further down waiting lists) by the closure. Staff have the discretion to move funds between rent supplements, motel rooms, and supportive housing to meet the specific needs of occupants.[51] Under the Region's procedures, ongoing funding would be determined for future years as part of the ongoing budget process.[52]

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[48] Decision, para. 67.
[49] Decision, para. 67.
[50] 1st Sweeney, AB, Tab 35, para. 41, p. 290.
[51] 1st Sweeney, AB, Tab 36, para. 42, p. 292; 1st Sweeney Cross, AB, Tab 37, Q102-107, pp. 294-296.
[52] 3rd Sweeney, AB, Tab 38, para. 10, p. 298; 1st Sweeney Cross, AB, Tab 37, Q104-108, pp. 295-296.

36. The January 2026 amendments to the Original By-law, including the Transition Protocol, provide greater protections for both Existing Residents and more recent arrivals. For example:

(a) Existing Residents cannot be removed without a written offer for Alternative Accommodation, defined as including emergency shelters, transitional housing, affordable/supportive housing, motels, and other options, recognizing the Existing Residents' diverse needs;[53]

(b) If an Existing Resident loses their Alternative Accommodation due to non-compliance with applicable rules, the Existing Resident will be referred back to the USWs and best efforts will be made to find a substitute option;

(c) Existing Residents are guaranteed offers of social service supports of the same nature as provided at the Property once they move to Alternative Accommodation;[54]

(d) The Region will offer Existing Residents transportation, and coverage for up to 6 months of storage for belongings, at no cost;[55]

(e) For others onsite at the Property who are not Existing Residents, the Region will take them into the housing stability system and make efforts, subject to availability and cooperation, to provide them with appropriate housing options. [56]

E. Persons Unknown

37. The Encampment was the subject of legal proceedings in 2022-2023, when the Region sought to enforce its general, region-wide Code-of-Use By-law ("**CUB**") against individuals living at the Encampment. Unlike the By-laws, the CUB prohibits overnight camping without a permit

[53] "Regional Bylaw Number 26-001" ["**Amending By-law**"], Ex. A, Kang, AB, Tab 39, pp. 301-302. This is not time-limited; those in temporary accommodation are expected to move to longer term-options when available.
[54] Amending By-law, AB, Tab 39, p. 303.
[55] Amending By-law, AB, Tab 39, p. 303.
[56] Amending By-law, AB, Tab 39, pp. 301-302.

on any property owned by the Region.[57] In that application, the Region took the position that it would use the court's order as a precedent for other encampments across the Waterloo region.[58]

38. In *Persons Unknown*, Justice Valente declined to enforce the CUB against residents of the Encampment, concluding that to do so would amount to a deprivation of their life, liberty, and security of the person contrary to the principles of fundamental justice, and thereby infringe s.7 of the *Charter.* He held that the CUB was overbroad and grossly disproportionate to the (generic) objectives relied upon by the Region.[59] He declared that insofar as the CUB prevented Encampment residents from living and erecting temporary shelters without a permit on the Property when the number of homeless persons in the Region exceeds the number of available accessible shelter beds in the Region, the CUB contravened s. 7 in a manner that was not saved under s. 1 and was to that limited extent inoperative.[60] Justice Valente found no s. 15 violation.[61]

39. *Persons Unknown* differs in many respects from this case. There was no plan to add capacity to the housing stability system to offset the closure of the Encampment. Key aspects of the Region's approach to homelessness – including the USW team, substantial increases in both operational and capital funding, and the PECH – have arisen since *Persons Unknown*. When *Persons Unknown* was argued in 2022, as Justice Valente noted, the Region intended to use the Property in connection with the KCTH only "at some undefined future date".[62] Justice Valente consequently makes very limited reference to the KCTH in his analysis. The CUB at issue in

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[57] *Code-of-Use By-law*, Sched. B, s. 2(t), Ex. B, 2nd Sweeney, Tab 40, p. 305
[58] *Persons Unknown*, paras. 6, 11. The Region had also used the CUB in past to clear other encampments.
[59] *Persons Unknown*, paras. 114, 119.
[60] *Persons Unknown*, para. 158.
[61] *Persons Unknown*, para. 127.
[62] *Persons Unknown*, para. 105.

Persons Uknown is also distinct from the present By-laws. They differ in scope and purpose: the CUB applies generally across the region, while the By-laws are site-specific to the Property.

F. The Injunction Decision and Mediation

40. From the outset, the Region took a "light touch" approach to enforcement of the By-laws. No charges were laid and no persons were evicted under the Original By-law prior to the injunction, which was granted on August 20, 2025. The Original By-law remains unenforced, though the Region and USW team have continued to implement the Transition Plan.

41. After Metrolinx revised its date for vacant possession, a mediation was held before Justice Sharpe in November-December 2025. Though mediation was unsuccessful, on January 9, 2026 the Region amended the Original By-law, in part to address criticisms raised in the Injunction Decision. The Amended By-law remained enjoined, however.

G. The AJ's Merits Decision

42. The AJ concluded that he was "bound by *Persons Unknown* 2023's legal determinations with respect to s. 7".[63] He further concluded that even if he was not strictly bound by *Persons Unknown*, that case was "persuasive authority" and that he "agree[d] with [Justice Valente's] conclusions regarding the law concerning the application of s.7 of the *Charter* in this context".[64] He then concluded that the Respondents were deprived of their s. 7 interests in life, liberty, and security of the person in a manner that was grossly dipropionate to the By-laws' objectives. In so finding, he reasoned that *Persons Unknown*'s determination of gross disproportionality "continues

[63] Decision, para. 103.
[64] Decision, para. 102.

to apply" and that "the gross disproportionality analysis is not now fundamentally different from *Persons Unknown*".[65]

43. The AJ relied heavily on international law sources, including non-binding commentaries. He reasoned that "Canada's decision to enact the [*National Housing Strategy Act,* ("***NHSA***")] in 2019 necessarily strengthens the force that Canada's international obligations should play in interpreting the scope and content of section 7"[66] and that "the PECH explicitly commits to take a human-rights based approach".[67] He found that international law instruments – in particular the *International Covenant on Economic, Social and Cultural Rights* ("***ICESCR***") – protect a "right to adequate housing", and that this right was incorporated into the gross disproportionality analysis under the principle of conformity. He then incorporated standards set out by the UN Special Rapporteur on the Right to Adequate Housing into his gross disproportionality analysis.[68] He adopted the Special Rapporteur's *National Protocol for Homeless Encampments in Canada: A Human Rights Approach* ("***National Protocol***") and the Federal Housing Advocate's 2025 *Guide to Meaningful Engagement and Integrating a Human-Rights Based Approach to Encampment Responses* ("***Guide***").

44. The AJ further held that the By-laws infringed s. 15 on the basis of sex, disability, and race - the first encampment case in Canada to reach such a conclusion. His Honour also recognized homelessness as an analogous ground under s. 15 for the first time in Canadian law and held that the By-laws discriminated against homeless persons.

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[65] Decision, para. 193, internal citations omitted.
[66] Decision, para. 126.
[67] Decision, para. 132.
[68] Decision, para. 134.

45. Finally, the AJ concluded that these infringements could not be justified under s. 1: the By-laws were not minimally impairing because the Region could obtain vacant possession of the Property by providing an alternate encampment site or enacting a safe tenting protocol;[69] and the salutary effects of the By-laws were outweighed by their deleterious effects because the effects of the By-laws on homeless individuals were significant, whereas the benefits of the KCTH were "speculative".[70] He declared that the By-laws were of no force and effect under s. 52(1) of the *Constitution Act, 1982*, and granted an injunction against enforcing them. He remained seized, ordering that the Region could return to court to seek further direction following "implementation of either a Safe Tenting Protocol, or the provision by the Region of an alternative Encampment site reasonably proximate to 100 Victoria Street, or both".[71]

PART IV. ISSUES AND THE LAW

46. The issues raised on appeal are:

(a) What is the standard of review;

(b) Whether the AJ erred in finding that the By-laws infringed s. 7;

(c) Whether the AJ erred in finding that the By-laws infringed s. 15; and

(d) Whether the AJ erred in finding that any infringements were saved under s.1.

A. Standard of Review

47. On appeal, findings of law are reviewable on a correctness standard.[72] Findings of fact are owed deference by appellate courts absent a palpable and overriding error.[73] Errors of mixed fact

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[69] Decision, para. 242.
[70] Decision, para. 243.
[71] Decision, para. 259.
[72] *Housen v. Nikolaisen*, 2002 SCC 33, paras. 8-9 [***Housen***].
[73] *Housen*, para. 10.

and law related to a constitutional issue are reviewable on a standard of correctness,[74] given the importance of ensuring that constitutional questions are answered correctly. The Region adopts Ontario's submissions on this point.

B. Errors in the s. 7 Analysis

1. The AJ erred in determining that he was bound by *Persons Unknown* on s. 7

48. The AJ erroneously concluded that he was bound by *Persons Unknown* to find a breach of s.7, under horizontal *stare decisis*. With respect, *Persons Unknown* considered the constitutionality of a different by-law, with a distinct purpose and different effects. As such, it considered a different question of law. The s.7 analysis is purpose-driven and compares the object of an impugned law with its effects. *Stare decisis* applies narrowly to prior rulings on the same question of law, not similar but legally distinct issues arising from overlapping factual context.[75]

49. While the AJ purportedly also conducted a fresh analysis of the s.7 issues, the errors in his analysis regarding *Persons Unknown* demonstrate that he failed to apply the s.7 test with the correct focus on the By-laws' specific purpose. He erred in equating the CUB's general purpose of "preventing disruption of the Region's operations" with the By-laws' specific purpose of obtaining vacant possession of the Property to facilitate the KCTH (because, he reasoned, the former purpose may include the latter) without addressing Justice Valente's finding that the Region had "no immediate need" for the Property at that time.[76] His Honour's fresh analysis on s.7 is incorrectly heavily influenced by *Persons Unknown* and is therefore similarly tainted.

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[74] *Société des casinos du Québec inc v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, paras. 45, 93-97; *Jacob v. Canda (Attorney General)*, 2024 ONCA 648, para. 53 (leave to appeal refused: 2025 CanLII 33146 (SCC)); *R v. Pike*, 2024 ONCA 608, para. 31. *Animal Justice v. Ontario (Attorney General)*, 2026 ONCA 380, para. 41.

[75] *R. v. Sullivan*, 2022 SCC 19, para. 86 ["***Sullivan***"].

[76] Decision, para. 101.

2. The By-laws are site-specific, not Region-wide

50. The site-specific nature of the By-laws differentiates this case from appellate caselaw from British Columbia[77] and from every other Ontario case on encampments.[78] All these cases considered general prohibitions on tenting that applied to public lands at large. In some (notably excluding *Heegsma* and *Kingston*, which reject this approach), courts held that an encampment could be closed only where the number of homeless people does not exceed the number of accessible available shelter beds in the given municipality.

