

Court File Nos. 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 and THE ATTORNEY GENERAL FOR
ONTARIO

Applicants (Appellants)

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)

and

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Proposed Intervener

**MOTION RECORD OF THE PROPOSED INTERVENER, THE DAVID ASPER
CENTRE FOR CONSTITUTIONAL RIGHTS
(Motion for Leave to Intervene)**

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***Amicus Curiae* for Persons Unknown,
The Mental Health Legal Committee**

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and

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Proposed Intervener

**NOTICE OF MOTION FOR LEAVE TO INTERVENE OF THE PROPOSED
INTERVENER, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

(Pursuant to Rule 13.02 of the *Rules of Civil Procedure*)

THE PROPOSED INTERVENER, the David Asper Centre for Constitutional Rights (the
“Asper Centre”), will make a motion to a Judge at a date and time to be fixed at the courthouse,
at Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5.

PROPOSED METHOD OF HEARING: The Motion is to be heard virtually over Zoom, unless on consent or unopposed, in which case the Motion will be in writing only in accordance with the Directions of the Case Management Judge.

THE MOTION IS FOR:

1. Pursuant to Rule 13.02 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, an Order granting the Asper Centre:
2. Leave to intervene on this appeal;
3. Permission to file a factum of not more than 10 pages and a book of authorities;
4. Permission to make oral submissions at the hearing of this appeal; and
5. Such further and other orders that the Judge may deem appropriate.

THE GROUNDS FOR THE MOTION ARE:

The Appeal

6. The appeal concerns the constitutionality of Regional Municipal By-law Number 25-021, as amended by By-law Number 26-001 (collectively, the “**By-laws**”), which provides for the Region’s vacant possession of a lot of land at 100 Victoria Street North in Kitchener.
7. The Appellants brought an application seeking a Declaration from the Ontario Superior Court of Justice that the By-laws are constitutional. Additionally, the Respondents initiated a cross-application, seeking a declaration that in the absence of sufficient accessible shelter beds for the

Region's unhoused population, the By-laws violates their sections 7 and 15(1) *Canadian Charter of Rights and Freedoms* rights.

8. On May 21, 2026, Justice Gibson of the Ontario Superior Court of Justice (the “**Application Judge**”) dismissed the application of the Region and allowed the cross-application of the Respondents in part, finding that sections 7 and 15 of the *Charter* were infringed and were not justified under section 1.¹ The Appellants are appealing the decision.

The Proposed Intervener Has an Interest in the Issues Arising in the Appeal

9. The Asper Centre has a direct and genuine interest in the outcome of this appeal.

10. The Asper Centre is a public interest organization operating out of the Henry N. R. Jackman Faculty of Law at the University of Toronto. The Centre seeks to promote greater awareness, understanding, and realization of constitutional rights in Canada, and it is especially concerned with constitutional advocacy on behalf of vulnerable individuals and groups. In its work, the Centre has focused on a number of aspects of public interest litigation, including standing, remedies, and the impact of decisions on non-parties to the litigation.

11. The issues raised in this appeal, especially in respect of the remedies sought, fall directly within the Asper Centre's mandate and strike at the core of the Centre's focus on promoting access to constitutional justice.

12. Should the Respondents be successful on this appeal, the remedies granted will have a significant impact on the availability of constitutional remedies.

¹ *Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, [2026 ONSC 2971](#) [Waterloo].

13. The Asper Centre is well situated to provide limited but useful assistance to this Court because of its relevant expertise. The Centre is a frequent intervener at both the trial and appellate court levels, and it has specifically intervened on the issue of constitutional remedies at both the Supreme Court of Canada and the Court of Appeal for Ontario in the following cases:

- a) *Canada (Attorney General) v. Power*, [2024 SCC 26](#);
- b) *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, [2022 SCC 27](#);
- c) *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020 SCC 13](#);
- d) *Ontario (Attorney General) v. G*, [2020 SCC 38](#);
- e) *Ernst v. Alberta Energy Regulator*, [2017 SCC 1](#);
- f) *Henry v. British Columbia (Attorney General)*, [2015 SCC 24](#);
- g) *Kazemi Estate v. Islamic Republic of Iran*, [2014 SCC 62](#) (jointly with the Faculty of Law's International Human Rights Program);
- h) *Canada (Prime Minister) v. Khadr*, [2010 SCC 3](#) (jointly with Human Rights Watch and the Faculty of Law's International Human Rights Program);
- i) *Vancouver (City) v. Ward*, [2010 SCC 27](#) (jointly with the British Columbia Civil Liberties Association);
- j) *R v. Conway*, [2010 SCC 22](#) (jointly with the Criminal Lawyers' Association);
- k) *Mathur v. Ontario*, [2024 ONCA 762](#); and
- l) *Tanudjaja v. Canada*, [2014 ONCA 852](#).

14. The Centre facilitates research and has hosted conferences on the subject of constitutional remedies.

The Proposed Submissions the Asper Centre Will Make if Permitted to Intervene

15. If granted leave to intervene, the Asper Centre will make submissions, as outlined in its draft factum, on the constitutionality and other relevant factors for courts when crafting remedies under s. 24(1) of the *Charter*. In particular, the Asper Centre will discuss the appropriateness of declarations of invalidity, injunctive relief, and supervisory jurisdiction.

16. Declarations of invalidity under s. 52(1) of the *Constitution* have been recognized by the Supreme Court of Canada as the primary remedy in *Charter* cases.² Declarations are to be interpreted generously, expansively, and purposively.

17. Declarations may be especially useful where *Charter* compliance requires the government to fashion a positive response.³

18. The issuance of injunctions as a remedy is “central to s. 24(1) of the *Charter*.”⁴ Injunctive relief gives the courts the power to restrain governments from taking certain actions, and it is appropriate when it used “to ensure rights are enforced, rather than merely declared.”⁵

19. The Supreme Court of Canada approved the development of new remedies in the case *Doucet-Boudreau*.⁶ The declaration plus is one such remedy that operates as a middle ground between a declaration and injunction.⁷

² *Canada (Attorney General) v. Power*, [2024 SCC 26](#), at para. 34, quoting *Vancouver (City) v. Ward*, [2010 SCC 27](#), at para. 1.

³ *Eldridge v. British Columbia (Attorney General)*, [1997 CanLII 327](#) (SCC), [1997] 3 S.C.R. 624 [Eldridge]; *Schachter v. Canada*, [1992 CanLII 74](#) (SCC), [1992] 2 S.C.R. 679.

⁴ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003 SCC 62](#), at para. 70 [Doucet-Boudreau].

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Kent W. Roach, *Constitutional Remedies in Canada, 3rd Edition*, (Toronto: Thomson Reuters Canada, 2020) s.12.1.

20. *Doucet-Boudreau* identified four factors to assist in crafting an appropriate and just remedy. The remedy must effectively address the rights of the claimant(s), be constitutionally legitimate, respect the role of the courts and separation of powers, and be fair to the party that is subject to the order.

