

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Appellant
(Applicant/Cross Respondent)

and

THE ATTORNEY GENERAL FOR ONTARIO

Appellant
(Intervener)

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Respondents
(Respondents/Cross-Applicants)

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October 9, 2026

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Applicant

and

PERSONS UNKNOWN AND TO BE ASCERTAINED

Respondents

APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure*

FACTUM OF THE APPLICANT

(Application Hearing, Returnable April 16, 17, 20, 2026)

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PART I. OVERVIEW

1. The Regional Municipality of Waterloo (“**Region**”) seeks a declaration that its site-specific Bylaw No. 25-021, as amended on January 9, 2026 (“**Amended Bylaw**”) complies with the *Canadian Charter of Rights and Freedoms* (“**Charter**”), and an injunction to allow it to enforce the Amended Bylaw. Alternatively, if it does not comply or is otherwise defective, the Region seeks this court’s direction as to the steps that it needs to take to close the encampment (“**Encampment**”) at 100 Victoria Street North, Kitchener (the “**Property**” or “**100 Vic**”), so it can proceed with construction activities relating to the Kitchener Central Transit Hub (“**KCTH**”).

2. The parties before this court agree on many things. All agree that there is a homelessness crisis in Ontario, that the number of unhoused individuals has risen sharply since the pandemic,¹ that unhoused individuals suffer from substantially worse health outcomes than the housed population, that homelessness is a complex and “wicked” problem to address, and that solutions to the homelessness crisis will require both increased resources from all levels of government and other stakeholders and time to implement the required strategies.² Indeed, in 2024 the Region adopted a “Plan to End Chronic Homelessness” (“**PECH**”) by 2030,³ and has arguably done more than any other Ontario municipality to address these issues – almost tripling its spending on

¹ From 2021 to 2025, known homelessness increased by approximately 49.1% province-wide, to an estimated 84,973 individuals: Donaldson, J., Kandyba, L. Wang, D, *Municipalities Under Pressure One Year Later: An Update on the Human and Financial Cost of Ontario’s Homelessness Crisis*, Jan, 2026, [*Municipalities Under Pressure Update*], p.8, Ex. “C” to the Aff of L. Pin, sworn February 20, 2026 [“**2nd Pin Aff**”], 2nd Supplementary Responding Application Record [“**2nd SRAR**”], Tab 12C, p. 132.

² As acknowledged by the Respondents’ witness David Alton, “homelessness is a wicked problem meaning that it is highly complex”: Cross-Ex of D. Alton [“**Alton Transcript**”], Joint Transcript Book [“**JTB**”], Vol. 1, Tab 3, pp. 111-113 (Q102-106).

³ The Plan to End Chronic Homelessness [“**PECH**”], Ex. “A” to the Aff of P. Sweeney, affirmed June 6, 2025 [“**1st Sweeney Aff**”], Application Record [“**AR**”], Tab 2A, p. 52.

homelessness programs between 2021 and 2025,⁴ as well as implementing an ambitious plan to create 2,500 affordable housing units over 5 years.⁵ The Region remains committed to the PECH.

3. However, the issues raised by the Amended Bylaw are more limited and discrete. The Region cannot wait until 2030 for construction to commence on the KCTH. The Amended Bylaw deals only with 100 Vic – unlike the bylaw at issue in *Persons Unknown*,⁶ it does not address homelessness policy throughout the municipality. Rather, the Region has created a more localized solution for this specific property. Under the Bylaw as originally passed in April 2025 (“**Original Bylaw**”), those residing at the Encampment as of the date public notice of the Bylaw was given (“**Existing Residents**”) were able to stay until at least December 1, 2025. In addition, the Original Bylaw was accompanied by a plan (“**Transition Plan**”) to transition the approximately 40 Existing Residents to alternative accommodation over a 7-month period, while adding equivalent capacity (i.e., approximately 40 spaces) to the Region’s housing stability system.

4. From the outset, the Region took a “light touch” approach to enforcement. No charges were laid and no persons were evicted under the Original Bylaw. The Respondents moved for an interlocutory injunction in June 2025, which was granted on August 21, 2025 (“**Injunction Decision**”),⁷ and the Original Bylaw remains unenforced. The parties held a mediation in November-December 2025. The mediation was unsuccessful, but on January 9, 2026, the Original Bylaw was amended, in part to address criticisms of the Original Bylaw in the Injunction Decision. The amendments added a transition protocol (“**Transition Protocol**”), that guarantees an offer of

⁴ 1st Sweeney Aff, Application Record, AR, Tab 2, para. 67, p. 32.

⁵ Cross-Ex of P. Sweeney Sweeney, July 11, 2025 [“**1st Sweeney Transcript**”], JTB, Vol. 2, Tab 1, p. 45 (Q98).

⁶ *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, [2023 ONSC 670](#) [“**Persons Unknown**”].

⁷ *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, [2025 ONSC 4774](#) [“**Injunction Decision**”].

alternative accommodation to all Existing Residents who engage with the Region and provides for continuation of their social supports and storage of their personal effects. The amendments also removed fines for contravening the bylaw and made provision for occupants who are not Existing Residents to be brought into the housing stability system.

5. As of February 2026, no Existing Residents remain⁸ – the Region has transitioned 29 Existing Residents to alternative accommodation, and a further 11 left the Encampment without accepting offers from the Region’s team of Unsheltered Support Workers (“USW”s).⁹ Because the injunction precluded the Region from preventing newcomers from taking up occupancy at the Encampment, there has continued to be an inflow of unhoused individuals, but the USWs have successfully placed a further 22 of those.¹⁰ At last count, approximately 10-12 occupants remained at the Encampment, with 1-3 staying overnight.¹¹ This indicates that as long as the Region is permitted to prevent additional newcomers from establishing occupancy (i.e., the injunction is lifted), the Region may well be able to close the Encampment without any forced evictions.

6. The Respondents, however, argue that the Region’s efforts are insufficient. The Respondents’ approach, respectfully, is tantamount to saying that the Encampment cannot be closed for the foreseeable future, because the Region must essentially solve homelessness for the long term before it can regain possession of 100 Vic. The Respondents and their witnesses have argued variously that the Encampment must remain open to newcomers, that occupants (current or future) can only be moved to permanent housing, that no occupant can be removed from the Encampment against their will, and that the Encampment cannot be closed until the Region has

⁸ Cross-Ex of A. Moss [“**Moss Transcript**”], JTB, Vol 4, Tab 21, p. 491.

⁹ Answers to Undertakings of A. Moss, Answer #2.

¹⁰ Moss Transcript, JTB, Vol 4, Tab 21, p. 492.

¹¹ Moss Transcript, JTB, Vol 4, Tab 21, p. 491.

sufficient shelter spaces for the diverse needs of the municipality's entire (and growing) unhoused and vulnerably housed population – despite arguing that shelter spaces are in fact worse than encampments. And that all these conditions must be met, no matter how long it takes.

7. The Region submits that the Amended Bylaw strikes an acceptable balance on the issues that arise from the need to use 100 Vic for construction purposes. It does not need to be perfect, or reflect the optimal approach, as long as it is *Charter*-compliant. However, if it is found to fall short, the Region seeks a realistic road map from the court as to any further steps it must take.

PART II. FACTS

A. *The Parties and the Encampment*

8. The Region is an upper-tier municipality under the *Municipal Act, 2001*¹² with jurisdiction over areas within Cambridge, Kitchener, Waterloo, and nearby townships. The Region's responsibilities are prescribed by statute, and include public health, community services, public transit, and waste management. The Region is designated under the *Housing Services Act, 2011* as a Service Manager responsible for delivery of housing and homelessness programming.¹³ The Region does not have jurisdiction beyond its territory, nor over the overall provision of healthcare services, education, social assistance, interest rates/monetary policies, or many other policy areas which affect homelessness. The Region is also statutorily barred from planning budget deficits.¹⁴

9. As an upper-tier municipality, the Region encompasses geographic areas that are also represented by lower-tier municipalities, each with their own elected councils. These

¹² *Municipal Act, 2001*, [S.O. 2001, c. 25](#) [“**Municipal Act**”].

¹³ *Ontario Regulation 367/11*, s.6; *Housing Services Act, 2011* [S.O. 2011, c.6, Sched. 1](#).

¹⁴ *Municipal Act*, s. [289](#).

municipalities are distinct legal entities from the Region.¹⁵ Lower-tier municipalities also own land (including public parks) over which the Region does not exercise control or have jurisdiction. While the Region makes efforts to cooperate with the governments of lower-tier municipalities, the Region cannot compel these municipalities to take policy action.

10. The Region owns the Property, which is a lot devoid of permanent structures or buildings. The Property is not a public park, nor a site that is normally open for public use. Despite this, however, since approximately December 2021, 100 Vic has been the site of the Encampment, comprised of unhoused individuals and the tents and other temporary structures they have erected.

11. The Respondents to the Application are all individuals who have recently experienced homelessness in the Region, many (but not all) of whom have previously resided at 100 Vic. Some, but not all, of the Respondents may be current occupants of the Encampment. Some, but not all, of the Respondents are Existing Residents within the meaning of the Amended Bylaw (detailed below). An *amicus curiae* has also been appointed to represent the interests of “those persons living in the encampment whose capacity may be in issue and who have not retained counsel”.¹⁶ The *amicus*’ position on the Application is generally aligned with that of the Respondents.

B. The Encampment’s Significant Health and Safety Risks

12. There have been significant public health and safety concerns arising from the Encampment throughout its existence. These include overcrowding, improperly disposed of drug paraphernalia, fire hazards, violence between residents, significant garbage accumulation, rodent

¹⁵ While they are represented on Regional Council and often coordinate with the Region, the Region does not exercise control over the lower-tier municipalities.

¹⁶ Order of Justice Gibson dated May 28, 2025, para. 1.

activity, the presence of human urine and feces, and construction of semi-permanent structures with no apparent adherence to building standards.¹⁷

13. Recognizing both the dangers of encampment living and the practical reality of the situation, the Region has taken significant steps to ameliorate the living conditions on the site,¹⁸ including hiring on-site security and pest control,¹⁹ arranging for regular cleaning of the Property,²⁰ adding proper waste-bins onsite, and installing and servicing onsite portable toilets.²¹ The Region currently spends approximately \$66,200 per month maintaining the Encampment, exclusive of staffing costs for social supports, outreach facilities, or bylaw staff who regularly attend the Property.²² The Region's efforts in respect of the Encampment are consistent with the National Working Group on Homelessness' recommendations for municipalities. Those guidelines recognize that while "[h]omeless encampments will rarely satisfy the requirements of the human right to housing, and thus should not be understood as a solution to homelessness and should not be permanent", municipalities can promote health and safety in encampments while they exist.²³

14. The Region established a team of USWs in 2023, which is currently comprised of six licensed professionals. Their role is to assist unhoused residents of the Region, including those at the Encampment, by developing and implementing Individual Housing Plans ("IHP"s) in collaboration with unhoused persons.²⁴ IHPs are personalized plans designed to match individuals

¹⁷ 1st Sweeney Aff, AR, Tab 2, para. 94, p. 28.

¹⁸ 1st Sweeney Aff, AR, Tab 2, para. 88, p. 40.

¹⁹ 1st Sweeney Aff, AR, Tab 2, paras. 88-91, pp. 40-41.

²⁰ 1st Sweeney Aff, AR, Tab 2, para. 90, p. 41.

²¹ 1st Sweeney Aff, AR, Tab 2, para. 91, p. 40.

²² 1st Sweeney Aff, AR, Tab 2, para. 92, p. 41.

²³ "Homeless Encampments: Municipal Engagement Guide", Ex. 3 to the Cross-Ex of S. Escobar, July 11, 2025 ["1st Escobar Transcript"], JTB, Vol. 1, Tab 7, p. 449.

²⁴ 1st Sweeney Aff, AR, Tab 2, para. 13, p. 18.

with housing options reflecting their specific needs and preferences, to the greatest extent possible. The USW team has been successful in supporting many unhoused individuals in the Region in finding alternative arrangements. From April 2024 to April 2025 alone, the USW team successfully supported 43 individuals from the Encampment in obtaining referrals to housing.²⁵

15. A complicating factor in the Region's attempts to assist those at the Encampment is that some individuals onsite have attempted to interfere with the Region's provision of services, such as by blocking access to waste bins on collection days²⁶ or have discouraged residents from accepting alternate shelter offers provided by USWs.²⁷ An activist group known as FightBack KW has maintained a continuous presence on the site since April 2025. The presence of activists who have come to 100 Vic since the Bylaw was passed has complicated the process of monitoring resident numbers and matching the needs of residents to available resources through IHPs.²⁸

16. Despite the Region's significant efforts to improve conditions onsite, however, the Encampment continues to pose substantial health and safety challenges to its residents and the general public. Recently, there have been several major fires at the Encampment. On February 12, 2026 a large fire in the middle of the Property reportedly injured two individuals and caused significant damage to certain structures onsite.²⁹ This fire was potentially caused by a propane tank.³⁰ Another significant fire occurred on February 14th.³¹

²⁵ 1st Sweeney Aff, AR, Tab 2, para. 92, p. 41.

²⁶ Aff of P. Sweeney, affirmed July 2, 2025 [**"2nd Sweeney Aff"**], Reply Application Record [**"RAR"**], Tab 2, para. 41, p. 23; "Maintenance workers blocked from accessing garbage bins at Kitchener encampment", Ex. 5 to the Cross-Ex of J. Droog, [**"Droog Transcript"**], JTB, Vol. 1, Tab 5, p. 298.

²⁷ 2nd Sweeney Aff, RAR, Tab 2, para. 40, p. 23.

²⁸ 2nd Sweeney Aff, RAR, Tab 2, para. 12, 14.

²⁹ Aff of P. Sweeney, affirmed February 27, 2026 [**"5th Sweeney Aff"**], Supplementary Application Record [**"SAR"**], Tab 6, para. 5, p. 153.

³⁰ 5th Sweeney Aff, SAR, Tab 6, para. 5, p. 153.

³¹ 5th Sweeney Aff, SAR, Tab 6, para. 7, p. 153.

17. The Region has also recently become concerned by heightened security risks at the Encampment. Given these concerns, in December 2025 the Region instructed the USW team to reduce its attendance at the Property from daily to once a week (although the team continued to be available at a nearby location).³² The Region also reduced attendance of maintenance and other non-security staff/contractors to once a week (and only when police are present), resulting in a reduction in cleaning and pest control conducted at the Property.³³ Region staff passed on a warning that there were reports of weapons to Sanguen Health Centre – a healthcare services agency that provides services at the Encampment via a mobile treatment bus – after which Sanguen withdrew from providing on-site services from mid-December 2025 to mid-January 2026.³⁴

C. The Persons Unknown Decision and the Region’s Subsequent Efforts

18. The Encampment was also the subject of proceedings in 2022-2023, when the Region sought to enforce its general, region-wide Code-of-Use Bylaw against individuals living at the Encampment. The Code-of-Use Bylaw prohibits overnight camping without a permit on any property owned by the Region.³⁵ In that application, the Region took the position that it would use the court’s order as a precedent for other encampments across the Waterloo region.³⁶

19. In *Persons Unknown*, Justice Valente declined to enforce the Code-Of-Use Bylaw against residents of the Encampment, concluding that to do so would amount to a deprivation of their life, liberty, and security of the person contrary to the principles of fundamental justice, and thereby infringe their rights under s.7 of the *Charter*. He held that the Code-of-Use Bylaw was overbroad

³² Aff of A. Moss, affirmed January 16, 2026 [“**Moss Aff**”], SAR, Tab 5, paras. 28-29, p. 128.

³³ Moss Aff, SAR, Tab 5, para. 10, p. 124.

³⁴ Moss Aff, SAR, Tab 5, paras. 30-31, p. 128; Aff of J. Kalbfleisch, 2nd SAR, Tab 9, para. 6, p. 60.

³⁵ *Code-of-Use By-law*, Sched. B, s. 2(t), Ex. B to 2nd Sweeney Aff, RAR, p.11.

³⁶ *Persons Unknown*, para. 6, 11. The Region had also used the Code-of-Use Bylaw in past to clear other encampments.

and grossly disproportionate to the objectives relied upon by the Region.³⁷ He declared that insofar as the Code-Of-Use Bylaw prevented the Encampment residents from living and erecting temporary shelters without a permit on the Property when the number of homeless persons in the Region exceeds the number of available accessible shelter beds in the Region, the Bylaw contravened s. 7 of the *Charter* in a manner that was not saved under s. 1 and was to that limited extent inoperative.³⁸ Justice Valente found no s. 15 violation.³⁹

20. Since *Persons Unknown*, the Region has made significant investments in its homelessness prevention and response efforts. Since 2022 (when *Persons Unknown* was argued), the Region has more than doubled its operating budget for homelessness programs and services, from \$30.9 million to \$65.5 million (and has approximately tripled its budget since 2021), with corresponding increases in capacity.⁴⁰ The USW team was established in 2023. In April 2024, the Region adopted the PECH with consultation from various stakeholder groups.⁴¹

21. The PECH lays out the Region’s proposed approach to achieving functional zero chronic homelessness in Waterloo Region by 2030. The Region works to implement the PECH with various stakeholders and advisors, including advocates for Encampments. The PECH is co-authored by the Social Development Centre Waterloo Region (“SDC”), a Region-funded organization with a mandate to ensure that lived experience is the basis for collective action.⁴² Two other groups, the Co-Creator’s Group and the Lived Experts Prototyping Cohort, have provided

³⁷ *Persons Unknown*, paras. [97](#), [101](#), [104](#), [114](#), [119](#).

³⁸ *Persons Unknown*, at para. [158](#).

³⁹ *Persons Unknown*, para. [120-127](#).

⁴⁰ 1st Sweeney Aff, AR, Tab 2, para. 67, p. 32.

⁴¹ PECH, Ex. “A” to the 1st Sweeney Aff, AR, Tab 2A, p. 52.

⁴² PECH, Ex. “A” to 1st Sweeney Aff, AR, Tab 2A, p. 52.

significant input on the PECH and represent the experiences of unhoused individuals and their allies, as well as service providers in the field.⁴³ The Co-Creator's Group meets monthly.⁴⁴

22. Despite these efforts, however, the unhoused population in the Region continues to grow, and exceeds the number of available shelter beds and other housing options. While no one measure of homelessness is fully reliable, the Region is mandated to conduct periodic “point-in-time” counts (“**PIT Counts**”). In a September 2021 PIT count, 1,085 people were counted as experiencing homelessness in the region, with 75% classified as experiencing chronic homelessness.⁴⁵ By October 2024, those numbers had increased to 2,371 and 78% respectively.⁴⁶ This growth is consistent with provincial trends,⁴⁷ which show significant growth in unhoused populations attributed to a complicated confluence of both national and international factors.⁴⁸ The situation in the Waterloo region appears to be more acute than elsewhere in the province, but the Region's response has been significantly more robust. Between 2021 and 2025, the overall homeless count in the province increased by 49.1%, with the average increase in municipal funding being 48.2%.⁴⁹ In the Waterloo region, the PIT Count increased by 118% over almost the same period, while the Region's operating budget for homelessness programs increased by 183%.⁵⁰

23. Despite the challenges, the Region has made important strides in addressing the homelessness crisis and remains committed to ending chronic homelessness. The Region's efforts

⁴³ PECH, Ex. “A” to 1st Sweeney Aff, AR, Tab 2A, p. 52.

⁴⁴ PECH, Ex. “A” to 1st Sweeney Aff, AR, Tab 2A, p. 55.; 2nd Sweeney Aff, AR, Tab 2, para. 36 p. 24.

⁴⁵ 2021 Point in Time Count [“**2021 PITC**”], Ex. “D” to the 1st Sweeney Aff, AR, Tab 2D, p. 171.

⁴⁶ 2024 Point in Time Count [“**2024 PITC**”], Ex. “E” to the 1st Sweeney Aff, AR, Tab 2E, p. 174.

⁴⁷ Municipalities Under Pressure Update, Ex. “C”, 2nd Pin Aff, 2nd SAR, Tab 12, pp. 132.

⁴⁸ Municipalities Under Pressure Update, Ex. “C”, 2nd Pin Aff, 2nd SAR, Tab 12, p. 136.

⁴⁹ Municipalities Under Pressure Update, Ex. “C”, 2nd Pin Aff, 2nd SAR, Tab 12, pp. 134.

⁵⁰ 1st Sweeney Aff, AR, Tab 2, paras. 61, 67, pp. 30,23.

have been crucial in curbing the growth of homelessness in the Waterloo Region.⁵¹ The problem, unfortunately, is – as all parties agree – not entirely within the Region’s control or ability to fix.⁵² Province-wide, it is projected that the homeless population will more than double by 2035.⁵³

D. The KCTH

24. The Region always taken the position that the Encampment would not be permitted to continue indefinitely. Since before *Persons Unknown*, the Region has indicated that the Property would eventually be needed in connection with the construction of the KCTH.⁵⁴ The KCTH is a landmark project that will create significant economic and social growth for residents of the Waterloo region and enable both a reduction in commuter times and greater public transportation options. The Region finalized an MOU with Metrolinx for the KCTH in May 2025.⁵⁵

25. Once completed, the KCTH will act as a gateway to the Waterloo Region and surrounding area, serving current and future residents, as well as visitors. It is vital to the economic and social growth of the Region, and a key part of the Region’s strategic priorities.⁵⁶ It will combine numerous services, including ION light rail transit, Grand River Transit, expanded rail and bus GO Transit, VIA Rail, inter-city busy service, passenger vehicles and car shares, and cyclists and pedestrians, into one central and convenient transit hub in the heart of the region.⁵⁷ A reduction in commuter times across the region will constitute a significant service to its residents. This is especially true

⁵¹ The Homeless Individuals and Families Information System (HIFIS) reflects that there were 462 and 470 living unsheltered in the Region in November and December 2025, respectively. HIFIS tracks individuals who interact with various homelessness services provided or funded by the Region: 2nd Undertakings of P. Sweeney, Answer #1.

⁵² Ex. 1 to the Cross-ex of S. Hwang [“**Hwang Transcript**”], JTB, Vol. 1, Tab 8, pp. 465, 468 (Q22, 32); Cross-Ex of M.J. Houle [“**Houle Transcript**”], JTB, Vol. 4, Tab 19, pp. 428-429, (Q140-146); Cross-Ex of B. Pauly [“**Pauly Transcript**”], JTB, Vol 4, Tab 17, pp. 228-229 (Q152-155).

⁵³ Municipalities Under Pressure Update, Ex. “C”, 2nd Pin Aff, 2nd SAR, Tab 12, pp. 135.

⁵⁴ Aff of D. Spooner, affirmed June 6, 2025 [“**Spooner Aff**”], AR, Tab 3, para. 18, p. 355.

⁵⁵ Spooner Aff, AR, Tab 3, para. 32, p. 359.

⁵⁶ Spooner Aff, AR, Tab 3, para. 16, p. 354.

⁵⁷ Spooner Aff, AR, Tab 3, para. 18, p. 355.

for those who rely on public transit daily, including those who commute for work, seniors, students, lower-income residents, and people with disabilities.

26. Metrolinx has advised the Region that it requires use of the Property for construction staging and laydown purposes for the KCTH.⁵⁸ Staging and laydown are critical preparation activities for the construction of a physical project.⁵⁹ They involve positioning and organizing construction materials (such as steel, concrete, bricks, wood), equipment and tools (including large construction machines and vehicles) and other items such as temporary structures for access during a project, to ensure worker safety and maintain workflow.⁶⁰

27. The proximity, size and grade of a staging and laydown site are important factors to consider in choosing such a site.⁶¹ Since large construction equipment and materials are transported from the laydown site to or from the construction site, a laydown site that is even a short distance away from can increase the chance of worker injury by increasing the distance materials or equipment need to travel. On similar rail construction projects, workers have been injured by equipment falling over while traversing a grade raising or on shaky ground.⁶² This can also, on aggregate, add significant additional time to a project.

28. The Region must provide the Property to Metrolinx in a condition fit for use, which means the Region will require time to engage in remediation and preparation of the Property prior to turnover to Metrolinx.⁶³ This may include clean up, investigations, geotechnical testing, soil

⁵⁸ Spooner Aff, AR, Tab 3, para. 37, p. 361; Ex. "I" to the Spooner Aff, RMR, Tab 31, p. 478.

⁵⁹ Spooner Aff, AR, Tab 3, para. 39, p. 361.

⁶⁰ Spooner Aff, AR, Tab 3, para. 39, p. 361.

⁶¹ Spooner Aff, AR, Tab 3, paras. 39-40, pp. 361-362.

⁶² Spooner Aff, AR, Tab 3, para. 40, p. 362.

⁶³ Spooner Aff, AR, Tab 3, paras. 45-46, p. 464.

testing and scraping, removal of hazardous materials, and/or groundwater monitoring. It will take the Region approximately three months to complete this work.⁶⁴

29. 100 Vic is the only space owned by the Region that is proximate to the construction work to be conducted by Metrolinx, of an adequate size, and on-grade with the construction site.⁶⁵ The Region has considered whether it could provide Metrolinx with an alternative site, but has determined that no other site can be used.⁶⁶ All other properties owned by the Region within 1 kilometre of the work are either properties that are already being used for the KCTH site or the Region's other works, have active ongoing uses, or are not on-grade or large or proximate enough for Metrolinx's purposes.⁶⁷ The option of purchasing additional land is impractical because the cost of acquiring suitable land that is proximate to the construction site is prohibitively high and the types of land available in close proximity are not suitable for construction purposes.⁶⁸ Further, the time required to identify, purchase, and prepare new land would delay the project timeline.⁶⁹

30. Given that construction work will be taking place on three sides of the Property, including rail work, road work, and (most critically) demolition work, the Region is also concerned with the health and safety risks to anyone residing nearby while construction work is ongoing.⁷⁰ The risks of heavy machinery or other fatal accidents must be taken into account.

⁶⁴ Spooner Aff, AR, Tab 3, paras. 52-55. P. 366.

⁶⁵ Spooner Aff, AR, Tab 3, paras. 41-44, pp. 363-363.

⁶⁶ Spooner Aff, AR, Tab 3, para. 44, p. 363.

⁶⁷ Spooner Aff, AR, Tab 3, para. 41, p. 362.

⁶⁸ Spooner Aff, AR, Tab 3, para. 44, p. 363.

⁶⁹ Spooner Aff, AR, Tab 3, para. 44, p. 363.

⁷⁰ Spooner Aff, AR, Tab 3, paras. 52-55, p. 366.

31. At the time of *Persons Unknown*, the Region did not yet have a defined start date for the KCTH, nor a date by which the Property specifically would be needed.⁷¹ The Region did not put forward the KCTH as the purpose of the Code-of-Use Bylaw in *Persons Unknown*, and instead relied on the general purposes of preventing physical damage to Region-owned lands, preventing disruption to the Region's operations, and regulating the use and enjoyment of designated areas by others.⁷² By contrast, the evidence on this application is that Metrolinx (the Region's contractual partner in constructing the KCTH) has advised the Region that it requires vacant possession of the Property in October 2026 for construction staging and laydown purposes, which in turn means that the Region requires possession by end of June.⁷³ Separate from the use of the Property itself, as the KCTH project continues, there will be construction activity on three sides of the Property, rendering it unsafe for residents to remain onsite.