51. Whatever the merits may be for this approach on municipality-wide by-laws, which more naturally invites a municipality-wide analysis, it is inapposite for this case. Even if the By-laws engage life, liberty, or security of the person interests (discussed below), they only infringe s.7 if they do so in a manner that is contrary to the principles of fundamental justice. The principles found to be infringed in *Persons Unknown* were overbreadth and gross disproportionality – because the region-wide CUB could achieve their generic purpose of preventing damage to property on Region-owned or occupied lands, preventing disruption of the Region's operations on such lands, and regulating use and enjoyment of such lands, while permitting tenting on the Property.[79] In particular, Justice Valente found that there was no incompatibility because the Region "has no immediate need for the Property".[80] In the present case, the purpose of the By-laws is to obtain vacant possession of the Property to facilitate construction of the KCTH. That specific purpose cannot be achieved without closing the Encampment. This yields a different s.7

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[77] *Victoria (City) v. Adams*, 2009 BCCA 563 ["***Adams***"].
[78] *The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662 ["***Kingston***"], *Heegsma v. Hamilton (City)*, 2024 ONSC 7154 (appeal pending) ["***Heegsma***"], *Persons Unknown*.
[79] *Persons Unknown,* paras. 9, 112-114.
[80] *Persons Unknown*, para. 114.

analysis - a point tacitly acknowledged by the Respondents and the AJ in that they did not even consider overbreadth, which was a major issue in *Persons Unknown*.

52. Relatively few cases consider a situation where an encampment is incompatible with a specific and immediate intended use for the property.[81] Those that do have allowed the encampment to be closed.

53. Likewise, in analyzing gross disproportionality, the AJ's focus ought to have been on the Property and its occupants, not the region-wide homeless population. Since the Original By-law and Transition Plan added equivalent capacity to the housing stability system to offset the closure of the Encampment, the homeless population outside of the Encampment would not be affected. Contrary to the AJ's conclusion, there was nothing arbitrary about using the April 2025 date to determine eligibility for this added capacity. It was tailored precisely to ensure that no Encampment occupant faced a material risk of eviction with no place to go, and that unhoused persons outside the Encampment would not be affected by being displaced or moved further down on waiting lists. On a proper analysis, the By-laws do not themselves have effects that are grossly disproportionate to their purpose, as further explained below.

3. The By-laws do not engage life or security of the person of occupants

54. The Region's expert evidence was unequivocal: indoor shelter is less risky than the encampment environment. The Respondents' expert evidence did not rebut this – it largely addressed the health risks of homelessness generally, and to a lesser extent the comparison between encampments and sleeping rough without a tent. The AJ made no finding that encampments are

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[81] *Clinique juridique itinérante c. Procureur général du Québec*, 2023 QCCS 1949 (leave to appeal refused 2023 QCCA 855) ["***Clinique juridique***"]; *Matsqui-Abbotsford Impact Society v Abbotsford (City)*, 2024 BCSC 1902 (leave to appeal granted 2025 BCCA 78, appeal not yet decided), para. 193 ["***Matsqui***"]; *Adams*, paras. 40, 116, contemplated "creating certain zones in sensitive park regions where sleeping was not permitted".

less risky than the alternatives offered by the Region. Some affiants for the Respondents expressed a preference for encampment living, but others said they did not want to stay at the Encampment or preferred indoor shelter.[82] That none of the Existing Residents remained after 11 months is itself evidence that the alternatives offered were, at a minimum, no worse than remaining at the Encampment.[83]

55. The AJ's analysis was clouded by the Injunction Decision, because the Region was unable to prevent newcomers from replacing Existing Residents who were transitioned to alternative accommodation. With respect, the AJ thereby created the very situation that he relied upon to conclude that the By-laws created a risk of harm. Even so, on the balance of probabilities the Region would likely have been able to transition all occupants to alternative accommodation and close the Encampment, without any evictions at all (and certainly without evicting occupants who would have no place to go), as long as it could prevent further newcomers from replacing them. The combined effect of the AJ's rulings in the Injunction Decision and Merits Decision that the Region could never prevent newcomers from coming to the Property, and his holding that any eviction would violate occupants' *Charter* rights, entirely foreclosed any possible solution that relied upon creating additional capacity in any forms of indoor shelter, regardless of the mix.

56. Alternatively, to the extent that these subsequent occupants are relevant to the s.7 analysis, the AJ could have provided directions that the Region must provide additional funded capacity to its system to accommodate this second generation of Encampment occupants. This would have

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[82] Bradley, AB, Tab 41, para. 15, p. 307; Sharpe, AB, Tab 42, para. 10, p. 309; Helsby, AB, Tab 43, para. 18, p. 311; Stubbs, AB, Tab 44, paras. 22-23, p. 314.

[83] Of the 40 Existing Residents, 29 accepted alternative accommodation. The remainder left the Property on their own. The Region cannot force people to take accommodations offered to them or to say where they are going if they choose to leave. They may or may not have found alternative accommodation or left the Waterloo region: Moss Undertakings, AB, Tab 45, Q2, p. 316.

avoided any material risk of harm to any and all occupants arising from the closure, regardless of when they had arrived.

4. Liberty

57. Section 7 liberty interests encompass "inherently private choices" at the "core of what it means to enjoy individual dignity and independence".[84] No case holds that "liberty" includes the right to reside on property owned by another. In this case, the By-laws apply only to a single property. In that circumstance, they do not engage liberty interests because they specify only one property on which individuals cannot reside; if this is a restriction on liberty then there must be a right to reside on this specific property. The AJ's finding that there is a site-specific liberty interest is an error, as this goes beyond the scope of s. 7 and resembles or even exceeds the sort of proprietary right that the Respondents themselves claim to not seek. It is noteworthy that no holders of property rights, including those with fee simple ownership, have the sort of unrestricted right to prevent a public transit project that the AJ recognized for the Encampment occupants. Fee simple ownership is always subject to expropriation.

5. Gross disproportionality

58. Focusing on the Property itself and the interests of those encamping there, the Region has sufficiently mitigated potential effects of eviction such that any deprivation caused by the By-laws is not grossly disproportionate. By the time the AJ heard this matter on the merits, none of the 40 Existing Residents remained onsite at the Property. For those remaining onsite who were not Existing Residents under the By-laws (and, but for the Injunction Decision, would not have been permitted to become occupants of the Property), the By-laws still provide that the Region will take

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[84] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, para. 66; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, para. 49.

them into the housing stability system and make efforts, subject to availability and cooperation, to provide those individuals with appropriate housing options.[85]

59. The AJ's finding of gross disproportionality given the Region's substantial efforts is inconsistent with the Supreme Court's caution that a law will deprive an individual's s. 7 interests in a grossly dipropionate manner only in "extreme cases" where the seriousness of the deprivation is "totally out of sync with the objective of that measure".[86]

60. The AJ, however, reasoned that gross disproportionality was made out because in his view the s.7 interests of homeless individuals not currently at the Property were engaged, because they may wish to relocate to the Property at some future time. With respect, this was an error. Non-occupants would not be any worse off after the Existing Residents were transitioned to the additional spaces created in the housing stability system under the Transition Plan. The logical corollary of the AJ's approach is that the Encampment could not be closed (unless replaced by another encampment) as long as there are any unhoused individuals in the region who do not have access to indoor shelter, regardless of what arrangements are made for the actual occupants.

61. The AJ explicitly based his analysis on the proposition that "other chronically homeless residents of the Region" would be affected by the closing of the Encampment because it would affect available shelter spaces and thereby create an "immediate disadvantage".[87] This was wrong – he ignored the Region's evidence that it created additional capacity in the housing stability system to account for Existing Residents.[88] In any event, this reasoning is also legally incorrect;

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[85] Amending By-law, AB, Tab 39, pp. 301-302.

[86] *R. v. Kloubakov*, 2025 SCC 25, para. 140, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 120 ["***Bedford***"].

[87] Decision, para. 190.

[88] 2nd Sweeney Cross, AB, Tab 46, Q151-156, Q415-418, pp. 318-322.

this result is not a "deprivation" within the meaning of s. 7. By the AJ's logic, the Region's use of any municipal property for any purpose other than establishing an encampment would deprive homeless individuals of their s. 7 interests because it would prevent them from accessing it and lead to higher demand in the emergency shelter system. This would be an undue expansion of that constitutional right. It cannot be a s. 7 deprivation for the Region to fail to solve homelessness or to decide as a matter of policy not to designate every piece of land it owns as an encampment.[89]

6. International law

62. The Application Judge erred in several ways in his treatment of international law sources.

63. First, he misapplied the principle of conformity in his treatment of non-binding international law sources.[90] The AJ treated these sources as more than merely "relevant and persuasive, but not determinative, interpretive tools".[91] He imported specific and detailed standards from non-binding instruments directly into the s.7 test. His reliance on these instruments incorrectly extended the role that international law plays in the constitutional analysis.

64. Further, s.7 is a legal right which protects the right to life, liberty, and security of the person. The commentaries upon which the AJ relied pertain to economic, social, and cultural rights, which extend beyond the ambit of s.7's protections. Those rights are positive economic rights framed in aspirational terms – for example, the *ICESCR* commits Canada to "take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means", including "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and

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[89] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, paras. 33-34,
[90] *Quebec (Attorney General) v. 9147-0732 Québec inc*., 2020 SCC 3, paras. 19-38 ["***Quebec***"].
[91] *Quebec*, para. 35.

housing, and to the continuous improvement of living conditions"; state parties are required to "take appropriate steps to ensure the realization of this right".[92] These rights cannot be translated directly into s.7 negative rights limiting the ability of a government to "deprive" persons of their "life, liberty and security of the person". If there is a right to adequate housing under s.7, there must also be a right to adequate food and clothing – a proposition that no court has endorsed. The AJ therefore erred in relying on international law sources that do not correspond to the *Charter* rights at issue.

65. Second, the AJ erred in holding that the NHSA necessarily strengthens the force that Canada's international obligations should play in interpreting s.7. The NHSA is a federal statute which provides only that it is "the housing policy of the Government of Canada" to recognize the right to adequate housing as a right protected in international law, and to "further the progressive realization of the right to adequate housing as recognized in the [ICESCR]"; this is to be achieved by the federal government developing a national housing strategy.[93] It does not create a "right to housing" in Canadian law, nor does it purport to impose obligations on provinces or municipalities. Such legislation may bind the federal government to a particular interpretation of a right, but that interpretation is not binding on the courts or the provinces.[94] Canada's federal structure does not allow federal legislation to define constitutional rights vis-à-vis provinces or municipalities. Moreover, the role of the Federal Housing Advocate is just that – it is an office created to advocate on issues related to housing, not to determine the content of "rights" and obligations purportedly

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[92] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Articles 2 and 11.

[93] *National Housing Strategy Act*, S.C. 2019, c. 29, s. 313, s. 4.

[94] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5, para. 60.

binding on the Region - when the federal government contributes only 8.4% of the Region's budget for providing homelessness programs.[95]

66. Third, the AJ erred in finding that the PECH, the Region's long-term policy roadmap to ending chronic homelessness (contingent upon other levels of government contributing sufficient resources), had the effect of incorporating international law standards into s.7. Unlike in *Mathur*,[96] relied upon by the AJ, the PECH is an aspirational policy document, not a legislative commitment. Crucially, the PECH itself does not specifically reference encampment closures, let alone provide a roadmap that the Region has bound itself to. The AJ also erroneously relied on a companion document to the PECH (the Lived Experience Prototyping Report) that Council had expressly declined to commit to implement.[97] More fundamentally, a municipal policy document can neither expand nor detract from constitutional rights.