21. Additionally, courts opting for a declaration plus should focus on why a declaration is insufficient, specify what constitutes the ‘plus,’ and be responsive to the facts and context at hand.⁸

22. A declaration plus may assist courts where a declaration is insufficient or when addressing complex, polycentric issues.

23. A declaration plus often involves the court retaining supervisory jurisdiction, which allows the government latitude to implement the *Charter* right while both respecting the roles of the judiciary and giving parties the ability to return to the same judge for additional clarity or assistance.⁹

24. If this Court determines that a *Charter* right has been infringed in the instant case, the remedy ordered by the Application Judge is within the power of the Court to grant. A declaration plus and supervisory jurisdiction are consistent with recognized remedial principles, responsive to the factual context of the case, and strikes an appropriate balance between the interests of the parties.

25. If granted leave to intervene, the Asper Centre:

- a) Will not file evidence or add to the application record;

⁸ *Ibid* at s. 12.4.

⁹ Roach, *Constitutional Remedies*, *supra* note 7 at s. 12.22.

- b) Will not unduly expand the issues;
- c) Will not unduly delay the proceedings;
- d) Will work with the parties and any other interveners in order to avoid duplicative submissions and to ensure an efficient presentation of each intervener's position to the Court;
- e) Will comply with any terms and conditions imposed.
- f) Such further and other grounds as counsel may advise and the Judge may permit.

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

- 26. The affidavit of Anna Su and the exhibits thereto; and
- 27. Such further and other evidence as counsel may advise and this Honourable Court may permit.

Dated this 21st day of October 2026.



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AFFIDAVIT OF ANNA SU

I, **Anna Su**, in the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a member of the Advisory Group of the David Asper Centre for Constitutional Rights (“the Asper Centre”) at the University of Toronto and, as such, have knowledge

of the matters deposed herein. This affidavit outlines the expertise of the Asper Centre regarding Canadian constitutional rights. Where facts are based on information obtained from others, I believe that information to be true.

I. THE ASPER CENTRE

A. Description and Expertise of the Asper Centre

2. The Asper Centre is a part of the University of Toronto, Faculty of Law (“the Faculty of Law”). With the assistance of an endowment from alumnus David Asper, the Centre was established in 2008 to promote “greater awareness, understanding and acceptance of constitutional rights in Canada” and to realize constitutional rights through advocacy, research, and education. The Centre seeks to promote access to constitutional justice and human rights for vulnerable individuals and groups. As part of an academic institution, the Centre is committed to high-quality research, intellectual engagement and scholarly rigour in its advocacy work.
3. The Asper Centre furthers its objectives in the following ways:
4. Appears at various levels of court as an intervener in legal matters that raise constitutional and access to justice issues;
5. Prepares position papers and makes written submissions to various governmental bodies, concerning the advancement of constitutional rights in Canada;
6. Engages in professional, academic, and public education, including organizing and hosting conferences and symposia to explore cutting-edge constitutional ideas;

7. Maintains working groups of volunteer law students focused on constitutional rights projects. Students work with faculty members and the executive director to research and draft position statements on draft legislation and other constitutional issues of concern;
8. Operates a constitutional rights legal clinic, allowing law students to work with practitioners for academic credit on files involving innovative constitutional advocacy.
9. The Asper Centre is able to draw upon the extensive constitutional expertise and litigation experience of its Executive Director and Advisory Group. In addition, it draws upon the expertise of the large number of scholars specializing in constitutional rights at the Faculty of Law.

B. Executive Director, Advisory Group and Staff Experience

10. I am an Associate Professor at the Faculty of law, and I have served on the Asper Centre's advisory group for approximately 10 years. I am currently a Research Lead at the Schwartz Reisman Institute for Technology and Society and a Nootbaar Institute Fellow on Law and Religion at Pepperdine University School of Law. My research and teaching areas of interest include international human rights law, comparative constitutional law, technology and international law, and law and religion.
11. Cheryl Milne serves as the Asper Centre's Executive Director. She joined the Asper Centre as its inaugural Executive Director in 2008. Prior to that, she was a legal advocate for Justice for Children and Youth where she led its *Charter* litigation. She has represented the Asper Centre as counsel in numerous cases.

12. In addition to myself, the current Advisory Group includes: Kent Roach, Chair, Professor of Law, whose teaching and scholarly interests include criminal law, comparative law, and constitutional law; Ian Lee, Professor at the Faculty of Law who teaches constitutional law, and whose research focuses on constitutional law, corporate law, and European Union law; Brenda Cossman, Professor of at the Faculty of Law, whose teaching and research interests include family and children's law, gender, sexuality and law, and legal theory; Nader R. Hasan, Adjunct Faculty at the Faculty of Law since 2010 and a partner with the Toronto law firm Stockwoods LLP, where he focuses on criminal and constitutional litigation at both the trial and appellate levels; and Alexi Wood, Adjunct Faculty at the Faculty of Law and the founding lawyer at St. Lawrence Barristers, where her practice includes a wide range of commercial litigation, administration and regulatory disputes, and professional regulation.
13. This year the Asper Centre will also benefit from Justin Safayeni, a partner at Stockwoods LLP and a litigator in the area of administrative and public law with experience at all levels of the court, who will be its constitutional litigator-in-residence for 2026-2027.

II. THE WORK OF THE ASPER CENTRE

A. Asper Centre Expertise

14. The Asper Centre has demonstrated significant expertise in constitutional remedies, and has intervened in the following cases where constitutional remedies were at issue:
15. *Canada (Attorney General) v. Power*, [2024 SCC 26](#);

16. *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, [2022 SCC 27](#);
17. *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020 SCC 13](#);
18. *Ontario (Attorney General) v. G*, [2020 SCC 38](#);
19. *Ernst v. Alberta Energy Regulator*, [2017 SCC 1](#);
20. *Henry v. British Columbia (Attorney General)*, [2015 SCC 24](#);
21. *Kazemi Estate v. Islamic Republic of Iran*, [2014 SCC 62](#) (jointly with the Faculty of Law's International Human Rights Program);
22. *Canada (Prime Minister) v. Khadr*, [2010 SCC 3](#) (jointly with Human Rights Watch and the Faculty of Law's International Human Rights Program);
23. *Vancouver (City) v. Ward*, [2010 SCC 27](#) (jointly with the British Columbia Civil Liberties Association);
24. *R v. Conway*, [2010 SCC 22](#) (jointly with the Criminal Lawyers' Association);
25. *Mathur v. Ontario*, [2024 ONCA 762](#); and
26. *Tanudjaja v. Canada*, [2014 ONCA 852](#).
27. The Centre has also facilitated research on the topic of constitutional remedies. In February 2014, it hosted a conference at the University of Toronto Faculty of Law on

constitutional remedies, and in March 2018 it held a conference on public interest litigation that resulted in a published book, *Public Interest Litigation in Canada*.