E. The Original and Amended Bylaws and the Injunction Decision

32. Given its contractual commitments to deliver the Property to Metrolinx, on April 23, 2025, the Region enacted the Original Bylaw to provide for vacant possession of 100 Vic by December 1, 2025. Amendments were made on January 9, 2026, to add additional protections for those at the Encampment. The Amended Bylaw came into force (though enjoined) on February 1, 2026.

33. As drafted, the Amended Bylaw provides for a phased closing of the Encampment by distinguishing between the approximately 40 individuals residing at the Encampment as of April 16, 2025, the date of public notice of the Bylaw (the Existing Residents), and those who have come to the Property since that date. Under the Original Bylaw, Existing Residents were permitted to

⁷¹ *Persons Unknown*, at paras. [15-16](#).

⁷² *Persons Unknown*, at paras. [9](#), [114](#), [119](#).

⁷³ Cross-Ex of D. Spooner, JTB, Vol. 5, Tab 25, pp. 172-173 (Q142).

remain at the Property until December 1, 2026 – more than 7 months after the Bylaw was enacted – giving the Region time to work with them to transition them to alternative accommodation. The Amended Bylaw revised that date to April 1, 2026.

34. Under the Amended Bylaw, as with the Original Bylaw, no newcomers may join the Encampment or remain as occupants on the Property. This structure allows for a gradual closure of the Encampment, similar to how emergency shelters wind down their operations over time in the event of a planned closure.⁷⁴ This gradual approach seeks to avoid a forced displacement of those at the site without adequate notice or supports, which benefits both the Region (which assists in finding individuals alternative arrangements) and individuals living at the Encampment (for whom greater notice of the Encampment's closure helps to mitigate harm). Indeed, as noted above, none of the 40 Existing Residents remain onsite at the Property, a testament to the Region's gradual, individualized approach for relocating unhoused individuals from the Encampment.⁷⁵

35. To ensure that Existing Residents are adequately supported in this transitional period, the Regional Council also approved the accompanying Transition Plan to support the Existing Residents along with the Original Bylaw. This included budgeting an additional \$814,333 in net new funding in 2025 to ensure that there is additional capacity in the housing stability system for the residents who will need to transition to other accommodations because of the anticipated closure.⁷⁶ This was intended to ensure that other unhoused people in the Waterloo region are not negatively affected (e.g., displaced or moved further down waiting lists) by the closure. While the \$814,333 is nominally allocated specifically among additional rent supplements, motel rooms, and

⁷⁴ 1st Sweeney Aff, AR, Tab 2, para. 117, p. 35.

⁷⁵ Moss Transcript, JTB, Vol 4, Tab 21, p. 491.

⁷⁶ 1st Sweeney Aff, AR, Tab 2, para. 41, p. 25.

supportive housing, Region staff have the discretion to move funds between these categories to meet the specific needs of residents.⁷⁷ The Region recognizes that the needs of residents are diverse, and some may be more suited to one form of accommodation rather than another. The Region's USW team also continues to support the Encampment residents, including by developing IHPs with willing residents.⁷⁸

36. Since this court's Injunction Decision in August 2025,⁷⁹ the Region has been enjoined from enforcing the Original Bylaw and Amended Bylaw until the hearing of this application on the merits. As the Region has not been able to prevent newcomers from joining the Encampment, the population has varied between approximately 40 individuals and the most recent count of 10-12 occupants as of February 2026. None of the original 40 Existing Residents remain on site, and the USWs have also successfully supported the transition of at least 22 more recent arrivals to alternative housing since May 2025.

37. The January 2026 amendments to the Bylaw, including the Transition Protocol, provide greater protections for both Existing Residents and more recent occupants. For example:

- (a) Existing Residents cannot be removed from the Property unless they have an offer in writing for alternative accommodation (with limited health and safety related exceptions). These "Alternative Accommodations" as defined in the Amended Bylaw include emergency shelters, transitional housing, affordable/supportive

⁷⁷ 1st Sweeney Aff, RMR, Tab 2, para. 42, p. 25; 1st Sweeney Transcript, JTB, Vol. 2, Tab 1, pp. 46-48 (Q102-107).

⁷⁸ 1st Sweeney Aff, AR, Tab 2, para. 37, p. 24.

⁷⁹ *Injunction Decision*, [2025 ONSC 4774](#).

housing, motels, and other options, recognizing that Existing Residents have a diversity of needs which different types of solutions might address;⁸⁰

- (b) In the event that an Existing Resident loses their Alternative Accommodation due to non-compliance with applicable rules, the Amended Bylaw provides that the Existing Resident will be referred back to USWs and best efforts will be made to find a substitute option;
- (c) Existing Residents are guaranteed offers of social service supports of the same nature as provided at 100 Vic once they move to Alternative Accommodation;
- (d) The Region will offer an Existing Resident transportation for themselves and their belongings, and coverage for up to 6 months of storage for additional belongings, at no cost to the Existing Resident;⁸¹
- (e) For those who are not Existing Residents but are onsite at 100 Vic, the Region will take them into the housing stability system and make efforts, subject to availability and cooperation, to provide those individuals with appropriate housing options.⁸²

F. Consultation Around the Original and Amended Bylaws

38. The Original and Amended Bylaws were developed in the broader context of years of engagement and consultation with stakeholders, advocates, and experts on the issue of addressing homelessness. Amongst other initiatives, the Region participates in the PECH Co-Creators Group (a group of system leaders, service staff and representatives from equity-owed groups that advise on the implementation of the PECH),⁸³ the Lived Experience Working Group (another information

⁸⁰ “Regional Bylaw Number 26-001” [“**Amending Bylaw**”], Ex. A to the Aff of D. Kang, affirmed January 9, 2026 [“**Kang Aff**”], SAR, Tab 4, pp. 93-94.

⁸¹ Amending Bylaw, Ex. A to the Kang Aff, SAR, Tab 4, p. 95.

⁸² Amending Bylaw, Ex. A to the Kang Aff, SAR, Tab 4, pp. 93-94.

⁸³ Aff of P. Sweeney affirmed July 31, 2025 [“**3rd Sweeney Aff**”], RAR, Tab 3, para. 24, p. 73.

channel between community members and the Region on issues related to homelessness),⁸⁴ and other forums and groups. The Region also hires consultants to engage with the Region regarding its implementation of the PECH, including one of the Respondents' affiants, Dr. Laura Pin.⁸⁵

39. On the ground, the Region's USW team is constantly receiving feedback through their interactions with unhoused individuals in the Region (at the Encampment and beyond), and often relays that feedback to more senior regional staff.⁸⁶ The Region, however, remains constrained by lack of resources, and by factors affecting homelessness outside of its control, in its ability to implement feedback obtained through these channels.

40. Public notice of the Original Bylaw was posted on April 16, 2025, and it was debated at an open Regional Council meeting on April 23, 2025, at which proponents and opponents could – and did – speak to it.⁸⁷ It was well known to Council that there was opposition to the closure of the Encampment. The Region has continued to seek input from the community on implementation of the Bylaw. For example, when the PECH Co-Creators Group met on May 15, 2025, the meeting was dedicated to discussing the Encampment and Bylaw,⁸⁸ and participants identified potential areas of focus for responding to and supporting people living at the Encampment.⁸⁹

41. The Amended Bylaw's additional protections for Existing Residents and others present at the Encampment demonstrate the Region's responsiveness to concerns raised by community members, particularly regarding the Original Bylaw's lack of an express guarantee of alternative

⁸⁴ 3rd Sweeney Aff, RAR, Tab 3, para. 26, p. 74.

⁸⁵ 3rd Sweeney Aff, RAR, Tab 3, para. 29, p. 75.

⁸⁶ 3rd Sweeney Aff, RAR, Tab 3, para. 32, p. 75.

⁸⁷ Droog Transcript, JTB, Vol. 1, Tab 5, p. 245 (Q152); Alton Transcript, JTB, Vol. 1, Tab 3, pp. 113-115 (Q107-112).

⁸⁸ 3rd Sweeney Aff, RAR, Tab 3, para. 25, p. 73.

⁸⁹ 3rd Sweeney Aff, RAR, Tab 3, para. 25, p. 73.

accommodation. Community members also had an opportunity to provide feedback on the Amended Bylaw in a manner that went beyond the Region's normal practices. Public notice of the Amended Bylaw was posted on December 18, 2025 and it was debated at an open Regional Council meeting on January 9, 2026, at which proponents and opponents alike provided comment. The Region also posted a notice of the intention to consider the proposed amendments and a copy of the proposed amendments at the Property.⁹⁰ Information sessions about the Amended Bylaw intended for people living at the Encampment were held on January 5 and 7, 2026 (and public notice of these sessions was also posted at the Encampment).⁹¹

G. Expert Evidence on the Application

42. The parties have each tendered expert evidence. At a high level, the parties' medical experts agree that being unhoused (including at encampments) is associated with significant risks and negative health outcomes as compared to being housed; they differ on the preferability of the Encampment as compared to indoor shelter options such as emergency shelters and hotel/motels. There is little or no empirical data on the risks of encampments compared to other outdoor settings.⁹²

1. The Region's Expert Evidence: Dr. Koivu

43. The Region put forward Dr. Sharon Koiu – a physician with over 40 years of experience in Ontario, including 13 years as an addiction physician – as an expert witness.⁹³ Dr. Koivu also has past experience as an emergency room physician.⁹⁴ In her experience practicing as a physician

⁹⁰ Ex. "B" to the Kang Aff, SAR, Tab 4B, p. 102.

⁹¹ Ex. "B" to the Kang Aff, SAR, Tab 4B, pp. 102-103.

⁹² Cross-Ex of S. Gupta ["**Gupta Transcript**"], JTB, Vol. 4, Tab 18, pp. 272-274 (Q106-109).

⁹³ Aff of S. Koivu, affirmed September 11, 2025 ["**Koivu Aff**"], SAR, Tab 2, paras. 1-2, p. 16.

⁹⁴ Cross-Ex of S. Koivu ["**Koivu Transcript**"], JTB, Vol. 2, Tab 13, pp. 353-354 (Q74).

in London and St. Thomas, the majority of the patients Dr. Koivu has treated have been unhoused or vulnerably housed.⁹⁵ Dr. Koivu's expert evidence was accepted in *Heegsma*, where Justice Ramsay concluded that she "has expertise outside the knowledge of a trier of fact on the question of whether there are health advantages of an encampment over a shelter".⁹⁶

44. In Dr. Koivu's expert opinion, encampments "pose extensive health and safety risks to the people living [in them] as well as public health and safety risks to the community".⁹⁷ These risks render encampments "not a safe alternative to housing or to a shelter".⁹⁸ In her expert opinion, the expert evidence tendered by the Respondents "does not support the conclusion that encampments pose lower health risks than shelters or other accommodation"⁹⁹ and some of the Respondents' evidence perpetuates "a developing false and even dangerous narrative...that encampments are safe and even desirable places to live".¹⁰⁰

45. Citing the academic literature on the subject, Dr. Koivu explains that "unsheltered people experiencing homelessness have a 2.7-fold increased risk of mortality compared to those who are sheltered" and that there are various health and safety risks that are either only present or are more severe in an encampment as compared to an indoor shelter.¹⁰¹ These risks include injuries and illnesses caused by poor living conditions specific to encampments rather than homelessness generally (such as hypothermia, frostbite, and heatstroke due to insufficient protection provided

⁹⁵ Koivu Transcript, JTB, Vol. 2, Tab 13, pp. 345-347, 350-351 (Q44, Q49, Q60-61).

⁹⁶ *Heegsma v. Hamilton (City)*, [2024 ONSC 7154](#), para. 15 (appeal heard in February 2026 currently under reserve) [*"Heegsma"*].

⁹⁷ Koivu Aff, SAR, Tab 2, para. 17, p. 20.

⁹⁸ Koivu Aff, SAR, Tab 2, paras. 118, 126, pp. 41-42.

⁹⁹ Koivu Aff, SAR, Tab 2, para. 63, p. 28.

¹⁰⁰ Koivu Aff, SAR, Tab 2, para. 126, pp. 42-43.

¹⁰¹ Koivu Aff, SAR, Tab 2, paras. 18-19, p. 20.

by tents from the elements),¹⁰² fires¹⁰³, violence from other residents,¹⁰⁴ and increased drug use in an encampment setting.¹⁰⁵

46. Dr. Koivu also explains that tent-based living comes with various risks, as these structures “are largely ineffective at preventing significant injury from exposure, and should not be regarded as a safe alternative to indoor shelters”.¹⁰⁶ Dr. Koivu recounts firsthand experience treating patients who developed serious frostbite while living in a tent within an encampment, leading to hypothermia,¹⁰⁷ gangrene,¹⁰⁸ loss of digits and, feet, and even legs.¹⁰⁹ Dr. Koivu also details the risk of trench foot that comes from prolonged exposure to damp and wet conditions, such as a poorly maintained tent, which in turn can lead to infections and other health challenges.¹¹⁰ She also explains that attempts at staying warm in an encampment setting carry their own dangers, such as burn risk from fires within or near tents.¹¹¹ In summertime, occupants of tents are at risk of overheating, leading to heat strain and dehydration, amongst other conditions.¹¹² Dr. Koivu also recounts a patient she treated who reported severe damage to their face believed to be caused by a rodent attack while the patient was unconscious due to drug use.¹¹³

47. Dr. Koivu also explains that encampments are congregate settings which entail risks of communicable diseases, especially without proper disease risk management protocols. For

¹⁰² Koivu Aff, SAR, Tab 2, 20-25, 31-56, pp. 20-27.

¹⁰³ Koivu Aff, SAR, Tab 2, 27-29, p. 21.

¹⁰⁴ Koivu Aff, SAR, Tab 2, paras. 29, 71-73, pp. 21, 30-31.

¹⁰⁵ Koivu Aff, SAR, Tab 2, para. 92, pp. 34-35.

¹⁰⁶ Koivu Aff, SAR, Tab 2, para. 21, p. 20.

¹⁰⁷ Koivu Aff, SAR, Tab 2, 24-25, p. 21.

¹⁰⁸ Koivu Aff, SAR, Tab 2, para. 23, pp. 20-21.

¹⁰⁹ Koivu Aff, SAR, Tab 2, para. 23, pp. 20-21.

¹¹⁰ Koivu Aff, SAR, Tab 2, paras. 30-32, p. 22.

¹¹¹ Koivu Aff, SAR, Tab 2, para. 24-29, p. 21.

¹¹² Koivu Aff, SAR, Tab 2, paras. 35-41, pp. 23-24.

¹¹³ Koivu Aff, SAR, Tab 2, para. 43, p. 24.

example, she details the risk of viral, bacterial, and parasitic infection spread through feces in sites with inadequate sanitation,¹¹⁴ the risks associated with needle sharing or improperly discarded needles (which often occurs in these settings),¹¹⁵ the increased risk of typhus, tuberculosis, lice, amongst other health risks.¹¹⁶

48. While she recognizes that emergency shelters and motels are not perfect solutions to homelessness nor free from risks,¹¹⁷ Dr. Koivu's evidence is that encampment living carries far more risks to inhabitants than emergency shelters and motels, and that health and safety outcomes are better when individuals are staying indoors.¹¹⁸ Emergency shelters implement safeguards to mitigate the risks associated with congregate living, including social distancing, mask wearing, cleaning of linens, onsite medical support, such that the evidence demonstrates their ability to successfully contain outbreaks of diseases.¹¹⁹ Such strategies are not available in encampments.¹²⁰ Shelters, she explains, also have strategies for addressing and containing physical and/or sexual violence which are not available in lawless encampments.¹²¹

2. Respondents' Medical Experts: Dr. Hwang, Dr. Gupta, and Bernadette Pauly

49. In contrast to Dr. Koivu's direct comparison of encampment living with shelters, the Respondents' medical expert evidence from Dr. Stephen Hwang is general in nature, and largely focused on the harms of homelessness itself, which are uncontested.¹²² Dr. Hwang's evidence was

¹¹⁴ Koivu Aff, SAR, Tab 2, paras. 48-50, p. 25.

¹¹⁵ Koivu Aff, SAR, Tab 2, paras. 52-53, p. 26.

¹¹⁶ Koivu Aff, SAR, Tab 2, paras 57-58, p. 27.

¹¹⁷ Koivu Transcript, JTB, Vol. 2, Tab 13, pp. 424-425 (Q228); Koivu Aff, SAR, Tab 2, paras 58, p. 27.

¹¹⁸ Koivu Transcript, JTB, Vol. 2, Tab 13, p. 419-430 (Q220-233).

¹¹⁹ Koivu Aff, SAR, Tab 2, paras 59-61, pp. 27-28.

¹²⁰ Koivu Aff, SAR, Tab 2, para. 61, p. 28.

¹²¹ Koivu Aff, SAR, Tab 2, paras. 70-73, 79-82, pp. 30-32.

¹²² Aff of S. Hwang, sworn May 6, 2025, Supplemental Responding Application Record ["SRAR"], Vol. 1, Tab 2, paras. 7-8, pp. 67-71.

largely confined to providing an opinion that homelessness is associated with negative health outcomes, and that homelessness itself (including encampments) “is the result of a complex interaction of factors” at both the individual and societal levels for which “the cooperation of all three levels of government” is required to address.¹²³ Dr. Hwang also conceded that he is “not an expert in the nature or the adequacy of the efforts that are being made on the ground” in respect of the Encampment and the Bylaw,¹²⁴ and that while he has published extensively on the issue of the negative health effects of being homeless, he has never conducted or participated in any research regarding the adverse effects of forced encampment evictions.¹²⁵

50. Despite his acknowledged lack of direct expertise in this area, Dr. Hwang’s affidavit attaches an article which he described on cross-examination as “the best and most representative article” on the harms of encampment evictions.¹²⁶ However, he conceded that the “encampment sweeps” that were the article’s focus – forced evictions with no or minimal notice and without accompanying supports or offers of alternative shelter – are in many key ways distinct from what the Region was contemplating doing in respect of the Encampment.¹²⁷

51. Dr. Gupta was similarly general in his evidence. Like Drs. Koivu and Hwang, Dr. Gupta agrees that there are negative health outcomes associated with living unsheltered or rough, including in an encampment.¹²⁸ He further conceded that much of the academic literature does not differentiate between encampment living and other forms of being unhoused,¹²⁹ including various

¹²³ Ex. 1 to the Hwang Transcript, JTB, p. 509; Hwang Transcript, JTB, Vol. 1, Tab 8, pp. 465, 468 (Q22, 32).

¹²⁴ Hwang Transcript, JTB, Vol. 1, Tab 8, pp. 479 (Q69).

¹²⁵ Hwang Transcript, JTB, Vol. 1, Tab 8, p. 473 (Q51-52).

¹²⁶ Hwang Transcript, JTB, Vol. 1, Tab 8, p. 473 (Q53).

¹²⁷ Hwang Transcript, JTB, Vol. 1, Tab 8, pp. 477, 481, 482, 483 (Q64, 75, 76, 79).

¹²⁸ Aff of S. Gupta, sworn August 15, 2025, SRAR, Vol. 2, Tab 6, para. 9, pp. 9-11; Gupta Transcript, JTB, Vol. 4, Tab 18, pp. 254-259, (Q50-58).

¹²⁹ Gupta Transcript, JTB, Vol. 4, Tab 18, pp. 259-260, (Q58-60).

sources upon which he relies in his affidavit.¹³⁰ The sole study which Dr. Gupta attaches to his affidavit – the MARCO study – is based on a relatively small and non-representative sample size, pure self-reports of largely subjective factors (e.g., subjective worries regarding violence rather than actual experiences thereof), and was conducted in the specific context of the height of COVID-19 in 2021 in Toronto. It therefore is not particularly generalizable to the Encampment specifically.

52. Crucially, Dr. Gupta conceded that he was “not denying that...living in a permanent, physical structure provides more elements and more safety than living in an encampment”.¹³¹ He agreed with Dr. Koivu that harms such as hypothermia, frostbite, and trench foot can all occur when someone is sleeping in a tent rather than outside without a tent,¹³² that any protection against the elements afforded by a tent may be lost when it is not properly maintained,¹³³ and that if an individual takes drugs in their tent alone they may not be found in the case of an overdose compared to being in a public space.¹³⁴ As was the case with Dr. Hwang, Dr. Gupta’s brief evidence on the harms of encampment evictions is entirely untethered from the reality of the Region’s approach. On cross, Dr. Gupta agreed that providing more notice of eviction and otherwise providing for the needs of evicted individuals being displaced would be better than not doing so.¹³⁵

53. Bernadette Pauly is a registered nurse with a PhD in nursing. Dr. Pauly has faced the court’s criticism when tendered as an expert witness in other encampment cases. In *Brett*, the BCSC held that “much of what was contained in [Dr. Pauly’s] affidavit amounted more to argument than the

¹³⁰ Gupta Transcript, JTB, Vol. 4, Tab 18, pp. 260-266, 268-273 (Q64-84, Q90-96, Q101, Q106).

¹³¹ Gupta Transcript, JTB, Vol. 4, Tab 18, pp. 301-302, (Q195).

¹³² Gupta Transcript, JTB, Vol. 4, Tab 18, p. 304 (Q204).

¹³³ Gupta Transcript, JTB, Vol. 4, Tab 18, pp. 305-306 (Q213).

¹³⁴ Gupta Transcript, JTB, Vol. 4, Tab 18, pp. 313-314 (Q231-Q234).

¹³⁵ Gupta Transcript, JTB, Vol. 4, Tab 18, pp. 324-325, 330-331 (Q273, Q288-294).

assistance expected of an expert witness pursuant to [BC's Rules]".¹³⁶ The same can be said for much of what Dr. Pauly has put forward in her affidavit in this proceeding. For example, when asked on cross examination about what would be required to transition individuals from an encampment, Dr. Pauly offered the completely untenable answer that individuals would need to be offered options that meet the seven criteria for adequate housing as set out in the *National Housing Strategy Act*, which would exclude any non-permanent options such as shelters.¹³⁷ A portion of Dr. Pauly's affidavit itself also asserts a "right to housing", a point of law upon which expert evidence is improper.¹³⁸ Further, the academic literature Dr. Pauly does cite is distinguishable from the case at hand (for example, articles about encampment "sweeps" rather than staged approaches as offered by the Region).¹³⁹ The Region's position is therefore that Dr. Pauly should not be qualified as an expert witness and, if she is so qualified, that her evidence be given very little weight by the Court.

3. The Respondents' Purportedly "Expert" Non-Medical Evidence

54. The Respondents also seek to lead purportedly "expert" evidence from individuals outside the medical sphere. The Region objects to the qualification of Ms. Houle and Dr. Pin as experts. For Drs. Schwan and Gaetz, their expertise is limited to general trends regarding homelessness, and is not particularly relevant to the court's determination of the Application.

55. Ms. Houle holds the position of Federal Housing Advocate. She lacks the impartiality required of an expert witness. By her very title and the definition of her role, Ms. Houle is an

¹³⁶ *Vancouver Fraser Port Authority v Brett*, [2020 BCSC 876](#), para. 75 [*"Brett 2"*].

¹³⁷ Pauly Transcript, JTB, Vol 4, Tab 17, pp. 211-213 (Q97-101).

¹³⁸ Aff of B. Pauly, sworn August 14, 2025 [*"Pauly Aff"*], SRAR, Vol. 2, Tab 10, para. 29, p. 224.

¹³⁹ Pauly Aff, SRAR, Vol. 2, Tab 10, Footnote 31, p. 218; Pauly Transcript, JTB, Vol 4, Tab 17, pp. 193-196 (Q54-61).

advocate on the issue of encampments. Ms. Houle has, by her own description, been “[a]ctively involved in advocacy work at a national, provincial and community level” for many years,¹⁴⁰ and she concedes that this work includes “urg[ing] municipalities to work with people living in encampments to find solutions...that meet their needs”.¹⁴¹ Further, despite her duties to the court as an expert, Ms. Houle failed to disclose past advocacy she has undertaken regarding the very Encampment at issue in this Application.¹⁴² Moreover, Ms. Houle’s affidavit is largely focused on the claimed “right to housing”, a legal matter for the courts and not for any expert witness to opine on – especially one with absolutely no legal training.¹⁴³ In any event, Ms. Houle concedes that “municipalities are currently limited in their ability to address homelessness”¹⁴⁴, and that federal leadership is needed to address the housing and homelessness crisis.¹⁴⁵

56. The Region also objects to Dr. Laura Pin’s qualification as an expert. Dr. Pin was originally tendered as a lay witness, but the Respondents then put forward the same affidavit as expert evidence. She lacks the objectivity required of an expert, and her 1st affidavit is largely concerned with factual matters more suitable to a lay affidavit. She is a member of the Co-Creators table and has sat on a PECH sub-committee, she has been hired by the Region to do work regarding the PECH, and she has delegated before Regional Council to speak in opposition to the Bylaw.¹⁴⁶ She is a member of the National Encampment Litigation Strategy Working Group, a lawyer-focused group that meets to discuss strategies to assist homeless clients.¹⁴⁷ Much of her evidence is either

¹⁴⁰Houle Transcript, JTB, Vol. 4, Tab 19, pp. 398 (Q43).

¹⁴¹ Houle Transcript, JTB, Vol. 4, Tab 19, pp. 399 (Q50).

¹⁴² Houle Transcript, JTB, Vol. 4, Tab 19, pp. 433-437 (Q159-174).

¹⁴³ Aff of M.J. Houle, sworn August 15, 2025 [“**Houle Aff**”], SRAR, Tab 14, paras. 65-71, pp. 474-477.

¹⁴⁴ Houle Transcript, JTB, Vol. 4, Tab 19, p. 429 (Q145).

¹⁴⁵ Houle Transcript, JTB, Vol. 4, Tab 19, pp. 429-430 (Q147).

¹⁴⁶Aff of L. Pin, sworn July 9, 2025 [“**1st Pin Aff**”], SRAR, Vol. 1, Tab 4, paras. 3, 7, 15-19, pp. 278-280, 283-285.

¹⁴⁷ Cross-Ex of L. Pin, February 20, 2026 [“**2nd Pin Transcript**”], JTB, Vol. 5, Tab 24, pp. 65-68 (Q21-34).

impermissibly argumentative or merely provides her recollection of events.¹⁴⁸ Further, whether, as she argues, the Bylaw is consistent with “a human rights approach” is not proper opinion.¹⁴⁹

57. Dr. Pin’s evidence also has serious reliability issues. Dr. Pin conceded that in her affidavit when she spoke to “the presence of police, bobcats and dumpsters” at the Encampment,¹⁵⁰ she was not speaking based on her first-hand observation, but rather based on accounts conveyed to her, and on this basis she “assumed that there was some sort of interaction [with the police] involved with folks at the encampment”. She conceded that it was possible police were not even present.¹⁵¹

58. Dr. Pin’s 1st affidavit also does not set out the scope of her expert evidence. When cross-examined on this, Dr. Pin answered that she was there to provide evidence on the very general categories of “municipal responses to encampments, housing and homelessness policy, [and] participatory democracy”.¹⁵² Her 2nd affidavit attempts to correct this, but in its substance she opines, among other things, on whether the Region’s consultation before the Amended Bylaw was consistent with the PECH. She conceded that she has no legal training, and no mandate to speak on behalf of those involved with creating the PECH.¹⁵³

59. Dr. Gaetz opines broadly on the causes of homelessness. Overall, Dr. Gaetz’s evidence adds little to the Respondents’ case given its general nature. Much of Dr. Gaetz evidence – both in his affidavit and on cross examination – involved broad policy considerations related to resource allocation, which are not relevant to this court and beyond this court’s institutional capacity.¹⁵⁴ Dr.