67. Fourth, the AJ's application of these purported rights to s.7 is novel and unsupported by principle. Starting from the non-binding commentaries' opinions that "forced evictions" could only be justified in exceptional circumstances,[98] he proceeded to adopt the Special Rapporteur's *National Protocol*, which provides *inter alia* that removal of occupants from encampments "without meaningfully engaging with them and identifying alternative places to live that are acceptable to them" is considered a "forced eviction" that is considered a "gross violation" of human rights.[99] He further adopted the *National Protocol*'s requirement that "all viable alternatives" be explored prior to eviction from an encampment, that "meaningful, robust, and

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[95] 4th Sweeney, AB, Tab 47, para. 35, p. 324.
[96] *Mathur v. Ontario*, 2024 ONCA 762.
[97] Ex. A, Alton, AB, Tab 48, p. 326; Alton Cross, AB, Tab 49, Q38-45, pp. 328-331.
[98] Decision, paras. 119-121, citing *General Comment #7* of the UN Committee on Economic, Social and Cultural Rights.
[99] Decision, para. 122.

ongoing engagement" with encampment residents is required for relocation, and that "[a]dequate alternative housing, with all necessary amenities must be provided" prior to any eviction.[100] Finally, he relied upon the Federal Housing Advocate's 2025 Guide, opining that a "human rights-based approach" requires "meaningful consultation that begins before a decision has already been made by a municipality", and a process "which provides people with real choices and an opportunity to make informed decisions".[101] In short, he incorporates consultation and consent requirements into s.7 that amount to a veto by occupants over any plan to close an encampment.

68. The Region did in fact consult widely about closing the Encampment, including with its occupants. Since at least *Persons Unknown*, Encampment occupants and their advocates knew that the Property would eventually be needed for the KCTH. In March 2024, Region staff attended an *ad hoc* meeting to discuss the closure.[102] The Encampment was regularly discussed at meetings of a working group established under the PECH.[103] The By-laws themselves were hotly debated and passed in public Council meetings in which occupants and their advocates participated; public comment was also specifically sought from occupants.[104] Individually, occupants were consulted over their options under the Transition Plan and Protocol. However, this was seemingly insufficient for the AJ, because they did not provide a veto over closure.

69. The AJ incorporates these consultation and consent obligations into s.7 by holding, without authority, that they "are relevant and persuasive criteria in assessing any mitigation of harm in the gross disproportionality analysis".[105] In other words, rather than assessing whether a law and

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[100] Decision, paras. 124-125.
[101] Decision, para. 131.
[102] 2nd Sweeney, AB, Tab 50, para. 42, pp. 333-334. This meeting featured accusations that Region staff were "Nazis".
[103] 3rd Sweeney, AB, Tab 51, para. 28, p. 336.
[104] Ex. A, Alton Cross, AB, Tab 52, pp. 338-342; Ex. B, Kang, AB, Tab 53, pp. 344-346.
[105] Decision, para. 134.

transition plan that offer encampment residents indoor shelter alternatives (entailing less risk to their health) meets the threshold of being an "extreme case" that is "entirely outside the norms accepted in our free and democratic society",[106] he assumes harmful evictions in order to find a risk to life, liberty, and security of the person, then interposes consultation and consent requirements to assess whether that risk is mitigated. This is illogical – the By-laws and Transition Plan do provide for alternative indoor shelter, and in any event, consultation does not necessarily decrease or increase risks of harm. Further, closing an encampment without adhering to the various steps of the *National Protocol* and *Guide* cannot be said to be "entirely outside the norms" of Canadian society, given the many cases that have allowed closures provided that appropriate arrangements are made for the occupants.[107]

70. With respect, the obligations that the *National Protocol* and *Guide* purport to impose on municipalities, if incorporated into s.7, will make it practically impossible to close any encampments on any definite timeline. Further, the impact of incorporating these obligations is exacerbated if authorities are precluded from preventing newcomers from coming to a site that is slated for closure – their efforts to provide "alternatives acceptable to" existing occupants will simply create a revolving door at the encampment. Notably, none of the *General Comments*, *National Protocol*, or *Guide* address the issue of whether newcomers can be restricted from an encampment that authorities seek to close. However, the AJ's approach that combines requiring

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[106] *Bedford*, para. 120.

[107] *Black et al. v. City of Toronto*, 2020 ONSC 6398, *British Columbia v. Adamson,* 2016 BCSC 1245, *Church of Saint Stephen et al. v. Toronto*, 2023 ONSC 6566 , *Clinique juridique*, *Heegsma*, *Maple Ridge (City) v Scott*, 2019 BCSC 157, *Matsqui*,, *Nanaimo (City) v Courtoreille*, 2018 BCSC 1629, *Poff v. City of Hamilton*, 2021 ONSC 7224, *Prince George (City) v Johnny*, 2025 BCSC 1556, *Saanich (District) v Brett*, 2018 BCSC 1648, *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926, *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876.

consultation and consent to relocate existing occupants with an open door for newcomers, if upheld, will make closing an encampment impossible on any timeframe.

C. The By-laws Do Not Infringe s. 15

1. If *Persons Unknown* is binding, it bound the Application Judge on s. 15

71. The AJ relied on *Kanyinda* to conclude that he could disregard *Persons Unknown*'s holding that the CUB did not infringe s.15, reasoning that the intersectional approach *Kanyinda* sets out was a legal development that justified departing from precedent. By the *Kanyinda* majority's own description, however, the intersectional approach "is not novel in the s. 15(1) analysis".[108] That case therefore did not represent a subsequent decision in the s. 15 jurisprudence which affected the validity of past judgments.[109] It was consequently an error for the AJ to determine that while he was bound by *Person Unknown* on s.7, he was not bound by Justice Valente's s.15(1) analysis (which, unlike s.7, is not a purpose-driven inquiry). Almost identical arguments as those before the AJ were made in *Persons Unknown* and rejected by Justice Valente.[110] Indeed, every Canadian court that has considered s.15 in an encampment context has found no infringement of the right to equality, including cases where intersectional arguments were made.[111]

2. No discrimination based on sex, race, or disability

72. The AJ further erred in his conclusion that the By-law infringed s. 15 based on the protected characteristics of sex, race, and disability. He analyzed the By-laws with reference to the homeless population in the Region generally, not those who were actually at the Encampment (whether Existing Residents or not). There was no evidence as to the gender, race, or disabilities of those

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[108] *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, para. 40 ["***Kanyinda***"].
[109] *Sullivan*, para. 73.
[110] *Persons Unknown*, paras. 123, 127.
[111] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 , paras. 225, 229, 233-236 ["***Shantz***"]; *Heegsma* para. 80.

remaining at the Encampment by the hearing date. He then incorrectly equated general societal disadvantage faced by these groups that is separate and apart from the By-laws with distinctions that are created by the By-laws themselves, either on their face or in their impact.[112]

73. In finding sex-based discrimination, the AJ concluded that harms associated with being homeless – namely, inability to access indoor shelter and vulnerability to violence – disproportionately impacted women and gender diverse individuals. In finding that these groups are disproportionately unable to access emergency shelters in Waterloo region, the AJ accepted the Respondents' submission that there were disproportionately more emergency shelter spaces reserved for men than for women and gender diverse individuals. He used the PIT count's gender breakdown to conclude that the ratio of emergency shelter spaces for men compared to women/gender diverse individuals was disproportionate to the gender ratio in the homeless population at large.[113]

74. This analysis is flawed because the emergency shelter system is only one component of the broader housing stability system. This analysis did not consider whether women and gender diverse individuals were disproportionately able to access other options, such as transitional housing, supportive housing, motels, and other forms of indoor shelter. The Respondents led no evidence regarding the gender breakdown of individuals accessing those options. The AJ therefore did not have sufficient evidence to conclude that women and gender diverse individuals were disproportionately affected overall.

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[112] *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 27.
[113] Decision, paras. 217-218.

75. Further, the Respondents did not demonstrate that spaces in the housing stability system were disproportionate to the actual population of the Encampment. A small specific population does not necessarily match the characteristics of a general population, so general population statistics were insufficient to establish a *prima facie* case that the By-laws created disparate impact discrimination.[114] Those who were actually subject to displacement were provided IHPs tailored to their individual circumstances. There is no reason to believe that they experienced disparate impacts based on gender.

76. Even if they exist, the alleged distinctions upon which His Honour bases his s.15 analysis are also too remote to be "caused" by the By-laws. By His Honour's logic, any time a shelter is closed, a social program is completed, or scarce resources are allocated differently amongst marginalized groups, s.15 is engaged. This would unduly expand the scope of s.15.

77. Regarding gender-based violence, His Honour accepted general, unspecific evidence tendered by the Respondents regarding women and gender diverse individuals' experiences of violence - including a report by the YWCA Kitchener-Waterloo (the "**Willow Report**"), consisting of self-reported survey responses from an unrepresentative sample of women living unhoused in the Kitchener-Waterloo area. For example, His Honour relied on the Willow Report in noting that "83% of women and gender-diverse persons experiencing homelessness in the Region had previously stayed in abusive or violent situations to avoid homelessness".[115]

78. The Willow Report, however, does not contain any empirical data comparing experiences of violence towards homeless men with those of women/gender diverse individuals, or directly

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[114] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, paras. 30-34.
[115] Decision, para. 218.

comparing encampments to indoor shelter – nor does any other document in the record. Without this sort of evidence, the AJ could not reasonably conclude that women and gender diverse individuals experience violence outside of encampments at a disproportionate rate, such that the By-laws caused a distinction in effect between those groups.[116] There was therefore insufficient evidence for the AJ to determine that the By-law created any sort of distinction based on gender.

79. The AJ's conclusion that the Encampment provided relative safety in comparison to the other available options for female and gender diverse residents was similarly unsupported by the record. The AJ relied on evidence of an expert witness tendered by the Respondents that women in the Encampment could "'look out for each other,' warn each other of dangerous or exploitative men, watch over each other's tents and possessions, and remain with partners or pets (e.g., dogs) who provided physical safety".[117] However, the AJ did not address the Region's submissions that during cross examination, the witness conceded that:

(a) being able to control access to one's space is an important element of personal safety, including for unhoused women and gender diverse individuals, that is not a feature of an encampment;[118]

(b) having a locked door (such as would be present in a motel setting) is "critical to safety for all people", and that this is a feature of motel rooms provided by the Region;[119]

(c) being able to access housing where a violent intimate partner can be excluded is an important part of escaping that violence, and that while an encampment does not

[116] *R. v. Sharma*, 2022 SCC 39, paras. 36, 42-50.
[117] Decision, para. 219.
[118] Schwan Cross, AB, Tab 54, Q23, p. 348.
[119] Schwan Cross, AB, Tab 55, Q24-25, pp. 350-351.

> have restrictions on who can stay there.[120] by contrast, many shelters train employees to identify and intervene in coercive or abusive conduct.[121]

80. These admissions significantly undermine the theory that encampments are preferable to emergency shelters for women and gender diverse individuals. His Honour also did not address the expert evidence of Dr. Koivu on this point that shelters have strategies for addressing and containing physical and/or sexual violence which are not available in lawless encampments.[122] In failing to advert to or engage with this evidence, the AJ erred in a manner that undermines his conclusion that the Encampment was an environment in which women/gender diverse individuals were less exposed to risk of violence.