B. Intervention Experience

28. The Asper Centre has been granted leave to intervene in a number of cases across Canada, at various levels of court. The Asper Centre has intervened in the following cases before the Supreme Court of Canada:

- a. *John Vabuolas, et al. v. Information and Privacy Commissioner for British Columbia, et al.*, [SCC File No. 41816](#);
- b. *Government of Saskatchewan as represented by the Minister of Education v UR Pride Centre for Sexuality and Gender Diversity*, [SCC File No. 41979](#);
- c. *Attorney General of Quebec v. Luamba*, [SCC File No. 41605](#);
- d. *English Montreal School Board, et al. v. Attorney General of Quebec, et al.*, [SCC File No. 41231](#);
- e. *R v. Cope*, [2026 SCC 32](#);
- f. *Quebec (Attorney General) v. Kanyinda*, [2026 SCC 7](#);
- g. *R v. Kloubakov*, [2025 SCC 25](#);
- h. *Ontario (Attorney General) v. Working Families Coalition (Canada) Inc.*, [2025 SCC 5](#);
- i. *Canada (Attorney General) v. Power*, [2024 SCC 26](#);

- j. *York Region District School Board v. Elementary Teachers' Federation of Ontario*, [2024 SCC 22](#);
- k. *Attorney General of Québec, et al. v. Attorney General of Canada, et al.*, SCC File No. 40061, [2024 SCC 5](#);
- l. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023 SCC 17](#);
- m. *McGregor v. Her Majesty the Queen*, [2023 SCC 4](#);
- n. *R v. Sharma*, [2022 SCC 39](#);
- o. *Attorney General of British Columbia v. Council for Canadians with Disabilities*, [2022 SCC 27](#).
- p. *City of Toronto v. Attorney General of Ontario*, [2021 SCC 34](#).
- q. *Ontario (Attorney General) v. G.*, [2020 SCC 38](#);
- r. *R v. Chouhan*, [2021 SCC 26](#);
- s. *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020 SCC 13](#);
- t. *R v. Barton*, [2019 SCC 33](#);
- u. *R v. Bird*, [2019 SCC 7](#);
- v. *Frank v. Canada (Attorney General)*, [2019 SCC 1](#);

- w. *India v. Badesha*, [2017 SCC 44](#);
- x. *Ernst v. Alberta Energy Regulator*, [2017 SCC 1](#);
- y. *R v. K.R.J.*, [2016 SCC 31](#);
- z. *B010 v. Canada (Citizenship and Immigration)*, [2015 SCC 58](#);
- aa. *Henry v. British Columbia (Attorney General)*, [2015 SCC 24](#);
- bb. *R v. Kokopenace*, [2015 SCC 28](#);
- cc. *Trial Lawyers Association of British v. British Columbia (Attorney General)*, [2014 SCC 59](#);
- dd. *R v. Anderson*, [2014 SCC 41](#);
- ee. *Kazemi Estate v. Islamic Republic of Iran*, [2014 SCC 62](#);
- ff. *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#);
- gg. *Czech Republic v. Zajicek*, SCC File No. 34767, [2012 CanLII 36253](#) (appeal quashed as moot);
- hh. *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013 SCC 47](#);
- ii. *R v. Davey*, [2012 SCC 75](#); *R v. Yumnu*, [2012 SCC 73](#); *R v. Emms*, [2012 SCC 74](#) (heard together as “the Jury Vetting Cases”);
- jj. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence*, [2012 SCC 45](#);

- kk. *R v. Caron*, [2011 SCC 5](#);
- ll. *Canada (Prime Minister) v. Khadr*, [2010 SCC 3](#) (jointly with Human Rights Watch and the Faculty of Law’s International Human Rights Program);
- mm. *Vancouver (City) v. Ward*, [2010 SCC 27](#) (jointly with the British Columbia Civil Liberties Association); and
- nn. *R v. Conway*, [2010 SCC 22](#) (jointly with the Criminal Lawyers’ Association).
29. The Supreme Court has specifically referenced the Asper Centre’s arguments in *Kanyinda* (paras. 39, 62), in *Bedford* (paras. 43-44), in *Frank* (para. 53), in *Canadian Council for Refugees v. Canada (Citizenship and Immigration)* (para. 180), and in *Ontario (Attorney General) v. G.* (paras. 80-81, 90, 133, 274).
30. In addition to the above cases before the Supreme Court, the Asper Centre was granted intervener standing before the Court of Appeal for Ontario in *Cycle Toronto v. Ontario*, [2026 ONCA 582](#); *Mathur v. Ontario*, [2024 ONCA 762](#); *R v. Morris*, [2021 ONCA 680](#); *R v. Sharma*, [2020 ONCA 478](#) (jointly with LEAF); *Tanudjaja et al. v. Canada*, [2014 ONCA 852](#); and *R v. Kokopenace*, [2013 ONCA 389](#).
31. The Asper Centre has also been granted intervener standing before the Federal Court of Appeal in *Slepcsik v. Canada*, [2025 FC 1840](#) and “interested persons” standing in the *Polygamy Reference*, [2011 BCSC 1588](#) at the British Columbia Supreme Court (with the Canadian Coalition for the Rights of Children).

C. Other Relevant Experience

32. In support of its academic and educational objectives, the Asper Centre hosts conferences, panels and workshops bringing together constitutional experts from across Canada and abroad. Asper Centre events have included the following:
- a. *Litigating Positive Rights Symposium*, a one-day conference held on January 16, 2026;
 - b. *Housing Encampments and the Charter*, a one-day symposium, jointly held with the Centre for Constitutional Studies at the University of Alberta, on February 28, 2025;
 - c. *Litigating Equality Rights Symposium*, a one-day conference held on May 26, 2023;
 - d. *Public Interest Litigation Symposium*, a one-day conference held on March 2, 2018;
 - e. *The State of Canada's Constitutional Democracy*, a two-day symposium held February 26-27, 2016 (organized with the Centre for Constitutional Studies, University of Toronto);
 - f. *Life, Liberty and Equality – Canadian Style: The Interplay Between Sections 7 and 15 of the Charter*, a one-day conference held February 27th, 2015;
 - g. *R v Kokopenace, the Panel*, a panel discussion on *R v Kokopenace* with panellists who argued the case. Held October 15, 2014;
 - h. *Privacy at Risk*, a panel discussion on Canadian privacy law, held March 12, 2014;
 - i. *Constitutional Remedies: Are They Effective and Meaningful?*, a one-day conference, held February 28, 2014;

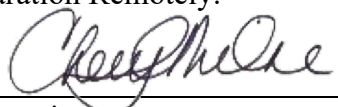
- j. *Social Science Evidence in Charter Litigation*, held November 9, 2012;
 - k. *Who Belongs? Rights, Benefits, Obligations and Immigration Status*, held September 24-25, 2010 (organized with the Canadian Civil Liberties Association).
33. The Asper Centre's Working Groups have allowed law students to engage in supervised research and advocacy on constitutional issues. In 2025-2026, the Asper Centre's working groups focused on accessible sex education, AI, and protective policing. In 2024-2025, the working groups focused on the use of the notwithstanding clause, encampments and *Charter* rights, as well as the role of interveners in constitutional litigation. The current year's working groups are focusing on the constitutionality of bail provisions, Indigenous rights in respect of the *Cowichan Tribes v British Columbia* decision, online safety and the *Charter*, trans and two-spirit prisoners' rights, and an update of the historical Supreme Court of Canada case materials housed on the Asper Centre's website.
 34. The Centre also operates a constitutional rights legal clinic during the academic year, allowing law students to work with practitioners for academic credit on files involving innovative constitutional advocacy. In the past, clinical students have worked with the Asper Centre on all of its court interventions (listed above), as well as with other organizations engaged in constitutional rights advocacy, including the Refugee Law Office of Legal Aid Ontario, Justice for Children and Youth, ARCH Disability Law Centre, Women's Legal Action and Education Fund (LEAF), and the Law Commission of Ontario.

