

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

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Applicant (Appellant)

- and -

THE ATTORNEY GENERAL OF 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 -

CITY OF HAMILTON

Proposed Intervener

MOTION RECORD OF THE PROPOSED INTERVENER, CITY OF HAMILTON
(RE: MOTION FOR LEAVE TO INTERVENE AS A FRIEND OF THE COURT
UNDER SUBRULE 13.02)

Date: October 21, 2026

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
One Main Street West
Hamilton, ON L8P 4Z5

Jennifer L. King (LSO#54325R)

Tel: 416-862-5778

jennifer.king@gowlingwlg.com

Jordan Diacur (LSO#65860E)

Tel: 905-540-8208

jordan.diacur@gowlingwlg.com

Lawyers for the Proposed Intervener,
City of Hamilton

-2-

TO: **Paliare Roland Rosenberg Rothstein LLP**
 155 Wellington Street West, 35th Floor
 Toronto ON M5V 3H1
 Tel: 416.646.4300

Gordon Capern (LSO # 32169H)
 Tel: 416.646.4311
gordon.capern@paliareroland.com

Andrew Lokan (LSO # 31629Q)
 Tel: 416.646.4324
andrew.lokan@paliareroland.com

Kartiga Thavaraj (LSO # 75291D)
 Tel: 416.646.6317
kartiga.thavaraj@paliareroland.com

Greta Hoaken (LSO # 879031)
 Tel: 416.646.6357
greta.hoaken@paliareroland.com

Lawyers for the Applicants (Appellants)

AND TO: **Attorney General of Ontario**
 Constitutional Law Branch
 Civil Law Division
 4th Floor, McMurtry–Scott Building
 720 Bay Street
 Toronto ON M7A 2S9

Zachary Green (LSO # 48066K)
 Tel: 416.992.2327
zachary.green@ontario.ca

Andrea Bolieiro (LSO # 60034I)
 Tel: 437.551.6263
andrea.bolieiro@ontario.ca

Sara Badawi (LSO # 87480W)
sara.badawi@ontario.ca

Lawyers for the Appellant/Intervener,
 Attorney General of Ontario

-3-

AND TO: **Waterloo Region Community Legal Services**

450 Frederick Street, Unit 101

Kitchener, ON N2H 2P5

Ashley Schuitema (LSO # 68257G)

Tel: 519.743.0254 ext. 17

ashley.schuitema@wrcls.clcj.ca

Joanna Mullen (LSO # 64535V)

Tel: 519.743.0254 ext. 15

joanna.mullen@wrcls.clcj.ca

Shannon K. Down (LSO # 43894D)

shannonkdown@gmail.com

Lawyers for the Respondents (Respondents in Appeal)

-4-

INDEX

TAB	DOCUMENT	PAGE
1.	Notice of Motion dated October 21, 2026	5
2.	Affidavit of Michelle Baird, affirmed October 21, 2026	12
3.	Draft Order	19
4.	Proposed Factum of the Intervener, City of Hamilton (draft)	22

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CITY OF HAMILTON

Proposed Intervener

NOTICE OF MOTION OF THE PROPOSED INTERVENER, CITY OF HAMILTON
(Motion for leave to intervene)

THE CITY OF HAMILTON will make a motion to the Court, in writing if on consent or unopposed, or if opposed on November 10, 11 or 12, 2026 at 10:00 a.m., or as soon after that time as the motion can be heard by videoconference.

THIS MOTION IS FOR:

1. An order granting the City of Hamilton ("**Hamilton**"):
 - a. Leave to intervene as a friend of the court in these appeals on a without costs basis;

-2-

- b. Permission to file a factum of not more than ten (10) pages, or such other length the court may deem appropriate;
- c. Permission to present oral argument at the hearing of these appeals of not more than fifteen (15) minutes, or such other time as the court may deem appropriate; and
- d. Such further or other relief as counsel may request and this Honourable Court may deem just.

THE GROUNDS OF THE MOTION ARE:

- 2. Hamilton is a single-tier municipality continued under the *City of Hamilton Act, 1999*, S.O. 1999, c. 14, Sched. C, and governed by the *Municipal Act, 2001*, S.O. 2001, c. 25;
- 3. The application and cross-application below concerned the constitutionality of Regional Municipality of Waterloo (“**Region**”) site-specific by-laws to implement a phased closing of an encampment on a specific Region-owned property;
- 4. Having declared the by-laws of no force and effect under s. 52(1) of the *Constitution Act, 1982*, the application judge added a “declaration plus”: he retained jurisdiction and ordered that the municipality may return to court only once it had implemented either “Safe Tenting Protocol” or provided alternative encampment site, or both;
- 5. The decision under appeal raises issues of significant public importance related to the use of public property, municipal encampment responses, section 7

-3-

and 15 rights, and the appropriate role of the judiciary in *Charter* challenges and in directing municipal policy approaches to homelessness;

6. The outcome of this appeal may have jurisprudential value for all municipalities in Ontario, including Hamilton;

7. Hamilton has a real, substantial and identifiable interest in the appeal. As a single-tier municipality facing distinct strategic and frontline operational challenges, and as a litigant Hamilton offers a useful perspective distinct from those of the parties;

8. If granted leave to intervene, Hamilton proposes to assist the Court by making focussed submissions on one issue raised on these appeals: whether the court exceeded its jurisdiction and proper constitutional role in that it “failed to extend the necessary deference to elected governments” and “instead prescribed its own views” on how complex social issues related to homelessness should be addressed;