81. Regarding disability (framed as those with physical, mental health, and addiction disabilities), the AJ's analysis suffers from similar frailties. There was no evidence to support the contention that the Encampment was a preferable environment for individuals from these groups, such that its closure would adversely affect them. Indeed, the AJ put it no higher than "in some cases the Alternative Accommodation may be less safe than the Encampment [for those with disabilities]" (emphasis added).[123] Even that statement was unsupported by the record. This is insufficient to base a finding of discrimination.

82. The Encampment is not a physically accessible space (unlike some options in the housing stability system), nor does it provide a legal haven for those with substance use disorders to consume drugs, nor does it provide mental health supports. That some of the "shelter options

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[120] Schwan Cross, AB, Tab 56, Q33-39, pp. 353-354.
[121] Schwan Cross, AB, Tab 57, Q43-45, p. 356.
[122] Koivu, AB, Tab 26, paras. 71, 79-82, pp. 259, 261.
[123] Decision, para. 231.

included as Alternative Accommodation options are fundamentally unsuitable for people with mental health/addiction disabilities"[124] – even if true – does not mean that the Encampment itself is fundamentally suited to individuals with such challenges. Further, the individualized nature of the USWs' work with Encampment residents to create IHPs that reflect the unhoused individuals' diverse needs also helps prevent individuals from being placed in unsuitable options. There is no evidence that any individual was placed in an unsuitable environment. There is therefore no evidence to support the AJ's conclusion that the By-law creates a distinction in its effects on persons with disabilities.

83. Regarding race, the AJ erred in finding that the overrepresentation of Indigenous peoples in the homeless population was a distinction caused by the By-laws because "[m]erely proving overrepresentation is insufficient" to make out a distinction under s.15.[125]

84. While the AJ also reasoned that "[u]pon eviction, Indigenous residents will be denied the benefit of culturally safe housing options and will face additional barriers due to shelter eligibility rules that disproportionately exclude them because of their Indigenous identities", s.15 does not place positive obligations on the state to rectify disadvantage (including by, for instance, providing culturally sensitive programming). There was also no evidence that shelters in the Region are turning away individuals because they are Indigenous, or that, as compared to the general population of the Region, Indigenous persons are less likely to have access to different options in the housing stability system. There was no evidence that any individual Indigenous person objected to their placement or sought culturally specific options.

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[124] Decision, para. 231.

[125] *Ontario Health Coalition and Advocacy Centre for the Elderly v. His Majesty the King in Right of Ontario*, 2025 ONSC 415, para. 317.

85. In fact, the Region devotes substantial resources to aligning available housing to the diverse needs of unhoused persons, including Indigenous persons. The Region previously partially funded an Indigenous-operated transitional housing program operated by an Indigenous-led organization, but the Board of that organization decided to discontinue operating the site, without any involvement from the Region, and requested instead that the Region transfer its funding to an affordable housing complex that organization owns and operates.[126] On the AJ's approach, it was those events, not the By-laws, that created the purported breach of s.15 by reducing the alignment between the needs and preferences of some Indigenous persons for a culturally specific environment and the available emergency shelter spaces. There is nothing in the Encampment that is culturally specific, and no evidence that the Encampment provided a better environment for Indigenous persons than alternative indoor shelter. The By-laws therefore do not cause any distinct adverse effects on Indigenous individuals.

86. Finally, even if the By-laws do create a distinction on an enumerated or analogous ground, it is not one that reinforces, perpetuates, or exacerbates disadvantage. The By-laws are not based on any stereotypical assumptions about the value, characteristics, and behaviours of a particular class of people. Instead, the By-laws were enacted given the practical reality that the Region requires vacant possession of the Property to allow for the KCTH construction, regardless of who the occupants of the Property are.

[126] 4th Sweeney, AB, Tab 58, paras. 8-20, pp. 358-360.

3. Homelessness is not an analogous ground

87. Courts rarely recognize a new analogous ground under s. 15; the Supreme Court of Canada has recognized only five such grounds: non-citizenship,[127] marital status,[128] sexual orientation,[129] Aboriginality-residence for members of an Indian Band living off the reserve,[130] and non-resident status in a self-governing Indigenous community.[131]

88. Courts have refused to recognize many proposed analogous grounds, such as professional status/occupational status,[132] place or province of residence,[133] and "substance orientation" (with respect to using marijuana)[134]. Lower courts, including in Ontario, have also rejected homelessness as an analogous ground under s. 15,[135] and this Court and others have determined that poverty is not an analogous ground.[136] This is consistent with the reasoning that "[e]conomic benefits or prejudices are relevant to s. 15, but are more accurately regarded as symptomatic of the types of distinctions that are at the heart of s. 15: those that offend inherent human dignity".[137]

89. In departing from this existing caselaw, the AJ offered only that "the time has now come for homelessness to be recognized as an analogous ground".[138] He did not distinguish the case at hand from horizontally binding authorities that have come to the opposite conclusion, including

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[127] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.
[128] *Miron v. Trudel*, [1995] 2 SCR 418.
[129] *Egan v. Canada*, [1995] 2 SCR 513 ["***Egan***"].
[130] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 ["***Corbiere***"].
[131] *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10.
[132] *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989.
[133] *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3.
[134] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74.
[135] *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410, paras. 124-137 ["***Tanudjaja SCJ***"], *Shantz*, para. 231, *Persons Unknown*, para. 125.
[136] *Boulter v. Nova Scotia Power Incorporation*, 2009 NSCA 17, paras. 32-44; *Falkiner v. Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ON CA), para. 88; *R. v. Banks*, 2007 ONCA 19, paras. 98-104; *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873, paras. 68-90 ["***Toussaint***"].
[137] *Egan*, p. 544 (L'Hereux-Dube, J., in dissent).
[138] Decision, para. 154.

Tanudjaja.[139] Instead, the AJ incorrectly applied the concurring opinion of the Chief Justice in *Kanyinda* (with which two other Supreme Court justices disagreed[140] and which the majority did not adopt) rather than the binding approach set out by the Supreme Court in *Corbiere*.

90. Applying the correct test from *Corbiere*, homelessness is not an analogous ground because it is not "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity".[141] Put differently, homelessness is not a characteristic which "the government does not have a legitimate interest [in changing]".[142] Rather, governments are encouraged – including by the Respondents – to implement policies to support individuals out of homelessness, and many homeless individuals themselves are actively working to change their circumstances. Homelessness is a socioeconomic fact that may change at any given time, not a core element of a person's identity that is integral to their human dignity.

91. The AJ notably did not define homelessness in his reasons. Homelessness lacks a clear definition, which demonstrates its unsuitability as an analogous ground. For example, the PIT count reflects those who are unhoused on a given night, whereas the definition in the PECH focuses on "chronic homelessness", which requires that an individual be unhoused for a certain amount of time to be included in the count. Views also differ on what constitutes "adequate" housing, and whether individuals without such housing are homeless. Some would include the "precariously housed" in the definition.[143]

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[139] *Tanudjaja SCJ*, paras. 124-137.
[140] *Kanyinda*, majority reasons para. 26, concurring reasons of Rowe, J. and dissenting reasons of Côté, J, paras. 119, 358.
[141] *Corbiere*, para. 13.
[142] *Toussaint*, paras. 73, 77, *Corbiere*, para. 13.
[143] PECH, AB, Tab 59, pp. 362-363.

92. The lack of a single, unifying definition for who is homeless demonstrates that homelessness is a fluid social status of contentious definition, and not a key component of who someone is as a person.

93. The consequences of recognizing homelessness as a new analogous ground are unpredictable and could even be counterproductive. If recognition of this new ground is upheld, it would be engaged every time a municipality closed a shelter. As the record in this case shows, municipalities routinely open and close facilities as needs evolve and buildings age. Closures directly and intentionally affect the client population. Courts would inevitably be asked to micromanage policy in this complex area, as affected clients challenge decisions that almost always leave some worse off, even if others benefit and overall capacity is maintained. Municipalities, in turn, may become paralyzed as they seek to determine their legal obligations. In the end, it is hard to see how service delivery would be improved by the constant threat of litigation that such recognition may entail. The Region also adopts Ontario's submissions on this issue.

D. Any Infringement of ss. 7 or 15 are Saved Under s. 1

94. The AJ accepted that facilitating construction of the KCTH was a pressing and substantial objective, and that the By-laws are rationally connected to the objective. However, he erroneously held that they were not minimally impairing, and that their deleterious effects outweighed their salutary effects. His brief treatment of s.1 gave short shrift to the complexity of the issues that the Region faces.

1. The By-laws are minimally impairing

95. In holding that the By-laws are not minimally impairing because the Region could have enacted a safe tenting policy or provided an alternative site, the AJ did not show the appropriate

level of deference to the Region's policy choices. The Region "is not required to pursue the least drastic means of achieving its objective", it must only "adopt a measure that falls within a range of reasonable alternatives".[144] Courts will "def[er] to the legislature in instances where it is better situated to choose among a range of alternatives".[145]

96. A safe tenting protocol or an alternative site are not clearly superior alternatives to the Transition Plan and Transition Protocol included in the By-laws, whereby displaced Encampment residents are transitioned to alternative indoor shelter of matching capacity. Safe tenting or an alternative site deprive other citizens of the Region from the use of public land, and they entail significant costs if the Region is expected to maintain these other sites as it currently maintains the Encampment – thereby consuming resources that could be devoted to longer-term solutions. Further, a safe tenting protocol is a Region-wide remedy that goes far beyond what is reasonably equivalent to the Transition Plan, which is site-specific and (if the By-laws can be enforced to exclude newcomers) time-bound in its application.

97. The complexity of the "wicked" problem of homelessness also requires significant deference to the Region on this issue. In *Michaud*, this Court concluded that a s.7 infringement was minimally impairing because the impugned legislation (requiring commercial truck drivers to equip their vehicles with a speed limiter) was part of a broader, complex government response to the "social problem of motor vehicle highway safety".[146] This Court noted the lack of cohesion between experts in the field and concluded that speed limiters were a reasonable choice along the

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[144] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, para. 149.

[145] *R. v. Michaud*, 2015 ONCA 585, para 122 (leave to appeal refused: 2016 CanLII 24866 (SCC)) ["***Michaud***"], citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 53, *Carter v. Canada (Attorney General)*, 2015 SCC 5 para. 102.

[146] *Michaud*, para. 127.

spectrum of potential policy choices. This Court also reasoned that "[w]here there is debate about countervailing risks in a situation of uncertainty, the regulator must make the call."[147]

98. The same deference applies to the Region's judgement calls in the complex area of housing policy. The alternative arrangements that the Region provides to those at the Encampment involve budgetary and policy decisions that are properly within the legislative sphere, not the purview of the courts. The Region, as the democratically elected government responsible for housing services, facing resource constraints and escalating needs that are not of its own making, should be given substantial leeway in balancing competing interests in this area.