III. THE ASPER CENTRE'S INTEREST IN AND PROPOSED CONTRIBUTION TO THIS APPLICATION

35. The Asper Centre's interest in this application flows directly from its mandate to realize constitutional rights and remedies through advocacy. The remedies granted in this litigation, should any be granted, could influence future litigation where constitutional remedies are sought. Therefore, intervening in this appeal falls squarely within the Asper Centre's mandate. The Asper Centre offers significant expertise in public interest litigation and constitutional remedies. This intervention will allow the Centre to make a distinctive and valuable contribution.
36. As outlined in the notice of motion, if granted leave the Asper Centre will intervene only on the issue of interpretation and availability of constitutional remedies, including declaratory relief, injunctive relief, and supervisory jurisdiction. It will provide submissions on three main points set out in the factum.
37. The Asper Centre's expected submissions are outlined in the notice of motion and its factum.
38. Granting leave to intervene to the Asper Centre will not prejudice any party or add expenses to any party. As noted, the Asper Centre will take the record as it finds it and will not unduly expand the issues or file evidence. The Centre will avoid duplication of submissions and will abide by any schedule set by the Court. The Asper Centre seeks no costs in the proposed intervention and asks that none be awarded against it.
39. For these reasons the Asper Centre respectfully requests leave to intervene to file a factum and to present oral argument at the hearing of this appeal.

40. I affirm this affidavit in support of the Asper Centre's motion for leave to intervene,
and for no other or improper purpose.

AFFIRMED BEFORE ME by video)
conference by Anna Su at the City of)
Toronto, in the Province of Ontario, on 20)
October 2026, in accordance with O. Reg.)
431/20, Administering Oath or)
Declaration Remotely.)



A Commissioner, etc.



ANNA SU

Court File Nos.: 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 and THE ATTORNEY GENERAL FOR
ONTARIO

Applicants (Appellants)

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 in Appeal)

and

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Proposed Intervener

**FACTUM OF THE PROPOSED INTERVENER, THE DAVID ASPER CENTRE FOR
CONSTITUTIONAL RIGHTS**

**(Motion for Leave to Intervene as a Friend of the Court Pursuant to Rules 13.02 and
13.03(1) of the *Rules of Civil Procedure*)**

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***Amicus Curiae* for Persons Unknown,
The Mental Health Legal Committee**

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PART I. OVERVIEW

1. The David Asper Centre for Constitutional Rights (the “**Asper Centre**”) seeks leave to intervene as a friend of the court to make written and oral submissions in this Appeal of *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*.¹

2. The Asper Centre has a useful contribution to make to this Appeal as an intervener. The Asper Centre is a well-recognized and leading public interest organization operating out of the Henry N. R. Jackman Faculty of Law at the University of Toronto with special expertise in constitutional rights that has previously been acknowledged by this Honourable Court. The Asper Centre has a substantial and identifiable interest in this Appeal arising under its mandate to promote greater awareness, understanding, and realization of constitutional rights in Canada. The Asper Centre also has an important and distinct perspective to bring to the issues in this Appeal as a non-partisan organization and dispassionate friend of the court.

3. In *Waterloo*, the Honourable Justice Gibson declared that By-law 25-021, as amended by By-law 26-001, of the Regional Municipality of Waterloo (the “**Region**”) infringed ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* and were not saved by s. 1. As a part of the remedy the Court retained jurisdiction to review or provide further guidance to the Applicant Region to its response to the decision.² If granted leave to intervene, the Asper Centre intends to make submissions relevant to the remedy granted by the Court below and on available and

¹ [2026 ONSC 2971](#) [*Waterloo*].

² *Ibid*, at para 256.

appropriate *Charter* remedies as set out in the Draft Factum at Appendix I required by the Direction of the Case Management Judge.³

PART II. FACTS

A. The Asper Centre for Constitutional Rights

4. Since 2008, the Asper Centre has operated within the Henry N. R. Jackman Faculty of Law at the University of Toronto as a centre dedicated to the furtherance of constitutional rights in Canada.⁴ The Asper Centre works with law students and the broader legal community to pursue constitutional litigation, promote general public awareness of constitutional rights, and facilitate academic commentary on the development of the *Charter*.⁵

5. The Asper Centre was constituted to promote “greater awareness, understanding and acceptance of constitutional rights in Canada.”⁶ Arising out of this mandate, the Asper Centre has a special interest in promoting access to constitutional justice through interventions.

6. The Asper Centre has a long and recognized record of assisting all levels of the court on constitutional interpretation, including the application of constitutional remedies.⁷

B. The Application and Appeal

7. The Appeal concerns the *Regional Municipality of Waterloo v. Named Respondents and Persons Unknown* decision (the “**Decision**”) by the Honourable Justice Gibson (the “**Application Judge**”) of the Ontario Superior Court of Justice dated May 21, 2026. In the Decision, the

³ Directions of Case Management Judge, dated July 23, 2026, *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, COA-26-CV-0836.

⁴ Su Affidavit at para. 2.

⁵ Su Affidavit at paras. 2-8.

⁶ Su Affidavit at para. 2.

⁷ Su Affidavit at paras. 14, 16-18.

Application Judge considered an application by the Region seeking guidance on the constitutionality of Regional Municipal By-law Number 25-021, as amended by By-law Number 26-001 (collectively the “**By-laws**”), which provides for the Region’s vacant possession of a lot of land at 100 Victoria Street North in Kitchener. Additionally, the Respondents initiated a cross-application, seeking a declaration that the By-laws violate their sections 7 and 15(1) *Charter* rights.

8. The Application Judge dismissed the Region’s application and allowed the cross-application of the Respondents in part, finding that the By-laws infringed sections 7 and 15 of the *Charter* and were not saved by section 1.⁸

9. The Applicants have appealed that decision to this Court.

C. The Asper Centre’s knowledge and experience as intervener

10. The Asper Centre has expertise in the legal issues raised in this Appeal, specifically regarding the constitutional remedies available if this Court finds a *Charter* infringement. The Asper Centre will make submissions on the interpretation and availability of constitutional remedies, including declaratory relief, injunctive relief, and supervisory jurisdiction.