9. Specifically, Hamilton intends to argue that a declaration plus, including retained jurisdiction and prescribed policy options, exceeds the court’s constitutional role and is not an appropriate remedy as against a municipality when a by-law is struck down under s.52(1) of the *Constitution Act, 1982* and where the principles of remedial jurisdiction are not satisfied;

10. Granting Hamilton leave to intervene will not prejudice any of the parties.
Hamilton:

-4-

- a. will take the record as it finds it and will not seek to supplement the record;
 - b. will not seek to expand the issues on appeal;
 - c. will coordinate with the parties and other interveners to avoid duplication; and
 - d. will comply with any timetable set by the Court;
11. Hamilton does not seek costs of this motion or of the proposed intervention and respectfully requests that no costs be awarded against it;
12. Rules 1.04, 13.02, 13.03(2) and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and the Directions of Huscroft J.A. dated July 23, 2026; and
13. Such further and other grounds as counsel may advise and this Honourable Court may permit.

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

14. Affidavit of Michelle Baird affirmed October 21, 2026;
15. Hamilton's factum filed in support of this motion and its draft proposed intervener factum; and
16. Such further or other material as counsel may advise and this Honourable Court may permit.

-5-

Date: October 21, 2026

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
One Main Street West
Hamilton, ON L8P 4Z5

Jennifer L. King (LSO#54325R)

Tel: 416-862-5778
jennifer.king@gowlingwlg.com

Jordan Diacur (LSO#65860E)

Tel: 905-540-8208
jordan.diacur@gowlingwlg.com

Lawyers for the Proposed Intervener,
City of Hamilton

TO: **Paliare Roland Rosenberg Rothstein LLP**

155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300

Gordon Capern (LSO # 32169H)

Tel: 416.646.4311
gordon.capern@paliareroland.com

Andrew Lokan (LSO # 31629Q)

Tel: 416.646.4324
andrew.lokan@paliareroland.com

Kartiga Thavaraj (LSO # 75291D)

Tel: 416.646.6317
kartiga.thavaraj@paliareroland.com

Greta Hoaken (LSO # 87903I)

Tel: 416.646.6357
greta.hoaken@paliareroland.com

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

-6-

AND TO: **Attorney General of Ontario**
 Constitutional Law Branch
 Civil Law Division
 4th Floor, McMurtry–Scott Building
 720 Bay Street
 Toronto ON M7A 2S9

Zachary Green (LSO # 48066K)

Tel: 416-992-2327

zachary.green@ontario.ca

Andrea Bolieiro (LSO # 60034I)

Tel: 437.551.6263

andrea.bolieiro@ontario.ca

Sara Badawi (LSO # 87480W)

sara.badawi@ontario.ca

Lawyers for the Appellant (Intervener),
 Attorney General of Ontario

AND TO: **Waterloo Region Community Legal Services**
 450 Frederick Street, Unit 101
 Kitchener, ON N2H 2P5

Ashley Schuitema (LSO # 68257G)

Tel: 519.743.0254 ext. 17

ashley.schuitema@wrcls.clcj.ca

Joanna Mullen (LSO # 64535V)

Tel: 519.743.0254 ext. 15

joanna.mullen@wrcls.clcj.ca

Shannon K. Down (LSO # 43894D)

shannonkdown@gmail.com

Lawyers for the Respondents
 (Respondents/Cross-Applicants)

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

THE REGIONAL MUNICIPALITY OF WATERLOO
Appellant (Applicant)

- and -

JOSEPHINA DUGAS et al.
Respondents (Respondents/Cross-Applicants)

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PROCEEDING COMMENCED AT
TORONTO

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GOWLING WLG (CANADA) LLP

Barristers & Solicitors
One Main Street West
Hamilton, ON L8P 4Z5

Jennifer L. King (LSO#54325R)

Tel: 416-862-5778

jennifer.king@gowlingwlg.com

Jordan Diacur (LSO#65860E)

Tel: 905-540-8208

jordan.diacur@gowlingwlg.com

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Respondents
(Respondents/Cross-Applicants)

- and -

CITY OF HAMILTON

Proposed Intervenor

AFFIDAVIT OF MICHELLE BAIRD
(Affirmed October 21, 2026)

I, Michelle Baird, of the City of Hamilton, in the Province of Ontario, **AFFIRM**

AND SAY:

1. I am the Director of Housing Services for the City of Hamilton (“**Hamilton**”). I have been in this role since 2022. Previously, I was Hamilton’s Director, Epidemiology, Wellness & Communicable Disease Control Division during the COVID pandemic from 2018 to 2022, and I was a Manager in the Hamilton Public Health Department from

-2-

1999 to 2022. As the Director of Housing Services, my responsibilities are broad and include coordination and oversight of the entire Hamilton-funded social housing and homelessness serving system. I oversee roughly 100 employees in the Housing Services division. As such, I have personal knowledge of the matters in this affidavit unless I say otherwise. Where I rely on information from others, I identify the source and believe it to be true.

2. Hamilton seeks leave to intervene as a friend of the court. It brings the perspective of a single-tier municipality responsible for public lands, by-law enforcement and a housing and homelessness serving system.

The City of Hamilton

3. Hamilton is a single-tier municipality continued under the *City of Hamilton Act, 1999*, S.O. 1999, c. 14, Sched. C, and governed by the *Municipal Act, 2001*, S.O. 2001, c. 25, with a population of approximately 650,000. The City owns and manages hundreds of parks and open spaces, hundreds of kilometres of road allowances, and other public property.