2. The salutary effects of the By-laws outweigh any deleterious effects

99. The AJ's comparison of the salutary and deleterious effects of the By-law was flawed on both sides of the ledger.

100. The AJ erroneously considered the interests of the Region's entire chronically homeless population, rather than focusing on the interests of the far more limited population residing at the Property.[148] As the By-laws are site-specific, only the interests of the latter are germane to the s. 1 analysis. This error led the AJ to overvalue the deleterious effects of the By-law. Further, as noted above, he failed to consider that the By-laws and Transition Plan were neutral in their impact on the broader population.

101. The AJ also erred in assessing the salutary effects of the By-laws by concluding that the "anticipated benefits of the transit hub (greater connectivity, reduced transfer times, more efficient

[147] *Michaud*, para. 127.
[148] Decision, para. 243.

transit connections) are speculative".[149] The Region led significant, uncontradicted evidence of the social and economic benefits for all residents of the Region that the KCTH will bring. This evidence is not "speculative" simply because it is not quantified, nor is quantification required to meet this branch of the s.1 test. The AJ's conclusion on this issue also directly contradicts his pronouncement only a few paragraphs later that "[t]he potential benefit to the Region's general population of the proposed KCTH constitutes a genuine public interest".[150] In any event, that a major public infrastructure transit project's construction will bring significant public benefits is precisely the sort of fact of which a court may take judicial notice.[151]

PART V. ORDERS SOUGHT

102. The Region requests that the appeal be allowed, that the AJ's declarations be set aside, that the Court confirm the By-laws' constitutional validity, and that an injunction be granted under s.440 of the *Municipal Act* allowing the By-laws to be enforced. Alternatively, to the extent that this Court may be of the view that the By-laws require amendment to be constitutionally valid, the Region seeks the direction of this Court as to what is required.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of August, 2026.

Andrew Lokan

[149] Decision, para. 243.
[150] Decision, para. 249.
[151] *Taylor v. Hanley Hospitality Inc.*, 2022 ONCA 376, para. 30.

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CERTIFICATE

1. An order under subrule 61.09(2) is not required.

2. The Appellant estimates that they will require 2 hours for the oral argument, not including reply.

3. The factum complies with subrule 61.12(5.1).

4. The number of words contained in Parts I to V of this factum is 11,993.

5. I am satisfied as to the authenticity of every authority cited in this factum.

August 7, 2026

Andrew Lokan
Paliare Roland Rosenberg Rothstein LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 .
2. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.
3. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.
4. *Animal Justice v. Ontario (Attorney General)*, 2026 ONCA 380.
5. *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55.
6. *Black et al. v. City of Toronto*, 2020 ONSC 6398.
7. *Boulter v. Nova Scotia Power Incorporation*, 2009 NSCA 17.
8. *British Columbia v. Adamson,* 2016 BCSC 1245.
9. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
10. *Carter v. Canada (Attorney General)*, 2015 SCC 5.
11. *Church of Saint Stephen et al. v. Toronto*, 2023 ONSC 6566 .
12. *Clinique juridique itinérante c. Procureur général du Québec*, 2023 QCCS 1949 .
13. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.
14. *The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662.
15. *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989.
16. *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10.
17. *Egan v. Canada*, [1995] 2 SCR 513.
18. *Falkiner v. Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ON CA).
19. *Fraser v. Canada (Attorney General)*, 2020 SCC 28.
20. *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844.
21. *Heegsma v. Hamilton (City)*, 2024 ONSC 7154.
22. *Housen v Nikolaisen*, 2002 SCC 33.

23. *Jacob v Canda (Attorney General)*, 2024 ONCA 648.

24. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

25. *Maple Ridge (City) v Scott*, 2019 BCSC 157.

26. *Mathur v. Ontario*, 2024 ONCA 762.

27. *Matsqui-Abbotsford Impact Society v Abbotsford (City)*, 2024 BCSC 1902.

28. *Miron v. Trudel*, [1995] 2 SCR 418.

29. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1.

30. *Nanaimo (City) v Courtoreille*, 2018 BCSC 1629.

31. *Ontario Health Coalition and Advocacy Centre for the Elderly v. His Majesty the King in Right of Ontario*, 2025 ONSC 415.

32. *Poff v. City of Hamilton*, 2021 ONSC 7224.

33. *Prince George (City) v Johnny*, 2025 BCSC 1556.

34. *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7.

35. *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 3.

36. *R. v. Banks*, 2007 ONCA 19.

37. *R. v. Kloubakov*, 2025 SCC 25.

38. *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74.

39. *R. v. Michaud*, 2015 ONCA 585.

40. *R v Pike*, 2024 ONCA 608.

41. *R. v. Sharma*, 2022 SCC 39.

42. *R. v. Sullivan*, 2022 SCC 19.

43. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5.

44. *The Regional Municipality of Waterloo v. Persons Unknown*, 2023 ONSC 670.

45. *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2025 ONSC 4774.

46. *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, 2026 ONSC 2971.

47. *Saanich (District) v Brett*, 2018 BCSC 1648.

48. *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3.

49. *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13.

50. *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410.

51. *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852.

52. *Taylor v. Hanley Hospitality Inc*., 2022 ONCA 376.

53. *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873.

54. *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926.

55. *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876.

56. *Victoria (City) v. Adams*, 2009 BCCA 563.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Canadian Charter of Rights and Freedoms, 1983

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

5 . (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 .

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

***Municipal Act, 2001*, S.O. 2001, c. 25,** s. 289

Yearly budgets, upper-tier

289 (1) For each year, an upper-tier municipality shall, in the year or the immediately preceding year, prepare and adopt a budget including estimates of all sums required during the year for the purposes of the upper-tier municipality, including,

(a) amounts sufficient to pay all debts of the upper-tier municipality falling due within the year;

(b) amounts required to be raised for sinking funds or retirement funds;

(c) amounts in respect of debenture debt of lower-tier municipalities for the payment of which the upper-tier municipality is liable; and

(d) amounts required by law to be provided by the upper-tier municipality for any of its local boards, excluding school boards. 2001, c. 25, s. 289 (1); 2006, c. 32, Sched. A, s. 119 (1).

***International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Articles 2 and 11.**

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

* * *

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

***National Housing Strategy Act*, S.C. 2019, c. 29, s. 313, s. 4.**

Housing Policy Declaration

Declaration

4. It is declared to be the housing policy of the Government of Canada to

(a) recognize that the right to adequate housing is a fundamental human right affirmed in international law;

(b) recognize that housing is essential to the inherent dignity and well-being of the person and to building sustainable and inclusive communities;

(c) support improved housing outcomes for the people of Canada; and

(d) further the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights.

Appendix "A" – Summary Chart of Canadian Encampment Cases

	Style of Cause	Summary	Result	Arrangements Made for Encampment Occupants
	Abbotsford, BC			
1.	*Abbotsford (City) v. Shantz*, 2013 BCSC 2426 ["***Shantz 1***"]	City sought injunction to remove wooden structure in an encampment on city land, prevent erection of further such structures	Order to remove unauthorized structure granted	None
2.	*Abbotsford (City) v Shantz*, 2013 BCSC 2612 ["***Shantz 2***"]	City sought injunction to clear encampment in city park and enjoin future camping in the park Encampment residents made a responding claim under s. 7 of the *Charter*	Injunction to clear encampment granted	None
3.	*Abbotsford (City) v. Shantz*, 2014 BCSC 2385 ["***Shantz 3***"]	Order sought to dissolve injunction granted in *Shantz* 2	Dissolution of the *Shantz 2* injunction order as sought on behalf of unhoused individuals denied	None
4.	*Abbotsford (City) v. Shantz*, 2015 BCSC 1909 ["***Shantz 4***"]	Application hearing for a permanent injunction sought by the City and a related *Charter* application under ss. 2(c), 2(d), 7, and 15 sought on behalf of unhoused individuals	*Charter* application granted in part The portions of the City bylaw which prohibit sleeping or being in a park overnight / erecting a temporary shelter without permits infringe s. 7 S. 15 claim dismissed	N/A
5.	*Fraser Health Authority v. Evans*, 2016 BCSC 1708	Regional health authority sought an injunction to clear a closed, private lot it owned Occupants claimed infringement of s. 2(b) *Charter* rights	Injunction to clear encampment granted *Charter* did not apply to the Fraser Health Authority	None

6.	*Matsqui-Abbotsford Impact Society v Abbotsford (City)*, 2024 BCSC 1902 (leave to appeal has been granted but the appeal not yet decided: 2025 BCCA 78)	Injunction sought on behalf of unhoused individuals encamping on land near City Hall Underlying claim under ss. 7 and 15 of the *Charter*	Injunction to prevent clearing of encampment denied, provided the City implement a phased approach to reduce and relocate encampment residents as per the terms of a court Order	Various conditions imposed on the City when enforcing the Bylaw.[1]
	Hamilton, ON			
7.	*Poff v. City of Hamilton*, 2021 ONSC 7224	Injunction sought on behalf of unhoused individuals camping in city parks preventing their removal during the day; no removal occurring at night Underlying claim under s. 7 of the *Charter*	Injunction to prevent encampment closure denied	None
8.	*Heegsma v. Hamilton (City)*, 2024 ONSC 7154 (appeal pending)	Underlying application in *Poff* – claims under ss. 7 and 15 of the *Charter*	*Charter* application on behalf of unhoused individuals dismissed (claim was limited to damages given decision in *Poff*)	None

[1] These conditions include the following: 1. The City must continue to work with the Petitioner and support groups to ensure a smooth transition as well as the immediate availability of harm reduction and mental health services for displaced individuals. 2. The City must: i. Ensure any shelter offered to Encampment occupants provides harm reduction services, if required by the occupant. ii. Identify regular occupants of the Encampment; iii. Conduct individual needs assessments for each occupant of the Encampment to identify appropriate accommodations or needs tailored to their specific requirements; iv. Identify occupants from the Encampment who share strong community ties and make every effort to keep these individuals together during relocation. v. provide MAIS and the occupants of the Encampment regular updates on shelter availability and the adequacy of those options; vi. consult directly with the Encampment occupants prior to any relocation to address their concerns and any preferences for proximity to necessary services; vii. Assist residents during relocation and ensure they have access to necessary resources; viii. Ensure that medical care and accessible transport are arranged to facilitate a safe and supported transition; ix. Respectfully manage the residents' shelters and belongings during relocation; x. Avoid dismantling shelters when residents are absent, unless there is clear evidence of abandonment; xi. Ensure residents have adequate time and opportunity to collect their essential belongings; xii. Store belongings at no cost for a period of six months and ensure their protection, with clear procedures established for their retrieval by the occupants or their representatives; and xiii. Assign a City representative to liaise with community services and ensure post-relocation support through follow-up check-ins.