11. The Asper Centre has experience and an interest in assisting courts in interpreting and applying constitutional remedies. This experience includes intervening in the following precedential cases before the Supreme Court of Canada:

a) *Canada (Attorney General) v Power*, [2024 SCC 26](#);

b) *British Columbia (Attorney General) v Council of Canadians with Disabilities*, [2022 SCC 27](#);

⁸ *Waterloo 2026*, *supra* note 1 at para. 244.

- c) *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, [2020 SCC 13](#);
- d) *Ontario (Attorney General) v G*, [2020 SCC 38](#);
- e) *Ernst v Alberta Energy Regulator*, [2017 SCC 1](#);
- f) *Henry v British Columbia (Attorney General)*, [2015 SCC 24](#);
- g) *Kazemi Estate v Islamic Republic of Iran*, [2014 SCC 62](#) (jointly with the Faculty of Law’s International Human Rights Program);
- h) *Canada (Prime Minister) v Khadr*, [2010 SCC 3](#) (jointly with Human Rights Watch and the Faculty of Law’s International Human Rights Program);
- i) *Vancouver (City) v Ward*, [2010 SCC 27](#) (jointly with the British Columbia Civil Liberties Association);
- j) *R v Conway*, [2010 SCC 22](#) (jointly with the Criminal Lawyers’ Association);
- k) *Mathur v Ontario*, [2024 ONCA 762](#); and
- l) *Tanudjaja v Canada*, [2014 ONCA 852](#).

12. The Asper Centre has also frequently been granted leave to intervene in cases concerning the *Charter* and available remedies at the Court of Appeal for Ontario under Rules 13.02 and 13.03(1), including in *R v. Sharma*,⁹ *Tanudjaja v. Canada*,¹⁰ and *Mathur v. Ontario*.¹¹

⁹ *R v. Sharma*, [2020 ONCA 478](#).

¹⁰ *Tanudjaja v. Canada*, [2014 ONCA 852](#).

¹¹ *Mathur v. Ontario*, [2024 ONCA 762](#).

PART III. STATEMENT OF ISSUES, LAW, AND ARGUMENT

A. Test for intervention as a friend of the Court

13. The Asper Centre seeks leave to intervene as a friend of the Court pursuant to Rules 13.02 and 13.03(1) of the *Rules of Civil Procedure*, which provide as follows:

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.¹²

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.¹³

14. In the context of *Charter* cases like the present Appeal, the Court will find that a proposed intervenor will make a useful contribution where it meets at least one of the following three criteria:

- a) The intervenor is a well-recognized group with a special expertise and with a broad identifiable membership base;
- b) The intervenor has a substantial and identifiable interest in the subject matter of the proceeding; or
- c) The intervenor has an important perspective, distinct from the immediate parties.¹⁴

B. The Asper Centre satisfies the criteria for public interest intervention

15. The Asper Centre satisfies all three criteria for public interest interventions.

16. First, the Asper Centre is a well-recognized group with special expertise and a history of intervening at this Honourable Court and the Supreme Court of Canada. The Asper Centre is

¹² *Rules of Civil Procedure*, RRO 1990, Reg. 194, at [r. 13.02](#) [Rules].

¹³ *Ibid.* at [r. 13.03\(1\)](#).

¹⁴ *Fair Change v. Her Majesty the Queen*, 2021 ONSC 2108, at [para. 16](#); *Martin v. Health Professions Appeal and Review Board*, 2022 ONSC 1340, at [para. 53](#); *Association for Reformed Political Action v. City of Hamilton*, 2022 ONSC 6691, at [para. 13](#).

dedicated to the advancement of constitutional rights in Canada.¹⁵ It draws on the constitutional expertise of its advisory board and the large number of constitutional rights scholars at the Faculty of Law.¹⁶ This Honourable Court most recently granted the Asper Centre's motion to intervene on a constitutional matter in *Mathur v. Ontario*.¹⁷

17. Second, the Asper Centre has a clear interest in the subject matter of the Appeal. Arising out of its mandate to promote a greater realization of constitutional rights in Canada, the Asper Centre has a special interest in the application of constitutional remedies.¹⁸ The issues in this Appeal, which address the application of the *Charter* and *Charter* remedies to homeless encampments, directly engage the Asper Centre's interest as a constitutional rights organization. The Asper Centre has been granted leave to intervene in similar cases in the past, demonstrating both its interest and expertise in such issues.¹⁹

18. Third, the Asper Centre has an important perspective that is distinct from the immediate parties. In the context of constitutional remedies, the Asper has particular expertise on the interpretation of available remedies; specifically, it has facilitated research and hosted conferences on the subject of constitutional remedies.²⁰ The Asper Centre has intervened in numerous remedies cases at the Supreme Court of Canada and this Honourable Court.²¹ In the context of constitutional remedies, the Asper Centre is well-positioned to provide this Honourable Court with submissions on the appropriate constitutional remedy in this case. The Asper Centre will incorporate the

¹⁵ Su Affidavit at para. 3.

¹⁶ Su Affidavit at para. 9.

¹⁷ *Rules*, supra note 12.

¹⁸ Su Affidavit at paras. 14-15, 22.

¹⁹ Su Affidavit, paras. 16-18.

²⁰ Su Affidavit at para. 15.

²¹ Su Affidavit, para. 14.

expertise of its Advisory Board, which includes the leading constitutional remedies scholar Professor Kent Roach.²²

C. The Asper Centre's involvement will not cause undue delay or prejudice

19. If granted leave to intervene, the Asper Centre will abide by the agreed-upon schedule between counsel for the parties for the delivery of its factum. The Asper Centre notes that the parties expressly contemplated the involvement of interveners in their schedule, acknowledging the public interest in the Appeal and the useful role interveners can play in *Charter* cases.

20. Furthermore, in order to avoid any injustice or prejudice to the parties, the Asper Centre will:

- a) Not file any additional evidence, unduly expand the issues, or add to the record;
- b) Not seek costs associated with its intervention;
- c) Not unreasonably delay or lengthen the hearing of this appeal;
- d) Avoid duplicative submissions by working collaboratively with the parties and other interveners; and
- e) Comply with any terms and conditions imposed.

PART IV. ORDER REQUESTED

21. The Asper Centre requests that its motion for leave to intervene in this Appeal be granted on the following terms:

- a) The Asper Centre be permitted to file a factum not exceeding 10 pages and a book of authorities;

²² Su Affidavit at para. 12.

- b) The Asper Centre be permitted to make oral submissions at the hearing of this appeal of a duration not to exceed 15 minutes; and
- c) There shall be no costs award made for or against the Asper Centre on this motion or in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2026.