Homelessness in Hamilton

4. In 2026, Hamilton budgeted approximately \$209 million for affordable housing, housing stability and homelessness programs, which includes funds for emergency shelter beds and rooms, drop-in centres, meal and shower programs, the activities of the Hamilton Housing Focused Street Outreach Team and the Hamilton Encampment Response Team, and supportive housing. Approximately one-third of this funding originates from other levels of government. An additional \$2.6 million in federal funding

-3-

for homelessness initiatives in Hamilton was announced in September, 2026. The remaining two-thirds comprises municipal revenue, funded by Hamilton taxpayers.

5. It is not straightforward to calculate the number of individuals experiencing homelessness in Hamilton on a given date. Hamilton tracks individuals defined as “actively homeless” via its Homeless Individuals and Families Information System (“**HIFIS**”) and publishes the data online, on its Housing and Homelessness Dashboard. At present, 2,026 individuals are counted as actively homeless in Hamilton. This number is variable, but it has generally increased since the COVID pandemic. Not every person counted as actively homeless for purposes of the Housing and Homelessness Dashboard is experiencing *unsheltered* homelessness (for example, they may be staying with friends, family, or in temporary accommodation), nor are they all experiencing homelessness on a particular date. The definition includes, and HIFIS counts, everyone who has interacted with any aspect of the Hamilton homelessness serving system in the past three months, including those aspects that do not involve shelter (meal programs, for example).

6. Hamilton coordinates with and funds service providers in the community, including Salvation Army, Good Shepherd and Mission Services. As of September 2026, the Hamilton-funded emergency shelter system had a capacity of 632 individual beds and 69 multi-person rooms, as reflected on the Housing and Homelessness Dashboard. This does not represent all of the shelter beds that are available within Hamilton. For example, Violence Against Women’s shelters are managed through the provincial Ministry of Children, Community and Social Services, rather than Hamilton,

-4-

and so the beds available through those shelters are not included in the above total. As well, there is no means to track shelter beds available through hospitals, charities and religious organizations that are not Hamilton-funded, so they are not reflected in the Housing and Homelessness Dashboard data.

Hamilton's response to encampments

7. Hamilton's response to encampments has been guided by several different policy approaches over the past 10 years. Hamilton has always sought to balance the needs of homeless individuals with the needs of the broader public, in terms of access to public parks and public roads, for example. Protocols for enforcement have changed over time, as Hamilton has grappled with the complexities of the social issues involved while seeking to strike this balance.

8. The 2025-2035 Housing and Homelessness Action Plan is Hamilton's second 10-year strategy, mandated by the Province of Ontario's Ministry of Municipal Affairs and Housing, to guide the work needed to transform the local affordable housing and homelessness system. It is a comprehensive and strategic document that identifies the current state of housing and homelessness in Hamilton and sets priorities, goals and actionable tasks over a 10-year period. All decisions around housing and homelessness made over the next 10 years will be aligned with this Action Plan (and the future Housing Master Plan, which is under development). It is a living document with annual reviews and a larger, in-depth review in year five to ensure it always reflects current need.

-5-

9. The Action Plan was informed by those who are most involved with and impacted by housing and homelessness issues, including frontline staff, people with lived/living experience of homelessness, Indigenous partners and service providers.

10. At present, in keeping with the current Housing and Homelessness Action Plan, Hamilton's Encampment Response Team works with encampment residents to help them transition to safer, more humane accommodations, while supporting the move with their belongings, and then ensuring any abandoned belongings are cleared and the site is cleaned.

11. The Encampment Response Team includes representatives from the City of Hamilton Housing Services Division and Street Outreach Team, Municipal Law Enforcement, Public Works and Hamilton Police Services' Social Navigator Program.

12. In the last 12 months, 621 individuals have been housed through Hamilton-funded homelessness programs, including the work of the Encampment Response Team.

Hamilton's interest in this appeal

13. Hamilton's work in addressing encampments is informed, in part, by the leading court decisions in encampment-related cases. This Court's decision in this case, though it relates to a site-specific by-law in another municipality, may impact upon the frontline work that Hamilton undertakes to address encampments.

-6-

14. Hamilton will not seek to file fresh evidence and does not seek costs.

AFFIRMED by Michelle Baird at the City of Hamilton, in the Province of Ontario, before me on October 21, 2026 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

DocuSigned by:

Jordan Diacur

Jordan Diacur (55860E)

*Commissioner for Taking Affidavits
(or as may be)*

DocuSigned by:

Michelle Baird

MICHELLE BAIRD

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

THE REGIONAL MUNICIPALITY OF WATERLOO
Appellant (Applicant)

- and -

JOSEPHINA DUGAS et al.
Respondents (Respondents/Cross-Applicants)

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Barristers & Solicitors
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jennifer.king@gowlingwlg.com

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Tel: 905-540-2500
jordan.diacur@gowlingwlg.com

Lawyers for the Proposed Intervenor,
City of Hamilton

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COURT OF APPEAL FOR ONTARIO

THE HONOURABLE	)	_____	, THE ____ DAY OF
	)		
JUSTICE HUSCROFT	)	_____	, 2026
	)		

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UNKNOWN

Respondents

(Respondents/Cross-Applicants)

- and -

CITY OF HAMILTON

Proposed Intervener

ORDER

THIS MOTION, made by the Proposed Intervener, City of Hamilton ("Hamilton"), for leave to intervene as a friend of the Court in the within Appeal, was heard [in writing/by videoconference] on [date], 2026 at Osgoode Hall, 130 Queen Street West, Toronto ON M5H 2N5.