	(ONCA heard this appeal in February 2026; the decision is under reserve)		No *Charter* infringement in preventing individuals from camping in a public park during the daytime	
	Kingston, ON			
9.	*The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662	Injunction brought by city seeking the removal of unhoused individuals camping in a city park Application on behalf of unhoused individuals preventing their removal, claim under ss. 7 and 15 of the *Charter*	Injunction to remove encampment entirely is denied *Charter* application granted under s. 7 in part (only insofar as the municipal bylaw prevented persons from camping overnight in public parks)	None
	Kitchener, ON			
10.	*The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670 ["***Persons Unknown***"]	Encampment established on Regional property Region sought to enforce its general Code-of-Use By-law to close the encampment Claims under ss. 7 and 15 of the *Charter*	Application sought by Region to enforce general Code-of-Use Bylaw not granted By-law ruled inoperative due to s. 7 breach insofar as it applies to prevent the encampment residents from living / erecting temporary shelters on the property when the number of homeless individuals in the Region exceed the number of accessible shelter beds S. 15 claims dismissed	N/A
11.	*The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2025 ONSC 4774 ["***Injunction Decision***"]	Same encampment/property as *Persons Unknown* Underlying application regarding Region's enforcement of a site-specific Bylaw – claims under ss. 7 and 15 of the *Charter*	Injunction sought on behalf of unhoused individuals granted (until conclusion of the merits hearing)	N/A

		Interim injunction sought on behalf of encampment residents		
	Maple Ridge, BC			
12.	*Maple Ridge (City) v Scott*, 2019 BCSC 157	Encampment established on two parcels of land owned by a third-party public authority. City sought an application permitting enforcement of two fire safety orders, which included a prohibition on in-tent heaters. Another order prohibited anyone from occupying the lands who is not seeking transition to housing City had previously sought an injunction to evict occupants, which it resolved in a Consent Order which set out various standards the encampment had to meet to ensure health and safety concerns were mitigated City did not seek a wholesale eviction from the lands in question No *Charter* challenge before the Court	Injunction to enforce part of the Fire Safety Orders granted (including the prevention of in-tent heaters) Injunction granted re: verification orders – occupants of the encampment who seek transition to housing to identify themselves to a representative of the City by producing government-issued photo identification, or by agreeing to be photographed, and providing a full legal name. Anyone who is not a "verified occupant" (i.e., has followed this protocol) is enjoined from occupying the subject lands	Under terms of order as sought by the City, occupants removed only where they have not identified themselves as seeking transition to housing
	Montreal, QC			
13.	*Clinique juridique itinérante c. Procureur général du Québec*, 2023 QCCS 1170	Injunction sought on behalf of unhoused individuals to delay their eviction Encampment located under a highway where major maintenance work was being carried out S. 7 *Charter* rights asserted; clinic also sought a positive remedy that individuals be provided with an action plan for housing homeless individuals	Injunction to prevent encampment clearing granted (for 10 days)	N/A

14.	*Clinique juridique itinérante c. Procureur général du Québec*, 2023 QCCS 1949 (leave to appeal dismissed 2023 QCCA 855)	Injunction sought on behalf of unhoused individuals (same facts as in 2023 QCCS 1170) – sought an extension of the order preventing eviction for a further month	Injunction to prevent encampment clearing denied	None
15.	*Clinique juridique itinérante c. Procureur général du Québec - Ministère des Transports et de la Mobilité durable du Québec*, 2025 QCCS 2087	Injunction sought on behalf of unhoused individuals living on land in Montreal owned by the Ministry of Transport to prevent their eviction *Charter* rights arguments under s. 7 raised	Injunction to prevent encampment clearing granted (for 10 days)	N/A
	Nanaimo, BC			
16.	*Nanaimo (City) v Courtoreille*, 2018 BCSC 1629	City sought statutory injunction to close a tent city The site of the encampment is a city-owned property in downtown Nanaimo Nanaimo permits temporary overnight camping in certain designated parks Respondents raised residents' s. 7 and 15 *Charter* rights	Injunction to clear encampment granted	None
	Prince George, BC			
17.	*Prince George (City) v Stewart*, 2021 BCSC 2089	City sought an injunction to remove two encampments located on a vacant lot and a green space it owned Respondents raised s. 7 *Charter* rights Court recognized that encampment residents could go to another nearby encampment, most had already done so	Injunction to close one of the two encampments granted	Future closure of the encampment permitted where the City could demonstrate "available and accessible housing and daytime facilities for [the encampment's] occupants"

18.	*Prince George (City) v Johnny*, 2022 BCSC 282 ["***Johnny 1***"]	City sought injunction to close an encampment (same as in *Stewart*) City argued that as per *Stewart*, there were now "suitable housing and daytime facilities" in the area with the addition of a new facility Court rejected that there were sufficient, accessible places for all encampment residents to go to	Injunction to clear encampment denied – *Stewart* condition not satisfied	Conditions in *Stewart* still apply
19.	*Prince George (City) v Johnny*, 2025 BCSC 1556 ["***Johnny 2***"]	City sought an injunction to close the *Stewart* / *Johnny 1* encampment on basis that the *Stewart* conditions had been fulfilled Additional housing options opened since the original *Johnny* decision near the Encampment; rooms there were held for individuals at the Encampment	Injunction to close encampment granted; Order allows individuals to apply for constitutional exemptions where options are not truly accessible to them	Conditions in *Stewart* still apply (and were met)
	Saanich, BC			
20.	*Saanich (District) v Brett*, 2018 BCSC 1648	Interim injunctions sought by the District and BC governments to evict an encampment on lands owned by these parties (parkland and land designated for highway use) *Charter* raised in defence Bylaw allowed sheltering in parks overnight, individuals to use the park during the day	Injunction to close encampment granted (for 10 months)	None
	Toronto, ON			
21.	*Black et al. v. City of Toronto*, 2020 ONSC 6398	Encampments in municipal parks	Injunction to prevent encampment closure denied	None

		Injunction to prevent encampment closure sought on behalf of unhoused individuals Underlying claims under ss. 7, 12, and 15 of the *Charter* and the *Human Rights Code*		
22.	*Church of Saint Stephen et al. v. Toronto*, 2023 ONSC 6566	Encampment on city land outside a church Injunction to prevent encampment closure sought on behalf of unhoused individuals Underlying claim under s. 7 of the *Charter*	Injunction to prevent encampment closure denied	None
	Vancouver, BC			
23.	*Vancouver Parks Board v. Mickelson*, 2003 BCSC 1271	Parks Board sought injunction against individuals living/erecting tents in a park Defendants raised *Charter* ss. 2(b) / (d), 7, and 15	Injunction to clear encampment granted	None
24.	*Vancouver Board of Parks and Recreation v. Sterritt*, 2003 BCSC 1421	Parks Board sought injunction against individuals living/erecting tents in a park Defendants intend to raise *Charter* defences and Aboriginal rights	Injunction to clear encampment granted	None
25.	*Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1871	Parks Board sought an injunction against individuals living/erecting tents in a park Encampment residents raised s. 7 *Charter* issues	Matter adjourned to the following week to allow for full argument Interim order made regarding the conditions at the park to address health and safety issues	N/A
26.	*Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926	Same as 2014 BCSC 1871	Injunction to clear encampment granted	Injunction to begin on date that the City

				indicated more housing would come online
27.	*Vancouver (City) v Wallstam*, 2017 BCSC 937	City sought an injunction to remove encampment from a property it owned S. 7 raised in encampment residents' underlying application	Injunction to clear encampment denied without prejudice to the City's ability to bring it again	N/A
28.	*Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876	Same encampment as in 2014 BCSC 1926 – individuals returned, now migrated/extended onto VFPA lands Encampment on VFPA lands are publicly owned and used for private commercial purposes S. 7 *Charter* rights raised	Injunction sought to clear encampment granted	None
29.	*Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49	Injunction sought by City to close encampment in a Vancouver park *Charter* rights raised Application for JR of two Orders of the Board: (1) prohibiting overnight sheltering at a park where there is an encampment; (2) closing an area in the park that was previously open for overnight sheltering Board sought injunction to enforce Orders and a municipal parks bylaw Bylaw allows sheltering overnight only in city parks S. 7 *Charter* rights raised	Encampment residents' application for judicial review granted – breach of procedural fairness, Orders not reasonable Board's injunction adjourned pending reconsideration of the Orders	N/A

30.	*Vandenberg v Vancouver (City) Fire and Rescue Services*, 2023 BCSC 2104	Fire Order to clear tents/structures from city blocks issued in respect of an existing encampment Ss. 7 and 15 of *Charter* raised	Encampment residents' application for judicial review granted – breach of procedural fairness	N/A
	Victoria, BC			
31.	*Victoria (City) v. Adams*, 2008 BCSC 1363	Claim under ss. 7 and 12 to City bylaw prohibiting sleeping in parks overnight	Application granted – s. 7 infringed where the number of homeless people in the City exceeds the number of available shelter beds and sheltering overnight not permitted (prohibition is both arbitrary and overbroad)	N/A
32.	*Victoria (City) v. Adams*, 2009 BCCA 563 (appeal of 2008 BCSC 1363)	Same as 2008 BCSC 1363	Application granted – s. 7 infringed where the number of homeless people in the City exceeds the number of available shelter beds and sheltering overnight not permitted (prohibition is overbroad)	N/A
33.	*Victoria (City) v. Thompson,* 2011 BCSC 1810	Encampment in public square in Victoria; City sought injunction to clear encampment S. 2(b) *Charter* arguments raised by encampment residents	Injunction to clear encampment granted	None
34.	*Johnston v. Victoria (City)*, 2011 BCCA 400 (appeal of 2010 BCSC 1707)	Individual charged with violating City bylaw by sheltering in parks during the daytime; appealed convictions, made s. 7 *Charter* arguments	Conviction remains; *Charter* arguments rejected (upholds *Adams*: overnight sheltering only)	None
35.	*British Columbia v. Adamson,* 2016 BCSC 584 ["***Adamson 1***"]	Interim injunction sought by province to evict encampment on green space at a courthouse property in Victoria	Injunction to clear encampment denied	N/A
36.	*British Columbia v. Adamson,* 2016 BCSC 1245	Same encampment as in *Adamson 1*, but 3 months later	Injunction to clear encampment granted	Residents to remove tents/belongings "as

	["***Adamson 2***"]	Injunction sought by province for the second time		housing becomes available, and by not later than August 8, 2016" (order made July 5)

Court File No.: COA-26-CV-0836
COA-26-CV-0897

THE REGIONAL MUNICIPALITY OF WATERLOO
Applicant (Appellant)

-and-

JOSEPHINA DUGAS et al.
Respondents (Respondents in Appeal)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPELLANT

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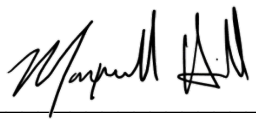
Lawyers for the Applicant (Appellant),
The Regional Municipality of Waterloo

This is Exhibit “D” referred to in the
Affidavit of Paul-Emile McNab sworn
before me, at the City of Toronto,
in the Province of Ontario
on this 20th day of October 2026.



A Commissioner for taking affidavits, etc.
Maxwell Hill (LSO# 86427T)

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

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.

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[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.

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[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]

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[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

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[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]

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[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

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[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

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[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

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[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 ["**Spooner 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.

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[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

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[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

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[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

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[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

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[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 (ON CA), ¶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

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[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"

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[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.

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[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*.

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[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

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[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

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[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

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[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 reserve[136] 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

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[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

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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 record[149] or being a prisoner[150] 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]

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[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

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[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

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[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.

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[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

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[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]

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[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

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[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.

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[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

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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.

22. *ETFO et al v Her Majesty the Queen*, 2019 ONSC 1308.

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.
45. *Ontario (Minister of Health) v Grassroots for Affordable Jewish Education Inc.*, 2024 ONSC 4905.
46. *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* 1995 CanLII 86 (SCC).
47. *Platnick v Bent*, 2018 ONCA 687.
48. *Poff v City of Hamilton*, 2021 ONSC 7224.
49. *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32.
50. *Quebec (Attorney General) v A*, 2013 SCC 5.
51. *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7.
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.