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COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO and THE ATTORNEY GENERAL FOR
ONTARIO

Applicants
(Appellants)

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
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CHARLES KOCHER, ALINE JEFFERY, MICHAEL JEFFERY, AND PERSONS
UNKNOWN

Respondents
(Respondents in Appeal)

and

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Proposed Intervener

CERTIFICATE

1. An order under Rule 61.09(2) is not required.
2. The Asper Centre estimates that they will require 1 hour for the oral argument.
3. The factum complies with rule 61.12(5.1).
4. The number of words contained in parts I to IV of this factum is 1,752.
5. I am satisfied as to the authenticity of every authority cited in the factum.

6. I am satisfied that every question from an authority that appears in the factum accurately reproduces the text of the authority.

Dated this 21st day of October, 2026



Cheryl Milne

Counsel for the David Asper Centre for
Constitutional Rights

SCHEDULE A – AUTHORITIES CITED

CASES

1. Association for Reformed Political Action v. City of Hamilton, [2022 ONSC 6691](#)
2. Fair Change v. Her Majesty the Queen, [2021 ONSC 2108](#)
3. Martin v. Health Professions Appeal and Review Board, [2022 ONSC 1340](#)
4. Mathur v. Ontario, [2024 ONCA 762](#)
5. R. v. Sharma, [2020 ONCA 478](#)
6. Tanudjaja v. Canada, [2014 ONCA 852](#)
7. The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown, [2026 ONSC 2971](#)

SCHEDULE B – LEGISLATION CITED

1. *Rules of Civil Procedure*, [RRO 1990, Reg. 194](#)

Leave to Intervene as Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Leave to Intervene in Divisional Court or Court of Appeal

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

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

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and

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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**DRAFT FACTUM OF THE PROPOSED INTERVENER, THE DAVID ASPER CENTRE
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PART I. OVERVIEW

1. The David Asper Centre for Constitutional Rights (the “**Asper Centre**”) intervenes on the issue of the remedies available under s. 24(1) of the *Canadian Charter of Rights and Freedoms* and s. 52(1) of the *Constitution Act, 1982*, for *Charter*-infringing legislation or by-laws affecting homeless encampments. Section 24(1) of the *Charter* allows courts to craft “appropriate and just remedies” based on the facts before them. Section 52(1) of the *Constitution* provides that legislation inconsistent with the *Constitution* is invalid.

2. Should this Honourable Court determine that a remedy is warranted in this case, there is jurisprudential support from the Supreme Court of Canada and this Court that the judiciary is competent to retain supervisory jurisdiction and grant remedies that blend elements of ss. 24(1) and 52(1) into a hybrid “declaration plus” as the Honourable Justice Gibson (the “**Application Judge**”) provided in *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown* (the “**Decision**”).¹

PART II. FACTS

3. The Asper Centre accepts the facts as outlined in the Appellants’ and Respondents’ facts. To the extent that there may be differences between them, it takes no position.

PART III. ISSUES AND LAW

4. The Asper Centre submits that the remedy ordered in the Decision is constitutionally available and appropriate and just in the circumstances. The remedy that the Application Judge ordered blends the standard remedies of declaratory and injunctive relief in a manner that is constitutional. The remedy that the Application Judge ordered is also within the power of the Court

¹ [2026 ONSC 2971](#) [*Waterloo*].

to grant and is consistent with remedial principles. It vindicates the rights of the claimants, respects the role of the courts, invokes the powers only of courts, and is fair to the Region. The remedy was also specific, responsive to the facts, and appropriately balanced the separation of powers against the need to provide an effective remedy.

A. Declaratory Relief

5. The Supreme Court of Canada has long recognized declarations of invalidity under s. 52(1) of the *Constitution* as the “first and most important remedy” in *Charter* cases.² They provide flexibility by allowing courts to “[define] the respective legal rights and obligations of the parties but leaves to them the task of implementing the demands of the Constitution.”³ Courts interpret Declarations, as a *Charter* remedy, generously and expansively in order to provide a meaningful remedy for violations of the *Charter*.⁴ Interpreting remedies purposively requires that the remedy be both responsive and effective.⁵

6. The Supreme Court has also recognized that declarations may be especially useful where *Charter* compliance requires the government to fashion a positive response.⁶ In *Eldridge*, a unanimous Court held that a suspended declaration of invalidity was appropriate so that the government could “explore its options and formulate an appropriate response.”⁷ Suspended declarations of invalidity may be appropriate if striking down the legislation would pose a danger

² *Canada (Attorney General) v. Power*, [2024 SCC 26](#), at para. 34, quoting *Vancouver (City) v. Ward*, [2010 SCC 27](#), at para. 1.

³ Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 8th ed (Toronto: Irwin Law, 2026) at p. 502–503.

⁴ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003 SCC 62](#), at para. 25 [*Doucet-Boudreau*].

⁵ *Ibid.*

⁶ *Eldridge v. British Columbia (Attorney General)*, [1997 CanLII 327](#), [1997] 3 S.C.R. 624 [*Eldridge*]; *Schachter v. Canada*, [\[1992\] 2 S.C.R. 679](#) (S.C.C.).

⁷ *Eldridge*, *supra* note 6 at para. 96.

to the public, if striking down the legislation with nothing in its place would threaten the rule of law, or if the unconstitutional legislation was underinclusive.⁸

B. Injunctive Relief

7. Section 24(1) of the *Charter* gives courts the power to issue injunctions against the government to remedy a violation of the *Charter*. In *Doucet-Boudreau*, the Supreme Court of Canada noted that “[t]he power of courts to issue injunctions against the executive is central to s. 24(1) of the *Charter* which envisions more than declarations of rights.”⁹ Injunctive relief gives courts the power to restrain the government from taking certain actions and permits subsequent contempt proceedings for non-compliance. This option is appropriate “to ensure rights are enforced, and not merely declared.”¹⁰

8. The Court in *Doucet-Boudreau* also noted that the remedial power under s. 24(1), which includes the power to issue injunctive relief, cannot be strictly limited by statute or common law rules.¹¹ Injunctive relief may also include structural injunctions that allow for continued supervision by the Courts as long as that supervision respects the separation of powers.¹²

C. Retention of Supervisory Jurisdiction and the “Declaration Plus”

9. As Justice McIntyre articulated in *R. v. Mills*, “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion” than that in s. 24.¹³ The Supreme Court of Canada acknowledged the development of new remedies beyond mere declarations and

⁸ *Schachter v. Canada*, *supra* note 6, at p. 719.

⁹ *Doucet-Boudreau*, *supra* note **Error! Bookmark not defined.** at para. 70.

¹⁰ *Ibid.*

¹¹ *Ibid.* at para. 51.

¹² *Ibid.* at paras. 72–74.