¹⁴⁸ 1st Pin Aff, SRAR, Vol. 1, Tab 4, paras. 18-21, pp. 285-286.

¹⁴⁹ 1st Pin Aff, SRAR, Vol. 1, Tab 4, para. 16, p. 284.

¹⁵⁰ 1st Pin Aff, SRAR, Vol. 1, Tab 4, para. 16, p. 284.

¹⁵¹ Cross-Ex of L. Pin, December 3, 2025 [“**1st Pin Transcript**”], JTB, Vol. 2, Tab 11, pp. 231-238 (Q78-99).

¹⁵² 1st Pin Transcript, JTB, Vol. 2, Tab 11, pp. 216-217 (Q36).

¹⁵³ 2nd Pin Transcript, JTB, Vol. 5, Tab 24, pp. 63, 114 (Q15-16, Q157).

¹⁵⁴ Cross-Ex of S. Gaetz [“**Gaetz Transcript**”], JTB, Vol. 2, Tab 10, p. 189-191 (Q70-75).

Gaetz explains that “what leads people to homelessness is usually a number of complex issue areas”,¹⁵⁵ many of which are outside the control of the Region. Dr. Gaetz did concede, however, that “motel and hotel rooms may be suitable as emergency shelter alternatives”¹⁵⁶ and that individuals may choose to stay at an encampment as a personal choice, even where that choice puts them at risk of violence, illness, or other harms.¹⁵⁷

60. Dr. Kaitlin Schwan’s evidence speaks generally to the experiences of women and gender-diverse individuals experiencing homelessness. Dr. Schwan confirmed that she has no first-hand knowledge of the current demographics of the Encampment, that she has not visited the Encampment, and that she has not undertaken any quantitative work comparing rates of violence in specific Waterloo shelters against violence at the Encampment or regarding shelter availability in the Waterloo Region.¹⁵⁸ On cross examination, Dr. Schwan agreed that being able to control access to one’s space is an important element of personal safety, including for unhoused women and gender diverse individuals,¹⁵⁹ and that the ability to have a locked door (such as would be present in a motel setting) would help mitigate risks of violence and is “critical to safety for all people”.¹⁶⁰ She also agreed that being able to access housing where a violent intimate partner can be excluded can be an important part of escaping that violence, but that such couples might choose to stay at an encampment given that an encampment does not have restrictions on who can stay there.¹⁶¹ She also agreed that, by contrast, many shelters have training regarding observing

¹⁵⁵ Gaetz Transcript, JTB, Vol. 2, Tab 10, p. 179 (Q27).

¹⁵⁶ Aff of S. Gaetz, affirmed August 14, 2025, SRAR, Vol. 2, Tab 8, para. 22, p. 55.

¹⁵⁷ Gaetz Transcript, JTB, Vol. 2, Tab 10, p. 197 (Q102).

¹⁵⁸ Cross-Ex of K. Schwan [“**Schwan Transcript**”], JTB, Vol. 4, Tab 20, pp. 468-469, 471 (Q6-8, Q14-15).

¹⁵⁹ Schwan Transcript, JTB, Vol. 4, Tab 20, p. 473 (Q23).

¹⁶⁰ Schwan Transcript, JTB, Vol. 4, Tab 20, p. 473-474 (Q24-25).

¹⁶¹ Schwan Transcript, JTB, Vol. 4, Tab 20, p. 476-477 (Q33-39).

coercive or abusive patterns of behaviour and how to intervene where necessary, whereas this is not the case in an encampment setting.¹⁶²

4. The Respondents' Lay Witnesses

61. The Respondents' witnesses Sara Escobar, Jacara Droog, David Alton, and Angela Allt speak to the difficulties in providing services and options to the unhoused population. Their evidence is sympathetic to the challenges the unhoused face, but is tainted by advocacy, and strays into impermissible argument or opinion. None of them offer any realistic solutions to the issues raised by the Region's need to obtain possession of 100 Vic for the KCTH. The Respondents also provide affidavits from current or former occupants of the Encampment, which underline the many dangers at 100 Vic – including widespread drug use, violence, pests, and unsanitary conditions.¹⁶³

PART III. ISSUES

62. The issues before the court are as follows:

- (a) Does the Amended Bylaw infringe s. 7 of the Charter?
- (b) Does the Amended Bylaw infringe s. 15 of the Charter?
- (c) If the answer to issues (a) or (b) is “Yes”, is the infringement saved by s. 1?
- (d) If there is an infringement that is not saved under s. 1, what should the remedy be?
- (e) Should the Amended Bylaw be quashed under s. 273 of the *Municipal Act*?
- (f) Should the Region be granted an injunction under s. 440 of the *Municipal Act*?

¹⁶² Schwan Transcript, JTB, Vol. 4, Tab 20, p. 479 (Q43-45).

¹⁶³ See e.g. Aff of C. Sharpe, Responding Application Record [“**RespAR**”], Vol. 1, Tab 3, para. 10, p. 2; Aff of J. Young, RespAR, Vol. 1, Tab 13, para. 31, p. 87; Aff of T. Cole, 2nd SAR, Tab 2, para. 22, p. 17.

PART IV. LAW & ARGUMENT**A. *The Bylaw does not infringe s. 7 of the Charter*****1. The applicable test**

63. Under s. 7, the claimant must demonstrate that (1) they have been deprived of their interest in life, liberty, or security of the person; and (2) that this deprivation was not in accordance with the principles of fundamental justice – namely, that it was not arbitrary, overbroad, or grossly disproportionate to the law’s objective.¹⁶⁴ The Respondents cannot meet either component of the test. The Amended Bylaw does not contravene s. 7 of the Charter given its specific purpose and the Region’s substantial efforts to provide residents with alternative shelter arrangements.

2. Comments on *Persons Unknown* and other encampment cases

64. With respect to *Persons Unknown*, horizontal *stare decisis* does not bind this court on the issue of whether the Amended Bylaw infringes s. 7. The legal question at issue in *Persons Unknown* is distinct from that before this court. Section 7 requires a comparison between a law’s effects on individuals and the law’s objective. *Persons Unknown* and the case at bar concern different bylaws, with different objectives. As such, they cannot be said to involve the same *legal* issue, which is a requirement of *stare decisis*.¹⁶⁵ It would therefore be an error of law to hold that *Persons Unknown* is a complete answer to the s. 7 analysis in this case, though Valente J.’s reasons carry persuasive weight. Unlike the Code-of-Use Bylaw at issue in *Persons Unknown*, the Amended Bylaw is specific to 100 Vic and has the stated purpose of obtaining vacant possession of the site to allow the KCTH construction to proceed. It is also accompanied by the Transition

¹⁶⁴ *Carter v. Canada (Attorney General)*, [2015 SCC 5](#), para. [55](#) [“**Carter**”].

¹⁶⁵ *R. v. Sullivan*, [2022 SCC 19](#), paras. [43](#), [45-48](#), [56-57](#), [65](#).

Plan and Transition Protocol to ensure that Existing Residents have guaranteed access to alternative shelter options. No such alternative arrangements were made in *Persons Unknown*.¹⁶⁶

65. Looking beyond *Persons Unknown*, there is no Canadian caselaw on encampments which binds this Court – either vertically or horizontally – on the issue of whether a site-specific bylaw infringes s. 7. Canadian courts have been abundantly clear, however, that there is no freestanding right to housing,¹⁶⁷ nor an unfettered right to seek shelter on publicly owned land. No case has held that there is a right to receive supports and services at an encampment, though municipalities may provide them as a matter of policy.

66. There is also no appellate authority from Ontario or from the Supreme Court directly on this issue of encampment closures. Non-binding appellate caselaw from British Columbia has recognized only a tightly circumscribed right to shelter overnight in public parks where there is insufficient shelter capacity to accommodate the area’s entire unhoused population.¹⁶⁸ Various subsequent cases from the BCSC have allowed the closure of encampments.¹⁶⁹

67. There is also caselaw from lower courts in Ontario favourable to the Region’s position on this Application. In *Kingston*,¹⁷⁰ the ONSC concluded that the *Charter* was not infringed by a city bylaw prohibiting camping in public parks during the daytime. That holding affords no

¹⁶⁶ There are in fact over 20 other known encampments in the Waterloo region, on municipal, private, and provincial lands: Ex. 1 to the Cross-Ex of P. Sweeney, March 6, 2026, Vol. 5, Tab 26, p. 253.

¹⁶⁷ *Tanudjaja v. Canada (Attorney General)*, [2014 ONCA 852](#), at paras. 19, 30 [*“Tanudjaja ONCA”*].

¹⁶⁸ *Victoria (City) v. Adams*, [2009 BCCA 563](#) (appeal of [2008 BCSC 1363](#)) [*“Adams”*], *Johnston v. Victoria (City)*, [2011 BCCA 400](#) (appeal of [2010 BCSC 1707](#)) [*“Johnston”*].

¹⁶⁹ *Nanaimo (City) v. Courtoreille*, [2018 BCSC 1629](#) [*“Nanaimo”*]; *Abbotsford (City) v. Shantz*, [2013 BCSC 2612](#) [*“Shantz 2”*]; *Matsqui-Abbotsford Impact Society v Abbotsford (City)*, [2024 BCSC 1902](#) (leave to appeal has been granted but the appeal not yet decided: [2025 BCCA 78](#)) [*“Matsqui”*]; *Maple Ridge (City) v. Scott*, [2019 BCSC 157](#) [*“Maple Ridge”*]; *Saanich (District) v. Brett*, [2018 BCSC 1648](#) [*“Brett 1”*]; *Brett 2*, [2020 BCSC 876](#); *British Columbia v. Adamson*, [2016 BCSC 1245](#) [*“Adamson 2”*].

¹⁷⁰ *The Corporation of the City of Kingston v. Doe*, [2023 ONSC 6662](#) [*“Kingston”*].

constitutional protection to semi-permanent, 24/7 encampments, like the one at 100 Vic. The ONSC came to a similar conclusion in *Heegsma*.¹⁷¹ Unlike the BCCA decisions on this issue, however, the courts in both *Kingston* and *Heegsma* held that the overall shelter capacity in a geographic area is irrelevant to the constitutional analysis – a different conclusion than Justice Valente reached in *Persons Unknown*.¹⁷²

68. In a series of injunction encampment cases in Ontario – including *Poff*,¹⁷³ *Black*,¹⁷⁴ and *Saint Stephen*¹⁷⁵ – the ONSC has allowed encampments to be closed. In all three cases, the Court recognized that encampments “raise serious health and safety concerns for an indefinite duration”¹⁷⁶ including a “risk of fire and danger to residents and passersby”,¹⁷⁷ and that they unduly prevent the use of spaces that are “valuable public resources” by others.¹⁷⁸ The Encampment similarly poses public health and safety risks to its residents and the general public, and prevents the Region from using the Property in a manner that will provide a substantial public benefit.

69. There is very limited caselaw involving a proposed alternative use of land for an important public infrastructure project, but it is favourable to the Region. In *Clinique juridique itinérante*, the QCCS denied an injunction to prevent the closure of an encampment on land owned by Quebec’s Ministry of Transport. Central in the court’s analysis was that a nearby highway repair project would pose health and safety risks to the encampment residents if they remained and that

¹⁷¹ *Heegsma*, [2024 ONSC 7154](#).

¹⁷² *Kingston*, at paras. [129-133](#); *Heegsma* at paras. [14](#), [72-73](#).

¹⁷³ *Poff v. City of Hamilton*, [2021 ONSC 7224](#) [“*Poff*”].

¹⁷⁴ *Black et al. v. City of Toronto*, [2020 ONSC 6398](#) [“*Black*”].

¹⁷⁵ *Church of Saint Stephen et al. v. Toronto*, [2023 ONSC 6566](#) [“*Saint Stephen*”].

¹⁷⁶ *Black*, at para. [150](#).

¹⁷⁷ *Saint Stephen*, at para. [62](#).

¹⁷⁸ *Poff*, at para. [29](#); *Black*, at para. [150](#).

its postponement would have been against the public interest,¹⁷⁹ The QCCS balanced the interests of the unhoused individuals against the importance of this public infrastructure project and the harms of its delay, and declined to grant the injunction preventing the closure – even where there was no Ministry plan to relocate the occupants of the Encampment.¹⁸⁰ In the present case, construction on a project of substantial public interest will similarly pose such risks to those residing on the Property. Dicta in *Adams* also indicate that a targeted law “prohibiting sleeping in sensitive park regions” would have been upheld.¹⁸¹

70. There is also caselaw demonstrating that courts will order the eviction of unhoused persons at a site upon which there is an encampment where residents of that encampment have been adequately provided for, even if the options available do not align with their preferences. In *Matsqui*,¹⁸² the BCSC allowed the closure of an encampment on city land provided that certain conditions were met by the city (such as offering to temporarily store residents’ belongings and assisting encampment residents with their relocation). In *Johnny #2*,¹⁸³ the BCSC allowed the City of Prince George to close an encampment on city-owned land, finding that there was available, accessible housing for all encampment residents. In doing so, the BCSC acknowledged that what constitutes an “accessible” housing option must not be construed too narrowly, even if that means it lacks qualities that may be preferred by given individual residents. In *Maple Ridge*, the BCSC

¹⁷⁹ *Clinique juridique itinérante c. Procureur général du Québec*, [2023 QCCS 1949](#) (leave to appeal dismissed [2023 QCCA 855](#)), at paras. [67](#), [71-77](#), [85-86](#), [90-92](#) [*“Clinique 2”*].

¹⁸⁰ *Clinique 2*, paras [91-92](#).

¹⁸¹ *Adams*, para. 116.

¹⁸² *Matsqui*, paras. [214](#), [218](#).

¹⁸³ *Prince George (City) v Johnny*, [2025 BCSC 1556](#), at paras. [99-100](#), [127](#) [*“Johnny 2”*].

permitted individuals in an encampment to be removed where they did not identify themselves as seeking a transition to housing.¹⁸⁴

71. *Matsqui, Johnny #2, and Maple Ridge* demonstrate that courts will not allow encampments to remain just because they are the preferred options of certain residents where municipalities come to the table with reasonable, alternative solutions and accommodations – such as the Region’s Transition Plan and Transition Protocol in the present case.

3. There is no deprivation of life, liberty, or security of the person

72. The Bylaw does not deprive anyone of their life or security of the person. Unlike the Code-of-Use Bylaw at issue in *Persons Unknown*, the Amended Bylaw explicitly addresses what will happen to those at 100 Vic when the site is closed. For Existing Residents, the Region’s Plan provides new resources to create additional options (in addition to the sizable budget already allocated by the Region) and the Amended Bylaw provides that no Existing Resident will be removed from the Property unless they have an offer in writing for Alternative Accommodation. In any event, as a result of the Region’s efforts to support Encampment residents, none of the 40 Existing Residents actually remain onsite.

73. For more recent arrivals, the Amended Bylaw further provides for them to be brought into the Region’s housing stability system, and that the Region will “endeavour to provide the person with appropriate housing options, subject to resources being available and such person cooperating with the Region’s outreach staff”.¹⁸⁵ The Region has successfully transitioned 22 individuals who do not qualify as Existing Residents from the Encampment to alternative accommodation.

¹⁸⁴ *Maple Ridge*, paras. 8, [57-66](#).

¹⁸⁵ Amending Bylaw, Ex. A to the Kang Aff, SAR, Tab 4, p. pp.93-94.

74. Provided that the Region is able to prevent further inflows into the Encampment, it is reasonable to assume on the evidence that the remaining occupants can be transitioned to alternative accommodation, without undue risk to their health and safety. The Region has been able to place at least 51 unhoused persons from the Encampment (29 Existing Residents and 22 more recent arrivals) over a 10-month period. Placing the remaining 10-12 in the next 2-3 months would be a consistent rate. Conversely, the Respondents have not proved a deprivation.¹⁸⁶

75. Given these facts, the choice is not between staying at the Encampment and “be[ing] forced to live in the rough or set up camp somewhere else”, as it was in *Persons Unknown*.¹⁸⁷ The expert evidence tendered by both sides in this case supports the conclusion that living indoors – even if at shelters or motels – is associated with better health outcomes than living outside, and that the different options encompassed within the category of Alternative Accommodations are beneficial for many unhoused individuals.¹⁸⁸ By contrast, encampment living is associated with various health and safety risks, and the evidence regarding the Encampment at 100 Vic specifically demonstrates that many of these risks are present there. Transitioning Encampment occupants to alternative accommodation does not infringe their s.7 rights, as their risk of harm actually *decreases* as a result of leaving the Encampment.

76. While some individuals may prefer to remain at the Encampment, these subjective feelings are not legally cognizable interests under s. 7. Further, as the BCSC recognized in *Johnny #2*, the accessibility of alternative housing options “must be approached at a certain level of generality”

¹⁸⁶ Possibly, more newcomers will have come to the site by the time of the hearing, with the arrival of spring. If so, their position would be somewhat distinct, though they would still be taken into the housing stability system.

¹⁸⁷ *Persons Unknown*, para [101](#).

¹⁸⁸ Koivu Transcript, JTB, Vol. 2, Tab 13, pp. 421-430 (Q220-233); Gupta Transcript, JTB, Vol. 4, Tab 18, pp. 301-302 (Q195).

and “not based on the individual needs or subjective impressions of every occupant of the Encampment”.¹⁸⁹ In that case, the court found that the transitional housing option presented to encampment residents was generally “accessible” despite objections from encampment residents that it lacked sufficient private space, put restrictions on residents’ conduct, had single-occupancy bedrooms, did not permit guests, and did not categorically allow pets.¹⁹⁰ The court held that rather than rule this option inaccessible as a whole, individual residents could apply to the court for an individual constitutional exemption in “exceptional circumstances”¹⁹¹ where they could demonstrate that the option presented was truly not accessible to them specifically.

77. The Amended Bylaw also does not engage any liberty interests. The Amended Bylaw does not make it an offence to remain on the Property, nor does it impose any fines.¹⁹² Residing at the Encampment is not an “inherently private choice” that goes to the “core of what it means to enjoy individual dignity and independence” and therefore warrants protection under s. 7.¹⁹³ Rather, “[t]he right to liberty in s. 7 does not prevent the state from restricting lifestyle choices, even if those choices may be subjectively important for some individuals”,¹⁹⁴ nor does it guarantee “[dignity] and...freedom from stigma” as “self-standing rights”.¹⁹⁵ The Amended Bylaw does not make being unhoused illegal, nor does it prohibit unhoused individuals from residing on all Region-owned

¹⁸⁹ *Johnny 2*, para [99](#).

¹⁹⁰ *Johnny 2*, paras. [107-128](#).

¹⁹¹ *Johnny 2*, paras [19](#), [106](#).

¹⁹² This is one of the differences between the Original Bylaw and the Amended Bylaw.

¹⁹³ *Godbout v. Longueuil (City)*, [\[1997\] 3 S.C.R. 844](#), paragraph [66](#).

¹⁹⁴ *Drover v. Canada (Attorney General)*, [2025 ONCA 468](#), para. [128](#).

¹⁹⁵ *Blencoe v. British Columbia (Human Rights Commission)*, [2000 SCC 44](#), para [80](#).

lands (as was the case in *Persons Unknown*). It simply provides that entry onto and residing on a single, specific, defined Property is not permitted.¹⁹⁶

78. Finally, insofar as the Amended Bylaw prevents individuals who are not currently occupants at 100 Vic from moving there, it does not deprive them of any constitutionally protected interest. They will be in the same position after the closure of the Encampment as before, and they are not directly affected by the closure. The additional capacity added to the housing stability system by the Region ensures that the transition of Existing Residents to alternative accommodations will not affect the position of other unhoused persons, or the availability of alternative options for them.

4. The Bylaw does not contravene the principles of fundamental justice

79. The objective of the Amended Bylaw is stated clearly as being “to specifically regulate and govern [100 Vic] and to obtain vacant possession” because the Region requires vacant possession “to facilitate the construction of the KCTH”.¹⁹⁷ The Region submits that any deprivation of s.7 interests is neither overbroad, nor grossly disproportionate to this objective.

(a) The Amended Bylaw is not overbroad

80. A law is overbroad where its scope includes some conduct that bears no relation to its purpose.¹⁹⁸ In *Persons Unknown*, Justice Valente found that the Code-of-Use Bylaw’s purpose was

¹⁹⁶ The Supreme Court has never recognized the right to liberty in s. 7 as protecting an individual’s choice of place of residence. While the Ontario Court of Appeal did so recently in the specific and distinguishable context of constituency-based residency requirements for electoral officials under the *Elections Act*, that holding has no application to the present case. Striking down a requirement that an official live in a specified district does not imply that individuals have a positive right to live in a specific location that they do not own. See: *Drover*, para. 131.

¹⁹⁷ See the preambles to the Amended Bylaw; *R. v. Sharma*, [2022 SCC 39](#), para 88: “The most significant and reliable indicator of legislative purpose would, of course, be a statement of purpose within the subject law.”

¹⁹⁸ *R. v. Kloubakov*, [2025 SCC 25](#), at para. 139 [“*Kloubakov*”] citing *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#) at para. 112 [“*Bedford*”].

to prevent physical damage to the Region’s premises, disruption to the Region’s operations, and disruption of the use and enjoyment of the Region’s premises by other people.¹⁹⁹ He concluded that the Code-of-Use Bylaw was overbroad because these purposes could have been achieved “without punishing everyone who erects a shelter when there is no accessible shelter alternative”.²⁰⁰ By contrast, the Bylaw at issue in this case has a narrow, specific purpose which, by definition, cannot be achieved unless all individuals leave the site.

81. The Respondents argue that the Region should provide all individuals at the Encampment with permanent, affordable housing, as advocated for by some of their affiants.²⁰¹ This suggestion has no place in the overbreadth analysis, as s. 7 does not protect positive rights, including a claimed right to housing.²⁰² Rather, the overbreadth analysis considers whether the state’s conduct goes “too far” because it is unnecessary to deprive some individuals of their s. 7 interests to achieve the impugned law’s goal, not whether the state could take further positive actions to improve the situation for individuals.²⁰³ This distinction recognizes that “developing solutions to address the growing homelessness issue involves policy and legislative choices that are within the purview of government, not the courts”.²⁰⁴

(b) The Amended Bylaw is not grossly disproportionate

82. Gross disproportionately is found only in “extreme cases” where the seriousness of the deprivation is “totally out of sync with the objective of that measure”.²⁰⁵ The oft-repeated example

¹⁹⁹ *Persons Unknown*, at para. [112](#).

²⁰⁰ *Persons Unknown*, at para. [114](#).

²⁰¹ Houle Transcript, JTB, Vol 4, Tab 19, pp. 400-403 (Q56-66); Pauly Transcript, JTB, Vol. 4, Tab 17, pp. 223-224, 231 (Q130-134, Q162).

²⁰² *Tanudjaja ONCA*, para. [30](#).

²⁰³ *Carter*, para. [85](#).

²⁰⁴ *Nanaimo*, para. [131](#).

²⁰⁵ *Kloubakov*, para. [140](#), citing *Bedford*, para. [120](#) and *R. v. Malmo-Levine*; *R. v. Caine*, [2003 SCC 74](#), para. [143](#).

is “a law with the purpose of keeping streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk”.²⁰⁶ The gross disproportionality analysis is fundamentally comparative: a law with significant impacts on an individual may nonetheless not be grossly disproportionate to its objective where law’s object is sufficiently pressing. Consequently, demonstrating a significant impact on an individual is not in itself sufficient to establish a breach.

83. The gross disproportionality analysis in this case is fundamentally different from *Persons Unknown*, where Valente J. concluded that the Code-of-Use Bylaw’s complete prohibition on erecting a temporary shelter on any Region-owned premises was grossly disproportionate to the generic purposes of the Code-of-Use Bylaw regarding the protection of Regional property.²⁰⁷ Notably, the Region did not put any plan for the occupants of 100 Vic before Valente J.

84. In the case at bar, any risks of potential harmful effects of the Amended Bylaw are mitigated by the conditions on enforcement in the Amended Bylaw and Transition Protocol. Unlike in *Persons Unknown*, the Amended Bylaw’s purpose is specific and tangible: it pertains to a major public infrastructure project of vital social and economic importance which requires that the Region obtain vacant possession of 100 Vic, not the generic purposes of the Code-of-Use Bylaw. When these mitigated risks are weighed against this specific and pressing public purpose, the Respondents do not meet the very high bar of gross disproportionality.

85. On this issue, the court should be mindful of the limits of its institutional competence. The Region, as the elected government responsible for housing policy, has exercised its best judgment in good faith in a complex and contested area in which there is no consensus, on the appropriate

²⁰⁶ Kloubakov, para. [140](#), citing *Bedford*, para. [120](#).

²⁰⁷ *Persons Unknown*, para. [119](#).

accommodation options and prioritization to offer to occupants of the Encampment. In the Region’s judgment, the mitigated risks do not outweigh the importance of the KCTH project. These are policy decisions to which the court should defer.

B. The Bylaw does not contravene s. 15 of the Charter

86. To establish a s. 15 infringement, a claimant must demonstrate (1) that either on its face or in its impact an impugned law creates a distinction based on enumerated or analogous grounds; and (2) that the impugned law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.²⁰⁸ While s. 15 infringements have been alleged in many encampment related cases, no case – including *Persons Unknown* – has found that such an infringement has been made out.²⁰⁹ The Respondents in this case similarly fail to meet their burden under each component of the s. 15 analysis.

1. The Bylaw does not create a distinction

87. That the Bylaw affects members of enumerated and analogous groups – or even that most people the Bylaw affects are members of such groups – is irrelevant to the s. 15 analysis.²¹⁰ “All laws are expected to affect individuals, including members of protected group” and “[m]erely proving overrepresentation [of those affected] is insufficient” to make out a distinction under s. 15.²¹¹ Instead, the issue is whether the Bylaw “created or contributed to a disproportionate impact on a protected group as compared to non-group members”.²¹²

²⁰⁸ *Quebec (Attorney General) v. Kanyinda*, [2026 SCC 7](#), para 48.

²⁰⁹ *Persons Unknown* at paras. [126-127](#), *Heegsma*, at paras. [80-82](#), *Abbotsford (City) v. Shantz*, [2015 BCSC 1909](#), paras. [234-236](#) [“*Shantz 4*”].