-2-

ON READING the Motion Record and Factum of Hamilton, and on noting the positions of the Appellants, the Respondents and the Amici Curiae in this matter:

1. **THIS COURT ORDERS** that Hamilton is hereby granted leave to intervene as a friend of the court in the within consolidated appeals, subject to the terms of this Order.
2. **THIS COURT ORDERS** that the City of Hamilton is permitted to make oral arguments of fifteen (15) minutes at the hearing of this Appeal.
3. **THIS COURT ORDERS** that the City of Hamilton is permitted to file a factum of a maximum of ten (10) pages, in accordance with the timetable to be fixed for these appeals.
4. **THIS COURT ORDERS** that the City of Hamilton shall take the record as it finds it and shall not file fresh evidence.
5. **THIS COURT ORDERS** that the City of Hamilton shall not seek any costs at the hearing of the Appeal and no costs shall be awarded against it.
6. **THIS COURT ORDERS** that there shall be no costs awarded in this motion for leave to intervene.

Date of issuance _____

(to be completed by registrar)

(Signature of judge, officer or registrar)

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

THE REGIONAL MUNICIPALITY OF WATERLOO
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One Main Street West
Hamilton, ON L8P 4Z5

Jennifer L. King (LSO#54325R)

Tel: 416-862-5778
jennifer.king@gowlingwlg.com

Jordan Diacur (LSO#65860E)

Tel: 905-540-8208
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PERSONS UNKNOWN

**Respondents
(Respondents/Cross-Applicants)**

- and -

CITY OF HAMILTON

Proposed Intervener

DRAFT PROPOSED FACTUM OF THE INTERVENER, CITY OF HAMILTON

Date: October 21, 2026

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
One Main Street West
Hamilton, ON L8P 4Z5

Jennifer L. King (LSO#54325R)

Tel: 416-862-5778
jennifer.king@gowlingwlg.com

Jordan Diacur (LSO#65860E)

Tel: 905-540-2500
jordan.diacur@gowlingwlg.com

Lawyers for the Proposed Intervener,
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TO: **Paliare Roland Rosenberg Rothstein LLP**
 155 Wellington Street West, 35th Floor
 Toronto ON M5V 3H1
 Tel: 416.646.4300

Gordon Capern (LSO # 32169H)
 Tel: 416.646.4311
gordon.capern@paliareroland.com

Andrew Lokan (LSO # 31629Q)
 Tel: 416.646.4324
andrew.lokan@paliareroland.com

Kartiga Thavaraj (LSO # 75291D)
 Tel: 416.646.6317
kartiga.thavaraj@paliareroland.com

Greta Hoaken (LSO # 87903I)
 Tel: 416.646.6317
greta.hoaken@paliareroland.com

Lawyers for the Appellants (Applicants),
 the Regional Municipality of Waterloo

AND TO: **Attorney General of Ontario**
 Constitutional Law Branch
 Civil Law Division
 4th Floor, McMurtry–Scott Building
 720 Bay Street
 Toronto ON M7A 2S9

Zachary Green (LSO # 48066K)
 Tel: 416.992.2327
zachary.green@ontario.ca

Andrea Bolieiro (LSO # 60034I)
 Tel: 437.551.6263
andrea.bolieiro@ontario.ca

Sara Badawi (LSO # 87480W)
sara.badawi@ontario.ca

Lawyers for the Appellant (Intervener),
 Attorney General of Ontario

AND TO: **Waterloo Region Community Legal Services**
450 Frederick Street, Unit 101
Kitchener, ON N2H 2P5

Ashley Schuitema (LSO # 68257G)

Tel: 519.743.0254 ext. 17

ashley.schuitema@wrcls.clcj.ca

Joanna Mullen (LSO # 64535V)

Tel: 519.743.0254 ext. 15

joanna.mullen@wrcls.clcj.ca

Shannon K. Down (LSO # 43894D)

shannonkdown@gmail.com

Lawyers for the Respondents
(Respondents/Cross-Applicants)

Table of Contents

PART I — OVERVIEW	1
PART II—ISSUES	1
PART III—LAW AND ARGUMENT	1
A. The application judge exceeded the court’s proper constitutional role in imposing the “declaration plus”	1
(i) Section 52(1) leaves nothing for the court to supervise..	3
(ii) In any event, the Declaration Plus fails on remedial principles	4
a. The “plus” is not required to provide a meaningful response.....	5
b. The application judge’s declaration plus fails to respect institutional roles and the separation of powers.....	6
c. The remedy does not invoke the functions and powers of a court.....	7
d. The remedy is not fair to the municipality—it is inconsistent with how municipalities must lawfully act	9
PART IV—ORDER SOUGHT	10
SCHEDULE “A”: LIST OF AUTHORITIES	11
SCHEDULE “B”: TEXT OF STATUTES, REGULATIONS and BY – LAWS0.	12
<i>Municipal Act, 2001, ss.5(3), 8-11, 289</i>	12

PART I — OVERVIEW

1. Municipalities are on the front line of the homelessness crisis. They act through elected councils, within legislated powers, under balanced-budget requirements, and with limited authority over the root causes of homelessness. They do not cause homelessness.
2. The application judge exceeded the court's constitutional role in granting a “declaration plus” in the decision under appeal, retaining jurisdiction and making a municipality's ability to return to court to address an encampment dependant on adopting policy options prescribed by the court. Courts directing and overseeing policymaking in such a manner risks significantly constraining municipal governments' ability to serve their executive and legislative functions and grapple with the complex, multisectoral social issue that is homelessness.
3. Hamilton takes no position on the facts specific to the property at issue located at 100 Victoria Street. It simply asks the Court to clarify and confirm a specific point: that a “declaration plus” is not an appropriate remedy in this context.

