

**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
(Motion in Writing)**

January 21, 2026

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TABLE OF CONTENTS

PART I. OVERVIEW.....	1
PART II. FACTS	2
A. The Application and its procedural history.....	2
B. The Moss Affidavit.....	4
PART III. ISSUES.....	5
PART IV. LAW & ARGUMENT	5
A. The Applicable Legal Framework	5
B. Leave should be granted to admit the Moss Affidavit.....	6
PART V. ORDERS SOUGHT	9
CERTIFICATE.....	10
SCHEDULE “A” - LIST OF AUTHORITIES.....	11
SCHEDULE “B” - TEXT OF STATUTES, REGULATIONS & BY-LAWS	12

PART I. OVERVIEW

1. The Regional Municipality of Waterloo (the “Region”) seeks leave of the Court to file the affidavit of Aaron Moss (“**Moss Affidavit**”). The underlying application (“**Application**”) involves the constitutional validity of a Regional by-law (the “**By-law**”). The By-law is site specific to a property located in downtown Kitchener (the “**Property**” or “**100 Vic**”) on which there is an unauthorized encampment of individuals experiencing homelessness (the “**Encampment**”). The By-law sets out a path for the Region to take vacant possession of the Property to facilitate the construction of a major public infrastructure project.

2. The Moss Affidavit provides updates regarding the headcount at the Encampment and the security situation onsite/the Region’s response. This information is crucial for the Court’s determination of the complex constitutional issues underlying the Application. It is also relevant to the issue of injunctive relief (whether sought by the Region or the Respondents). Because the relevant timeframe of the Moss Affidavit is from September to December, 2025 – including key updates from December 2025 – the evidence therein could not have been tendered by the Region at the outset, nor in advance of the commencement of cross-examinations.

3. The Application involves an issue of significant public interest affecting those beyond the individuals represented by counsel in this proceeding. It is in the best interest of all involved that this Court have up to date and accurate information about the rapidly evolving situation onsite at the Property. Admitting the affidavit would be consistent with flexible approach taken by the parties and the Court to this litigation. There is no prejudice to the Respondents in allowing the Moss Affidavit to be filed. There will be ample opportunity for the Respondents to respond to or cross-examine on the Moss Affidavit if they so choose.

PART II. FACTS

A. *The Application and its procedural history*

4. The facts of the underlying Application are well known to the Court.¹ The Region is an upper-tier municipality that owns the Property, which is a lot devoid of permanent structures or buildings. 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. The named respondents (“**Respondents**”) in the underlying Application are all individuals who have recently experienced homelessness in the Region, many of whom have previously resided at 100 Vic. Some, but not all, of the Respondents currently reside at the Encampment.

5. The Region seeks a declaration that the By-law enacted in April 2025, amended in January 2026, does not infringe the Respondents’ rights under the *Charter*. In August 2025, the Respondents obtained an interlocutory injunction preventing the Region from enforcing the By-law. The injunction expires at the close of the hearing on the merits of the Application.² On January 9, 2025, Regional Council passed amendments to the By-law (the “**Amended By-law**”). All parties agree that the injunction continues to apply to the Amended By-law.

6. Given the evolving situation onsite at the Encampment and the importance of the issues, the parties have tendered various affidavits and supplementary affidavits to provide the Court with an accurate portrayal of the situation onsite. The parties and the Court have adopted a flexible approach to the evidence to date. For example:

¹ *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, [2025 ONSC 4774](#). [“**Injunction Decision**”].

² *Injunction Decision*, para. [118](#).