²¹⁰ *Ontario Health Coalition and Advocacy Centre for the Elderly v. His Majesty the King in Right of Ontario*, [2025 ONSC 415](#), para. [317](#) [“*Ontario Health Coalition*”].

²¹¹ *Ontario Health Coalition*, paras. [313](#), [317](#).

²¹² *Ontario Health Coalition*, paras. [313](#); *Sharma*, para. [44](#).

88. The Bylaw applies uniformly to all people. It does not create a disproportionate impact on a protected class of individuals because no individuals are permitted to remain at the Encampment following April 1, 2026 without authorization, and any unauthorized individual remaining on the Property necessarily makes obtaining vacant possession of the Property unachievable.²¹³

89. The record does not establish that the Amended Bylaw affects those who are racialized/Indigenous, female or gender diverse, or married, in any particular way. The evidence in the record shows, at best, that while some racialized, women, gender diverse, or married individuals may have different experiences of homelessness, the Bylaw is not the cause of those different experiences, nor does it uniquely affect those protected groups. This evidence is therefore insufficient to meet the claimants' evidentiary burden under s. 15.

90. There is limited authority to support receipt of social assistance as an analogous ground under s.15.²¹⁴ In any event, as with the enumerated grounds set out above, there is no evidence that those in receipt of social assistance will be impacted by the Amended Bylaw in a manner that is fundamentally different from individuals who do not receive social assistance. The court should be careful to ensure that it does not inappropriately permit the use of receipt of social assistance as a proxy for "economic disadvantage, which alone does not justify protection under s. 15".²¹⁵

²¹³ *Sharma*, para. [53](#).

²¹⁴ See e.g. *Falkiner v. Ontario (Minister of Community and Social Services)*, [2002 CanLII 44902](#) (ON CA), para. [84](#) [*"Falkiner"*], in which this ground was one of three relied upon by the court to find a breach of s.15. This ground was previously rejected in *Masse v. Ontario (Minister of Community and Social Services)*, [1996 CanLII 12491](#) (ON SCDC), at paras. [82-84](#); see also *Guzman v. Canada (Minister of Citizenship and Immigration) (F.C.)*, [2007] [3 FCR 411](#), paras. [23-28](#).

²¹⁵ *Falkiner*, para. [88](#); *Tanudjaja v. Attorney General (Canada) (Application)*, [2013 ONSC 5410](#), (appeal dismissed: [2014 ONCA 852](#)), para. [131](#) [*"Tanudjaja SCJ"*]; *Polewsky v. Home Hardware Stores Ltd.*, [2003 CanLII 48473](#) (ON SCDC), paras. [7](#), [24](#).

91. The Respondents also seek to rely on purported analogous ground of homelessness. Canadian caselaw is clear that homelessness and “being without adequate housing” are not analogous grounds under s. 15.²¹⁶ Indeed, given that the definition of adequate housing is so hotly disputed between the parties (and even amongst academics and policymakers in this area), it would be practically impossible to determine the boundaries of such a category. In any event, because s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation,²¹⁷ the Region’s inability to fully solve the issue of homelessness before implementing the Amended Bylaw cannot be an infringement of s. 15.

2. Any distinction does not reinforce, perpetuate, or exacerbate disadvantage

92. Even if the Bylaw does create a distinction on an enumerated or analogous ground, it is not one that reinforces, perpetuates, or exacerbates disadvantage. The Bylaw is not based on any stereotypical assumptions about the value, characteristics, and behaviours of a particular class of people. Instead, the Bylaw was enacted given the practical reality that the Region requires vacant possession of the Property to allow for the KCTH construction, regardless of who the occupants of the Property are. The KCTH is itself a major infrastructure project which will benefit all residents of the Region. The Bylaw therefore is entirely disconnected from any past disadvantage or stereotyping experienced by protected groups. Indeed, those receiving social assistance and unhoused individuals are among those who stand to gain from the expansion of affordable transportation within and beyond the Region.

²¹⁶ *Persons Unknown*, para. [123](#); *Shantz 4*, para. [321](#) [*“Shantz”*], *Tanudjaja SCJ*, paras. [124-137](#) (appeal dismissed on other grounds: [2014 ONCA 852](#), as per para. [37](#)).

²¹⁷ *Sharma*, para. [63](#).

C. If the Bylaw infringes ss. 7 or 15 of the Charter, it is demonstrably justified under s. 1

93. If the Bylaw infringes ss. 7 and/or 15, such infringement(s) are reasonable limits justifiable under s. 1. Where the limits arise from “a complex regulatory response to the social problem”, courts have shown greater deference to governmental policy choices under s.1.²¹⁸

1. The limit is prescribed by a law which has a pressing and substantial objective

94. The Amended Bylaw clearly meets the “prescribed by law” requirement.²¹⁹ Its objective is set out in its text:²²⁰ to enable the vacant possession of the Property by a defined date to allow for the construction of the KCTH. It is uncontested that the KCTH will bring significant economic and social benefits to the Region; in light of this, the Region submits that the Bylaw’s objective is clearly pressing and substantial.

2. There is proportionality between the Bylaw’s objectives and its means

(a) The limit is rationally connected to the objective

95. The rational connection test requires the Region to show a "connection between the infringement and the benefit sought on the basis of reason or logic"²²¹ The Region’s objective of obtaining vacant possession of 100 Vic logically necessitates the transition of all individuals from the site, including the named Respondents. The Region therefore meets this low bar.

(b) The limit minimally impairs the Respondents’ rights

96. The Region “is not required to pursue the least drastic means of achieving its objective”, it must only “adopt a measure that falls within a range of reasonable alternatives”.²²² Courts will

²¹⁸ This is true even for s.7 breaches: *R. v. Michaud*, [2015 ONCA 585](#), para. [127](#) (leave to appeal denied: [2016 CanLII 24866 \(SCC\)](#)) [*“Michaud”*].

²¹⁹ *R. v. Oakes*, [\[1986\] 1 SCR 103](#), para. [62](#).

²²⁰ *Sharma*, para. [88](#).

²²¹ *Carter*, para. [99](#).

²²² *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015 SCC 1](#), para. [149](#).

“def[er] to the legislature in instances where it is better situated to choose among a range of alternatives”.²²³ As the Supreme Court noted in *Hutterian Brethren*:

Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused... The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate.²²⁴

97. In *Michaud*, the Ontario Court of Appeal concluded that a s. 7 infringement was minimally impairing because the impugned legislation (requiring commercial truck drivers to equip their vehicles with a speed limiter) was part of a broader, complex government response to the “social problem of motor vehicle highway safety”.²²⁵ The Court noted the lack of cohesion between experts in the field, and concluded that speed limiters were a reasonable choice along the spectrum of potential policy choices. The Court reasoned that “[w]here there is debate about countervailing risks in a situation of uncertainty, the regulator must make the call and did so.”²²⁶ The same applies here to the Region’s judgment calls in the complex area of housing policy.

98. As the Region’s evidence demonstrates, the Region requires vacant possession of the Property, meaning nothing short of closing the Encampment would meet the pressing and substantial objective. Regarding alternative arrangements for those living at the Encampment, given the complexity of the social problem of homelessness – especially in light of the pronounced surge of homelessness across Canada during and following the COVID-19 pandemic²²⁷ and the

²²³ *Michaud*, para. [122](#), citing *Alberta v. Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#), para. [53](#) [“*Hutterian*”], *Carter*, para. [102](#).

²²⁴ *Hutterian*, para. [37](#).

²²⁵ *Michaud*, para. [127](#).

²²⁶ *Michaud*, para. [127](#).

²²⁷ *Municipalities Under Pressure Update*, Ex. “C”, 2nd Pin Aff, 2nd SRAR, Tab 12, p. 142.

necessity of all three levels of government fulfilling their roles for any meaningful solution²²⁸ – the Region’s Transition Plan and Protocol should be afforded particular deference. The Amended Bylaw was enacted in the context of a wider Regional (and multi-governmental) response to homelessness which, on the Region’s part alone, has involved billions of dollars and many years of investment in various forms of emergency shelter and permanent housing. The Region has provided a specific Transition Plan for those at the Encampment, which has already shown significant success at connecting Encampment residents with alternative accommodation options. These are budgetary and policy decisions that are properly within the legislative sphere.

99. The Respondents will likely argue that the Region could provide alternative encampment sites, with supports, or a range of additional shelter options that they argue are more appropriate. No case holds that a municipality must fund services and supports to an encampment, or must provide sanctioned encampment sites, although municipalities may choose to do so as a matter of policy. Nor should courts seek to micro-manage the precise mix of housing and shelter facilities. The Amended Bylaw therefore represents a minimal impairment of the rights of the Respondents.

(c) The salutary effects of the Bylaw outweigh its deleterious effects

100. At this step, the court must balance the potential risks of harm to the Respondents with the benefit of using the Property to construct the KCTH.²²⁹ Given the mitigation of risks set out above, and the KCTH’s substantial anticipated benefits for the entire Waterloo region – including the Respondents – the balance falls in favour of upholding the Amended Bylaw.

²²⁸ Hwang Transcript, JTB, Vol. 1, Tab 8, pp. 465, 468 (Q22, 32); Houle Transcript, JTB, Vol. 4, Tab 19, pp. 428-429, (Q140-146); Pauly Transcript, JTB, Vol 4, Tab 17, pp. 228-229 (Q152-156).

²²⁹ Michaud, para. [137](#), citing *Hutterian*, paras. [77-78](#).

101. The Region’s evidence is that the Property is needed in order to enable the construction of the KCTH, and that no suitable alternative property is available.²³⁰ When constructed, the KCTH will represent a “landmark endeavor for the Region” that is “vital to the economic and social growth and wellbeing of its residents.”²³¹ Some of these benefits include improved public transit throughout the region,²³² greater connectivity to communities surrounding the Kitchener-Waterloo area (which in turn brings more economic opportunities),²³³ a potential boost to the economic health of the region given the increased likelihood of companies expanding or relocating to the area (amongst other factors),²³⁴ and reduced transfer times and more efficient transit connections.²³⁵ These benefits will be shared by all residents of the Region.

D. Remedy - If a Breach is Found, the Court should provide guidance to the Region

102. In the alternative, if the Amended Bylaw does infringe the *Charter*, this court should provide guidance for the Region on what steps it must take in order to obtain vacant possession of the Property in a *Charter*-compliant manner. In *Matsqui*, the BCSC offered such guidance when it permitted an encampment to be closed provided that the City of Abbotsford took steps to “gradually relocate existing residents while at the same time preventing new arrivals or any efforts by any individuals or organizations to expand the encampment”.²³⁶ The court’s order set out parameters on appropriate shelter offers and detailed processes that the City was required to follow in relocating the encampment residents.²³⁷ Similarly, in *Stewart*, the BCSC permitted the future

²³⁰ Spooner Aff, AR, Tab 3, paras. 6, 41-44, pp. 351, 363-363.

²³¹ Spooner Aff, AR, Tab 3, para. 16, p. 354.

²³² Spooner Aff, AR, Tab 3, para. 19, p. 355.

²³³ Spooner Aff, AR, Tab 3, paras. 20-21, p. 356.

²³⁴ Spooner Aff, AR, Tab 3, para. 22, p. 356.

²³⁵ Spooner Aff, AR, Tab 3, para. 19, p. 355.

²³⁶ *Matsqui*, para. [217](#).

²³⁷ *Matsqui*, para. [218](#).

closure of an encampment in Prince George only where available and accessible housing and daytime facilities were provided for all of the encampment residents, and provided subsequent guidance in *Johnny #1* and *Johnny #2* regarding whether the City had fulfilled those conditions.

E. The Bylaw was passed in good faith and should not be quashed under the Municipal Act

103. In considering whether to quash a Bylaw under s. 273 of the Municipal Act, “a number of factors may inform the court’s exercise of discretion including, the nature of the bylaw in question, the seriousness of the illegality committed, its consequences, delay and mootness”.²³⁸ The standard for doing so is a high bar: courts are to apply “a generous, deferential standard of review” to “the decisions of elected municipal councils made pursuant to valid enabling legislation”,²³⁹ which “must be presumed to have been enacted in good faith unless the contrary can be proven”.²⁴⁰ Courts “should be reluctant to find bad faith on the part of democratically elected municipal councils unless the evidence leads to no other rational conclusion”²⁴¹ such that “[i]f there are lawful grounds upon which the municipal council can be found to have acted, the court should not presume that the council acted beyond its authority or that it intended to do so”.²⁴² In rare cases, the courts have found on compelling evidence that a municipality acted in bad faith and for a collateral purpose.²⁴³

104. The evidence before this court does not meet the standard of “no other rational conclusion” than the Region having acted in bad faith by enacting the Bylaw. To the contrary, there are many

²³⁸ *Corporation of the City of London v. RSJ Holdings Inc.*, [2007 SCC 29](#), para. 39.

²³⁹ *2386240 Ontario Inc. v. The City of Mississauga*, [2018 ONSC 3162](#) (aff’d [2019 ONCA 413](#)) para. 44 [“**2386240 Ontario**”], citing *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000 SCC 13](#), paras. 35-36; *Grosvenor v. East Luther Grand Valley (Township)*, [2007 ONCA 55](#), para. 31 [“**Grosvenor**”].

²⁴⁰ *2386240 Ontario*, para. 48.

²⁴¹ *2386240 Ontario*, para. 47, internal quotations omitted, emphasis added.

²⁴² *2386240 Ontario*, para. 48, citing *McKay v. The Queen*, [1965 CanLII 3 \(SCC\)](#), [1965] S.C.R. 798, at 803-804.

²⁴³ See e.g. *Grosvenor*, [2007 ONCA 55](#), where a municipal bylaw designating a municipally owned land as a “highway” was enacted “for the sole purpose of evading the Township’s obligation to fence [that land] under the *Land Fences Act*”, rather than for the genuine purpose of serving as a highway.

indicia of good faith. The Bylaw was passed for a compelling public purpose, public notice of the Bylaw was posted as required, and the Bylaw was debated at an open council meeting on April 23, 2025 at which opponents of the Bylaw could – and did²⁴⁴ – speak against it.²⁴⁵ The Region did not enforce the Bylaw before proactively seeking the court’s input.²⁴⁶ In developing the Bylaw, the Region considered feedback obtained from stakeholders over years of consultation regarding homelessness.²⁴⁷ The Region also finances its own critics – indeed, some of the Respondents’ witnesses on this Application are individuals who have either been contracted to do work for the Region or whose employers are funded by the Region.²⁴⁸ The Region sought mediation, albeit unsuccessfully. The Region also amended the Bylaw to respond to criticisms and to provide greater protections for those living at the Encampment, after further consultation. Whether or not the Region failed to follow “best practices” in its consultations as argued by the Respondents, there is no basis to find bad faith.²⁴⁹

F. The Region meets the test for an injunction under s. 440 of the Municipal Act

105. The injunction granted by Justice Gibson preventing the Region from enforcing the Bylaw expires at the hearing of this application on the merits. The Region now seeks a statutory injunction under s. 440 of the *Municipal Act*, permitting it to enforce the Bylaw as required. Enforcement will enable the Region to prevent newcomers from arriving at the Encampment, allowing for greater site management and a phased approach to its anticipated closure.

²⁴⁴ Droog Transcript, JTB, Vol. 1, Tab 5, p. 245 (Q152); Alton Transcript, JTB, Vol. 1, Tab 3, pp. 113-115 (Q107-112).

²⁴⁵ This was a factor which supported a finding of good faith in *2386240 Ontario*, at para. [66](#).

²⁴⁶ 2nd Sweeney Aff, RAR, Tab 2, para. 6, p. 12.

²⁴⁷ 3rd Sweeney Aff, RAR, Tab 3, paras. 22-48, pp. 73-80.

²⁴⁸ 3rd Sweeney Aff, RAR, Tab 3, para. 29, p. 75; Cross-Ex of S. Escobar, March 2, 2026 [“**2nd Escobar Transcript**”], JTB, Vol. 5, Tab 22, p. 9, (Q8-9); Alton Transcript, JTB, Vol. 1, Tab 3, p. 78 (Q10).

²⁴⁹ Just because the Respondents “believe that the [Region] is wrong, that does not mean that the [Region] acted in bad faith”. *Tiny Township Association v Township of Tiny*, [2025 ONSC 1578](#), at para. [36](#).

106. The test for an injunction under s. 440 differs from the common law *RJR-MacDonald* test: the Region does not need to establish inadequacy of damages or irreparable harm. The Region is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest.²⁵⁰ The Region must only establish a strong *prima facie* case, on a balance of probabilities, that there is a breach of the applicable law. If so, the court may only exercise its residual discretion to not order an injunction in “exceptional circumstances”.²⁵¹

107. The Encampment is a clear violation of the Amended Bylaw, and there are no exceptional circumstances that would justify this court declining to grant an injunction. In *Persons Unknown*, Valente J. declined to order an injunction under s. 440 that would have allowed the Region to enforce the Code-of-Use Bylaw because he was “troubled by the lack of effort the Region made to connect with Encampment residents and the options provided to them prior to both the date of the Trespass Notice and the Eviction Date”.²⁵² He further noted that the Region had not used “all reasonable outreach and support efforts to connect with the Encampment residents” to “address their individual needs on a case-by-case basis by providing access to services, supports and shelter”, as was required by the Region’s own Encampment Policy in place at the time.²⁵³

108. By contrast, here the Region has given ample notice to occupants of the Encampment through the lengthy notice period provided the Bylaw and has made significant efforts to provide for additional capacity in the system for Existing Residents through the accompanying Transition Plan and the Transition Protocol. The Region has also continued to work with other individuals on

²⁵⁰ *The Corporation of the City of Windsor v. Persons Unknown*, [2022 ONSC 1168](#), paras. [51-56](#) [“*City of Windsor*”].

²⁵¹ *City of Windsor*, at paras. [51-56](#); *City of Waterloo v. Persons Unknown*, [2025 ONSC 1572](#), para. [30](#).

²⁵² *Persons Unknown*, para. [142](#).

²⁵³ *Persons Unknown*, para. [143](#).

site at 100 Vic to find them alternative arrangements. The USW team has provided the sort of individualized, needs-based, case-by-case analysis contemplated in *Persons Unknown* to all occupants of the Encampment who have been willing to engage. In light of this, there are no extraordinary circumstances as Valente J. concluded were present in *Persons Unknown*.

109. At the very least, the Region should be entitled to enforce the Amended Bylaw to prevent a further inflow of newcomers pending this Court's determinations on the merits of the Application, to ensure that the Region can conduct an orderly wind-down of the Encampment. The Region requires the ability to restrict newcomers to have any reasonable chance of closing the Encampment. This staged approach to closing the Encampment best serves the interests of all parties, and would allow the Region to focus its efforts on assisting the current occupants.

110. As noted above in the *Charter* analysis, if the court remains concerned by any aspect of the Amended Bylaw and Transition Protocol, the court could incorporate conditions into any injunction granted under s.440.²⁵⁴

PART V. ORDERS SOUGHT

111. The Region respectfully requests that this court:

- (a) Declare that the Amended Bylaw complies with the *Charter*;
- (b) Dismiss the Respondents' cross-application to declare the Bylaw invalid under the *Charter* and quash the Amended Bylaw under s. 273 of the *Municipal Act*; and
- (c) Grant the Region an injunction under s. 440 of the *Municipal Act*.

²⁵⁴ Examples similar to or drawn from other cases include:

- Varying dates set out in the Amended By-law
- Requiring the Region to provide storage of personal effects
- Providing that residents can apply to the court for an individual constitutional exemption in "exceptional circumstances" if they can demonstrate that the option presented to them was truly not accessible to them specifically.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of March, 2026.



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TAB 67

Court File No.: CV-25-00000750-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Applicant

-and-

PERSONS UNKNOWN AND TO BE ASCERTAINED

Respondents

APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure*

**BOOK OF AUTHORITIES OF THE INTERVENER,
THE ATTORNEY GENERAL OF ONTARIO**

April 9, 2026

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PART I – OVERVIEW

1. The Attorney General of Ontario [“Ontario”] intervenes pursuant to s. 109(4) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to make submissions to the Court in respect of the constitutional question.
2. Ontario intervenes to make submissions on the proper approach to ss. 7, 15, and s. 1 of the *Charter* in this case, and specifically the ways in which the analysis in this case differs from the Court’s analysis in the previous application, *Persons Unknown 2023*.¹
3. Ontario’s submissions on s. 7 focus on the role of shelter space accessibility in determining whether a claimant is deprived life, liberty, and security of the person. Section 7 does not create a positive right to shelter, including the right to live permanently in an encampment or to prefer encampment living over other shelter options. Nor do Ontario courts agree that s. 7 requires municipalities to guarantee alternative and accessible shelter before taking steps to remove an encampment. Even if the availability and accessibility of alternative shelter is relevant to s. 7, it is the claimants who bear the onus to prove that they must live in the encampment as a last resort because the conditions of the alternative shelter being offered to them deprive them of life, liberty, or security of the person.
4. This case is unlike *Persons Unknown 2023*. The Region is offering alternative shelter that is tailored to the individual circumstances of the claimants and other encampment residents before the by-law can be enforced. Moreover, the by-law at issue in this case has a different, more limited purpose which requires the Court to conduct a fresh analysis of fundamental justice.

¹ *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, [2023 ONSC 670](#) [*Persons Unknown 2023*].

5. Courts have correctly held that by-laws prohibiting encampments do not violate s. 15.² Homelessness is not an analogous ground, and “[m]erely proving overrepresentation” of certain groups affected by homelessness is insufficient to show that a by-law prohibiting encampments causes an adverse impact.³

6. Finally, if the by-law is found to infringe ss. 7 or 15 of the *Charter*, this Court must conduct a meaningful justification analysis under s. 1. The Supreme Court has held that societal interests must be considered under s. 1 and that courts must defer to policy choices that attempt to reconcile the claims of competing groups.⁴ A failure to meaningfully consider s. 1 will result in the rights of individual claimants being “set above any potentially competing societal or individual rights, interests, or values.”⁵

PART II – STATEMENT OF ISSUES

7. Ontario makes submissions on the following issues:
1. Does the by-law engage section 7 of the *Charter*?
 2. Does the by-law infringe section 15 of the *Charter*?
 3. In the event the by-law is found to infringe ss. 7 or 15, is it justified as a reasonable limit under section 1 of the *Charter*?

² See e.g. *Heegsma v Hamilton (City)*, 2024 ONSC 7154 [*Heegsma*] at [paras 80-82](#); *Persons Unknown 2023* at [paras 125-127](#); *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Abbotsford (City)*] at [paras 234-236](#).

³ *Ontario Health Coalition and Advocacy Centre for the Elderly v Ontario*, 2025 ONSC 415 [*Ontario Health Coalition*] at [para 317](#); *Fair Change v Ontario*, 2024 ONSC 1895 [*Fair Change*] at [paras 326-327, 383](#); *Symes v Canada*, [1993] 4 SCR 695 [*Symes*] at [764-765](#); *R v Sharma*, 2022 SCC 39 [*Sharma*] at [paras 31-32, 44](#).

⁴ *Canada (Attorney General) v Bedford*, [2013 SCC 72](#) [*Bedford*]; *Irwin Toy Ltd. v Quebec (Attorney General)*, [\[1989\] 1 SCR 927](#) [*Irwin Toy*].

⁵ Debra M. Haak, “Revisiting the Analytical Distinction Between Section 7 and Section 1 of the Charter: Legislative Objectives, Policy Goals and Public Interests” (2023) 112 SCLR (2d) 115 [*Haak*] at para 27, Intervener’s Book of Authorities [*IBOA*], Tab 2, p 44.

PART III – STATEMENT OF ARGUMENT

I. The By-Law does not engage Section 7 of the *Charter*

A. *Section 7 does not protect a preference to live in an encampment*

8. Section 7 does not create a positive right to shelter. This includes living permanently in an entrenched encampment or preferring to stay in an encampment over other available shelter options.⁶ In *Victoria (City) v Adams*, the issue was whether prohibiting “temporary overhead shelter at night” that was “taken down every morning” violated s. 7.⁷⁸ The claimants in that case did not seek the right to remain in a semi-permanent encampment on an indefinite basis.

9. Nor do Ontario courts agree that s. 7 requires municipalities to guarantee alternative, accessible shelter options before taking steps to remove an encampment.⁹

10. In considering whether s. 7 is even engaged, courts must distinguish between claimants living in an encampment as a last resort and claimants living in an encampment because they prefer to live there even when alternative shelter is available. The eviction of individuals who are exercising a preference to live in an encampment, rather than living there as a last resort to protect themselves from the elements, does not engage s. 7 interests.

11. If this Court concludes that the availability and accessibility of alternative shelter is relevant to s. 7, it is the claimants in this case who bear the onus to show that the

⁶ *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 [*Tanudjaja ONSC*] at [para 59](#), aff’d in *Tanudjaja v Canada (AG)*, [2014 ONCA 852](#); *The Corporation of the City of Kingston v Doe*, 2023 ONSC 6662 [*Kingston*] at [para 67](#); *Johnston v Victoria (City)*, 2011 BCCA 400 at [paras 10-13](#); *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams BCCA*] at [para 74](#).

⁷ *Adams BCCA* at [paras 1, 52, 99-100](#); *Victoria (City) v Adams*, 2008 BCSC 1363 at [paras 129-130, 138, 207](#).

⁸ *Adams BCCA* at [paras 52, 99-100](#).

⁹ *Kingston* at [paras 129-133](#); *Heegsma* at [paras 14, 72-73](#); *Poff v City of Hamilton*, [2021 ONSC 7224](#); *Black et al. v City of Toronto*, [2020 ONSC 6398](#) [*Black*]; *Church of Saint Stephen et al. v Toronto*, [2023 ONSC 6566](#).

alternative shelter deprives them of life, liberty or security of the person, thereby forcing them to continue living in the encampment. To meet this onus, the claimants must lead evidence of their personal circumstances, their efforts to find shelter space, any offer of alternative shelter, and the harmful conditions of that alternative shelter.

12. Justice Valente did not conduct this analysis in the previous application. Instead, he held that any alternative shelter offered by the Region had to be “truly accessible” to comply with s. 7.¹⁰ While he did not define the term “truly accessible”, he identified examples of shelter spaces that are “impractical” for unhoused individuals.¹¹ However, “impracticality” cannot be the standard to engage s. 7 of the *Charter*. This Court properly noted in *Heegsma* that making compliance with s. 7 conditional on removing common barriers to accessibility in shelters would impose an impossible burden on municipalities.¹²

13. Instead, “accessibility” should be understood with specific reference to the interests that s. 7 is designed to protect. Claimants must establish that the conditions of the shelter space being offered to them deprive them of life, liberty, or security of the person such that their only alternative is seeking shelter outdoors in an encampment.

B. The evidence does not establish a breach of section 7

14. In any event, this case is distinguishable from *Persons Unknown 2023* because the Region has provided ample evidence of its proactive efforts to assist existing residents at the encampment. Since the first application, the Region has taken considerable steps to meet the residents’ short and long-term needs. Support workers have routinely visited the

¹⁰ *Persons Unknown 2023* at [para 93](#).