PART II—ISSUES

4. The City of Hamilton intervenes to submit that a “declaration plus”, including retained jurisdiction and prescribed policy options, is not an appropriate remedy as against a municipality when a by-law is struck down under section 52(1), and where the principles of remedial jurisdiction are not satisfied.

PART III—LAW AND ARGUMENT

A. The application judge exceeded the court's proper constitutional role in imposing the “declaration plus”

5. Having declared the by-laws of no force and effect under section 52(1) of the

-2-

Constitution Act, 1982, the application judge added a “plus” to the declaration: he retained jurisdiction so that the municipality may return to court only “once it has promulgated either a Safe Tenting Protocol or provided an alternative site for an encampment somewhere reasonably proximate to 100 Victoria, or both” (the “**Declaration Plus**”).¹ In their notices,² none of the parties below requested the judge to retain jurisdiction over the matter.

6. The application judge relied on (a) the Supreme Court’s acknowledgment in *Doucet-Boudreau* that some cases require novel remedies³, and (b) a draft paper by Prof. Kent Roach proposing to extend one such remedy, the “declaration plus”, beyond its rare use primarily in Indigenous rights and language rights cases.⁴

7. In this instance, the Declaration Plus goes well beyond the judicial role and competence, which is to adjudicate the constitutional validity of by-laws, into the realm of prescribing the specific policies a municipality must adopt.

8. Hamilton makes two submissions. First, the declaration plus concept described in Prof. Roach’s article is not a remedy available under section 52(1). Second, even if it were available, the Declaration Plus conflicts with the principles that govern remedial discretion; in particular, the requirement that a municipal legislative body impose a specific court-selected policy option fails to respect the separation of powers.

¹ *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, 2026 ONSC 2971 [the “**Decision**”] at paras [248](#), and [253](#) to [256](#); Appeal Book and Compendium of the Appellant/Intervener (August 7, 2026) [“**ABCO**”], Tab 4, pp 111 to 113.

² Further Amended Notice of Application of the Region (May 1, 2025), ABCO, Tab 7; Amended Notice of Application of Named Respondents (Cross-Applicants) (May 5, 2025), ABCO, Tab 9.

³ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 [“**Doucet-Boudreau**”] at paras [55](#) to [59](#), and [87](#).

⁴ Professor Roach’s then-unpublished paper is now published, and it contains a discussion of the Declaration Plus in the Decision below: Roach, Kent, [A New Constitutional Remedy: The Declaration Plus](#), 47 Nat’l J. Const. L. 49 [“**Roach, Declaration Plus**”].

-3-

9. While decisions with respect to remedies are owed deference, this must be tempered where, as here, fundamental legal principles are threatened.⁵ This exceptional remedy should not be used to retain jurisdiction over, much less prescribe, municipal responses to a complex social problem like homelessness.

(i) Section 52(1) leaves nothing for the court to supervise

10. Two provisions govern remedies for *Charter* breaches, section 52(1) and section 24(1). Where a law is inconsistent with the *Charter* in purpose or effect, the usual remedy lies under section 52(1) of the *Constitution Act, 1982*: the law is of no force or effect to the extent of the inconsistency. Section 52(1) does not explicitly provide courts with a grant of remedial jurisdiction, although courts have a measure of discretion to define the scope, form and timing of a declaration of invalidity.⁶ Section 24(1), by contrast, confers on judges a wide discretion to grant appropriate remedies; not for unconstitutional *laws*, but for unconstitutional government *acts*.⁷

11. If the application judge's finding that the by-laws are invalid under section 52(1) stands, then the by-laws are of no force or effect. There is nothing left for the court to supervise.⁸ The application judge relied on Prof. Roach's discussion of the declaration plus concept without considering whether it is available under section 52(1), and

⁵ *Doucet-Boudreau* at para 87, see also the observations of Lebel and Deschamps JJ. in the dissent at para 145; the Decision at para 253.

⁶ *Schachter v. Canada*, 1992 CanLII 74 (SCC), *Ontario v. G* (2020), 2020 SCC 38 ["*Ontario v G*"] at paras. 108, 109, and 112; *Procureur général du Québec v. Quebec English School Boards Association*, 2025 QCCA 383 ["*Quebec English School Boards*"] at paras 241 to 248.

⁷ *R. v. Ferguson*, 2008 SCC 6 at para 35.

⁸ There may be rare circumstances, which do not exist here, where combining s. 24(1) individual remedies (such as retained jurisdiction) in connection with a s. 52(1) declaration of invalidity may be necessary to provide the claimant with an effective remedy, for example, where there is a suspended declaration of invalidity: *Ontario v G* at paras 140 to 147, or where damages are appropriate: *Canada (Attorney General) v. Power*, 2024 SCC 26.