- (a) The Region consented to the Respondents adducing 11 additional fact affidavits on the injunction motion in June, 2025, two to three weeks after their deadline for serving their motion record;³
- (b) The Court granted leave to the Respondents in August 2025 to amend their notice of cross-application to include analogous grounds under s.15 of the *Charter* and to file further affidavit evidence in support;⁴
- (c) The Region's main fact witness, Peter Sweeney, has been cross-examined twice on overlapping subject-matter, with the parties filing further affidavits after the first cross-examination, because of the overlap between the injunction motion and the merits of the application;
- (d) The hearing dates have been postponed twice; first, to allow for mediation, and second, to allow the Court to consider amendments to the By-law; and
- (e) The Region has agreed to the Respondents filing 5 further fact affidavits dated October 10-15, 2025, but only provided to the Region on Dec. 2, 2025, and the Respondents have agreed to the Region filing the entirety of the 4th Sweeney affidavit dated Sept 15, 2025.

7. The Region conducted its first cross examination on the Respondents' evidence on the Application on December 2, 2025. Following a January 12, 2026 case conference and the parties'

³ Affidavits of J. Paul (June 16, 2025), J. Young (June 13, 2025), K. York (June 17, 2025), S. McMillan (June 17, 2025) J. Davis (June 20, 2025), M. Lopes (June 18, 2025), A. Ament, J. Stubbs, S. Escobar, D. Alton, and A. Allt (June 23, 2025), *Supplementary Motion Record (Injunction Motion)*, Caselines B-1-824 to B-1-1164; Order dated June 12, 2025 para. 2(a), *Orders and Endorsements*, Caselines G-13.

⁴ Endorsement dated August 5, 2025, Caselines G-18.

general agreement that the Amended By-law should be considered, the evidence has been reopened to allow the Respondents to file further evidence to respond to the Amended By-law.

B. The Moss Affidavit

8. On January 9, 2026 – the same day the Amended By-law was passed – the Region delivered a copy of the Moss Affidavit to the Respondents, noting that it would not file the Moss Affidavit at that time, but indicating its intention to have the affidavit be put before the Court. The Moss Affidavit has since been re-sworn (on January 16, 2026) to include an update on the number of individuals residing at the Encampment and the number who have been placed in alternative accommodation (at paragraphs 37-39) but is otherwise unchanged.

9. Mr. Moss is the Director of Facilities and Fleet at the Region. His role regularly engages issues at the Encampment because his team is responsible for overseeing the operation and maintenance of all Region-owned facilities, including the Property. Security and maintenance fall within those duties, meaning it is Mr. Moss' team which schedules and executes pest control, garbage collection and clean-up, maintenance of the toilet facilities onsite, and more at 100 Vic.

10. The Moss Affidavit explains that the affiant has observed “a substantial escalation of violence incidents or threats of violence engendering the security of Encampment residents, Regional staff and contractors, and the general public” over the past few months.⁵ In support of this, the Moss Affidavit attaches incident reports for the period between September 16, 2025 and December 16, 2025, and provides statistics on the number of incidents in this period as compared to January to August, 2025. The Moss Affidavit further explains that, in December 2025, the Region decided that unsheltered support workers (“USW”) would no longer attend the

⁵ Affidavit of Aaron Moss, affirmed January 16, 2026, para. 11 [“**Moss Affidavit**”].

Encampment daily due to these escalated security concerns. It also explains that since mid-December 2025 a third-party provider of mobile healthcare services – Sanguen Health – has ceased attending the Encampment to provide services as a result.

PART III. ISSUES

11. The sole issue on this motion is whether this Court should grant the Region leave to deliver the Moss Affidavit on the Application.

PART IV. LAW & ARGUMENT

A. The Applicable Legal Framework

12. Rule 39.02(2) limits parties' ability to rely on affidavits delivered following cross-examination on an adverse party's affidavit "without leave or consent".⁶ It further provides that the Court "shall grant leave, on such terms as are just".⁷ Courts have held that leave under rule 39.02(2) is not limited to scenarios where evidence is tendered to respond to a matter raised for the first time during the cross-examination, although this factor is relevant.⁸

13. The test for admission of further evidence after cross-examination under r. 39.02(2) involves a "flexible, contextual approach" whereby the Court weighs the following factors:⁹

- (1) is the evidence relevant;
- (2) is the evidence responsive to something raised in cross-examination;
- (3) is there prejudice; and

⁶ *Rules of Civil Procedure*, [RRO 1990, Reg 194, r. 39.02\(2\)](#) ["**Rule 39.02(2)**"]

⁷ [Rule 39.02\(2\)](#).