¹¹ *Persons Unknown 2023* at [para 93](#).

¹² *Heegsma* at [paras 70-72](#).

encampment over many months to build relationships with encampment residents, understand their circumstances, identify their needs, and connect them with the appropriate resources.¹³

15. The site-specific by-law requires the Region to work with existing residents to develop personalized housing action plans and offer them alternative accommodation. If existing residents lose their accommodation due to non-compliance with the rules, the Region further endeavours to reconnect residents with support workers to assist them in finding another suitable accommodation. Furthermore, the Region offers to store the personal belongings of existing residents who accept offers for alternative accommodations for up to six months.¹⁴ The by-law also offers to work with individuals who joined the encampment after April 16, 2025 to provide them with appropriate housing options.¹⁵

16. The relevant question in this case is whether the claimants have been offered alternative shelter, not whether there are enough shelter spaces in the entire Region to house the total number of unhoused persons. This Court need not and should not compare these figures on an aggregate basis. While Justice Valente did this in *Persons Unknown 2023*, he did so because he was considering the validity of a general by-law that prohibited the erection of any structure on any municipal property. By contrast, the site-specific by-law in this case applies only to the encampment at 100 Victoria Street and its residents. Requiring

¹³ Affidavit of Peter Sweeny Affidavit affirmed June 6, 2025 [**1st Sweeny Affidavit**] at paras 14-17, 20-21, Applicant's Application Record [**AAR**], Tab 2, pp 18-20.

¹⁴ Schedule "C": Transition Protocol, Consolidated version of By-Law #25-021 showing the tracked amendments [**Amended By-Law**], Affidavit of Dilupneet Kang affirmed January 9, 2026 [**Kang Affidavit**] at 116, Applicant's Supplementary Application Record [**ASAR**], Tab 4B, Appendix B.

¹⁵ Amended By-Law s. 6(2), Kang Affidavit at 112, ASAR, Tab 4B, Appendix B.

the Region to have an aggregate surplus of available shelter spaces for the entire unhoused population would be incongruent with the limited scope of this by-law.

17. The impugned by-law does not engage *Charter* s. 7. The evidence demonstrates the Region’s efforts to mitigate the consequences of homelessness and eviction on the encampment residents. The existing residents at the encampment will be offered an alternative accommodation that is appropriate for their individual circumstances and needs before the by-law is enforced. The impugned by-law does not negatively impact the claimants’ life, liberty, and security of the person.

II. The By-law Accords with the Principles of Fundamental Justice

18. A law that engages the interests protected by s. 7 may still be consistent with fundamental justice. As the Supreme Court held in *Carter*, “[s]ection 7 does not promise that the state will never interfere with a person’s life, liberty or security of the person – laws do this all the time – but rather that the state will not do so in a way that violates the principles of fundamental justice.”¹⁶

A. This Court must conduct a fresh analysis of fundamental justice

19. Whether a law accords with the principles of fundamental justice can only be assessed with a clear and precise articulation of the purpose of the provisions at issue. Because the purpose of the site-specific by-law in this case is different from the purpose of the general by-law considered in *Persons Unknown 2023*, this Court must conduct a fresh analysis of fundamental justice.

¹⁶ *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*] at [para 71](#); see also *Matsqui-Abbotsford Impact Society v Canada (Attorney General)*, 2026 FC 268 at [paras 15-16](#).

20. The Supreme Court has held that the analysis of fundamental justice requires courts to examine “the relationship between the law’s purpose and what it actually does”.¹⁷ It is therefore necessary at the outset to identify the purpose of the law being challenged.¹⁸ The law’s purpose must be articulated “at an appropriate level of generality” which “resides between the statement of an ‘animating social value’ – which is too general – and a narrow articulation, which can include a virtual repetition of the challenged provision.”¹⁹ The purpose should also be stated in a way that is both precise and succinct, and focused on the particular provisions being challenged.²⁰

21. The purpose of the site-specific by-law being challenged in this case is different than the purpose of the general by-law considered in *Persons Unknown 2023*. In that case, Justice Valente held that the purpose of the general by-law was to “prevent physical damage to the lands owned or occupied by the Region”, to “prevent disruption of the Region’s operations” on the lands, and to “prevent the disruption of the use and enjoyment” of the lands by other people.²¹ By contrast, the purpose of the site-specific by-law at issue in this case is much narrower: “to specifically regulate and govern 100 Victoria Street and to obtain vacant possession” so as to facilitate construction of the new transit hub.²² This purpose is clear on the face of the by-law and “firmly anchored” in the text of the preamble.²³

22. The scope of the two by-laws is also different. The general by-law prohibits various activities on *any* lands owned or occupied by the Region, including erecting any

¹⁷ *R v Moriarity*, 2015 SCC 55 [*Moriarity*] at [paras 27-31](#).

¹⁸ *R v Safarzadeh-Markhali*, 2016 SCC 14 [*Safarzadeh-Markhali*] at [para 24](#); Sharma at [para 87](#).

¹⁹ *Moriarity* at [paras 27-31](#); *Safarzadeh-Markhali* at [paras 24, 27](#); *R v Ndhlovu*, 2022 SCC 38 [*Ndhlovu*] at [paras 61-62](#).

²⁰ *Moriarity* at [para 29](#), *Safarzadeh-Markhali* at [para 28](#); Sharma at [para 87](#); *Ndhlovu* at [para 62](#).

²¹ *Persons Unknown 2023* at [paras 9, 112](#).

²² Amended By-Law, Kang Affidavit at 110, ASAR, Tab 4B, Appendix B.

²³ *Moriarity* at [para 32](#).

unauthorized form of structure or bringing any dangerous, illegal or flammable goods on the lands.²⁴ As held by Justice Valente, the general by-law “prohibits any form of shelter regardless of the circumstances”, including circumstances where the Region “has no immediate need for the Property”.²⁵ By contrast, the site-specific by-law prescribes the specific circumstances to which it applies, namely that there is now an immediate need for the Property, and that several pre-conditions must be met before the by-law can be enforced, including an offer of alternative accommodation and social service supports. The site-specific by-law is not concerned with any other land owned or occupied by the Region.

23. The fact that both by-laws may apply to the same property, e.g. 100 Victoria Street, does not mean they have the same purpose. Instead, the Court must look at the purpose of each by-law independently from its effect in order to determine whether the by-law employs rational means to achieve its own purpose.²⁶

24. The claimants do not allege that the impugned by-law is arbitrary. Given the narrow purpose and scope of the by-law, it is also not overbroad or grossly disproportionate.

B. The by-law is not overbroad

25. Overbreadth arises when a law goes further than reasonably necessary to achieve its objective.²⁷ A law is overbroad where it “sweep[s] conduct into its ambit that bears no relation to its objective.”²⁸

²⁴ *Persons Unknown 2023* at [para 8](#).

²⁵ *Persons Unknown 2023* at [paras 113-114](#).

²⁶ *Bedford* at [para 107](#).

²⁷ *Safarzadeh-Markhali* at [para 50](#), citing *Bedford* at [para 101](#).

²⁸ *Bedford* at [para 117](#).

26. The finding in *Persons Unknown 2023* that the general by-law was overbroad does not mean the site-specific by-law is overbroad. Justice Valente found that the general by-law was overbroad because it prohibited any form of shelter “regardless of the circumstances”, sweeping conduct into its ambit that bore no relation to its objective of preventing damage to the property, disruption to the Region’s operations, or disruption of the use and enjoyment of the property.²⁹ Justice Valente concluded that the encampment had not caused damage of any significance to 100 Victoria, had not disrupted the Region’s operations, and had not disrupted the use of the property by “other persons” because the Region “has no immediate need for the Property”.³⁰

27. The purpose of the site-specific by-law, however, is to obtain vacant possession of 100 Victoria Street and facilitate construction of the transit hub. The by-law goes no further than reasonably necessary in pursuit of this goal. It only prohibits conduct that interferes with the use of the property for construction purposes, including the erection of structures on the property or residing on the property.³¹ The site-specific by-law does not prevent individuals currently living at the encampment from sheltering elsewhere.

C. The by-law is not grossly disproportionate

28. The rule against gross disproportionality only applies in “extreme cases” where “the seriousness of the deprivation is totally out of sync with the objective of the measure”:

This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.³²

²⁹ *Persons Unknown 2023* at [paras 112-114](#).

³⁰ *Persons Unknown 2023* at [para 114](#); see also [para 105](#).

³¹ Schedule “B”: Prohibited Activities, Amended By-Law, Kang Affidavit at 115, ASAR, Tab 4B, Appendix B.

³² *Bedford* at [para 120](#).

29. The site-specific by-law does not approach the “draconian impact” of a law that imprisons people for life for spitting on the sidewalk. It is not “totally out of sync” to require individuals to vacate a specific piece of property so that it can be used to construct a specific and important public project for the benefit of the community as a whole. To find otherwise would trivialize the important protections of the *Charter*.

30. The harms alleged by the claimants relate to being removed from encampments generally, not to being removed from this encampment specifically. There is no evidence that the claimants must shelter at 100 Victoria Street to protect their life or security of the person. Nothing in the site-specific by-law limits their ability to seek shelter in an alternative location. In any event, the by-law greatly mitigates the potential negative impacts on the claimants by requiring that they be offered alternative accommodation and social service supports before they are required to leave.

31. By contrast, the Region’s evidence is that it has an immediate and important need for the property, because 100 Victoria Street is the only space owned by the Region that is both proximate to the construction site and big enough to be used as a staging and laydown site. The Region’s inability to access 100 Victoria Street will significantly delay a landmark public project and increase the cost to prohibitively high levels that may ultimately render the project infeasible.³³ The result will be the loss of the benefit of improved transit for all residents of the Region, including environmental benefits and reduction in commuter times, as well as more accessible transit for vulnerable community members such as seniors, lower income residents, and persons with disabilities.

³³ Affidavit of Douglas John Spooner affirmed June 6, 2025 [**Spooner Affidavit**] at para 44, AAR, Tab 3, p 363.

III. The By-Law does not infringe Section 15 of the *Charter*

A. *Homelessness is not an analogous ground*

32. Courts in Ontario and British Columbia have repeatedly recognized that homelessness is not an analogous ground.³⁴ This Court held in *Tanudjaja* that homelessness cannot be established as an analogous ground under *Charter* s. 15 without an understanding of the common characteristics which define the group.³⁵

33. The Supreme Court held in *Corbiere* that “s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.”³⁶ Constructively immutable characteristics are “changeable only at unacceptable cost to personal identity” and “the government has no legitimate interest in expecting us to change [them] to receive equal treatment under the law.”³⁷ Immutability, actual or constructive, is the defining feature of enumerated grounds, and informs the approach to recognizing new analogous grounds.³⁸

34. Being without adequate or accessible housing is not a shared quality, characteristic or trait, or a fact that can be determined on objective criteria.³⁹ Changing that characteristic does not impose an unacceptable cost to personal identity; on the contrary, governments consistently invest taxpayer dollars to reduce and eliminate poverty.⁴⁰ As this Court found in *Persons Unknown 2023*:

³⁴ *Tanudjaja* ONSC at [para 130-31](#); *Persons Unknown 2023* at [para 126](#); *Abbotsford (City)* at [para 231](#); *R v Ferkul*, 2019 ONCJ 893 at [para 29](#).

³⁵ *Tanudjaja* ONSC at [para 134](#).

³⁶ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*] at [para 13](#).

³⁷ *Corbiere* at [para 13](#).

³⁸ Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada* 5th ed (Toronto: Thomson Reuters Canada, 2007) (loose-leaf 2025 supplement), ch 55:26 at 54-55, IBOA, Tab 5, p 109.

³⁹ *Tanudjaja* ONSC at [para 130](#); see also *Abbotsford (City)* at [para 231](#).

⁴⁰ *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17 at [para 42](#).

...I am particularly persuaded by the reasoning that homelessness is not a personal characteristic, nor is it a fact that can be determined objectively. To my mind, there is inevitably a subjective element in determining what may or may not be accessible housing given an individual's particular circumstances.⁴¹

35. A challenge based on s. 15 must be clearly anchored in a recognized ground of discrimination.⁴² Like the challenge in *Tanudjaja*, the challenge to the by-law in this case is not based on any recognized ground, but rather on “a general concern for those who live in poverty and without appropriate housing.”⁴³ The claimants argue that they are members of various protected groups based on race, indigeneity, sex, disability, marital status or receipt social assistance.⁴⁴ However, the fact that the claimants belong to various protected groups is not itself sufficient to meet the burden at the first step of s. 15.⁴⁵ A group that is disparate and heterogenous cannot be treated as analogous and does not obtain the protection of s. 15 of the *Charter*.⁴⁶

36. Contrary to the Respondents' assertion, *Kanyinda* does not alter the *Charter* s. 15 analysis, nor remove the need to ground a s. 15(1) distinction in a recognized enumerated or analogous ground.⁴⁷ As the Supreme Court noted, “the recognition of a particular claimant's intersecting identities and realities...is not novel in the s. 15(1) analysis.”⁴⁸ Intersecting identities and realities can provide context but, ultimately, the s. 15 claim “must be clearly anchored in a recognized ground of discrimination”.⁴⁹

⁴¹ *Persons Unknown 2023* at [para 126](#); also see *Abbotsford (City)* at [para 231](#).

⁴² *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 [*Kanyinda*] at [paras 50-51](#).

⁴³ *Tanudjaja ONSC* at [para 135](#).

⁴⁴ Notice of Cross-Applcation at para 2(a).

⁴⁵ *Sharma* at [para 40](#); *Ontario Health Coalition* at [para 317](#). See also *Kanyinda* at [paras 50-51](#); *Fair Change* at [para 327](#); *Heegsma* at [para 81](#).

⁴⁶ *Tanudjaja ONSC* at [paras 135-136](#); *Fair Change* at [paras 348, 356, 369, 385](#) and [398](#).

⁴⁷ *Kanyinda* at [para 43](#).

⁴⁸ *Kanyinda* at [para 40](#).

⁴⁹ *Kanyinda* at [para 51](#).

B. *In any event, the by-law does not cause or contribute to a disproportionate impact*

37. The by-law does not cause or contribute to the harm alleged by the claimants. The Supreme Court of Canada has repeatedly held that it is important to distinguish between adverse impacts “caused” or “contributed to” by the impugned law and those social circumstances which “exist independently of” it.⁵⁰ Here, the claimants have not shown a causal link between the alleged harms and the by-law.⁵¹ The disadvantages they face are caused by homelessness, not by enforcement of the by-law, particularly in light of the Region’s extensive efforts in this case to offer alternative accommodation to residents.

IV. Any violation is saved by Section 1

A. *Section 1 plays an important role in encampments cases*

38. The Supreme Court in *Bedford* clarified that the principles of fundamental justice are concerned with the law’s effect on the individual, and not “the beneficial effects of the law for society.”⁵² It follows that societal interests and the beneficial impact of the law are central to the justification analysis under s. 1.⁵³

39. Prior to *Bedford*, cases like *Motor Vehicle Reference*, *New Brunswick v G(J)*, and *Charkaoui* cautioned against justifying a s. 7 infringement under s. 1, holding that such an infringement could only be justified in exceptional circumstances such as natural disasters, war, or epidemics.⁵⁴ But the Supreme Court in *Bedford* noted the different

⁵⁰ *Sharma* at [paras 44-45](#); *Symes* at [764-65](#); *Withler v Canada (Attorney General)*, 2011 SCC 12 at [para 64](#); *Kanyinda* at [paras 57-59](#); *Fair Voting BC v Canada (Attorney General)*, 2025 ONCA 581 [*Fair Voting BC*] at [para 71](#); *Fair Change* at [para 327](#).

⁵¹ *Abbotsford (City)* at [para 236](#).

⁵² *Bedford* at [paras 121-123](#).

⁵³ *Bedford* at [paras 123-125](#); *Carter* at [paras 82, 94-99](#); *R v Michaud*, 2015 ONCA 585 [*Michaud*] at [para 62](#).

⁵⁴ *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at [518](#); *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46 [*G. (J.)*] at [para 99](#); *Charkaoui v Canada (Citizenship and Immigration)*, 2007

analyses under s. 7 and s. 1 and acknowledged that “the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.”⁵⁵ As observed by Professor Hamish Stewart,

The highly individualistic focus of the section 7 analysis is complemented by an apparent willingness to consider societal interests at the section 1 stage, thus opening up the possibility of justifying a violation of a principle of fundamental justice.⁵⁶

40. Legal scholars have argued that *Bedford*’s heightened focus on the individual in the s. 7 analysis necessitates a more robust and meaningful consideration of societal interests in the s. 1 analysis. As explained by Professor Debra Haak,

A failure to meaningfully consider both societal and individual interests, rights, or values other than those of the rights’ claimant (especially where they were relevant to Parliament in enacting impugned laws) suggests that concern for the public good, including balancing rights, interests and values in tension, “may be pushed out of the Court’s conception of what justice means in Canadian society”.⁵⁷

41. The Court of Appeal in *Michaud* similarly observed that s. 7’s “relentless” focus on the individual risks losing sight of the benefits of the law “across a population”, and that some infringements of s. 7 must be capable of justification under s. 1:

The Supreme Court noted in *Carter*...that it would be difficult to justify an infringement of s. 7 under s. 1, but added, at para. 95: “in some situations the state may be able to show that the public good -- a matter not considered under s. 7, which looks only at the impact on the rights claimants -- justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*”. This, in my view, is one such situation. More are predictable in light of *Bedford*’s instruction that the

SCC 9 at [para 66](#); Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto, ON: Irwin Law, 2019) at 351-352, IBOA, Tab 4, pp 85-86.

⁵⁵ *Bedford* at para [129](#); *Carter* at [para 95](#); see also *Safarzadeh-Markhali* at [para 57](#).

⁵⁶ Hamish Stewart, “Bedford and the Structure of Section 7” (2015) 60:3 McGill Law J 575–594 at 588-589, IBOA, Tab 3, pp 75-76.

⁵⁷ Haak at para 27, IBOA, Tab 2, p 44.

public good sought to be achieved by the challenged law can be considered only in the s. 1 analysis.⁵⁸

42. Despite the Supreme Court’s guidance in *Bedford* and the ongoing expansion of individual interests protected by s. 7, some encampment decisions, including *Persons Unknown 2023*, have continued to find that s. 7 infringements are “difficult to justify” under s. 1.⁵⁹ But if societal interests have no place in the s. 7 analysis post *Bedford*, then they must be central to the justification analysis under s. 1. Otherwise, as Professor Haak observes, “the individual claimant’s rights are set above any potentially competing societal or individual rights, interests, or values.”⁶⁰

43. The failure to meaningfully consider societal interests at either the s. 7 or s. 1 stages results in governments being constitutionally prohibited from legislating in the complex policy area of homelessness where competing individual and societal interests are in tension. In those cases, the interests of certain individuals occupying public spaces have been prioritized over the equally legitimate interests of other community members.

B. Courts must defer to policy choices that reconcile the claims of competing groups

44. The Supreme Court has distinguished between *Charter* cases where the government is best characterized as the “singular antagonist” and cases involving the government’s “reconciliation of claims of competing individuals or groups”.⁶¹ In the latter category, courts have no superior expertise or legitimacy as compared to elected governments in making complex policy decisions:

⁵⁸ *Michaud* at [paras 78-79, 150-151](#).

⁵⁹ *Persons Unknown 2023* at [para 129](#); *Kingston* at [para 116](#); *Abbotsford (City)* at [para 237](#).

⁶⁰ Haak at para 27, IBOA, Tab 2, p 44.

⁶¹ *Irwin Toy* at [994](#).

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.⁶²

45. The Supreme Court has held in numerous cases including *Irwin Toy*, *RJR-McDonald*, and *Hutterian Brethren* that where the government is mediating between claims of competing groups, deference is owed to the government's legislative choices.⁶³ A law should not fail under s. 1 because a court can conceive of alternative means that appear to be less restrictive.⁶⁴ The question is not whether the impairment of the individual claimant's rights is minimal, but whether it is one which "reasonably balances the competing social demands which our society must address."⁶⁵ A law that balances competing interests and falls within a reasonable range of policy choices is minimally impairing.⁶⁶

46. In devising policy responses to homelessness (including laws that regulate encampments) governments must reconcile the individual claims of unhoused persons with broader societal interests, which involves the allocation of scarce resources, mitigating risks to public safety, and preserving public spaces for the public benefit.⁶⁷ Faced with this difficult balance, courts must engage in a meaningful justification analysis that properly

⁶² *Irwin Toy* at [993-994](#).

⁶³ *Irwin Toy* at [994](#); *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR*] at [para 135](#); *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] at [para 37](#); see also *Carter* at [para 97](#).

⁶⁴ *Hutterian Brethren* at [para 54](#) citing *RJR*; see also *Committee for the Commonwealth of Canada v Canada*, [1991] 1 S.C.R. 139 at [248](#).

⁶⁵ *McKinney v University of Guelph*, [1990] 3 S.C.R. 229 at [314](#).

⁶⁶ *Michaud* at [paras 127, 136](#).

⁶⁷ *Black* at [paras 7-8](#); *City of Grants Pass v Johnson*, 144 S.Ct. 2202 at 2226, IBOA, Tab 1, pp. 19-20.

defers to the policy choices of elected governments and gives adequate weight to societal interests under s. 1.

C. Justice Valente’s section 1 analysis is not binding on this Court

47. This Court is not bound by horizontal *stare decisis* to follow the s. 1 analysis in *Persons Unknown 2023* because the analysis in that case did not apply the Supreme Court’s principles on s. 1 as set out in *Bedford*.⁶⁸ The s. 1 analysis in *Persons Unknown 2023* consists of three short paragraphs and relies on pre-*Bedford* case law for the proposition that a s. 7 breach may only be justified “in cases arising out of exceptional conditions, such as disasters, the outbreak of war, epidemics and the like.”⁶⁹ Justice Valente’s analysis does not consider societal interests or exercise judicial deference respecting the Region’s policy choices. Societal interest is only briefly considered and dismissed under the Court’s analysis of security of the person.⁷⁰ Justice Valente ruled out societal interests and the benefits of the by-law when analyzing the principles of fundamental justice under s. 7, yet also disregarded them at s. 1.

48. In particular, Justice Valente took note of the risks associated with the encampment, such as human feces, fire risks due to the presence of barbeques and propane tanks, and consumption of alcohol and drugs.⁷¹ He also acknowledged the Region’s burden in mitigating these risks, including security, garbage pick-up and janitorial services.⁷² Yet, he did not contend with any of these concerns in the s. 1 analysis. The decision focused on

⁶⁸ *R v Sullivan*, 2022 SCC 19 at [para 75](#).

⁶⁹ *Persons Unknown 2023* at [para 129](#) citing *G. (J.)* at [para 99](#).

⁷⁰ *Persons Unknown 2023* at [para 105](#).

⁷¹ *Persons Unknown 2023* at [para 47](#).

⁷² *Persons Unknown 2023* at [para 21](#).

the needs of the individual claimants without considering the impact on scarce public resources.

D. In any event, the section 1 analysis in this case is distinguishable

49. This Court must conduct a fresh analysis under s. 1 due to the material differences between the impugned by-laws and the evidentiary record in this application as compared to *Persons Unknown 2023*.

50. The objective of the site-specific by-law, which is to regulate and govern 100 Victoria Street and obtain vacant possession in order to facilitate construction of the new transit hub, is pressing and substantial.

51. Additionally, the Region's choice of means is rationally connected and well-tailored to the objective. The by-law is minimally impairing; it is narrowly circumscribed to cover only the property at 100 Victoria Street and, in turn, only applies to the individuals residing at the encampment on that property. Furthermore, the Region implemented various measures to facilitate the transition out of the encampment and minimize the disruptions associated with evictions. The by-law contemplates a transition plan over many months to avoid the negative impacts of sudden, forced evictions on encampment residents.⁷³ The Region's social workers have been working with the individuals at the encampment to develop a personalized housing plan that is suited to each individual's needs and preferences to the greatest extent possible.⁷⁴ The by-law guarantees alternative accommodations and equivalent social service supports to the encampment residents who resided at the encampment on the date of public notice of the by-law and offers to store

⁷³ 3rd Affidavit of Peter Sweeny affirmed July 31 2025 at para 36, Applicant's Reply Application Record, Tab 3, p 76.

⁷⁴ 1st Sweeny Affidavit at paras 14, 20, AAR, Tab 2, pp 18, 19.

their belongings for up to six months. It also endeavours to work with and find suitable alternative accommodations for the individuals that subsequently joined the encampment. The alternative accommodation will be an improvement to the living conditions of the encampment, which can be a source of injury due to continued exposure to the elements, as well as the presence of infectious and communicable diseases.⁷⁵

52. The benefits of the by-law outweigh any deleterious effects. The effect of the encampment is to appropriate the public space and prevent any other public use of that space.⁷⁶ The Region has put forward detailed and cogent evidence explaining why it needs vacant possession of this particular property to facilitate the construction of the new transit hub.⁷⁷ The transit hub will reduce commute times, connect multiple transportation services in one location, and help connect the Region to the Greater Toronto Area and other urban areas in southwestern Ontario.⁷⁸ It is expected to benefit residents and visitors alike and promote business development in the Region.⁷⁹

53. The Region and other municipalities in Ontario are not “singular antagonists” against the claimants or other unhoused persons by virtue of being responsible for regulating and directing the use of public spaces for the public benefit, and their enforcement activities in pursuit of this valid objective are entitled to judicial deference. The by-law represents a reasonable attempt by the Region to reconcile the competing interests of these claimants with the legitimate interests of the broader public in a landmark

⁷⁵ Affidavit of Dr. Sharon Koivu Affirmed September 11, 2025 at paras 34-38, 43-46, 48-49, 52, ASAR, Tab 2, pp 22-26.

⁷⁶ *Bracken v Niagara Parks Police*, 2018 ONCA 261 at [para 71](#), citing with approval *Batty v City of Toronto*, 2011 ONSC 6862 at [para 91](#); *Calgary (City) v Bullock (Occupy Calgary)*, 2011 ABQB 764 at [para 44](#).

⁷⁷ Spooner Affidavit at para 6, AAR, Tab 3, p 351.

⁷⁸ Spooner Affidavit at paras 17-20, AAR, Tab 3, p 354.

⁷⁹ Spooner Affidavit at paras 16, 17, 22, AAR, Tab 3, p 354.

transit project that will improve economic outcomes for many residents. Municipalities are not constitutionally obligated to allow public property to be turned into residential spaces, depriving the rest of the community of the use of the property for its intended and publicly-funded purpose.