-4-

without applying the principles that govern the exercise of such remedial discretion.⁹

12. Hamilton is not aware of any case in which a Canadian court has retained supervisory jurisdiction after making an unsuspended section 52(1) declaration. In *Sfetskopoulos*,¹⁰ a trial judge specifically declined to retain supervisory jurisdiction in the section 52(1) context. The judge distinguished the supervisory jurisdiction cases under section 24(1), noting that section 52(1) is “self-executing”. Striking an invalid law under section 52(1) leaves the government free to pass a new law. On separation of powers, the trial judge found:

What would be required of me if I were to retain supervisory jurisdiction would be the monitoring of future legislation and, if such jurisdiction were to be of any use to the applicants, I would have to exercise a veto over new proposed regulations which appear to me to be inconsistent with that right of access. Under the circumstances, I do not think that is appropriate and I will not so order.¹¹

13. The Declaration Plus has put the application judge in the position of monitoring future municipal law and policy and exercising a pre-emptive veto over new proposed by-laws if they do not include either of the two options the application judge prescribed. A municipality should not be so constrained. Passing a new by-law is a fresh legislative act which would be open to challenge in the ordinary course. The Declaration Plus is not a section 52(1) remedy.

(ii) In any event, the Declaration Plus fails on remedial principles

14. Even if the Declaration Plus were available under section 52(1), the application judge failed to observe the principles that govern the exercise of remedial discretion.

⁹ Notably, the application judge also imposed an injunction (the Decision at para [259](#)) without any consideration of the test to grant such relief.

¹⁰ *Sfetskopoulos v. Canada (Attorney General)*, 2008 FC 33 at para [27](#).

¹¹ *Ibid.*

-5-

15. Prof. Roach describes the “declaration plus” concept as a remedy stronger than a mere declaration, but not as strong as a mandatory order, allowing courts to ensure constitutional compliance through specific directions and/or retained jurisdiction.¹² However, he cautions that it “must be justified and exercised in a manner consistent with remedial principles recognized in the court’s constitutional jurisprudence”.¹³ In particular, a just and appropriate remedy will have four features. It will:

- (a) meaningfully respond to the circumstances of the violation and the claimant;
- (b) respect institutional roles and the separation of powers including the role of the legislature and the executive;
- (c) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
- (d) be fair to the party against whom the order is directed.¹⁴

16. The Declaration Plus does not accord with any of these principles.¹⁵

a. The “plus” is not required to provide a meaningful response

17. The section 52(1) invalidity declaration fully resolved the constitutional question and gave the respondents the result they sought. No “plus” was needed to provide a meaningful remedy.

18. Retained jurisdiction is rare and is generally reserved for exceptional cases

¹² Roach, *Declaration Plus* at 51.

¹³ *Ibid.* at 52.

¹⁴ *Doucet-Boudreau* at paras [54](#) to [59](#).

¹⁵ *Doucet-Boudreau* at para [87](#); Prof. Roach acknowledges in his article (Roach, *Declaration Plus* at 52) that neglecting to ensure a remedy including a declaration plus is consistent with these principles can be a basis for appellate intervention.

-6-

where government is delaying action or refusing to comply with its constitutional obligations.¹⁶ Here, unlike the other cases Prof. Roach cites,¹⁷ there is no basis to presume that a municipality will not respect its obligations at the end of the judicial process.

b. *The application judge's declaration plus fails to respect institutional roles and the separation of powers*

19. Municipal councils are the level of government closest to citizens. They are democratically accountable, and they perform a quintessentially governmental function. When regulating public property, municipalities are not the “singular antagonist” of homeless persons.¹⁸ They reconcile competing claims from all residents, including those who rely on parks and other public spaces.

20. The Declaration Plus “would be tantamount to allowing him to oversee the law-making process”, which is directly contrary to the separation of powers and fails to respect the legislative role of the municipality.¹⁹

21. In particular, the Declaration Plus converts the application judge's section 1 findings into a mandatory policy template. In his section 1 analysis, the application judge found that a *Charter*-compliant plan “would need to include an alternative lawful encampment site of last resort, or a tenting protocol”, pointing to London and Thunder Bay “by way of inspiration”. Making adopting one of two options which have been pre-emptively deemed minimally impairing as the condition of any return to court leaves no

¹⁶ *Quebec English School Boards* at para. [252](#).

¹⁷ *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 [“*Thomas*”] at para. [405](#); *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 [“*Restoule*”]; and *Québec (Procureur général) c. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, which are all cases related to Indigenous rights involving findings of egregious and long-standing and continuing breaches requiring substantive change on the part of the Crown where the court held that broad declarations would not translate into substantive change.

¹⁸ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.

¹⁹ *Quebec English School Boards* at para. [254](#).

-7-

meaningful room to weigh and balance community interests in the *Oakes* analysis.

22. In every other case Prof. Roach cites, the court fashioned a meaningful remedy while leaving it up to the government to determine the means of compliance within the range of reasonable options.²⁰ Notably, In *Rio Tinto*, British Columbia Court of Appeal made the declaration more specific but refused a declaration requiring a revamping of the water licence: “Judges are not entitled through the auspices of declaratory relief to stand in the shoes of government, usurp its administrative and policy functions...”.²¹

23. As this court recently reaffirmed in *Cycle Toronto*,²² it is the legislature’s role “to choose the appropriate response to social problems within the limiting framework of the Constitution” and it is the court’s role to determine whether that choice falls within the that framework.²³ A court-imposed remedy that dictates the policies a municipality must adopt cannot be reconciled with the separation of powers.

c. The remedy does not invoke the functions and powers of a court

24. As the Supreme Court acknowledged in *Restoule*, “courts are generally not well equipped to make polycentric choices or to ‘evaluate the wide-ranging consequences that flow from policy implementation.’ Accordingly, courts should exercise considerable caution before intervening in such circumstances.”²⁴

25. The Declaration Plus imposed by the application judge is not a remedy courts are designed and equipped to deliver.²⁵ It touches on polycentric questions of site

²⁰ *Restoule*, paras [294](#), [299](#); *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, at para [37](#).