¹³ [\[1986\] 1 SCR 863](#) at p. 965.

injunctions in *Doucet-Boudreau*. There, the Court observed that s. 24 remedies “should be allowed to evolve” and “[t]hat evolution may require novel and creative features when compared to traditional and historical remedial practice[...].”¹⁴ The declaration plus is one such innovative remedy that operates as a middle ground between the traditional remedies of declaration and injunction.¹⁵

10. Courts have previously granted a declaration plus in the encampment context in *Prince George (City) v. Johnny*.¹⁶ In that case, the Supreme Court of British Columbia granted the municipality’s application for an injunction to close an encampment on city-owned lands, with residents required to leave within seven days of being offered housing. In addition to the injunction, the court issued a declaration plus by permitting the occupants to apply to the Court in order to be exempted from the injunction.¹⁷

11. In selecting an appropriate and just remedy, the majority in *Doucet-Boudreau* identified four factors that courts should consider, regardless of whether the remedy is a novel one. First, the remedy must “meaningfully [vindicate] the rights and freedoms of the claimants.” Second, it must “use means that are legitimate within the framework of our constitutional democracy,” and “courts must not [...] depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies [...].” Third, the remedy must “[vindicate] the right while invoking the function and powers of a court.” Fourth, it must be “fair to the party against whom the order is made.”¹⁸

¹⁴ *Doucet-Boudreau*, *supra* note **Error! Bookmark not defined.** at para. 59.

¹⁵ Sharpe, *The Charter of Rights and Freedoms*, *supra* note **Error! Bookmark not defined.** at 506.

¹⁶ [2025 BCSC 1556](#).

¹⁷ *Ibid.*, at para. 139.

¹⁸ *Doucet-Boudreau*, *supra* note **Error! Bookmark not defined.** at paras. 55-58.

12. In addition to complying with the remedial principles articulated in *Doucet-Boudreau*, courts opting for a declaration plus should focus on why a mere declaration is insufficient, be specific about what precisely constitutes the ‘plus,’ and be responsive to the specific facts and context at hand.¹⁹

13. In *Doucet-Boudreau*, the Supreme Court of Canada restored the trial judge’s declaration plus remedy requiring Nova Scotia to use its “best efforts” to provide publicly funded secondary education in French pursuant to s. 23 of the *Charter* and to report back to the trial judge with progress reports on its compliance efforts.²⁰ The trial judge found that there was a history of delay in providing French-language education that could “imperil the already vulnerable s. 23 rights” of the claimants.²¹ In this context, the Court found that there was a significant risk that a declaration would be insufficient,²² in which case the appellants would be required to create a new factual record and reinitiate proceedings before a potentially unfamiliar judge.²³ Thus, the remedy of requiring progress reports was found to “meaningfully protect [...] the applicants’ rights [...] while maintaining appropriate respect for the proper roles of the executive and legislative branches.”²⁴

14. The dissenting justices stated that they “fully agree[d] with [their] colleagues [...] on the need for efficacy and imagination in the development of constitutional remedies.”²⁵ They instead dissented on the basis that the judge’s progress report order was too vague and violated the separation of powers, insofar as it allowed him to make further orders after the conclusion of the

¹⁹ *R. v. Warren*, [2024 ONSC 2785](#), at para. 213-216; **Error! Bookmark not defined.** Kent Roach, *Constitutional Remedies in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2026), at § 12:4.

²⁰ *Doucet-Boudreau*, *supra* note **Error! Bookmark not defined.** at paras. 7, 88.

²¹ *Ibid.* at para. 60.

²² *Ibid.* at para. 66.

²³ *Ibid.* at para. 61.

²⁴ *Ibid.* at para. 37.

²⁵ *Ibid.* at para. 94.

case. However, as Justice Sharpe noted, “[m]any of the concerns of the dissenting judges [...] are mitigated if it is seen [...] as a ‘creative blending of declaratory and injunctive relief’ or a declaration plus.”²⁶

15. A declaration plus such as the one in *Doucet-Boudreau* may assist courts where a mere declaration is insufficient and “can only vindicate [...] rights to a limited degree.”²⁷ Furthermore, other common law jurisdictions, such as the United States, India, and South Africa, employ such remedies to address complex, polycentric issues “where democratic institutions are not responding effectively to the needs of rights holders.”²⁸

16. The risk of a declaration being insufficient may arise in cases where a *Charter* infringement has been previously litigated in favour of the claimants. The Alberta Court of Appeal in *R. v. Reilly* observed that a declaration plus,

[...] should not be granted the first time that a constitutional point is litigated, because the government generally will comply with court declarations. When a problem is identified, the executive branch should be given an opportunity to correct it. However, where *Charter* breaches become entrenched, the courts can and should intervene.²⁹

17. A declaration may also be insufficient where the case involves complex, polycentric remedial contexts.³⁰ As a result, the declaration plus has been implemented in cases involving

²⁶ *Supra*, note **Error! Bookmark not defined.** at 511 (citations omitted).

²⁷ *Warren*, *supra* note 19 at para. 213.

²⁸ Hon. Paul S Rouleau & Linsey Sherman, “*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot?” (2010) 41:2 Ottawa L. Rev. 171 at 206, quoted with approval in *Warren*, *supra* note 19 at para. 214.

²⁹ *R. v. Reilly*, [2019 ABCA 212](#) (rev’d, but not on this point, [2020 SCC 27](#)) at para. 55, citing *Fédération Franco-Ténoise v. Canada*, [2008 NWTCA 6](#) at para. 90.

³⁰ Sharpe, *supra* note **Error! Bookmark not defined.**, at 507-508.

minority language rights,³¹ Indigenous rights,³² and criminal contexts,³³ among others.

18. A declaration plus often, if not innately, involves the court retaining supervisory jurisdiction of the matter. Supervisory jurisdiction acknowledges that some *Charter* issues are complex, and it accordingly gives courts a practical and equitable way to resolve any disputes or uncertainties about how governments will carry out their orders.³⁴ It grants the parties the ability to return to the same judge for additional clarity on the declaration and the *Charter* right, or to allow the applicants to make a claim that government is still infringing the right.³⁵

19. A declaration plus also gives the government room to “design the details of how the *Charter* right will be implemented,”³⁶ consistent with the constitutional roles of the judiciary and legislature and the principle of separation of powers. This principle “requires the judiciary to be deferential not only to policy objectives, but to the specific means chosen to achieve those objectives.”³⁷ A declaration plus, by giving the government flexibility, does not dictate those specific means to the government.

20. In *Ontario (Attorney General) v. Restoule*, the Court retained jurisdiction by allowing the plaintiffs to seek judicial review of the negotiation process and the amount of the increased annuity. The Court further noted that “it is not the business of the courts to force the Crown to exercise its

³¹ See e.g.: *Doucet-Boudreau*, *supra* note **Error! Bookmark not defined.**; *Assn. des parents francophones de la Colombie Britannique v. British Columbia*, [1998 CanLII 3969](#) (BC SC); *L’Association des parents de l’école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, [2011 BCSC 1495](#), rev’d 2013 BCCA 407, aff’d 2015 SCC 21.

³² See e.g.: *Ontario (Attorney General) v. Restoule*, [2024 SCC 27](#) [*Restoule*]; *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, [2024 SCC 39](#); *Thomas v. Rio Tinto Alcan Inc.*, [2024 BCCA 62](#) (leave to appeal refused, [2024 CanLII 96608](#)); *Yahey v. British Columbia*, [2021 BCSC 1287](#).