PART IV – ORDER REQUESTED

54. Ontario takes no position on the order to be granted in the application.
55. Ontario does not seek costs and asks that no order as to costs be made against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9TH DAY OF APRIL
2026**



Andrea Bolieiro



Sara Badawi

TAB 68

A New Constitutional Remedy: The Declaration Plus

Kent Roach*

Abstract

The Canadian courts have recognized a new constitutional remedy: the declaration plus. This new remedy is stronger than a bare declaration that ends the court's involvement with the case. At the same time, it is weaker than an injunction because it does not contain specific orders that can fairly be enforced through contempt of court sanctions if breached by the government. The first part of this article examines the British Columbia Court of Appeal's 2024 decision in *Thomas v. Rio Alcan* and the Supreme Court's 2024 decisions in *Restoule* and *Pekuakamiulnuatsh Takuhikan* as recent examples of cases where courts recognize that something more than a bare declaration is needed. The Supreme Court has stressed that the plus could involve all of the court's remedial powers. Subsequent sections suggest that the use of a declaration plus could have improved remedial decisions in the Little Sisters bookstore, Omar Khadr and the *Doucet-Boudreau* cases. The final section argues that the declaration plus should not be limited to Indigenous rights and minority language cases. It can be an appropriate and just in a broader range of complex and dynamic remedial contexts where a bare declaration may not be enough but a mandatory order may be too much.

Introduction

From its earliest cases interpreting s.24(1) of the Charter, the Supreme Court has recognized that its broad grant of remedial discretion can authorize new and creative remedies.¹ After more than forty years of experience under the Charter, however, only a few "new" constitutional remedies have been ordered. Moreover, they have been controversial.

Under *Doucet-Boudreau*², courts can order injunctions against the Crown and retain supervisory jurisdiction. This was, however, a 5: 4 decision with the dissenters arguing that the majority had upheld a remedy that was unfair to the government and beyond judicial powers and competence. More than twenty years later, there are few reported cases of Canadian courts ordering injunctive relief and retaining jurisdiction as a constitutional remedy despite such remedies being used in other constitutional democracies including Germany, India, South Africa and the United States.³

* Professor of Law, University of Toronto. I thank Naiomi Metallic, Robert Sharpe and an anonymous reviewer for helpful comments on an earlier draft. I also thank those who organized and participated in the Honouring Treaties conference in April 2025 where an earlier version of this paper was given. All errors and shortcomings are my responsibility.

¹ R. v. Mills, [1986] 1 SCR 863 at 964-966; R. v. Gamble, [1988] 2 SCR 595 at 641-643.

² Doucet Boudreau v. Nova Scotia, 2003 SCC 62.

³ Kent Roach and Geoff Budlender "Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable" (2005) 122 South African L.J. 325; Kent Roach *Constitutional Remedies in Canada* 3rd ed (Toronto: Thomson Reuters, in press) at 12-6-12.8, 12.31-12.39.

Another new remedy, the suspended declaration of invalidity, has received largely negative academic reviews.⁴ The Supreme Court has recently recognized that it has been overused and its use must be better justified in the future.⁵ Thus, it is with some trepidation that this article claims that Canadian courts have recognized a new constitutional remedy: the declaration plus.⁶

As its name suggests, the declaration plus is a species of declaratory relief that stops short of a mandatory order or injunction. Canadian courts have favoured declaratory relief as their go-to constitutional remedy on the basis that it leaves governments with flexibility to select among different ways to comply with minority language rights⁷, equality rights⁸, legal rights in the national security context⁹ and Indigenous rights, especially when limitation periods prevented other actions¹⁰. Reliance on declaratory relief has also been encouraged by confidence that Canadian governments did not need the threat of being held in contempt of court to comply with the constitution.¹¹

Unfortunately, the reliance on declaratory relief has not always resulted in effective and meaningful remedies. In 2000, the Supreme Court decided that on a stale factual record it would not enter injunctive relief after having found that customs had unconstitutionally targeted imports from Little Sisters, a small gay and lesbian bookstore. Conflict and confusion about what the Charter required persisted. The small book store had to start follow-on litigation. It was ended in 2007 when the Court refused to grant advanced costs to finance the litigation.¹² In 2010, the Court overturned a mandatory order that the Canadian government request Omar Khadr's repatriation from American military detention.¹³ Again, the result was

⁴ Bruce Ryder "Suspending the Charter" (2003) 21 S.C.L.R.(2d) 267; Robert Leckey "The Harms of Remedial Discretion" (2016) 14 I. Con. 1; Brian Bird "The Judicial Notwithstanding Clause: The Suspended Declaration of Invalidity" (2019) 42 Man.L.J. 23; Hugo Cyr et al "Judicially Licensed Unconstitutionality" (2023) 55 U.B.C.Law Rev. 323.

⁵ Ontario (Attorney General) v. G., 2020 SCC 38.

⁶ This article expands on my previous more preliminary writings on the declaration plus see Kent Roach *Constitutional Remedies in Canada* 2nd ed (Toronto: Thomson Reuters, as updated) at 12.10-12.13, 15.19; Kent Roach *Remedies for Human Rights Violations* (Cambridge: Cambridge University Press, 2021) at 7.4; Kent Roach "Judicial Remedies for Climate Change" (2021) 17 J of Law and Equality 105 at 126-129; Kent Roach "Charter Remedies" in Peter Oliver, Patrick Macklem and Natalie Des Rosiers *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) at 689-692.

⁷ Mahe v. Alberta, [1990] 1 SCR 342.

⁸ Eldridge v. British Columbia. [1997] 3 SCR 624 and Little Sisters Book and Art Emporium v. Canada (Attorney General), [2000] 2 SCR 1120. See generally Kent Roach "Remedial Consensus and Dialogue" (2002) 35 U.B.C.Law Rev. 211.

⁹ Canada (Prime Minister) v. Khadr, 2010 SCC 3.

¹⁰ Manitoba Metis Foundation v. Canada (Attorney General), 2013 SCC 14 (declaration that the Crown had not acted honourably not prohibited by limitation defence or laches); Shots Both Side v. Canada 2024 SCC 12 (declaration used when six year limitation period had expired)

¹¹ Beverley McLachlin, "The Charter: A New Role for the Judiciary" (1991) 29 Alta. L.Rev. 540 at 550-53; Association des parents de l'école Rose-des-vents v. British Columbia (Education), 2015 SCC 21 at para 65.

¹² Little Sisters Book and Art Emporium v. Canada (Attorney General), 2007 SCC 2

¹³ Canada (Prime Minister) v. Khadr, 2010 SCC 3.

follow-on litigation that did not provide Khadr with an effective remedy. Khadr subsequently pled guilty in an American military commission in order to win his release from Guantanamo Bay.

Learning from these cases, as well as a second look at the controversial remedy in *Doucet-Boudreau*¹⁴, suggests that there is a need for an intermediate remedy or “half-way house” between a declaration and an injunction so that successful constitutional applicants do not have to commence foreseeable and expensive follow on litigation to obtain an effective and meaningful remedy. The declaration plus remains a declaratory remedy because it will generally not be specific enough that its violation can fairly be enforced through contempt. It fulfills the traditional role of declarations as practical and proportionate remedies that allow courts to resolve disputes.¹⁵ Although the declaration plus should not be a routine remedy, it need not be limited to the context of either s.35 or s.23 of the Charter.

The plus in the declaration plus will often involve the court’s retention of jurisdiction to resolve disputes that may arise from the implementation of the declaration. These disputes can and should be resolved in a fair manner that respects the roles and responsibilities of courts, the executive, and legislatures. The plus can also involve the full range of the courts remedial powers as the Supreme Court stressed in *Restoule*¹⁶ and *Pekuakamiulnuatsh Takuhikan*¹⁷. Such remedies could include more detailed declarations that are sometimes called “directions”¹⁸ damages, and costs. A declaration plus could, if necessary, evolve over time into a mandatory order. If the court retains jurisdiction, it can gain more information that will often be necessary if it is to craft any mandatory order that can fairly and with clear notice be enforced through contempt of court. Recognition of the declaration plus will hopefully encourage both litigants and judges to focus on why a declaration alone would not be inadequate and what specifically must be added to the declaration to ensure an effective and fair remedy.

Outline

The first part of this article will examine three cases decided in 2024 that all recognize that a declaration alone would be an inadequate remedy. In *Thomas v. Rio Tinto Alcan Inc*¹⁹, the British Columbia Court of Appeal decided that a simple declaration recognizing a s. 35(1) right to fish made by the trial judge was inadequate. It commented that “there are cases in which the courts have crafted declarations that bear some resemblance to injunctive relief” in order “” to bridge the gap between declarations and injunctions and combine the benefit of both

¹⁴ 2003 SCC 62

¹⁵ *Solosky v. The Queen*, [1981] 1 S.C.R. 821 at 833; *S.A. v. Metro Vancouver Housing Authority*, 2019 SCC 4 [60-61]

¹⁶ 2024 SCC 27 at [273]-[277].

¹⁷ 2024 SCC 39 at [203], [210], [220].

¹⁸ *Auton (Guardian of) v. British Columbia (Attorney General)*, 2002 BCCA 538 [75] [107] rev’d on other grounds 2004 SCC 78.

¹⁹ 2024 BCCA 62.

remedies’’.²⁰ *Thomas* affirmed the utility of the declaration plus in s.35 litigation. It also has the virtual of adopting the name declaration plus to distinguish the new remedy from both declaratory and injunctive relief and to encourage litigants and judges to be specific about what needs to be added to the bare declaration.

In *Ontario v. Restoule*²¹, the Supreme Court concluded unanimously that a simply declaration that Ontario had breached an 1850 Treaty by not augmenting \$4 payments since 1875 would not be sufficient. Instead, the Court gave the parties a six month window to negotiate an agreement and failing an agreement, for governments to increase the Treaty payments. This remedy did not end the court’s involvement because the way the Crown exercised its discretion could be reviewed for constitutional compliance. Moreover, the courts would have the full range of remedial powers, including powers to award damages and issue mandatory relief if needed, to remedy any remaining constitutional violation. The plus in the declaration potentially involved the full range of the court’s remedial powers. The Court itself did not retain jurisdiction but only because the trial judge in the case had not yet decided the appropriate remedy in a bifurcated trial.

In *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*²², the Supreme Court held that the public law concept of the Crown’s honour when entering into a relationship with Indigenous people justified a “reconciliatory justice” approach that in this case deferred to the First Nation’s choice of remedy. It rejected arguments by opposing governments that such a flexible monetary award did not account for ad hoc supplementary funding that they had provided to an Indigenous police service and that a declaration alone would be sufficient. It also recognized the need for proportionate and practical remedies that did not needlessly require additional litigation.²³ All three cases are united in recognizing that simple declarations in the context of long-standing and complex wrongs can be inadequate and fail to resolve the underlying dispute. All three cases recognize that new and creative remedies were required.

Although novel remedies, including the declaration plus, will be especially appropriate in the s.35 context, they should not be limited to such a context. The second part of this article will suggest that a declaration plus could have promoted more effective and fairer remedies in both the Little Sisters and Omar Khadr cases. In both cases successful Charter applicants had to engage in follow-on litigation after the court had relied on a simple declaration. A declaration plus in both cases could have be administered in a manner that respects all of the remedial principles recognized in *Doucet-Boudreau*²⁴ including the need to respect institutional roles and treat governments fairly. Indeed, the declaration plus was used in the follow on litigation in the Khadr case.

²⁰ Ibid at paras 438-439.

²¹ 2024 SCC 27

²² 2024 SCC 39

²³ Ibid at [220], [223]

²⁴ 2003 SCC 62.

The third part of this article will re-examine the controversial *Doucet-Boudreau* decision as a declaration plus. The minority of the Nova Scotia Court of Appeal that, like the majority of the Supreme Court, upheld the trial judge's "best efforts" order with reporting requirements explicitly recognized the remedy was a creative and well balanced blending of declaratory and injunctive relief.²⁵ Because of its lack of specificity, the best efforts order could not fairly be enforced through contempt of court proceedings against the government, something stressed by the dissenters in the Supreme Court. At the same time, the trial judge's retention of jurisdiction and order that the government present progress reports was an appropriate recognition of the complex and polycentric nature of bringing minority language school systems throughout Nova Scotia into constitutional compliance. Understanding the trial judge's successful and effective remedy in *Doucet-Boudreau* as a declaration plus takes much of the bite out of the strongly worded dissent in that case, a dissent that has arguably been more influential than the majority's judgment.

The final section of this article will outline the potential utility of the declaration plus in a range of contexts beyond s.35 of the Constitution Act, 1982 and s.23 of the Charter. It will argue against a remedial exceptionalism that limits novel and complex remedies to these two parts of the Constitution. The declaration plus could be used in other complex contexts including litigation over legal rights involving prisons and interpreters and in climate change litigation. Retention of jurisdiction should no longer be seen as a penalty for recalcitrant governments that is presumed to be unnecessary in Canada as opposed to the United States.²⁶ Rather, as the Court suggests in *Pekuakamiulnuatsh Takuhikan*,²⁷ it should be seen as part of a "cultural change" that may be necessary in some contexts to increase access to justice and to avoid unnecessary, expensive and repetitive litigation that has sometimes followed reliance on a bare declaration.

I. The Declaration Plus in *Thomas, Restoule and Pekuakamiulnuatsh Takuhikan*

The three appellate court decisions in 2024 that recognize the limits of reliance on declaratory relief all arise in the context of the enforcement of s.35 rights or the related concept of the honour of the Crown when dealing with Indigenous peoples. This is not surprising because the enforcement of Aboriginal and Treaty rights and the honour of the Crown raises many complex and polycentric remedial issues which focus on the future even as they respond to an unjust past. One use of a declaration plus is to provide for an opportunity for governments and rights holders to negotiate an agreement. The Supreme Court has long recognized consensual agreements as the preferred and purposive outcome in s.35 litigation.²⁸ That said, the declaration plus contemplates that courts are not limited to ordering only declaratory relief and

²⁵ Nova Scotia v. Doucet-Boudreau 2001 NSCA 104 [82] per Freeman J.A. in dissent.

²⁶ For arguments that retention of jurisdiction can be justified because of concerns about governmental capacity and lack of clarity and not exclusively on the basis of concerns about governmental intransigence see Kent Roach and Geoff Budlender "Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable" (2005) 122 South African L.J. 325

²⁷ 2024 SCC 39 [229] citing *Hryniak v. Mauldin*, 2014 SCC 7 [32].

²⁸ *Delgamuukw v. British Columbia* [1997] 3 SCR 1010; *Haida Nation v. British Columbia* 2004 SCC 73.

that they can order the full range of remedies should consensual agreements not be reached.²⁹ This has the potential to respond to power imbalances when governments and Indigenous peoples engage in negotiation. It also helps to ensure that those who go to the great expense of proving a violation also receive meaningful and effective remedies in a process that is both fair and proportionate.

A. *Thomas v. Rio Alcan*

Thomas was complex litigation started when the trial judge rejected Alcan's motion for summary judgment dismissing a s.35 claim on the basis that the corporation had statutory authorization for the 1952 construction of the Kenney Dam on the Nechako River.³⁰ The trial judge issued a simple declaration that the First Nation had s.35 right to fish for food and ceremonial purposes. The trial judge declined requests for injunctive relief and ongoing judicial supervision on the basis that the court did not have the competence to design a fishery.³¹ This conclusion is part of a long-standing attitude in Canada³² that is dismissive of public law litigation³³ and structural injunctions.³⁴ There is a common but in my view erroneous assumption by many that the only alternative to a bare declaration that leaves the court functus is for the court to manage a complex institution or situation in a manner the exceeds judicial powers and competence.³⁵

²⁹ The Court has recognized that courts have a full range of remedies including "injunctive relief, damages or an order that consultation or accommodation be carried out" when enforcing Aboriginal title. *T'silhqot'in Nation v. British Columbia* 2014 SCC 44 [89]

³⁰ *Thomas v. Rio Tinto Alcan Inc.*, 2013 BCSC 2303. Alcan, Canada and British Columbia all strenuously and unsuccessfully opposed amendments to the plaintiff's statement of claim to request more detailed declarations of a fiduciary duty and injunctive relief. *Thomas v Rio Tinto Alcan Inc.*, 2019 BCSC 107. The trial lasted 189 days. *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 [15]

³¹ *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 [659]

³² The origins of this resistance can be seen in judicial and legislative doctrines of Crown immunity from injunctions. Wilfred Estey in 1978 commented that American public law litigation "is wholly foreign to us, so far, and I would suggest that no amount of prodding by our law schools, professors and commentators will bring this kind of litigation to the doors of our courtrooms." Wilfred Estey "The Law of Remedies- an Overview" in *New Developments in the Law of Remedies* (Toronto: Butterworths, 1978) at p.19. Estey's view foreshadowed the influential view of the American law professor John Yoo who argued "Supervising and controlling the everyday operations of a hospital, school, or prison are executive and legislative, rather than judicial, functions" John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts*, (1996) 84 CAL. L. REV. 1121 at 1140. For arguments relating Yoo's position to American extra-legalism see Kent Roach *Constitutional Remedies in Canada* 3rd ed (Toronto: Thomson Reuters, in press) ch.12.

³³ Abram Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 7. Chayes stressed that reliance on negotiation between the parties and a focus on the future as opposed to a corrective justice focus on the past actually characterized the judge's role in public law litigation. Empirical accounts of such litigation have generally confirmed the accuracy of his account. Larry Yackle *Reform and Regret* (New York: Oxford University Press, 1989); Phillip Cooper *Hard Judicial Choices* (New York: Oxford University Press.)

³⁴ Owen Fiss *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978); Owen Fiss "Foreward: The Forms of Justice", (1979) 93 Harv.L.Rev. 1. Fiss stressed, much more than Chayes, the power of the judge and saw negotiation between the parties as a threat to justice.

³⁵ For work that stresses public law litigation has evolved beyond simple command and control theories see Charles Sabel and William Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117

In its 2024 decision, the British Columbia Court of Appeal held that the trial judge's simple declaration that the federal and provincial governments had an obligation to respect the applicant's s.35 right to fish was not a sufficient or adequate remedy. It stated that "before granting a declaration, a court must generally satisfy itself that the sought-after order has practical utility or would serve a 'useful purpose' in the context of the facts of the case and the parties' interests".³⁶ It then ruled that the trial judge had erred in taking "an unduly narrow approach to the scope of declaratory relief that was properly available to him in the context of the appellants' pleadings, and, critically, in light of his findings of a proved Aboriginal right to fish" by issuing "a declaration that, because of its generalized nature, is of no real practical utility to the appellants."³⁷ The Court of Appeal stressed: "specificity is preferred because broad declarations are likely to serve little purpose where they do not translate into substantive change."³⁸

In going beyond a bare declaration, the Court cited extra-judicial writings of Justice Rowe that declarations can "facilitate negotiation outside the litigation" and stated that this was especially important in the s.35 context.³⁹ The Court also noted its prior uses of declarations plus remedy "bear some resemblance to injunctive relief" and "attempt to bridge the gap between declarations and injunctions and combine the benefit of both remedies" (Roach at § 12:10).⁴⁰

The Court of Appeal elaborated that some of its prior decisions already had adopted "a 'declaration plus' approach".⁴¹ In one of these cases, Chief Justice Fitch made a declaration that the Crown's consultation with First Nations was inadequate while noting it was made "without prejudice to the giving of such directions for accommodation following further consultation between the parties, as may appear appropriate."⁴² In another case, the Court of Appeal modified declarations about specific bands' s.35 rights to fish while noting "[t]hat at this point, there is no demonstrated need to make mandatory orders, though they will remain available if Canada does not act diligently to remedy the problems. There is no suggestion, at this stage, that compensatory orders need to be made, but they, too, remain available in the future should a case be made out for them."⁴³ The stress placed on the availability of the court's full range of

Harv.L.Rev. 1016; Margo Schlanger "Beyond the Hero Judge: Institutional Reform Litigation as Litigation" (1999) 97 Mich. L. Rev. 6.

³⁶ *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 [382] leave to appeal dismissed 2024 CanLII 96608 (SCC)

³⁷ *Ibid* [392]

³⁸ *Ibid* [405]

³⁹ *Ibid* [438] quoting Malcolm Rowe and Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill L.J. 295, 318.

⁴⁰ *Ibid* [439]

⁴¹ For a discussion of the historical origins of the declaration plus see Kent Roach *Constitutional Remedies in Canada* 3rd ed (Toronto: Thomson Reuters, in press) at 12.4

⁴² *Ibid* [439] [447], citing *West Moberly* [2011] BCCA 247 [168]. Another cited case of the declaration plus involved obiter comments meant to facilitate future consultations between the Crown and First Nations/ *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216 at paras 84-95.

⁴³ *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2021 BCCA 155 [299] In relation to this case and *Yahey v. British Columbia* 2021 BCSC 1287, Justice Rowe and Diane Shnier observed "these declarations bear

remedies is also an important feature of the Supreme Court's subsequent decisions in *Restoule*⁴⁴ and *Pekuakamiulnuatsh Takuhikan*⁴⁵. In addition, the Court of Appeal's conclusion that the trial judge's general declaration would be of no practical use to the First Nations who had succeeded in extensive litigation is also consistent with access to justice concerns about the proportionate use of legal resources subsequently expressed by the Supreme Court in *Pekuakamiulnuatsh Takuhikan*.⁴⁶

Courts should exercise principled remedial discretion in determining the specific nature of the "plus" in the declaration plus. In *Thomas*, the plus was more specific declarations affirming that both the federal and provincial governments:

have a fiduciary duty to protect the plaintiffs' established Aboriginal right to fish by consulting the plaintiffs whenever governments' action or conduct in managing the annual water allocation and flow regime for the Nechako River, pursuant to Rio Tinto Alcan Inc.'s water licences and agreements, raises the potential for a novel adverse impact on the right".⁴⁷

This finding of a fiduciary duty underlined that a broad range of equitable remedies could follow from any subsequent violation of the fiduciary duty.

The Court of Appeal also declared that both the federal and provincial governments have duties to ensure that the participation in the management of the "the annual water allocation and flow regime for the Nechako River, pursuant to Rio Tinto Alcan Inc.'s water licences and agreements, is substantively consistent with the requirements of s. 35 of the Constitution Act, 1982."⁴⁸ This focused on the need for constitutional compliance in the future while giving the governments flexibility to decide the precise means to comply with the constitution and to respond to changing circumstances. The focus on the future is a characteristic of public law litigation⁴⁹ and what the Supreme Court in *Pekuakamiulnuatsh Takuhikan*⁵⁰ characterized as "reconciliatory justice."

some resemblance to injunctive relief. Unlike an injunction, a bare declaration is not technically enforceable. That being said, to enforce an injunction—or any enforceable court order—courts rely on the government. Courts have no ability to enforce any court order on their own. In this sense a declaration that the government must do something is functionally very similar to an injunction." Malcolm Rowe and Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill L.J. 295, 319. They also noted that the court retained jurisdiction in *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, and the parties subsequently returned to the court. *Ahousaht Indian Band v. Canada* 2018 BCSC 633.

⁴⁴ 2024 SCC 27 [273]-[277].

⁴⁵ 2024 SCC 39 [203], [210], [220].

⁴⁶ 2024 SCC 39 [224], [229].

⁴⁷ *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 [453]

⁴⁸ *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 [453] [455]

⁴⁹ Chayes "The Role of the Judge in Public Law Litigation" *supra*. For arguments in favour of two-track approach that combines remedies directed at compensating for past injustices while also attempting to prevent similar violations in the future see Kent Roach *Remedies for Violations of Human Rights* (Cambridge: Cambridge University Press, 2021) ch. 2.

⁵⁰ 2024 SCC 39 [203]

The British Columbia Court of Appeal build a consultation requirement into its declaration plus. One of its more specific declarations was that:

As an incident to the honour of the Crown, both the federal and provincial governments have a fiduciary duty to protect the plaintiffs' established Aboriginal right to fish by consulting the plaintiffs whenever governments' action or conduct in managing the annual water allocation and flow regime for the Nechako River, pursuant to Rio Tinto Alcan Inc.'s water licences and agreements, raises the potential for a novel adverse impact on the right...⁵¹

This recognized that consultation involving the parties could play a key role in filling in the details of the complex remedial responses that the trial judge had said were beyond the competence of the judiciary. As will be seen below, consultation requirements have been used as the plus in other declarations plus remedies⁵² and in other remedies involving Indigenous peoples including the Crown's duty to consult.⁵³ Consultation requirements open the door to negotiated settlements which may be more efficient for both the parties and the courts. They also help ensure that the parties and the court are informed about changing circumstances and have as much information as possible. Finally consultation requirements make sense in ensuring that remedies are meaningful, effective and of practical use for those whose constitutional rights have been violated.

The more detailed declarations entered by the Court of Appeal were justified on the basis they were required to provide a meaningful and effective remedy without being so detailed that they could be enforced through contempt sanctions or would strain the role of the courts. Although more detailed than the trial judge's simple declaration of a right, the Court of Appeal's declarations were not so detailed that they risked subverting the governments' institutional role, including with respect to balancing the complex and conflicting interests caused by a long existing dam that had the effect of infringing Indigenous fishing rights.

One unfortunate aspect of the Court of Appeal's decision in *Thomas* is that it did not address whether a court could retain jurisdiction as part of a declaration plus. The trial judge in this case displayed an aversion to the retention of jurisdiction stating:

At various points in time during the trial of this case, the Court expressed to the parties its disinclination (and likely incompetence) to design a flow regime for the preservation of fish in the Nechako River. The Court has no expertise whatever in such matters and can hardly monitor the effectiveness of any adaptive management regime in the absence of precise metrics by which to measure success or failure.⁵⁴

⁵¹ *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 [453]

⁵² *Khadr v. Canada (Prime Minister)*, 2010 FC 715 (T.D.)

⁵³ *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 456 quoting *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para 156; *Corbiere v. Canada* [1999] 2 SCR 203.

⁵⁴ *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 [657]

The trial judge cited another trial judgment in another complex fishing rights case in British Columbia who had similarly declined to retain jurisdiction.⁵⁵ In both cases, the court declined to follow American precedents allowing for retention of jurisdiction because of concerns that the court would be incompetent to take over the management of the fishery and this would not be an appropriate use of scarce judicial resources. This approach, however, discounts the important role that negotiation between the parties has played in such American litigation.⁵⁶ Part of the trial judge's hostility to retention of jurisdiction was an implicit sense that there was no viable intermediate remedy between a bare declaration that would end the court's jurisdiction and judicial assumption of command and control powers over all aspects of the fishery. The declaration plus can provide a half-way house between the extreme poles of a simple declaration that may not be effective and detailed judicial commands or injunctions.

B. *Restoule v. Ontario*

In *Restoule v. Ontario*⁵⁷ the Supreme Court held that the Crown had failed diligently to fulfill its treaty promises under the Robinson Treaty by not revising \$4 per person payments made since 1875. It recognized that in enforcing this Treaty right under s.35(1) of the Constitution Act, 1982, it could make use of "the full range of remedies — declaratory and coercive".⁵⁸ It specifically rejected Ontario's argument that only declarations, as opposed to injunctions or damages, were available as remedies. It stressed the "courts are responsible for ensuring that Aboriginal and treaty rights are protected by adequate, effective, and meaningful remedies."⁵⁹

Despite rejecting Ontario's declaration only approach, the Court held that "a declaration clarifying the rights and obligations of the parties is an appropriate remedy in this case, as it will inform both the future implementation of the Robinson Treaties and clarify the nature of the past breach".⁶⁰ Effective remedies will often speak both to the past and the future. They should provide a bridge from constitutional violations in the past to constitutional compliance in the future.