²¹ *Thomas* at paras [405](#), [434](#).

²² *Cycle Toronto v. Ontario (Attorney General)*, 2026 ONCA 582 [“*Cycle Toronto*”], paras [20 to 26](#).

²³ *Doucet-Boudreau* at para [35](#), citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para [136](#).

²⁴ *Restoule* at para [294](#).

²⁵ *Doucet-Boudreau* at para [57](#).

-8-

selection, land use, budget and service delivery, not legal standards. The Declaration Plus supplies no standard for assessment, and the trigger for a return is not a dispute between the parties but rather the Region's adoption of a policy.

26. Approving policy is a legislative and executive function, not a judicial one. The application judge was himself alive to this danger, recognizing that courts "must be careful not to engage in 'judicially legislating' beyond their sphere of competence",²⁶ but then proceeded to do precisely what he was cautioning against.

27. Supervision "should be avoided when it risks becoming overly politicized", which occurs "when there is there is substantial disagreement as to the manner in which a right should be respected or where the court would be called upon to supervise a legislative process."²⁷ This case is exactly that situation. Indeed, the application judge recognized that homelessness is a "complex multi-faceted phenomenon of diverse origins not susceptible to easy resolution" with "no prevailing academic or policy consensus about the best way to address it".²⁸ Clearly, there may be a variety of *Charter*-compliant ways for a municipality to seek to address homelessness.

28. The Declaration Plus has no end date; the court has made itself an ongoing participant in local policymaking. The municipality's request for direction does not change this: a litigant's request for guidance cannot expand the court's constitutional role or institutional competence. Courts must respect the roles and responsibilities of the other branches of government. *Charter* review "is not an occasion for courts to comment on or critique policy or political decisions".²⁹ An open-ended retention of

²⁶ Decision, paras [9](#) & [252](#)

²⁷ *R. v. Warren*, 2024 ONSC 2785 at paras [214 to 215](#).

²⁸ Decision, para. [4](#)

²⁹ *Cycle Toronto* at para. [26](#), citing *Dorceus v. Ontario*, 2026 ONCA 321, at paras. [23 to 24](#)

-9-

jurisdiction that prescribes council's future policy choices invites exactly that.

29. The court should not “pre-clear” a future by-law in a proceeding it holds open indefinitely. As this Court observed in *Cycle Toronto*:

Legislation is, after all, an experiment: it may or may not work, as intended or at all. It may work well for a time, but circumstances may change; legislation may outlive its usefulness and require significant reform to remain relevant.³⁰

d. The remedy is not fair to the municipality—it is inconsistent with how municipalities must lawfully act

30. A municipality's powers are exercised by council, by by-law, within the statutory limits set out in the *Municipal Act, 2001*. Designating land for outdoor sheltering, or adopting a “Safe Tenting Protocol”, involves the exercise of legislative powers.³¹

31. Municipalities face different problems and take different approaches to encampments. They must be free to legislate, enforce and innovate in response to an evolving crisis, often quickly and sometimes in emergencies. Municipalities do not always seek court pre-approval before enforcing duly enacted by-laws, nor should they be expected or required to. Litigating the court’s pre-approval of a response to homelessness diverts time and resources that could otherwise be spent delivering the programs themselves.

32. Courts are not well-equipped to make the type of policy choices made in the Declaration Plus. For example, the Declaration Plus presumes a publicly-owned site “reasonably proximate to 100 Victoria” exists. In a two-tier municipal system, a “reasonably proximate” site may fall on land within, or regulated by, a lower-tier municipality that was not a party. Further, there is no indication that a Safe Tenting

³⁰ *Cycle Toronto*, para. [35](#)

³¹ *Municipal Act, 2001*, S.O. 2001, c. 25, ss [5\(3\)](#), [8](#) to [10](#).

-10-

Protocol has been studied in the specific context of the Region. The application judge appears not to have considered this. Such decisions belong to an elected council whose deliberations a court ought not to anticipate.

33. Hamilton particularly cautions against the use of a Declaration Plus like the one imposed in this case (with respect to a site-specific by-law) in cases involving by-laws of general application. Parks, streets and public property by-laws apply city-wide and to all residents. Conditioning a municipality's ability to return to court, or to enforce, on its adoption of a court-selected policy risks tying council's hands pending a time-consuming court process to effectively regulate public spaces.

PART IV—ORDER SOUGHT

33. Hamilton takes no position on the particulars of the present appeal. Hamilton merely asks this court to confirm that a Declaration Plus is not an appropriate remedy in this context. Hamilton seeks no costs and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 21st DAY OF OCTOBER, 2026.

I confirm that I am satisfied as to the authenticity of all authorities cited herein.