³³ See e.g.: *Reilly*, *supra* note 29; *Bacon v. Surrey Pretrial Services Centre (Warden)*, [2010 BCSC 805](#) [*Bacon*].

³⁴ Roach, *Constitutional Remedies in Canada*, *supra* note 19 at § 12:22.

³⁵ *Ibid.*, § 12:04.

³⁶ *Ibid.*

³⁷ *R. v. Michaud*, [2015 ONCA 585](#) at para. 108.

discretion in a particular way,” but that the courts may review the Crown’s exercise of its discretion for compliance with the Constitution.³⁸

21. In *Bacon v. Surrey Pretrial Services Centre (Warden)*, the trial judge held that the respondent breached ss. 7 and 12 of the *Charter* by placing the claimant in solitary confinement arbitrarily, among other practices.³⁹ Crucially, the trial judge held that the claimant retained the right to apply to the Court for further rulings or directions after availing himself of administrative remedies.⁴⁰ The Court retained jurisdiction, keeping active control over the implementation of its decision.

22. Should the Court determine that a *Charter* right was infringed in the instant case, the remedy that the Application Judge ordered, including supervisory jurisdiction, is within the power of the Court to grant and is consistent with the remedial principles articulated in *Doucet-Boudreau*.

23. First, it would meaningfully vindicate the claimants’ rights by having the court evaluate the constitutionality of any amended by-law without the need for the claimants to bring a new case. A similar *Charter* infringement has been previously litigated in favour of the claimants,⁴¹ and the parties returned to court to obtain a judgment on a new set of by-laws, exercising the supervisory jurisdiction remedy ordered in that case.

24. Second, it uses legitimate means in our constitutional democracy without unduly or unnecessarily departing from the Court’s role. Like the remedy in *Doucet-Boudreau*, the remedy that the Application Judge ordered vindicates the rights of the claimants “while leaving the detailed

³⁸ *Restoule*, *supra* note 32 at para. 299.

³⁹ *Bacon*, *supra* note 33 at paras. 353-354.

⁴⁰ *Ibid.*, at para. 340.

⁴¹ *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, [2023 ONSC 670](#).

choices of means largely” to the legislative body.⁴² Under the Application Judge’s order, the Region may select from many options available to it that would address any issues the Court finds, affording it the flexibility necessary to legislate on complex, polycentric issues.⁴³

25. Third, the remedy uses the functions and powers of a court. As discussed above, the ability of courts to have “continuing involvement in the relationship between parties” has been used in a variety of contexts,⁴⁴ including injunctions. Supervisory jurisdiction in this case does not “represent a radical break with the past practices of courts” by improperly taking over the function of another branch of government.⁴⁵ Rather, it strikes an appropriate balance and respects the separation of powers by affording the Region the latitude needed to respond appropriately to the Court’s decision without being bound to a particular solution.

26. Finally, it would be fair to the Region by allowing, but not requiring, them to return to the Application Judge for further guidance. In ordering the remedy, the Application Judge recognized that the Region may come up with a solution or experience a change in circumstance not anticipated by the Court. If necessary, the Region would be able to seek guidance without being bound by a specific injunction or the threat of being held in contempt. Additionally, the remedy is fair to the region in that the Application Judge was specific about what the “plus” entailed⁴⁶ and was responsive to the facts in deciding that a declaration alone may be insufficient.

⁴² *Doucet-Boudreau*, *supra* note **Error! Bookmark not defined.** at para 69.

⁴³ *Waterloo*, *supra* note **Error! Bookmark not defined.** at para. 247.

⁴⁴ *Doucet-Boudreau*, *supra* note **Error! Bookmark not defined.** at para 71.

⁴⁵ *Ibid.*

⁴⁶ *Waterloo*, *supra* note **Error! Bookmark not defined.** at para. 256.

PART IV. SUBMISSIONS ON COSTS

27. The Asper Centre does not seek costs and asks that none be awarded against it.

PART V. ORDER REQUESTED

28. The Asper Centre requests permission to present oral argument on this appeal.

DRAFT ONLY - SUBJECT TO REVISION.

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SCHEDULE A – AUTHORITIES CITED

CASES

1. *Assn. Des parents francophones de la Colombie Britannique v. British Columbia*, [1998 CanLII 3969](#) (BC SC).
2. *Bacon v. Surrey Pretrial Services Centre (Warden)*, [2010 BCSC 805](#).
3. *Canada (Attorney General) v. Power*, [2024 SCC 26](#).
4. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003 SCC 62](#).
5. *Eldridge v. British Columbia (Attorney General)*, [\[1997\] 3 SCR 624](#).
6. *Fédération Franco-Ténoise v. Canada*, [2008 NWTCA 6](#).
7. *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, [2011 BCSC 1495](#).
8. *Ontario (Attorney General) v. Restoule*, [2024 SCC 27](#).
9. *Prince George (City) v. Johnny*, [2025 BCSC 1556](#).
10. *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, [2024 SCC 39](#).
11. *R. v. Michaud*, [2015 ONCA 585](#).
12. *R. v. Mills*, [\[1986\] 1 SCR 863](#).
13. *R. v. Reilly*, [2019 ABCA 212](#).
14. *R. v. Warren*, [2024 ONSC 2785](#).
15. *Schachter v. Canada*, [\[1992\] 2 SCR 679](#).
16. *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, [2026 ONSC 2971](#).
17. *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, [2023 ONSC 670](#).

18. *Thomas v. Rio Tinto Alcan Inc.*, [2024 BCCA 62](#).
19. *Vancouver (City) v. Ward*, [2010 SCC 27](#).
20. *Yahey v. British Columbia*, [2021 BCSC 1287](#).

SECONDARY SOURCES

1. Kent Roach, *Constitutional Remedies in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2026).
2. Hon. Paul S Rouleau & Linsey Sherman, “Doucet-Boudreau, Dialogue and Judicial Activism: Tempest in a Teapot?” (2010) 41:2 *Ottawa L. Rev.* 171 at 206.
3. Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 8th ed (Toronto: Irwin Law, 2026)

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](#)

Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

2. *The Constitution Act, 1982*, being [Schedule B to the Canada Act 1982 \(UK\), 1982, c 11](#)

General

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

THE REGIONAL
MUNICIPALITY OF
WATERLOO
Appellants (Applicants)

-and-

PERSONS UNKNOWN ET AL and
Respondent (Respondent)

DAVID ASPER CENTRE FOR
CONSTITUTIONAL RIGHTS

Intervenor

Court File Nos. COA-26-CV-0836 and COA-26-CV-0897

ONTARIO
COURT OF APPEAL

PROCEEDING COMMENCED AT
TORONTO

**MOTION RECORD OF THE PROPOSED
INTERVENER, THE DAVID ASPER CENTRE FOR
CONSTITUTIONAL RIGHTS**

**DAVID ASPER CENTRE FOR CONSTITUTIONAL
RIGHTS**

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