At the same time, the Court stressed that a "bare" or "simple"⁶¹ declaration was not sufficient given the context of the case. The Court then entered a declaration plus with the plus being a "direction" that gave the Crown a "circumscribed window within which to exercise its discretion, either through honourable negotiation or by determination of the Crown if necessary"⁶² to determine a constitutionally sufficient way to augment the Treaty payments.

⁵⁵ *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2018 BCSC 633 [1775-1777] varied on other grounds *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2021 BCCA 155

⁵⁶ Chayes "The Role of the Judge in Public Law Litigation" *supra* ; Sabel and Simon "Destabilization Rights" *supra*

⁵⁷ 2024 SCC 27

⁵⁸ *Ibid* [273]

⁵⁹ *Ibid* [275]

⁶⁰ *Ibid* [271]

⁶¹ *Ibid* [283]

⁶² *Ibid* [292]. The word "direction" is also used at para 272

The Court's "direction" borrowed language from some British Columbia decisions that similarly employed "directions" as part of a declaration plus remedy.⁶³ A direction is somewhat stronger and more specific than a declaration. At the same time, it is not as strong as a mandatory order that must be specific and clear to give fair notice because it can be enforced through sanctions for contempt of court.

The unanimous Court in *Restoule* made clear that "it is appropriate for that redress to be negotiated by the treaty partners, in a manner that is consistent with the goal of reconciliation."⁶⁴ Such an approach was supported by "the nature of the treaty promise, the proper role of the courts, and the need to effectively repair the treaty relationship and restore the honour of the Crown."⁶⁵ This recognized the need for remedies to reflect the purposes of the particular constitutional right, produce effective and meaningful remedies and respect institutional roles and the separation of powers.

Negotiation and consensual agreements are supported by the purposes of s.35 rights. They also have the potential to integrate the laws of the affected Indigenous peoples in a manner consistent with Article 40 of the UN Declaration of the Rights of Indigenous Peoples. That said, negotiation is a common feature of most complex forward looking public law litigation and the South African courts have especially encouraged negotiation and engagement as part of their constitutional remedies.⁶⁶ The Court's focus on the future and repairing the treaty relationship can be seen as a form of what the court would later in 2024 call "reconciliatory justice".⁶⁷

The Court provided Ontario and Canada an opportunity to resolve the case through negotiations with the First Nation Treaty rights holders, promoting reconciliation and avoiding the difficulties of formulating an effective judicial remedy. At the same time, the Court did not make the outcome of the case dependent on negotiations which could be adversely affected by imbalances of bargaining power and delays. Through a "direction", it imposed a time limit that could only be extended by a request or with the agreement of the First Nation applicants. This recognized the long delays that had occurred since 1875 and the extensive resources already spent on the lengthy litigation. The Court gave the successful First Nation litigation some degree of bargaining power in deciding whether the time for negotiations should be extended. This responded to concerns that Professor Drake has raised that short time periods may not allow enough time for Indigenous laws and governance to operate.⁶⁸

⁶³ *Bacon v. Surrey Pretrial Services Centre* 2010 BCSC 805 at paras 333- 340; *Auton v. British Columbia* (2001) 197 DLR(4th) 165 at paras 17 and 27 var'd 220 DLR(4th) 411 (B.C.C.A.) rev'd on merits [2004] 3 SCR 657.

⁶⁴ 2024 SCC 27 [271]

⁶⁵ *Ibid* [288]

⁶⁶ *Residents of Joe Slovo v. Thubelish Homes* [2009] ZACC 16; Brian Ray *Engaging with Social Rights* (Cambridge: Cambridge University Press, 2016) at p.217.

⁶⁷ *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 [18] [148].

⁶⁸ Karen Drake "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law" (2015) 11 J.S.D.L.P 183. For concerns about imbalance of power see Sarah Morales "Braiding the Incommensurables" in John Borrows et al eds. *Braiding Legal Orders* (Waterloo: Centre for International Governance, 2019) at 69.

The Court also specifically preserved its ability to determine in the future whether the process and content of how the Crown exercised its discretion to augment Treaty payments was constitutionally sufficient and, if necessary, to order additional remedies including damages⁶⁹ and injunctions. The Court's reference in *Restoule* to coercive or injunctive relief is related to the recognition by the entire Court in *Doucet-Boudreau*⁷⁰ that, if appropriate, fairly constructed injunctions could bind the Crown.⁷¹

The Court made clear that how the Crown conducted itself after its judgment would be relevant in determining whether its exercise of discretion was constitutional and, if not, what remedies the court could order.⁷² This future orientated remedy seemed to contemplate a court retaining jurisdiction over the dispute. The Supreme Court's direct retention of jurisdiction was not necessary because the trial had been divided with the remedial issues still outstanding before the trial judge.⁷³ The Court also made clear that the extensive trial record could still be used should additional litigation be necessary after its judgment. This recognized that the plaintiffs had invested considerable resources in compiling this record.

⁶⁹ Jamal J. made crystal clear that the courts could order damages when he stated: "I hasten to add that this does not mean that the Crown should *never* be judicially compelled to pay a certain sum of money as determined by a court. Under some circumstances, a court may decide to intervene and set the amount to be paid by the Crown. For example, a failure by the Crown to pay an honourable amount in all the circumstances should not limit a court to quashing the amount set by the Crown and remanding the issue to the Crown for redetermination. In such a case, a court may need to make a determination that the Crown refuses to make, or that it makes dishonourably. The Crown cannot be allowed to continue to undermine the very object and purpose of the treaty promise." *Ontario v. Restoule* 2024 SCC 27 [291].

⁷⁰ 2003 SCC 62.

⁷¹ The exercise of either remedial discretion under s.24(1) or the inherent remedial discretion of superior courts in constitutional cases should prevail over legislative provisions that restrict injunctive and mandatory remedies against the Crown. Crown Liability and Proceedings Act R.S.C. 1985, c.C-50. For similar provisions see Crown Liability and Proceedings Act, 2019 S.O. 2019 c.7 Sch. 17 s.22; Crown Proceeding Act, RSBC 1996, c.89 s.11(2). See generally Patrick Monahan, Wade Wright and Erika Chamberlain *Hogg's Liability of the Crown* 5th ed (Toronto: Thomas Reuters, 2024) ch.2.

⁷² Jamal J. stated: "Absent a settlement, the Crown will be required to explain to the Superior plaintiffs and the court how it reached its determination and why. This would permit the court to pay careful attention to the manner in which the Crown exercised its discretion, having regard to both the amount determined and the process by which it arrived at that amount, when assessing whether the Crown's determination is honourable." *Ibid* at 290.

⁷³ The trial was actually divided into three phases with the first two stages involving the interpretation of the Treaty and the Crown's immunity and limitation defences with remedies being reserved for the third phase. *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 at para 2. The trial was and is complex involving 11 expert witnesses in an attempt to understand both Anishinaabe and Euro-Canadian perspectives and 30,000 pages of primary documents and about the same amount of secondary documentation. *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at paras 8-11. The trial judge refused Ontario's motion to adjourn the remedial phase of the law suit stressing that additional delay would cause irreparable harm to the First Nations plaintiffs including the possible unavailability of Elders who might testify. *Restoule v. Canada (Attorney General)*, 2022 ONSC 7368. *Restoule* is somewhat similar to a bifurcated s.23 case where the Supreme Court upheld a preliminary declaration of a violation subject to a bifurcated trial on justification and remedy. The Court recognized: "Properly structured, communicated, and understood, phasing can facilitate access to justice by ordering a proceeding in such a way as to resolve first those issues that can be dealt with more expeditiously, while leaving to later phases more time-consuming or complex issues, particularly where it may prove unnecessary to engage the later stages." *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21 [63]

The Court also directed that should the governments not reach an agreement with the Superior plaintiffs that increases in the Treaty payments should flow to the successful plaintiffs without delay. Justice Jamal explained:

Given that the Superior plaintiffs have now been waiting almost a century and a half for their treaty entitlement, the amount to be paid would not be stayed pending any potential review by the courts, and should be paid to the Superior plaintiffs within a reasonable period of time sufficient to allow for the necessary legislative approvals.⁷⁴

This as well as the six month window foreshadowed a concern that the Court expressed in *Pekuakamiulnuatsh Takuhikan*⁷⁵ that further delay and litigation costs were harmful and not in the interests of reconciliatory justice.

The Court readily acknowledged the difficulties of crafting remedies in this complex context. The determination of an appropriate and honourable increase in moneys paid under the Treaty was “a polycentric and discretionary determination that will inevitably reflect many social, economic, and policy considerations that may change over time....”.⁷⁶ Quoting from the dissenters in *Doucet- Boudreau*⁷⁷ and the Court’s caution in *Schachter*⁷⁸ about selecting between a legitimate range of options for complying with the Constitution, Justice Jamal acknowledged that “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.”⁷⁹ Caution is not the same, however, as abdication or a strict line preventing the courts from making any remedial in a complex and polycentric context. In the end, the Court recognized its ultimate obligation to craft effective remedies with Justice Jamal stated: “I stress that courts are not incompetent or unable to entertain these considerations when necessary. Indeed, I acknowledge the jurisdiction of the courts to order compensation at Stage Three if appropriate to do so.”⁸⁰

The declaration plus in *Restoule* took advantage of what the Court has long recognized was an advantage of declaratory relief. Citing the 1997 case of *Eldridge*⁸¹, Jamal J. stated “it is appropriate in this case for this Court to order the government to repair the breach of its constitutional obligations, while leaving it up to the executive branch to determine the best means of doing so.”⁸² This recognized that there was more than one way to achieve

⁷⁴ Ibid [305]

⁷⁵ 2024 SCC 39 [229] Much evidence relevant to remedy and Treaty augmentation had been heard by the trial judge.

⁷⁶ 2024 SCC 27 [294].

⁷⁷ 2003 SCC 62

⁷⁸ [1992] 2 SCR 679

⁷⁹ 2024 SCC 27 [294].

⁸⁰ Ibid [294].

⁸¹ [1997] 3 SCR 624.

⁸² 2024 SCC 27 [299]

compliance with the constitution. It also provided an opportunity for a negotiated settlement that reflected the priorities of the Treaty rights holders.⁸³

There was a definite plus in the declaratory part of the *Restoule* remedy. The plus was the direction to the Crown to negotiate with the rights holders and the ability of the Superior plaintiffs, but not the Crown, to request further time for negotiation after which the Crown would have to exercise its discretion.⁸⁴ Another plus were six detailed declarations including declarations that in the past “The Crown dishonourably breached the Robinson Treaties by failing to diligently fulfill the Augmentation Clause” and that it must exercise its discretion to increase the annuities without loss “diligently, honourably, liberally, and justly” and that “its discretion is not unfettered and is subject to review by the courts.”⁸⁵ The final plus was the Court’s strong statements that the trial judge would have the full range of remedial powers including damages and coercive relief on the basis of how the Crown exercised its discretion to increase the Treaty payments.

Unfortunately there was no agreement between the successful Superior plaintiffs and federal and provincial governments during the six month period that the Court provided for negotiations. During this period, the parties met over 27 days including 18 days in person. They also had the assistance of a mediator.⁸⁶ The Court’s statement that the conduct of the governments would also be relevant should a judicial remedy eventually have to be ordered was understandable given the Court’s findings that the Crown had not acted honourably and that Anishinaabe legal principles based on reviving the Council Fire were also relevant. At the same time, this meant that the negotiations were based on formal “on the record” statements from the parties. The responsible Ministers only attended a small part of the negotiations with governments lawyers often stating that the ultimate agreement would have to be made by both the federal and provincial Ministers and Cabinet.⁸⁷ The divided Crown and the difficulties of achieving agreement among three levels of government did not make matters easier and the First Nation plaintiffs did not exercise their right under *Restoule* to ask for an extension of time for negotiations.

The Crown exercised their discretion to increase the payments on January 27 2025 through letters by the responsible federal and provincial Ministers. The reported amount of the increase was \$3.7 billion, less than the \$10 billion settlement received by the Robinson Huron plaintiffs.

⁸³ The Huron plaintiffs have settled their suit for a payment of \$10 billion. *Mike Restoule v. The Attorney General of Canada*, 2024 ONSC 1127.

⁸⁴ *Ibid* at 306. Jamal J. justified this unequal treatment of the parties on the basis that “Given the long history of this litigation and the Crown’s dishonourable conduct, it will not be open to the Crown to seek such an extension if opposed by the Superior plaintiffs.” *Ibid*.

⁸⁵ *Ibid* [304]. For another example of a detailed declaration see *Shot Both Sides v. Canada* 2024 SCC 12.

⁸⁶ Brian Gover “*Ontario v. Restoule*: Judicially Mandated ‘Meaningful and Honourable’ Engagement and Negotiation, April 7, 2025 presented at Honouring Treaties conference.

⁸⁷ *Ibid*.

The successful Robinson Superior plaintiffs are seeking judicial review before the trial judge as part of the bifurcated trial.⁸⁸ The case is not over.

C. *Quebec v. Pekuamiunuatsh Takuhikan*

The Supreme Court in an 8:1 decision found that Quebec had violated both a contract and the honour of the Crown in refusing to negotiate deficits incurred by a First Nations in running its own police service in Mashteuiatsh between 2013 and 2017.⁸⁹ Between 2013 and 2017, the funding of the First Nations police service increased 1.5% compared to 27% for the RCMP between 2008 and 2017 and 15% for the Quebec provincial police from 2011 to 2017.⁹⁰ As in *Restoule*, the dispute was complicated by requirements for agreements between Indigenous, federal and provincial governments.

Justice Kasirer for the Court stressed that while private law damages would attempt to achieve “corrective justice” by restoring the aggrieved party to the position they would have occupied but for the breach, this remedial approach was not the appropriate one under public law where the focus was on “repairing and maintaining the special relationship with the Indigenous peoples on whom European laws and customs were imposed... This is what I will call justice linked to reconciliation or reconciliatory justice.”⁹¹ James Anaya has similarly argued that remedies for violations of Indigenous rights will “not necessarily entail a reversion to the status quo ante”⁹². Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples calls for effective but also bi-jural remedies that give due consideration to Indigenous law. There is a potential for relevant Indigenous laws to be included as part of “reconciliatory justice” especially to the extent that consensual agreements are reached.⁹³

The Court upheld an award against Quebec of their proportionate share of the deficit run by the First Nations police service between 2013 and 2017 despite claims that both Quebec and Canada had made some supplementary payments during this time in order to ensure that the First Nations police service was not, as many have been, disbanded because of inadequate funding. The Court acknowledged that this award could not be justified on exclusively private law principles given the various payments Quebec had made to keep the police service operating.⁹⁴ It could, however, be justified under public law where:

⁸⁸ Ibid. See also “Talks on how many Billions in Annuities Canada, Ontario owe Robinson Superior First Nations begin this week”. CBC News December 7, 2024 at <https://www.cbc.ca/news/canada/sudbury/robinson-huron-superior-settlement-compensation-negotiation-ontario-1.7409634>; “Robinson Superior Plaintiffs annuities case heads back to Court” CBC News January 27, 2025 at <https://www.cbc.ca/news/canada/sudbury/robinson-huron-ten-billion-ontario-canada-crown-1.7443284>

⁸⁹ 2024 SCC 39 [132]

⁹⁰ Ibid [130]

⁹¹ Ibid [148] (citations omitted)

⁹² James Anaya *Indigenous Peoples in International Law* 2nd ed (Oxford: Oxford University Press, 2004) at 107.

⁹³ For arguments about the need for judicial deference and incorporated of negotiated systemic remedies that may include Indigenous law while courts also provide remedies to provide for compensation and protection against irreparable harm see Roach *Remedies for Violations of Human Rights* supra ch.9.

⁹⁴ 2024 SCC 39 [208].

A breach of the obligations flowing from the honour of the Crown makes available “the full range of remedies, including damages and other coercive relief, . . . to remedy that breach” (*Restoule*, at para. 276, citing Roach, at § 15:2). Under the public law regime, the analysis must be focused on restoring the honour of the Crown, which was marred by its wrongful conduct. The purpose of this exercise is not to remedy the consequences of a civil fault, but rather to impose a measure that restores balance to the relationship between the parties and thus places them back on the path to reconciliation.⁹⁵

The Court linked the case with *Restoule* by stating “as this Court recognized in *Restoule*, courts must be creative in determining the appropriate remedy where this is necessary to restore the honour of the Crown (para. 277).”⁹⁶ The Court rejected arguments by the government that a declaration would be sufficient and distinguished *Shot Both Sides*⁹⁷ on the basis that in that case, the Indigenous claimant had requested declaratory relief.⁹⁸ As in *Restoule*, the Court recognized that something more than a declaration was necessary.

In the end, a remedy requested by the First Nation⁹⁹ was awarded as the best means to achieve forward looking reconciliatory justice even though the majority of the Court concluded that it could not be justified on more backward looking private law principles. The plus in the Court’s declaration plus approach was the Court’s rejection of the idea that breaches of the honour of the Crown could only be enforced through declarations and its acceptance of a damage award that drew on the “flexibility inherent in the assessment of damages in this public law context”¹⁰⁰.

The Court recognized a new concept of “reconciliatory justice” which in its focus on the future was very similar to the attributes of public law litigation that Abram Chayes recognized in 1976.¹⁰¹ Justice Kasirer explained that reconciliatory justice “transcends the corrective justice at the heart of private law to make room for repairing and maintaining the special relationship with the Indigenous peoples on whom European laws and customs were imposed (see *MMF*, at para. 67; *Haida Nation*, at para. 17).”¹⁰² The Court stressed that reconciliatory justice could require judicial flexibility and creativity.

One of the traditional uses of declarations is to end disputes and the declaration plus builds on this aspiration which is even more important as the costs and delays of litigation increase. The Court rejected remanding the case back to the trial judge for a precise calculation of private law

⁹⁵ Ibid [210]

⁹⁶ Ibid [217], [220], [223]

⁹⁷ 2024 SCC 12

⁹⁸ 2024 SCC 39 [220]

⁹⁹ “It is not possible to determine the position the respondent would be in today but for the Crown’s dishonourable conduct. However, since it is the Crown’s dishonourable conduct itself that makes this impossible, Pekuakamiulnuatsh Takuhikan should not be penalized. The other injury caused to it, from the standpoint of the quality of policing and its dignity, is also difficult to quantify with any precision.” Ibid at [225].

¹⁰⁰ Ibid [232]

¹⁰¹ Chayes “The Role of the Judge in Public Law Litigation” supra

¹⁰² 2024 SCC 39 [148]

damages that might take into account \$400,000 that Quebec had contributed to keeping the small Indigenous police service solvent. It concluded that such a remand would delay the remedy and not be a proportionate use of scarce litigation resources.¹⁰³ This approach drew a solitary dissent from Justice Cote.¹⁰⁴ This may underline the importance of the Court's recognition of a forward-looking concept of reconciliatory justice.

The exact meaning of reconciliatory justice will be fleshed out in subsequent cases. Nevertheless, it is relevant that in this case the Court accepted the remedial request of the First Nation even though it resulted in more generous damages than would be justified under private law principles of corrective justice.

II. The Need for the Declaration Plus in *Little Sisters* and *Khadr*

This section will suggest that the declaration plus could have provided more effective remedies in two of the Court's leading remedial precedents dealing with complex situations where the Court found that a mandatory order was not justified. In both cases, litigants who had already established that their rights had been violated were required to engage in follow on litigation. To make matters worse, both *Little Sisters* and *Omar Khadr* were again unsuccessful in obtaining effective remedies in this follow on litigation. The use of the declaration plus in each case may have resulted in more effective remedies and would represent learning from these remedial failures.¹⁰⁵

A. *Little Sisters v. Canada*

This case involved a successful Charter challenge that established that customs had targeted imports from a small gay and lesbian book store in violation of both freedom of expression and equality rights. The extensive trial record revealed that *Little Sisters* bookstore had 261 items

¹⁰³ Kasirer J. elaborated: "remanding the case to the Superior Court for this sort of assessment — as opposed to an assessment of the damages related solely to civil fault — would, in my opinion, be contrary to the principle of proportionality that must guide the courts as an organizing principle of the law of civil procedure.... the path to restoring the honour of the Crown does not always involve the strict application of private law principles. Nor does it always require insistence on following procedures that are burdensome, given the amount at stake, in order to establish the consequences of dishonourable conduct. Reconciliatory justice requires both adaptability and flexibility. This is an example of where a "culture shift" calls upon judges to manage the legal process "in line with the principle of proportionality" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 32; see *Code of Civil Procedure*, CQLR, c. C-25.01, art. 18). Ibid [224] [229]"

¹⁰⁴ Justice Cote argued that she was "not convinced that it is necessary to create a remedial scheme based on "reconciliatory justice". I fail to see why the rules of corrective justice could not be adapted to consider the Indigenous perspective and the imperative of reconciliation when a court finds that the Crown has not acted in good faith and with honour in the context of a contractual relationship with an Indigenous party." 2024 SCC 39 [318] She expressed concerns about "the highly discretionary nature of the remedy anchored in reconciliatory justice" and would have followed the trial judge's much less generous approach to the remedy." Ibid [323] For my views on the limits of corrective justice even in the non-Indigenous context and the potential of more discretionary and flexible equitable remedies see Kent Roach "The Limits of Corrective Justice and the Potential of Equity" (1991) 33 *Ariz. L. Rev.* 859.

¹⁰⁵ On the significance and prevalence of remedial failure see Roach *Remedies for Human Rights Violations* supra at 2.6.

detained by customs between 1984 and 1994 including items imported with any delays by other bookstores. After a two month trial, a judge found that customs had targeted the small bookstore's imports in a manner that discriminated on the basis of sexual orientation. Both the ss.2 and 15 violations were caused by a lack of training of customs employees in the law governing obscene publications and a lack of updating of internal material to reflect developments including the liberalization of the law of obscenity.

Justice Binnie for the Court declined to order injunctive relief and retain jurisdiction in part because of the government's representation that it had addressed the institutional and administrative problems encountered by the appellants in the six years since the trial decision.¹⁰⁶ He noted that the Court's specific declarations about past violations "should provide the appellant with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider any further action is necessary".¹⁰⁷

In his dissent, Justice Iacobucci warned that the majority's use of declarations was "simply inadequate. Systemic problems call for systemic solutions".¹⁰⁸ He warned that "declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance."¹⁰⁹ He recognized that compiling the "enormous" record at trial was "a massive undertaking" for the small bookstore. Moreover, he prophetically warned that if Little Sisters was not satisfied with the government's response to the Court's declaration, it would have the "heavy" and "unfair" burden of commencing new litigation. In short, a "stronger remedy is necessary to vindicate the appellants' rights."¹¹⁰

Little Sisters continued to have problems with its imports and eventually had to start new litigation. Because of the estimated \$1 million costs of a new trial¹¹¹, it sought an order of advance costs against the government. The trial judge granted advance costs noting that the bookstore barely made a profit and litigation was necessary not only to determine if four titles were obscene, but if customs had adequately responded to the systemic problems identified in the Supreme Court's 2000 decision.

The majority of the Supreme Court overturned the advance costs order. It warned of floodgates on the basis that "the same logic would seem to imply that it is an exceptional matter every time a public actor is alleged to be acting illegally — from a Crown corporation involved in a labour dispute to an administrative agency acting beyond its jurisdiction."¹¹² It also indicated that the systemic issue would not be of exceptional public importance should the court determine that custom's systemic response was constitutional.

¹⁰⁶ 2000 SCR 69.

¹⁰⁷ Ibid [157- 158]

¹⁰⁸ Ibid [253]

¹⁰⁹ Ibid [258]

¹¹⁰ Ibid [261]

¹¹¹ 2007 SCC 2 [69]

¹¹² Ibid [63]

Justice Binnie, the author of the majority judgment in 2000, issued a strong dissent on the basis that “[t]he issue of public importance is whether Canada Customs learned the lessons of *Little Sisters No. 1*, and now performs its mandate without discrimination on grounds of sexual orientation, and has lived up to its assurances given to the Court.”¹¹³ He stressed there was no business case for the litigation and “[t]he government is in effect being accused of fighting a war of attrition. Today four books, tomorrow another four books. Litigation follows litigation until the rational businessperson is forced to throw in the towel. This is how civil liberties can be eroded, little by little, yielded in small increments that case by case are not worth the cost of the fight.”¹¹⁴ Justice Binnie’s practical concern about access to justice is congruent with the idea expressed in *Pekuakamiulnuatsh Takuhikan*¹¹⁵ about the need for a proportionate response that would settle the dispute.

In *Little Sisters*, the use of a declaration plus might have achieved an effective remedy and would have lessened the burden on Little Sisters of commencing fresh litigation. A declaration plus should not be confused with mandatory relief. All of the Justices in 2000 were reluctant to impose mandatory orders, four years after the trial judge’s findings. This is understandable given that customs had taken some measures to respond to the declaration at trial that it had violated Little Sister’s rights under ss.2 and 15 of the Charter. At the same time, there was a ten year record of chronic violations of the small bookstore’s rights as well as concerns about customs’ resources and training. Systemic and complex remedies will often take time and involve uncertain outcomes. Retention of jurisdiction either by the Supreme Court or through a remand back to the trial judge would have ensured that the massive trial record could be used should subsequent disputes arise between the parties about what the Charter required.

Under the declaration plus approach, Justice Binnie’s specific declarations as opposed to mandatory orders could still have been entered. This would have left it to the government to select how it would comply with the Charter. Retention of jurisdiction, however, would have allowed either the government or Little Sisters to seek guidance or additional relief if necessary. All of this would have been done in a transparent and fair manner that respected the roles of courts, legislative and executive. This would have been a proportionate way of proceeding in a complex and dynamic case to ensure that the declaration plus had the practical effect of resolving the dispute rather than spawning new, fresh and expensive litigation.

B. *Khadr v. Canada*

The limits of declarations and the potential of innovative remedies such as the declaration plus is well illustrated in the Omar Khadr saga. In 2010, the Supreme Court overturned a mandatory remedy that Canada request that the United States return Omar Khadr to Canada. Khadr had been detained since 15 years of age at Guantanamo Bay, Cuba. The Court stressed that a

¹¹³ Ibid [152]

¹¹⁴ Ibid [129]

¹¹⁵ 2024 SCC 39 [203]

declaration would give the government flexibility to decide what steps should be taken while considering its broader foreign policy with the United States.¹¹⁶ The Court's remedy in this case, as in the *Little Sisters* case, consisted of a declaration that the government had violated the Charter in the past. The declaration was even less specific than the declaration in *Little Sisters*.

After some initial hesitation when it appeared as if the government might do nothing in response to the declaration, the government sent a diplomatic note that requested that the United States not use materials obtained by Canadian officials who unconstitutionally interrogated Khadr at Guantanamo in 2003 and 2004.¹¹⁷ This responded to the past violation in a minimal manner. At the same time, it did nothing to address Khadr's continued detention. Not surprisingly, it did not result in an effective remedy.