Jennifer L. King and Jordan Diacur
Gowling WLG (Canada) LLP
Barristers & Solicitors
One Main Street West
Hamilton, ON L8P 4Z5

SCHEDULE “A”: LIST OF AUTHORITIES

1. [Canada \(Attorney General\) v. Power, 2024 SCC 26](#)
2. [Canada \(Prime Minister\) v. Khadr, 2010 SCC 3](#)
3. [Cycle Toronto v. Ontario \(Attorney General\), 2026 ONCA 582](#)
4. [Dorceus v. Ontario, 2026 ONCA 321](#)
5. [Doucet-Boudreau v. Nova Scotia \(Minister of Education\), 2003 SCC 62](#)
6. [Irwin Toy Ltd. v. Quebec \(Attorney General\), \[1989\] 1 SCR 927](#)
7. [Ontario \(Attorney General\) v. Restoule, 2024 SCC 27](#)
8. [Ontario v. G \(2020\), 2020 SCC 38](#)
9. [Procureur général du Québec v. Quebec English School Boards Association, 2025 QCCA 383](#)
10. [Québec \(Procureur général\) c. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39](#)
11. [R. v. Ferguson, 2008 SCC 6](#)
12. [R. v. Warren, 2024 ONSC 2785](#)
13. Roach, Kent, [A New Constitutional Remedy: The Declaration Plus, 47 Nat'l J. Const. L. 49](#)
14. [Schachter v. Canada, 1992 CanLII 74 \(SCC\)](#)
15. [Sfetkopoulos v. Canada \(Attorney General\), 2008 FC 33](#)
16. [Thomas v. Rio Tinto Alcan Inc., 2024 BCCA 62](#)

SCHEDULE “B”: TEXT OF STATUTES, REGULATIONS and BY – LAWS

Municipal Act, 2001, ss.5(3), 8-11, 289

Powers exercised by by-law

5... (3) A municipal power, including a municipality’s capacity, rights, powers and privileges under section 9, shall be exercised by by-law unless the municipality is specifically authorized to do otherwise.

PART II GENERAL MUNICIPAL POWERS

Scope of powers

8 (1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality’s ability to respond to municipal issues. 2006, c. 32, Sched. A, s. 8.

Ambiguity

(2) In the event of ambiguity in whether or not a municipality has the authority under this or any other Act to pass a by-law or to take any other action, the ambiguity shall be resolved so as to include, rather than exclude, powers the municipality had on the day before this Act came into force. 2006, c. 32, Sched. A, s. 8.

Scope of by-law making power

(3) Without limiting the generality of subsections (1) and (2), a by-law under sections 10 and 11 respecting a matter may,

- (a) regulate or prohibit respecting the matter;
- (b) require persons to do things respecting the matter;
- (c) provide for a system of licences respecting the matter. 2006, c. 32, Sched. A, s. 8.

Scope of by-laws generally

(4) Without limiting the generality of subsections (1), (2) and (3) and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis a municipality considers appropriate. 2006, c. 32, Sched. A, s. 8.

-13-

Exception

(5) Subsection (4) does not apply with respect to a by-law made under Parts VII, VIII, IX, X, XI and XIII. 2006, c. 32, Sched. A, s. 8.

of a natural person

9 A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act. 2006, c 32, Sched. A, s. 8.

Broad authority, single-tier municipalities

10 (1) A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public. 2006, c. 32, Sched. A, s. 8.

By-laws

(2) A single-tier municipality may pass by-laws 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.
9. Animals.
10. Structures, including fences and signs.
11. Business licensing. 2006, c. 32, Sched. A, s. 8; 2017, c. 10, Sched. 1, s. 1.

One power not affecting another

(3) The power to pass a by-law respecting a matter set out in a paragraph of subsection (2) is not limited or restricted by the power to pass a by-law respecting a matter set out in another paragraph of subsection (2). 2006, c. 32, Sched. A, s. 8.

-14-

Services or things provided by others

(4) The power of a municipality to pass a by-law respecting the matter set out in paragraph 7 of subsection (2) does not include the power to pass a by-law respecting services or things provided by a person other than the municipality or a municipal service board of the municipality. 2006, c. 32, Sched. A, s. 8.

Exception

(5) Nothing in subsection (4) prevents a municipality from passing a by-law with respect to services or things provided by any person to the extent necessary,

- (a) to ensure the physical operation of a system of the municipality or of a municipal service board of the municipality is not impaired; or
- (b) to ensure the municipality, a municipal service board of the municipality or a system of the municipality or municipal service board meet any provincial standards or regulations that apply to them. 2006, c. 32, Sched. A, s. 8.

Definition

(6) In this section,

“local board” means a local board other than,

- (a) a society as defined in subsection 2 (1) of the *Child, Youth and Family Services Act, 2017*,
- (b) a board of health as defined in subsection 1 (1) of the *Health Protection and Promotion Act*,
- (c) a committee of management under the *Fixing Long-Term Care Act, 2021*,
- (d) a police service board established under the *Community Safety and Policing Act, 2019*;
- (e) a board as defined in section 1 of the *Public Libraries Act*, or
- (f) a corporation established in accordance with section 203.

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

THE REGIONAL MUNICIPALITY OF WATERLOO
Appellant (Applicant)

- and -

JOSEPHINA DUGAS et al.
Respondents (Respondents/Cross-Applicants)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE PROPOSED INTERVENER,
CITY OF HAMILTON**

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
One Main Street West
Hamilton, ON L8P 4Z5

Jennifer L. King (LSO#54325R)

Tel: 416-862-5778

jennifer.king@gowlingwlg.com

Jordan Diacur (LSO#65860E)

Tel: 905-540-8208

jordan.diacur@gowlingwlg.com

Lawyers for the Proposed Intervener,
City of Hamilton

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

**MOTION RECORD OF THE PROPOSED
INTERVENER, CITY OF HAMILTON**

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
One Main Street West
Hamilton, ON L8P 4Z5

Jennifer L. King (LSO#54325R)

Tel: 416-862-5778

jennifer.king@gowlingwlg.com

Jordan Diacur (LSO#65860E)

Tel: 905-540-8208

jordan.diacur@gowlingwlg.com

Lawyers for the Proposed Intervener,
City of Hamilton