64. *Sagharian v Ontario (Education)*, 2008 CanLII 63481 (SCC).

65. *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13.

66. *Symes v Canada,* 1993 CanLII 55 (SCC), [1993] 4 SCR 695.

67. *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410.

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.

72. *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670.

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.

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

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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Court File No.: COA-26-CV-0836; COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

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Court File No.: COA-26-CV-0836
COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

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THE REGIONAL MUNICIPALITY OF WATERLOO

Appellant
(Applicant/Cross Respondent)

and

THE ATTORNEY GENERAL FOR ONTARIO

Appellant
(Intervener)

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Respondents
(Respondents/Cross-Applicants)

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I. THE INTERVENER AND DECISION APPEALED FROM

1. Aboriginal Legal Services ("ALS") intervenes in this appeal to assist in the interpretation and application of s. 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The appeal is brought by the Appellant/Applicant, the Regional Municipality of Waterloo (the "Region"), and the Appellant/Intervener, the Attorney General of Ontario ("Ontario"), from the judgement of the application judge (the "AJ") Gibson J., dated May 21, 2026.

2. In his decision, the AJ found, *inter alia*, that the By-law[1] at issue in this appeal infringed upon s. 15(1) *Charter* rights by disproportionately impacting the Indigenous residents of the encampment located at 100 Victoria Street North in Kitchener (the "Encampment"), in a manner that exacerbated their existing harms and disadvantages.[2]

II. OVERVIEW

3. The right to equality guaranteed by the *Charter* has been interpreted generously, reflecting the "continuing framework" of the Constitution and the need for the "unremitting protection" of equality rights.[3] The interpretation of equality rights continues to evolve. Earlier this year, the Supreme Court in *Kanyinda* emphasized that claims of adverse effects discrimination under s. 15(1) require an analysis that considers the intersecting identities and lived realities of claimants.[4]

4. While the Supreme Court did not change the s. 15(1) test in *Kanyinda*, it provided clear and explicit guidance that courts should take an intersectional approach. The AJ correctly found that *Kanyinda* rendered Justice Valente's s. 15(1) analysis in *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*[5], no longer binding.

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[1] By-law 25-021, Respondents' Compendium Volume 1 ["RComVol.1"] Tab 2, pp.20-35, 32-40.
[2] *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, 2026 ONSC 2971, ¶233 ["*Decision*"].
[3] *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, ¶216 ["*Kanyinda*"]; *Miron v. Trudel,* [1995] 2 S.C.R. 418, ¶145.
[4] *Kanyinda,* ¶¶40, 43.
[5] 2023 ONSC 670 ["*Persons Unknown 2023*"].

5. In applying the Supreme Court's updated guidance on addressing equality claims, the AJ correctly found that (1) the By-law had a disproportionate impact on Indigenous people in the Encampment, which arose from the intersection (or nexus) of homelessness and Indigenous identity;[6] (2) the By-law reinforced, perpetuated, or exacerbated existing disadvantages of Indigenous people;[7] and (3) these infringements could not be saved under s. 1 of the *Charter*.[8]

III. FACTS

6. ALS relies on the submissions on facts of the Respondents.[9]

IV. ISSUES AND THE LAW

7. ALS' submissions address the following issues raised on appeal:

a) What is the standard of review;

b) Whether the AJ erred in making factual findings related to s. 15(1);

c) Whether the AJ erred in finding that he was not bound by horizontal *stare decisis* due to the *Kanyinda* decision;

d) Whether the AJ erred in finding the By-law infringed s.15(1) based on race; and

e) Whether the By-law could be saved by s.1 of the *Charter*.

A. Standard of Review

8. ALS adopts the Respondents' submissions on the proper standards of review.[10] In particular, ALS reinforces the Respondents' position that the AJ's factual findings regarding social facts concerning how outdoor sheltering impact Indigenous homeless persons; legislative facts defining the social, economic, cultural, and political context within which the By-law was adopted;

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[6] *Decision*, ¶236; *Kanyinda* ¶50.
[7] *Decision* ¶237.
[8] *Decision*, ¶244.
[9] Factum of the Named Respondents, October 9, 2026, ¶¶10-53 ["Respondents Factum"].
[10] *Ibid*, ¶54-55.

and adjudicative findings on the credibility of affiants and experts are entitled to deference.[11]

B. No Error in Fact Finding

9. The Region and Ontario each made submissions regarding findings of fact made by the AJ concerning issues relating to Indigenous peoples. The findings of fact were based on a complete record, are owed deference, and do not constitute a palpable and overriding error.

i. Lee Ann Hundt's Evidence

10. Ontario challenged the AJ's finding that Indigenous persons "face additional barriers due to shelter eligibility rules that disproportionately exclude them because of their Indigenous identities", submitting that this finding was based on the opinion of an unqualified expert.[12] The evidence in question was tendered by Lee Ann Hundt ("Ms. Hundt") in her affidavit sworn on August 15, 2025.[13] The AJ did not err in relying on Ms. Hundt's evidence.

11. Ontario's argument rests on a characterization of the evidence that was never adopted by either ALS or the AJ. Ms. Hundt has worked in social services since 1998, much of that time in the Waterloo/Kitchener area, with a particular focus on housing and Indigenous housing, working with most local Indigenous organizations in the Region.[14]

12. The Region cross-examined Ms. Hundt on her affidavit on December 10, 2025.[15] The Region and the Respondents confirmed during the cross-examination that Ms. Hundt was not an expert.[16] The Region questioned where Ms. Hundt got her knowledge about the homeless Indigenous community. Ms. Hundt explained the means she came by the information in her

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[11] *Ibid*, ¶55, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, ¶48-52; *R. v. Spence*, 2005 SCC 71,¶57-58.
[12] Factum of the Appellant, Attorney General of Ontario, dated August 7, 2026, ¶101 ["Ontario Factum"].
[13] Affidavit of Lee Ann Hundt, August 15, 2025, Supplemental Responding Application Record ("Supp. RAR") Volume 1, pp.7-64 ["Hundt Affidavit"].
[14] *Ibid*, ¶¶7-10, p.326.
[15] Transcript of the Cross-Examination of Lee Ann Hundt, held December 10, 2025, Joint Transcript Brief ["JTB"], Volume 2, pp.300-330.
[16] *Ibid*, Q. 82, 111-122, pp.314-315, 325-328.

affidavit included her 20 years of experience working with Indigenous clients, her connections in the community and shelters, and her attendance at social gatherings and pow-wows.[17] The Region sought an undertaking regarding specific conversations Ms. Hundt had with community members. She refused in order to not damage her relationship with the community, and the Region did not challenge her refusal.[18]

13. Lay opinion evidence is admissible where it is "based upon the witness's own observations, does not depend upon specialized knowledge, and is an inference that the witness is better placed than the trier of fact to draw."[19] Ms. Hundt's evidence fell squarely within this framework: she was in a position to provide evidence based upon her own observations and conclusions which could not be readily separated from those underlying observations.[20] The adoption of Ms. Hundt's evidence does not dissolve the distinction between lay opinion and expert opinion evidence.[21]

ii. Barriers and Exclusion from Housing and Shelters

14. The Appellants challenge the AJ's finding that Indigenous peoples were "turned away"[22] from shelters in the Region due to their Indigenous identity. The AJ did not make a finding that Indigenous people were turned away from shelters; rather, the AJ said that Indigenous people in the Region "face additional barriers … that disproportionately exclude them".[23]

15. There is a significant difference between an individual being "turned away", and being excluded for one's identity. The latter involves an understanding of the systemic barriers, discrimination, and marginalization that have historically limited Indigenous peoples' access to

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[17] *Ibid*, Q. 83, pp.316-318.
[18] Answers to Undertakings from the Cross-Examination of Lee Ann Hundt on December 10, 2025, Respondents' Brief Answers to Undertakings, April 14, 2026, p.223.
[19] *R. v. R.G.*, 2026 ONCA 591, ¶43 ["*R.G.*"]
[20] *Ibid.*
[21] *R.G.*, ¶¶43, 46; *R. v. Collins* (2001), 150 OAC 220 (ONCA), ¶¶16-17.
[22] Factum of the Appellant, the Regional Municipality of Waterloo, August 7, 2026, ¶84 ["Region Factum"]; Ontario Factum, ¶101.
[23] *Decision,* ¶236.

housing and services. Dr. Bernadette Pauly ("Dr. Pauly") gave expert evidence that the Indigenous peoples in urban centres experience continuing legacies of colonial oppression and exclusion.[24]

16. Courts may take judicial notice of the unique, systemic and background factors affecting Indigenous peoples in Canadian society.[25] At the hearing, ALS made oral submissions regarding how courts can take judicial notice of the "history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration" among Indigenous people.[26]

17. In the criminal context, judges undertake the sentencing of Indigenous offenders individually because the circumstances of Indigenous people are unique.[27] While systemic and background factors are typically applied in criminal sentencing, the Supreme Court has accepted this approach in other contexts, such as when the liberty of an Indigenous person is at stake.[28]

18. Taking judicial notice of the unique systemic and background factors affecting Indigenous peoples supports societal and legal changes concerning the obligations of governments to use truth and reconciliation strategies to address the consequences of colonialism. As such, the AJ correctly took judicial notice of the systemic factors affecting homeless Indigenous peoples.

19. The Region argues that the evidentiary record does not establish that Indigenous individuals objected to alternative accommodations offered or that the Encampment was a better environment for them than an indoor shelter.[29] ALS submits that these facts were established on the record. There is general evidence on the record from Dr. Pauly that maintaining connections

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[24] Affidavit of Dr. Bernadette Pauly, affirmed August 14, 2025 ["Dr. Pauly Affidavit"], RComVol.1 Tab 29, ¶14.
[25] *Anderson v. Alberta*, 2022 SCC 6, ¶36 ["*Anderson*"].
[26] *R. v. Ipeelee*, 2012 SCC 13, ¶60 .
[27] *R. v. Gladue*, [1999] 1 SCR 6886, ¶66-68 ["*Gladue*"].
[28] *Gladue*, ¶66-68; *Anderson*, ¶36; *R v. Anderson*, 2014 SCC 41, ¶17; *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534, ¶¶56-59; *United States v Leonard*, 2012 ONCA 622, ¶85.
[29] Region Factum, ¶84-85.

to culture and community can mitigate harm;[30] Ms. Hundt observed that Indigenous peoples are more vulnerable to eviction from an Encampment due to their history of displacement from land, and their connection with the land and people around them;[31] Aaron Sharpe, an Indigenous resident of the Encampment, gave evidence regarding his experiences with racism at shelters in the Region;[32] and the Region confirmed that there are no Indigenous-specific shelter beds available in the Region[33], which contributes to their exclusion.

20. The AJ did not err in accepting this evidence – he found it to be credible, and his findings are entitled to deference.