As in *Little Sisters*, follow on litigation was necessary. The trial judge, Justice Zinn, found that Canada had violated a common law duty to consult Khadr's representatives before responding to the Supreme Court's 2010 declaration. Consultation requirements will often be a feature of a declaration plus. They provide the intended beneficiaries of a declaration an opportunity to make representations to the government about how the government should respond to the declaration so that the response provides an effective and meaningful remedy and ends the dispute.

Justice Zinn responded to the complex and dynamic situation with a "declaration plus" that, like the *Restoule* remedy, provided a structured and time sensitive process to ensure that Khadr received an effective remedy either by government action or, if necessary, by judicial remedy. After finding that Khadr has still not received an effective remedy, he ordered Canada to propose another remedy in seven days. Khadr would then have seven days to comment on the proposed remedy. Justice Zinn would then issue a remedy that took into account both the government's proposals and Khadr's response. This process was transparent and fair to the affected parties. Justice Zinn hinted that he would not rule out the possibility that a mandatory order that Canada request Khadr's return from the United States might be the only effective remedy in this case.¹¹⁸ His appeal to the widest possible range of remedies is firmly echoed in s.24(1) jurisprudence. It is also consistent with the Court's reference to a broad range of remedies in *Restoule* and *Pekuakamiulnuatsh Takuhikan* even though those non-Charter cases did not involve s.24(1).

Justice Zinn's declaration plus approach combined the flexibility of a declaration that allowed the government to balance competing interests and exercise discretion with a judicially

¹¹⁶ *Khadr v. Canada (Prime Minister)* [2010] 1 S.C.R. 44. This itself was a second round of litigation before the Court. See *Canada v. Khadr* 2008 SCC 28.

¹¹⁷ For background on the government's response see Roach "The Supreme Court at the Bar of Politics" (2010) 28 N.J.C.L. 115 and Andrew Stobo Sniderman "'The Melancholy Truth': Corrective and Equitable Justice for Omar Khadr" (2014) 23 Dal J of Legal Studies 172.

¹¹⁸ *Khadr v. Canada (Prime Minister)* 2010 FC 715. Justice Zinn retained jurisdiction in another national security case. *Abdelrazik v. Canada* [2010] 1 FCR 267 [167-8]

structured consultation process that was designed to ensure an effective and meaningful remedy that would consider both the perspectives of the successful litigant and the government. Like *Restoule*, it imposed time limits in recognition of the adverse effects of remedial delay. Like *Pekuakamiulnuatsh Takuhikan*, it sought to minimize the additional burdens for a successful litigant in obtaining a remedy in a proportionate manner.

The declaration plus was fair to both parties and respective of the role of the courts and the government. As in *Restoule*, Justice Zinn would only have crafted a judicial remedy in the eventuality that there was no agreement among the parties and only if the government's response was constitutionality inadequate. The declaration plus approach was judicial in being transparent and allowing adversarial argument about what remedy should be ordered. It respected the roles of courts and government because it did not immediately jump into complex and polycentric matters that in the first instance should be decided by the government.

Justice Zinn's innovative remedial order was, however, stayed pending appeal with Chief Justice Blais expressing serious doubts that a mandatory order to make diplomatic representations could be made in light of the Supreme Court's decision in the Khadr case overturning such a remedy.¹¹⁹ The case was subsequently declared moot after Omar Khadr pled guilty in an American military tribunal subject to a diplomatic agreement that he be allowed to return to Canada to serve the remainder of his sentence.¹²⁰

The declaration plus approach used by Justice Zinn recognized that in some complex and contentious cases, the use of a bare declaration may result in an inadequate remedy that is not meaningful to those whose constitutional rights have been violated. At the same time, it also recognized that courts will not often have the necessary information to make detailed and enforceable orders. It respected institutional roles by allowing the government at least initially to select among different ways to achieve constitutional compliance while also fairly hearing from the other side. It created a process, as in *Restoule*, that created the possibility for a consensual resolution without abdicating the court's responsibility to provide an effective remedy. The innovative declaration plus responded to the acknowledged weaknesses of bare declarations as a remedy that might produce further disputes and litigation between the parties.

III. Reconceiving *Doucet-Boudreau* as a Declaration Plus

The Court's decision in *Doucet-Boudreau*¹²¹ is an awkward precedent. It was a 5:4 decision and the dissenting judgment seem to have been more influential than the majority judgment in

¹¹⁹ Khadr v. Canada (Prime Minister) 2010 FCA 199. For arguments that this approach would adopt a type of political questions judicial abdication at the remedies stage that the Court had rejected in *Operation Dismantle v. The Queen* [1985] 1 SCR 441 see Kent Roach "The Supreme Court at the Bar of Politics" (2010) 28 N.J.C.L. 115.

¹²⁰ Khadr v. Canada 2011 FCA 92.

¹²¹ 2003 SCC 62

subsequent jurisprudence.¹²² The dissenters argued that the trial judge's order that Nova Scotia make its "best efforts" to deliver minority language educational facilities in five parts of the province and his retention of jurisdiction to receive sworn progress reports from the government exceeded the judicial function and treated the government unfairly. The Supreme Court has subsequently affirmed that while ongoing judicial supervision can be justified in some cases, any mandatory orders "must be sufficiently clear so that they give the parties bound by them fair guidance on what must be done to comply...".¹²³

Given all this, it is not surprising that there are few reported decisions of injunctive relief combined with judicial supervision. Courts will often not have sufficient information to craft specific and enforceable orders. They may be forced to rely on declarations even when they may not produce an effective remedy and may force applicants to engage in new litigation as both Little Sisters and Omar Khadr were required to do. There has been more heat than light in much of the commentary on *Doucet-Boudreau*. An important point that often is ignored is that the trial judge's remedy was successful in producing compliance with s.23 of the Charter and the case was moot by the time the Supreme Court decided the case.¹²⁴

In this section, it will be argued that the Court should affirm the majority decision in *Doucet-Boudreau* but reconceive the trial judge's remedy as a declaration plus. Such a re-interpretation would not be novel. The dissenting Nova Scotia Court of Appeal judge who would have upheld the trial judge's remedy characterized it as a "creative blending of declaratory and injunctive relief"¹²⁵; in other words: a declaration plus. Freeman J.A. defended the trial judge's remedy as "a pragmatic approach to getting the job done expeditiously. Requiring fresh applications by the parties each time one of the respondents appeared not to be using its best efforts could have dragged matters out interminably."¹²⁶ In contrast, the trial judge's remedy that involved retention of jurisdiction was "a well-balanced remedy, mild and unobtrusive but effective."¹²⁷

In a joint decision by Justices Iacobucci and Arbour, the majority of the Supreme Court upheld the trial judge's remedy as an exercise of remedial discretion under s.24(1) of the Charter which was not subject to common law or statutory restraints. Remedial discretion was, however,

¹²² *Jodhan v. Canada* 2012 FCA 161; *Canada v. Long Plain First Nation* 2015 FCA 177.

¹²³ *Thibodeau v. Air Canada*, 2014 SCC 67 [127]. The Court also related the need for clear orders to its desire "to prevent a potentially endless round of further applications to determine whether the parties have complied." (ibid) This concern about unnecessary litigation is understandable but ignores the follow-on litigation that both Little Sisters and Omar Khadr had to engage in and the failure of the declarations used in those cases to resolve the dispute.

¹²⁴ Paul Rouleau and Linsey Sherman, "Doucet-Boudreau, Dialogue and Judicial Activism: Tempest in a Teapot?*", (2010) 41 *Ottawa Law Review* 171.

¹²⁵ 2003 SCC 62 [68]

¹²⁶ *Nova Scotia v. Doucet-Boudreau* (Attorney General), 2001 NSCA 104 [72]. The next year, the British Columbia Court of Appeal also upheld a declaration plus in a complex equality case under s.24(1) of the Charter. *Auton (Guardian of) v. British Columbia* (Attorney General), 2002 BCCA 538 at para 92 rev'd on merits 2004 SCC 78. Lambert J.A. observed that the declaration plus was not yet a mandatory order but that it could become one if it became more specific and addressed a specific office holder. Ibid at paras 128-129.

¹²⁷ *Doucet Boudreau v. Nova Scotia* 2003 SCC 62 [82]

subject to constitutional principles including the need for an effective remedy; respected the role of courts and other branches of government and that was fair. They stressed that s.24(1) allowed “novel” and “creative” remedies.¹²⁸ They indicated that while the best efforts orders and reporting requirements might have been more clearly expressed¹²⁹, they were a legitimate exercise of remedial discretion. They stressed the need for a proportionate response that would not smother access to remedies in unnecessary procedures and costs when they stated:

In the absence of reporting hearings, the appellant parents would have been forced to respond to any new delay by amassing a factual record by traditional means disclosing whether the parties were nonetheless using their best efforts. A new proceeding would be required and this might be heard by another judge less familiar with the case than LeBlanc J. All of this would have taken significant time and resources from parents who had already waited too long and dedicated much energy to the cause of realizing their s. 23 rights. The order of reporting hearings was, as Freeman J.A. wrote “a pragmatic approach to getting the job done expeditiously” (para. 74). LeBlanc J.’s order is a creative blending of remedies and processes already known to the courts in order to give life to the right in s. 23.... Parents such as the appellants should not be forced continually to seek declarations that are essentially restatements of the declaration in *Mahe*. Where governments have failed to comply with their well-understood constitutional obligations to take positive action in support of the right in s. 23, the assumption underlying a preference for declarations may be undermined.¹³⁰

Justices Iacobucci and Arbour’s recognition of the trial judge’s remedy as a “creative blending of remedies” can be seen as implicit recognition that the trial judge’s best efforts order and retention of jurisdiction for progress reporting was a declaration plus.

The four judges who dissented concluded that the trial judge’s reporting sessions created “confusion, doubt and uncertainty about the obligations of the respondents and about the nature of a process that went on over several months.”¹³¹ The several months that it took to resolve the matter, however, was a more proportionate response than requiring a successful Charter applicant with legitimate expectations of receiving an effective remedy to have to start fresh litigation as happened in both the Little Sisters and Omar Khadr cases.

The dissenting judges argued that the trial judge would have violated the separation of powers if he had made additional orders on the basis that he: “would have assumed a supervisory role which included administrative functions that properly lie in the sphere of the executive. These functions are beyond the capacities of courts. The judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation.”¹³² As suggested above, this approach is based on a simplistic view that once

¹²⁸ Ibid [51].

¹²⁹ Ibid [83]

¹³⁰ Ibid [61], [66].

¹³¹ Ibid [102]

¹³² Ibid [120]

courts went beyond a declaration, the only alternative was judicial management that exceeded the institutional role and capacity of the courts.¹³³

The dissenters also argued that the remedy was improper even if the trial judge was, as he suggested at one of the progress hearings, unable to make further remedial orders. In such a case, the trial judge would have breached the separation of powers because the “reporting sessions did not result in the exercise of adjudicative, or any other, functions that traditionally define the ambit of a court’s proper sphere. Moreover, it resulted in activity that can be characterized as political. According to the appellants’ characterization, a primary purpose of the hearings was to put public pressure on the government to act. This kind of pressure is paradigmatically associated with political actors.”¹³⁴ The better alternative for the dissenters was “the construction deadline coupled with the possibility of a contempt order.”¹³⁵ Such a remedy, however, might have strained judicial competency.

This approach placed trial judges in an impossible situation where if they want to go beyond a declaration that will end their involvement in the case, they must immediately impose mandatory orders that are specific enough that they can fairly be enforced through contempt. At the same time, trial judges often have insufficient information to make such orders. The declaration plus responds to this dilemma. It recognizes that the use of the declaration with the court then becoming *functus* may not always provide an effective remedy. Instead of moving prematurely to mandatory orders or requiring expensive follow on litigation as in *Little Sisters* and *Khadr*, the declaration plus provides an option of retaining jurisdiction, as the trial judge did in *Doucet-Boudreau*, while providing the government and the parties some flexibility to resolve their differences as in *Restoule*. This is done without abandoning the court’s ability, as stressed in both *Restoule* and *Pekuakamiulnuatsh Takuhikan*, to use the full range of remedies to achieve constitutional compliance if necessary.

Although the trial judge’s vague “best efforts” could not have fairly been enforced by contempt, more specific remedies could have been developed as the judge receive more information and gave the government more specific information about what was required. In formulating any additional remedies, the trial judge would have been informed not only by the complex trial record but by information that was obtained in a procedurally fair manner in the reporting sessions by requiring the government to produce progress reports by affidavit subject to cross-examination by the parties. The majority’s judgment in *Doucet-Boudreau* remains good law but the trial judge’s remedy is better understood as a declaration plus as opposed to a structural injunction.

IV. Possible Future Uses of the Declaration Plus

¹³³ See *infra* note 32.

¹³⁴ 2003 SCC 62 [128]

¹³⁵ *Ibid* [143]

Complex constitutional remedies in Canada have at times been related to the particular demands of s.23 of the Charter and s.35 of the Constitution Act, 1982.¹³⁶ Under such an approach, *Thomas, Restoule* and *Pekuakamiulnuatsh Takuhikan* could be seen *sui generis* responses to violations of s.35 rights or the related concept of the Honour of the Crown. To be sure, the declaration plus can play an important role in the enforcement of such rights. Nevertheless, the declaration plus can also play a role in enforcing many other rights. To be sure, the declaration plus should not be a routine remedy. Nevertheless, it can be a useful constitutional in a variety of complex and dynamic contexts where a declaration alone may not end the dispute and be an effective remedy while a mandatory order as the only way to remedy the constitution¹³⁷ may not be appropriate.

A. Legal Rights and Section 14 of the Charter

Most Charter litigation involves litigation by the accused often revolving around the legal rights in ss.7-14 of the Charter. There is a tendency to think of these rights as negative rights where the state is a singular antagonist of the accused.¹³⁸ But sometimes the context is much more complex.

Violations of the right to an interpreter under s.14 of the Charter might result in the need for complex remedies including a declaration plus. In a series of cases involving incompetent interpreters being provided in Peel, Justice Hill made a series of findings that could be seen as specific declarations somewhat similar to that used by the Supreme Court in *Little Sisters*. The declarations stressed that trial judges did not have to accept the interpreter supplied by the government and could decide whether the interpreter should provide simultaneous or consecutive translation. If necessary, trial judges could require two interpreters. The declarations also indicated that unaccredited interpreters should rarely be used and when they were used both the judge and the litigants should be notified and aware of the lack of accreditation.¹³⁹ Justice Hill concluded that governmental actions in supplying incompetent interpreters was “merely one manifestation of the overall indifference to the s.14 *Charter* right in the Peel courthouse.”¹⁴⁰

Given the complexity and resource implications of these declarations, a case can be made that a declaration plus with reporting back requirements by the Ontario government might have been appropriate. There is an unfortunate tendency to see the retention of jurisdiction as a kind of punishment for a recalcitrant government. This may reflect the particular American experience with public law litigation, especially given resistance to the desegregation of public schools. But sometimes retention of jurisdiction is needed to respond to capacity concerns of

¹³⁶ For an explicit recognition of such remedial exceptionalism see *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 at paras 297 ff per Brown and Rowe JJ. dissenting in part.

¹³⁷ This was the rationale for the Court’s use of a mandatory order in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 150.

¹³⁸ *Irwin Toy v. Quebec* [1989] 1 SCR 927

¹³⁹ *R. v. Sidhu*, 2005 CanLII 42491 at 335.

¹⁴⁰ *Ibid* [383]

governments¹⁴¹ or to challenges that are unforeseen and perhaps unforeseeable at the time of the initial remedy. The latter concerns may have motivated the trial judge in *Doucet-Boudreau* to have retained jurisdiction. In *Doucet-Boudreau* and many other cases, reporting back could assist the government by informing judges about practical information that may justify delays and even reductions in remedies that judges may otherwise be considering. Given this, government lawyers should reconsider their longstanding resistance to the retention of jurisdiction.¹⁴²

A failure to use a declaration plus in a complex and dynamic situation may result in repetitive litigation as well as a failure to achieve an effective systemic remedy. Six years after the above decision Justice Hill found continued problems. He ruled that five different interpreters were not qualified to provide simultaneous Hindu/English translation and instead should provide consecutive translation. He noted:

While the complexity and challenges for government in complying with s.14 of the Charter should not be underestimated, it is evident that the Province's transition to a world-class court interpreting system will be lengthy in duration and fraught with debate as to the objective validity of certain approaches being taken to accreditation under 'the new model'.¹⁴³

In short, even if the government was not intransigent and had not ignored previous declarations and mandatory orders were not yet justified, constitutional compliance was a complex matter that might have justified the use of a declaration plus including retention of jurisdiction.

B. Legal Rights and Conditions of Confinement

Litigation about conditions of confinement is a staple of public law adjudication in countries such as the United States and India. In Canada, however, such problems are almost exclusively the subject of individual remedies such as increased credit for time served under bad remand conditions or class actions. These individual remedies attempt to repair the past but without necessarily ensuring that future conditions are constitutionally compliant.¹⁴⁴

¹⁴¹ Kent Roach and Geoff Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Just and Equitable" (2005) 122 South African L.J. 325

¹⁴² Retention of jurisdiction in an early s.23 in Ontario allowed the parties to return to the court which approved a new proposal developed by a French language educational board created after the court's initial remedy. *Marchand v. Simcoe County* (1987), 44 D.L.R.(4th) 171 at 173-4 as discussed in Roach *Constitutional Remedies in Canada* 3rd ed at 12.32.

¹⁴³ *R. v. Dutt*, 2011 ONSC 3329 at 115. Translation problems have unfortunately persisted in Peel with a judge noting in 2014 that while interpretation problems cannot be solved "instantaneously, however, the pace of change appears to be moving at the speed of molasses. Perhaps we can look forward to some speedier progress in the days ahead, otherwise, justice will be sacrificed." *R. v. Douglas and Bryan*, 2014 ONSC 2573 At 48. See also *R. v. Thim*, 2015 BCSC 1677 (stay of proceeding because of lack of Cambodian interpreter)

¹⁴⁴ On the need for two-track remedies that respond both to past violations and that attempt to prevent similar violations in the future see Roach *Remedies for Human Rights Violations* supra ch.2.

A recent exception to this trend is a case where a sentencing judge found that a mentally disturbed offender serving an indeterminate sentence could not receive constitutional treatment in a prison and ordered that the accused be transferred to a provincial hospital. Pomerance J. (as she then was) reasoned that

[a] declaration can only vindicate Mr. Warren's rights to a limited degree. A judicial recommendation to those responsible for Mr. Warren's imprisonment may have no impact whatsoever. It runs counter to common sense to suggest that Mr. Warren should initiate new proceedings to challenge his treatment in custody if the anticipated breaches become reality."¹⁴⁵

She noted that "although supervisory remedies are not common and should generally be seen as tools of last resort"¹⁴⁶ that the court "will retain supervisory jurisdiction over the administration of Mr. Warren's sentence." As in *Doucet-Boudreau*, the trial judge requested responsible officials regularly to report back to the court "in order to allow assessment of compliance with constitutional standards."¹⁴⁷

Justice Pomerance recognized that "the devil is in the details" and asked for additional submissions so that "the details of the supervision order will be determined at a later time, following the receipt of submissions from the parties and any third parties that should be given standing."¹⁴⁸ Despite this cautious and fair approach, the government has appealed this creative remedy. This suggests that governments tend to view retention of jurisdiction as an inherently unfair penalty imposed on them and a sign of judicial overreaching. As in *Doucet-Boudreau*, however, retention of jurisdiction can be an admission by the court that it is open to hearing new evidence about the practical limits that governments may confront. A decision from the Ontario Court of Appeal is pending from the government's appeal. Hopefully it will recognize the declaration plus as a creative remedy approved by the Supreme Court in *Doucet-Boudreau*.

C. Climate Change Litigation

Doucet-Boudreau has placed trial judges in a difficult and sometimes impossible position of often not having enough information to order specific remedies that can fairly be enforced through contempt while also recognizing that a mere declaration may not provide an effective remedy or resolve the underlying dispute. One way out of this remedial conundrum is to simply conclude that no rights have been violated or that the matter is not justiciable.¹⁴⁹ In this way, a lack of creative remedies may thwart the application of rights in novel contexts.

The declaration plus could play a role in encouraging courts that various socio-economic rights and rights responding to the existential threat of global warming are both justiciable and

¹⁴⁵ *R. v. Warren*, 2024 ONSC 2785 [223]

¹⁴⁶ *Ibid* [210]

¹⁴⁷ *Ibid* [210]

¹⁴⁸ *Ibid* [216]

¹⁴⁹ For discussion of such remedial deterrence see Daryl Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 *Columbia Law Rev.* 4

manageable. The Ontario Court of Appeal in a recent climate change case rejected an attempt by the government of Ontario to characterize the applicant's remedial request as an unmanageable and inherently non-justiciable request "that the court assume judicial control over environmental and climate policy".¹⁵⁰ In rejecting such arguments, the Court of Appeal cited the Supreme Court's reliance on declaratory relief in the 2010 Omar Khadr case that declaratory relief can be used to allow governments to select among a range of ways to comply with the constitution. But as suggested above, the Court's use of the declaration failed to produce an effective remedy for Khadr.

The declaration plus may be a better but still manageable remedy. Such a new remedy would still allow the government to select a target for emission reductions, but then would involve the court retaining jurisdiction given the dynamic nature of what targets would be justifiable in our rapidly warming world. A court could also require periodical reports from the government in affidavit form subject to cross examination by the parties. This would allow the court to become better informed in a fair and transparent manner about a dynamic and complex situation and to develop manageable and practical remedies. This would stop far short of the spectre of the court assuming managerial control over climate policy. As I have argued elsewhere "the requirement that injunctions be specific and enforceable places trial judges in a bind or a Catch-22, especially when dealing with novel issues like climate change."¹⁵¹

The declaration plus responds to the dangers that a simple declaration may not result in an effective and meaningful remedy. It allows the adjudicator to retain jurisdiction, obtain more information in a fair and transparent manner that is subject to adversarial challenge and, if necessary and with fair notice to the parties, order supplemental remedies. It can avoid successful litigants have to start to fresh litigation after the court becomes functus after issuing a declaration, as both Little Sisters bookstore and Omar Khadr had to do after winning their cases in the Supreme Court.

The declaration plus accords with recent scholarship on public law litigation which stress that successful litigation often does not involve an "heroic judge"¹⁵² using "command and control"¹⁵³ strategies. This scholarship suggests that successful remedies often involve monitoring and the collection and provision of information. The novelty of this approach can be overestimated given that Abram Chayes recognized the importance of negotiating the details of the decree in public law litigation¹⁵⁴ and Freeman J.A. recognized that the trial judge's remedy

¹⁵⁰ Mathur v. Ontario 2024 ONCA 762 [67] See also La Rose v. Canada 2023 FCA 241 [51] refusing to strike out climate change litigation on the basis that it may require creative remedies. For arguments about the possible role of the declaration plus in climate change litigation see Kent Roach "Judicial Remedies for Climate Change" (2021) 17 J of Law and Equality 105.

¹⁵¹ Roach "Judicial Remedies for Climate Change" supra at 125

¹⁵² Margo Schlanger "Beyond the Hero Judge: Institutional Reform Litigation as Litigation" (1999) 97 Mich. L. Rev. 6. The reference to the hero judge speaks to the influential work of Owen Fiss. See Owen Fiss *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978)

¹⁵³ Charles Sabel and William Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 Harv.L.Rev. 1016.

¹⁵⁴ Chayes "The Role of the Judge in Public Law Litigation" supra

in *Doucet-Boudreau* was “a creative blending of declaratory and injunctive relief with a means of mediation...”¹⁵⁵

V. Conclusion

There is a need for an intermediate remedy that is stronger than a simple declaration but that is not so detailed that it can be immediately enforced by coercive sanctions for contempt of court. Courts should learn from failure of simple declarations in *Little Sisters* and *Khadr* to produce effective remedies for long-standing violations of constitutional rights in complex and dynamic situations.

In 2024, Canadian courts recognized the need for an intermediate remedy stronger than a bare declaration but not as strong as an enforceable mandatory order. The British Columbia Court of Appeal in *Thomas* concluded that a simple declaration of s.35 right to fish would not produce an effective remedy and would not practically assist in resolving the dispute. They saw the need for a declaration plus that involved more detailed declarations and judicial directions that the First Nation and federal and provincial governments consult each other on the complex issues of river flows and s.35 fishing rights. The Court of Appeal did not address whether a court should retain jurisdiction, a remedy that the trial judge had quickly rejected as beyond judicial competence. Rather than instinctively dismissing retention of jurisdiction as a sign that a court is straying from its legitimate role or as a form of punishment for a recalcitrant or defiant government, retention of jurisdiction should be seen as a means for court to enhance its institutional competence by receiving more information in a transparent and fair manner.

The Supreme Court in both *Restoule* and *Pekuakamiulnuatsh Takuhikan* recognized that declarations alone would not remedy longstanding Treaty violations or dishonourable dealings by the Crown. In *Restoule*, a unanimous Court directed the parties to engage in negotiation and for the Crown to increase Treaty payments on an expedited schedule. This may be the Court’s most creative remedial decision since the 1985 *Manitoba Language Reference* when it retained jurisdiction and at various junctures over a seven year period clarified the extent of constitutional bilingualism obligations. The Court was sensitive to the burdens that the litigation had placed on the successful First Nation applicants. It creatively devised a creative and complex remedy that provided an opportunity for a negotiated settlement without sacrificing the ability of the courts, if necessary, to provide an effective and fair remedy from among a broad range of remedial options.

The Court in *Pekuakamiulnuatsh Takuhikan* also rejected government arguments that a declaration alone would be an effective and meaningful remedy for a breach of the honour of the Crown with respect to chronic under-funding of an Indigenous police service. Moreover, it preferred the remedy requested by the First Nation as a means to advance reconciliatory justice that looked to the future even as it responded to an unjust past. It was able to end the

¹⁵⁵ *Nova Scotia v. Doucet Boudreau* 2001 NSCA 104 at [70] (in dissent) but the trial judge’s remedy was affirmed by the Supreme Court was upheld in *Doucet-Boudreau v. Canada* 2003 SCC 62.

dispute without imposing additional delay and expense on successful litigants who were entitled to an effective remedy.

The Court in both *Restoule* and *Pekuakamiulnuatsh Takuhikan* stressed the breadth of the court's remedial powers and the need for creativity in remedial decision-making. It would be a mistake to limit this invitation to the Indigenous rights context or to view retention of jurisdiction as either an unfair penalty imposed on government or an extravagant expenditure of limited judicial resources. As suggested by my re-analysis of the important remedial precedents of *Little Sisters*, *Khadr* and *Doucet-Boudreau*, courts can and have used the declaration plus, including the retention of jurisdiction, in a way that would have produced effective remedies while treating the government fairly and respecting the respective role of the courts and governments.

THE REGIONAL MUNICIPALITY OF WATERLOO ET AL. v.

Appellants

DUGAS ET AL, PERSONS UNKNOWN/TO BE ASCERTAINED

Respondents

**ONTARIO
COURT OF APPEAL**

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