⁸ *Shah v. LG Chem, Ltd.*, [2015 ONSC 776](#), para [22](#) ["**Shah**"], citing *Nolan v. Canada (Attorney General)* (1997), [1997 CanLII 12213 \(ON SC\)](#), 38 O.R. (3d) 722 (Gen. Div.).

⁹ *Shah*, para [22](#), citing *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 at para. 4 (Div. Ct.) (also *Knowles (c.o.b. Special Events Marketing) v. Arctic Glacier Inc.*, [2011 ONSC 682](#) at paras. [52-54](#) (internal quotations omitted)).

(4) is there a satisfactory explanation for not having included this evidence at the outset?¹⁰

14. All four criteria should be weighed when considering the facts of each case in determining whether it is appropriate to grant leave.¹¹ In its assessment of these factors, the Court is to have regard to the overriding principle outlined in r.1.04 that the rules are to be interpreted liberally to ensure a just and timely resolution of the dispute.¹²

B. Leave should be granted to admit the Moss Affidavit

15. Considering the applicable factors, it would be just for the Court to grant the Region leave to deliver the Moss Affidavit under rule 39.02(2).

16. The Moss Affidavit is clearly relevant to the Application. The Court's analysis under s. 7 of the *Charter* requires it to consider the safety risks associated with the Encampment in determining whether the Amended By-law deprives residents of their protected life and security of the person interests by providing for the closure of the Encampment. Safety concerns are also salient to the s. 1 analysis, as they inform the Region's justification for any *Charter* breach resulting from the closure.

17. Safety concerns about the Encampment are also relevant to whether the injunction constraining enforcement of the By-law should be extended past the end of the application hearing (when it is set to expire) and to whether the Court should grant an injunction to enforce the By-law under the *Municipal Act* if sought by the Region. In a series of injunction encampment cases

¹⁰ *Brash v. Sims*, [2024 ONSC 6509](#) [“*Brash*”], para [27](#), citing *Catalyst Fund Limited Partnership II v. IMAX Corporation*, [2008 CanLII 8778](#) (ON SC), para [15](#).

¹¹ *Brash*, para [28](#).

¹² *Aniekwe v. Aniekwe*, [2025 ONSC 3258](#), at para [41](#), citing *Shah*, paras. [22-25](#)

in Ontario – including *Poff*,¹³ *Black*,¹⁴ and *Saint Stephen*¹⁵ – the ONSC has allowed encampments to be closed where the Court recognized the presence of “serious health and safety concerns”¹⁶ including a “risk of fire and danger to residents and passersby”.¹⁷ The Moss Affidavit provides updates on precisely these sorts of occurrences at the Encampment, which have become more prevalent in recent months.

18. The safety of the Encampment was an issue that was raised repeatedly in cross-examinations (including the safety of encampments more generally as compared to other forms of accommodation). The role of USWs and third-party providers in assisting those at the Encampment was also a matter addressed in cross examinations. The Moss Affidavit squarely addresses these issues and the suggestion put to the Region’s witness in cross-examination that the Encampment is no more dangerous than shelters, and is therefore responsive to issues raised on cross examinations.

19. There will be no prejudice to the Respondents if the Moss Affidavit is admitted. The Respondents have the opportunity to adduce their own evidence in response, and will have the opportunity to cross-examine Mr. Moss. Rule 39.02(2) is “designed to fairly regulate and provide closure to the evidence gathering process for motions and applications”.¹⁸ The evidence has not yet closed in this matter, and there is no unfairness in allowing him to update the Court on recent developments at the Encampment.

¹³ *Poff v. City of Hamilton*, [2021 ONSC 7224](#).