C. No error in the law

i. Horizontal Stare Decisis

21. The Appellants allege that the AJ erred by finding that he was not bound by *Person's Unknown 2023's* determinations with respect to s. 15(1).[34] There are three narrow grounds under the *Re Hansard Spruce Mills* framework on which a trial court may depart from a binding decision of a court of coordinate jurisdiction.[35] The AJ correctly applied the first of these grounds: a subsequent decision affected the validity of the previous judgment.[36]

22. In reaching that conclusion, the AJ referenced that "[a]n intersectional approach is not novel in the s. 15(1) analysis",[37] but, he correctly recognized that *Kanyinda* provided a structured approach to step one of the s. 15(1) analysis which emphasizes the benefit from looking at a

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[30] Dr. Pauly Affidavit, RComVol.1 Tab 29, ¶¶8, 16.
[31] Hundt Affidavit, Supp. RAR V.1, ¶¶36-38.
[32] Affidavit of Calvin Sharpe, affirmed May 30, 2025, Responding Application Record Volume 1, ¶¶3,10, pp.19, 21.
[33] Transcript of the Continued 2nd Cross Examination of Peter Sweeney, JTB Vol. 4, Q. 241-245, ["Cont. 2nd Sweeney XE"].
[34] Region Factum ¶71; Ontario factum ¶92.
[35] *Hansard Spruce Mills,* [1954] 4 D.L.R. 590 (B.C.S.C.).
[36] *Decision*, ¶103.
[37] *Decision*, ¶197, referencing *Kanyinda*, ¶40.

claimant group's intersecting identities and realities.[38]

23. Intersectional analyses are not novel in law, but *Kanyinda* provided guidance on how a Court can use intersectionality to identify this nexus in s.15(1) analyses. The Court made it clear that an inquiry into the disproportionate impact of a government decision "cannot be divorced from a claimant group's unique situation, which may include intersecting identities and realities".[39] *Kanyinda* provides that claimants can satisfy step one of the s. 15(1) analysis when adverse effects arise from the nexus between a distinction that may not be rooted in an enumerated characteristic and a subgroup that does share a protected ground.[40]

24. In *Kanyinda*, it was "the combined effect of women's historical disadvantage regarding their access to employment *and* asylum seekers' exclusion from subsidized daycare that produced the adverse effects on Ms. Kanyinda."[41] Although the exclusion from subsidized daycare applied equally to all refugee claimants, its impact fell more heavily on women refugee claimants because of the barriers they already face in entering and participating in the workforce.[42]

25. Justice Valente did not have the benefit of this specific guidance on s. 15(1) when conducting his analysis. He devoted the bulk of the s. 15(1) analysis to whether homelessness was an analogous ground but did not consider or evaluate the intersectional identities of the homeless residents of the Encampment.[43] The AJ was therefore warranted in finding that the first *Hansard Spruce Mills stare decisis* exception permitted him to determine the issues of s. 15(1) afresh.[44]

ii. No error in relation to the s. 15(1) analysis

26. ALS supports the Respondents' submission that the AJ correctly analyzed the By-Law

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[38] *Kanyinda*, ¶43.
[39] *Ibid*, ¶41.
[40] *Ibid*, ¶42.
[41] *Ibid*, ¶78 (emphasis in original).
[42] *Ibid*, ¶10.
[43] *Persons Unknown 2023*, ¶¶125-126.
[44] *Decision*, ¶103.

against the homeless population of the Region generally, making factual findings that the Encampment was the only lawful place to shelter and the Region would not allow sheltering elsewhere, rather than limiting his equality analysis to the Region's definition of "Residents".[45]

a. Substantive Equality, Adverse Effects Discrimination, and the "Combined Effect" Analysis

27. The AJ did not err at step one in finding that the By-law creates a distinction for the Indigenous residents of the Encampment. The Appellants allege that the AJ used the overrepresentation of Indigenous peoples in the homeless population to establish that the By-law has a disproportionate adverse impact on the group.[46] His analysis was not so simple.

28. The AJ established a nexus by following the "combined-effect" analysis articulated and applied in *Kanyinda*. Although homelessness (until the Decision) was not a protected ground, the distinction found by the AJ was "tethered"[47] to the protected ground of race.

29. The AJ correctly found that the "adverse effects of the By-law arise in the nexus between homeless[ness] and race".[48] This nexus arose from the combined effects of the societal, historical, and institutional disadvantage that contribute to disproportionately high rates of homelessness among Indigenous peoples *and* the By-law's eviction of Indigenous Encampment residents.

30. The AJ found the overrepresentation of Indigenous people in homeless populations not merely as a matter of demographic context, but because among Indigenous people, homelessness is a consequence of colonization dispossessing Indigenous people of their land and resources, propelling generations trauma and systemic racism.[49] The AJ did not err in finding that the By-law's adverse effects create a distinction through the intersection of homelessness and race.[50]

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[45] Respondents Factum ¶90, *Decision*, ¶¶149, 185, 250.
[46] Region Factum, ¶83; Ontario Factum, ¶101.
[47] *Kanyinda*, para 43.
[48] *Decision*, ¶¶236-237.
[49] *Decision*, ¶234.
[50] *Decision*, ¶236.

b. No error in relation to step two of the s. 15(1) analysis

31. The Region alleges that the By-law did not fail at step two of s.15(1) because it was not based on any stereotypical assumptions[51], but this is not a requirement of the s.15(1) test.[52] Instead, this inquiry is contextual and must be grounded in the group's lived realities and in the broader social, political, and legal environment in which the law operates.[53]

32. The Appellants allege that there was insufficient evidence to establish that the By-law perpetuates the existing disadvantages of Indigenous peoples.[54] Ontario recognized that when addressing step two, evidence that the By-law created a disproportionate impact must be more than just "a web of instinct"[55]. In this case, it rises "to the level of demonstrating any relationship between"[56] the By-law, eviction of Encampment residents, and Indigenous identity. The AJ correctly found that this low threshold was met through the evidence on the record.

c. The AJ Does Not Misconstrue s.15 as a Positive Right

33. The Region alleges that the AJ's consideration of the absence of culturally safe housing for Indigenous peoples misconstrues the s.15(1) analysis by assigning positive obligations on the state to rectify disadvantage.[57] Once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner.[58] The AJ pointed out that, similarly to *Mathur v. Ontario*, the Region has committed to obligations related to the By-law and the transition of Encampment residents.[59]

34. The Transition Protocol attached to the Region's By-law, as explained by the Region,[60] contains Individual Housing Plans ("IHP") put forth by Unsheltered Support Workers. By virtue

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[51] Region Factum, ¶86.
[52] *Kanyinda*, ¶67; see also *Fraser v. Canada (Attorney General)*, 2020 SCC 28, ¶78.
[53] *Kanyinda*, ¶64; see also *R. v. Sharma,* 2022 SCC 39, ¶¶56-61.
[54] Region Factum, ¶¶85-86; Ontario Factum, ¶¶104-105.
[55] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, ¶34.
[56] *Ibid*.
[57] Region Factum, ¶84.
[58] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, ¶73.
[59] Decision, ¶138, referencing *Mathur v. Ontario*, 2024 ONCA 762.
[60] Region Factum, ¶3.

of the Transition Protocol, the Region set out to provide alternative accommodation for evicted Encampment residents, including Indigenous residents. An IHP sufficient for an Indigenous person would include housing or services that are responsive to their unique needs, circumstances, and lived realities. Such an IHP cannot exist when those options are unavailable.

35. The Region references the resources that it has devoted to aligning available emergency housing to the needs of Indigenous people[61], but the Region did not, as of December 12, 2025, include funding for Indigenous-specific emergency shelter beds despite the disproportionate overrepresentation of Indigenous homeless people.[62] The Region's Plan to End Chronic Homelessness by 2030 states that there is work to be done to restore the trust of marginalized people, and the system must do better with the Indigenous community and reconciliation.[63]

36. To remain consistent with its stated commitment to IHPs, reconciliation, and regaining the trust of marginalized Indigenous communities, the Region should recognize, as the AJ did, that sometimes, "enforcement of a negative right may require a government to take positive steps."[64]

iii. *No error in relation to Charter s. 1*

37. ALS adopts the Respondents' submissions on section 1 of the *Charter*.[65]

V. ORDERS REQUESTED

38. ALS takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ___ day of _____, 2026

Asha James
Counsel for the Intervener,
Aboriginal Legal Services

[61] Region Factum, ¶85
[62] Cont. 2nd Sweeney XE, JTB V4, Qs 241-244, pp. 93-94.
[63] 1st Affidavit of Peter Sweeney, affirmed June 6, 2025, Application Record Tab 2, at Exhibit A: Final PECH Report 2024, p. 90.
[64] *Decision*, ¶138.
[65] Respondents Factum, ¶¶126-133.

Court File No.: COA-26-CV-0836
COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Appellant
(Applicant/Cross Respondent)

and

THE ATTORNEY GENERAL FOR ONTARIO

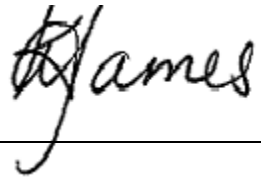
Appellant
(Intervener)

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

Respondents
(Respondents/Cross-Applicants)

CERTIFICATE

1. I am satisfied that every authority cited in the factum is authentic, and every quotation from an authority that appears in the factum accurately reproduces the text of the authority.
2. An order under subrule 61.09(2) is not required.
3. The proposed intervener estimates that, if given intervener status, they will require ¼ hour for oral argument.
4. The factum complies with subrules 61.11(3) and 61.12(5.1).
5. The number of words contained in Parts I to V of the factum is 3008.



October 21, 2026

Counsel for the Proposed Intervener,
Aboriginal Legal Services

Schedule A – List of Authorities

1. *Anderson v. Alberta*, 2022 SCC 6
2. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
3. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624
4. *Fraser v. Canada (Attorney General)*, 2020 SCC 28
5. *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534
6. *Hansard Spruce Mills,* [1954] 4 D.L.R. 590 (B.C.S.C.)
7. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30
8. *Mathur v. Ontario*, 2024 ONCA 762
9. *Miron v. Trudel,* [1995] 2 S.C.R. 418
10. *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7
11. *R v. Anderson*, 2014 SCC 41
12. *R. v. Collins* (2001), 150 OAC 220 (ONCA)
13. *R. v. Gladue*, [1999] 1 SCR 6886
14. *R. v. Ipeelee*, 2012 SCC 13
15. *R. v. R.G.*, 2026 ONCA 591
16. *R. v. Sharma,* 2022 SCC 39
17. *R. v. Spence*, 2005 SCC 71
18. *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained,* 2023 ONSC 670
19. *The Regional Municipality of Waterloo v Named Respondents and Persons Unknown*, 2026 ONSC 2971
20. *United States v Leonard*, 2012 ONCA 622

Schedule B – List of Statutes

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**

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.

REGIONAL MUNICIAPLITY OF WATERLOO Applicant (Appellant)	-and-	JOSEPHINA DUGAS et al. Respondents (Respondents in Appeal)	-and-	ABORIGINAL LEGAL SERVICES Proposed Intervener

Court File No.: COA-26-CV-0836; COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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REGIONAL MUNICIAPLITY OF WATERLOO Applicant (Appellant)	-and-	JOSEPHINA DUGAS et al. Respondents (Respondents in Appeal)	-and-	ABORIGINAL LEGAL SERVICES Proposed Intervenor

Court File No.: COA-26-CV-0836; COA-26-CV-0897

COURT OF APPEAL FOR ONTARIO

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