¹⁴ *Black et al. v. City of Toronto*, [2020 ONSC 6398](#) [“*Black*”].

¹⁵ *Church of Saint Stephen et al. v. Toronto*, [2023 ONSC 6566](#) [“*Saint Stephen*”].

¹⁶ *Black*, at para. [150](#).

¹⁷ *Saint Stephen*, at para. [62](#).

¹⁸ *Shah*, para. [23](#).

20. The Moss Affidavit could not have been adduced earlier, before the start of cross-examinations. The Moss Affidavit focuses on the increased violence observed at the Encampment from September to December 2025, which represents “a substantial escalation of violence incidents or threats” as compared to prior months.¹⁹ It also details the Region’s decision to withdraw USWs from the site on days other than Wednesdays (a decision taken on December 9, 2025)²⁰ and a third-party provider’s decision to withdraw from the site (as communicated to the Region on December 16, 2025).²¹ Such evidence was clearly not available to the Region before the start of cross-examinations on the merits.

21. This is not a scenario where the Region is seeking to revise a prior decision not to adduce evidence on the safety risk issue. The Region included incident reports in the 1st Sweeney Affidavit sworn June 6, 2025, which formed part of the original Application Record.²² That affidavit also provided the Region’s evidence at the time about health and safety concerns associated with the Encampment. Consequently, the Region is not using the Moss Affidavit to correct a deficiency in the original materials,²³ but rather is seeking to update the Court based on new developments on an issue that has been raised throughout this litigation.

22. In a *Charter* case of significant public importance, the Court should be able to draw upon “the best evidence currently available” in determining issues such as the s.1 analysis.²⁴ Provided there is no prejudice to the Respondents, as in this case, the evidence should be admitted.

¹⁹ Moss Affidavit, para. 11.

²⁰ Moss Affidavit, para. 22.

²¹ Moss Affidavit, para. 31.

²² 1st Affidavit of Peter Sweeney (affirmed June 6, 2025), Exhibits “G”, “H”, and “I”, Application Record, Tab 2.

²³ *Shah*, para [23](#).

²⁴ *Irwin Toy Ltd. v. Quebec (A.G.)*, [\[1989\] 1 SCR 927](#), p. 984.

PART V. ORDERS SOUGHT

23. The Region respectfully requests that this Court grant it leave to adduce the Moss Affidavit under rule 39.02(2).

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



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CERTIFICATE

I, Andrew Lokan, lawyer for the Applicant, certify that I am satisfied as to the authenticity of every authority cited in this factum.



January 21, 2026

Andrew Lokan
Paliare Roland Rosenberg Rothstein LLP

SCHEDULE “A” - LIST OF AUTHORITIES

1. *Aniekwe v. Aniekwe*, [2025 ONSC 3258](#).
2. *Black et al. v. City of Toronto*, [2020 ONSC 6398](#).
3. *Brash v. Sims*, [2024 ONSC 6509](#).
4. *Catalyst Fund Limited Partnership II v. IMAX Corporation*, [2008 CanLII 8778](#) (ON SC).
5. *Church of Saint Stephen et al. v. Toronto*, [2023 ONSC 6566](#).
6. *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [\[2009\] O.J. No. 4492](#).
7. *Irwin Toy Ltd. v. Quebec (A.G.)*, [\[1989\] 1 SCR 927](#).
8. *Knowles (c.o.b. Special Events Marketing) v. Arctic Glacier Inc.*, [2011 ONSC 682](#).
9. *Nolan v. Canada (Attorney General)* (1997), [1997 CanLII 12213 \(ON SC\)](#), 38 O.R. (3d) 722 (Gen. Div.).
10. *Poff v. City of Hamilton*, [2021 ONSC 7224](#).
11. *Shah v. LG Chem, Ltd.*, [2015 ONSC 776](#).
12. *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, [2025 ONSC 4774](#).

SCHEDULE “B” - TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

On a Motion or Application

39.02

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
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