

Court File No. CV-25-00000750-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

THE REGIONAL MUNICIPALITY OF WATERLOO

Applicant

-and-

PERSONS UNKNOWN AND TO BE ASCERTAINED

Respondent

FACTUM OF THE INTERVENER, ABORIGINAL LEGAL SERVICES

DATE: April 9, 2026

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AND TO: THIS HONOURABLE COURT

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PART I – OVERVIEW

1. This Application concerns the rights of any persons that live or stay at the property at 100 Victoria Street North, Kitchener (“100 Vic” or the “Encampment”). The Encampment functions as a place for the chronically homeless or unhoused people to live in the Regional Municipality of Waterloo (the “Region”). Aboriginal Legal Services (“ALS”) sought intervention status because the Region’s Site-Specific By-law 25-021, and that by-law as it was amended on January 9, 2026 (together, the “By-Law”), which seeks to evict the residents of the Encampment, will have a disproportionate impact on the Encampment’s Indigenous residents and exacerbate ongoing harms and existing disadvantages. ALS will assist the Court in applying the evolving jurisprudence under section 15(1) of the *Charter of Rights and Freedoms*¹ to ensure the Indigenous residents of the Encampment’s protected *Charter* rights are not violated by the By-law’s enactment.
2. Homelessness among Indigenous people is not simply a matter of individual misfortune. For Indigenous people, it is well established that homelessness is a consequence of colonization which dispossessed Indigenous people of their land and resources, propelling and inflicting generations of systemic racism and ongoing trauma.² Furthermore, “homelessness is a consequence of systemic and societal barriers, a lack of affordable and appropriate housing, the individual/household's financial, mental, cognitive, behavioral or physical challenges, and/or racism and discrimination.”³

¹ *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [“*Charter*”].

² Affidavit of Dr. Bernadette Pauly, affirmed August 14, 2025, [Supplemental Responding Application Record \[“Supp RAR”\] Volume 2, p. 214, para. 15](#) [“Dr. Pauly Aff”].

³ *Ibid*, [Supp RAR V.2, p. 210, para. 7](#), quoting “Canadian Definition of Homelessness”, Canadian Observatory on Homelessness.

3. The By-Law has the specific purpose of providing vacant possession of 100 Vic to the Region so that it may be used as a “laydown” and staging site during the construction of the proposed Kitchener Central Transit Hub (“KCTH”).⁴ The Region has brought this Application to ask the Court for, *inter alia*, a declaration that the By-Law complies with the *Charter*.
4. Many of the issues raised by this Application were decided in an earlier proceeding. In 2023, this Court in *Persons Unknown* refused permission to clear the Encampment, declaring that closing the Encampment would breach the s. 7 *Charter* rights of the Encampment’s residents in such a way that was not justified in a free and democratic society.⁵
5. This Court also conducted a s. 15(1) *Charter* analysis and rejected the claim that homelessness constituted an analogous ground.⁶ However, this Court did not conduct a s. 15 *Charter* analysis regarding the disproportionate impact that eviction would have had upon the Indigenous residents of the Encampment.
6. To prove a *prima facie* violation under s. 15(1) of the *Charter*, ALS will establish that the By-Law creates a distinction for the Indigenous residents in the Encampment, and that the By-Law will impose a burden or deny a benefit in a manner that will exacerbate their existing disadvantages. Following the Supreme Court’s s.15(1) analysis in *Kanyinda*, although homelessness may not be an analogous ground under s. 15(1), the Encampment’s Indigenous residents will satisfy the first part of the s. 15(1) test as a subgroup of the affected homeless

⁴ Affidavit of Douglas John Spooner, affirmed June 6, 2025, [Application Record \[“AR”\]](#), p. 351, paras. 5-6 [“Spooner Aff”].

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

⁶ *Ibid*, paras. 125-126.

population.⁷ The adverse effects of the By-Law arise in the nexus between “homeless” and “race”.⁸

7. The second part of the test is satisfied because the impacts of the By-Law are particularly severe for Indigenous people who are already unhoused and overrepresented in the homeless population. Upon eviction, Indigenous residents will be denied the benefit of culturally safe housing options and will face additional barriers due to shelter-eligibility rules that disproportionately exclude them because of their Indigenous identities.
8. Finally, the By-Law cannot be saved under s.1 of the *Charter*, as the rights of Indigenous peoples are not minimally impaired by eviction from the Encampment, and proportionally, these deleterious effects are not outweighed by the By-Law’s salutary effects.

PART II – SUMMARY OF THE FACTS

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

A. Background

i. Aboriginal Legal Services

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

⁷ *Quebec (Attorney General) v Kanyinda*, [2026 SCC 7](#), para. 42.

⁸ *Ibid.*

⁹ Affidavit of Paul-Emile McNab, affirmed July 15, 2025, Motion Record of the Proposed Intervener Aboriginal Legal Services, p. 18, para. 12.

¹⁰ *Ibid.*, para. 7.

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

ii. The Encampment

11. Unhoused persons have lived at the Encampment since approximately December 2021.¹² As of January 15, 2026, one resident stated that there were “about thirty people still living [there]”.¹³ The exact number of Indigenous residents in the Encampment is unknown, although six of the Named Respondents are Indigenous.¹⁴

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

12. In *Persons Unknown*, Justice Valente dismissed the Region’s Application to close the Encampment under the Code-of-Use By-law because its enforcement would have violated s.7 of the *Charter*.¹⁵ Justice Valente rejected the Named Respondents’ s. 15 *Charter* argument on the basis that “homelessness” was not an analogous ground of discrimination under s. 15.¹⁶ The Court did not undertake a s. 15(1) analysis with respect to Indigeneity.

B. Indigenous Homelessness is a Systemic Issue

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

¹¹ *Ibid*, paras. 13-14.

¹² *Persons Unknown*, para. 19.

¹³ Affidavit of Charles Kocher, affirmed January 13, 2026, [2nd Supp RAR, pp.41-42, para. 21](#) [“Kocher Aff”].

¹⁴ Kocher Aff, [2nd Supp RAR, p. 39, para. 6](#); Affidavit of Josephina Dugas, affirmed May 7, 2025, [RAR V.1, p. 75, para. 3](#); Affidavit of Jeremy Nichol, affirmed May 8, 2025, [RAR V.1, p. 56, para. 3](#); Affidavit of Noah Helsby, sworn May 15, 2025, [RAR V.1, p. 109, para. 3](#); Affidavit of Kyle York, sworn June 17, 2025, [RAR V.1, p. 92, para. 3](#); Affidavit of Calvin Sharpe, affirmed May 30, 2025, [RAR V.1, p. 19, para. 3](#) [“Sharpe Aff”]; Affidavit of Aline Jeffrey, affirmed January 21, 2026, [2nd Supp RAR, p. 45, para. 3](#).

¹⁵ *Persons Unknown*, para. 101.

¹⁶ *Ibid*, paras. 125-126.

¹⁷ Dr. Pauly Aff, [Supp RAR V.2, p.213, para 12](#).

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

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

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

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

¹⁸ *Ibid*, [Supp RAR V.2, p. 214, para. 14.](#)

¹⁹ *Ibid*, [Supp RAR V.2, p. 214-215, para. 16.](#)

²⁰ Affidavit of Lee Ann Hundt, affirmed on August 7, 2025, [Supp RAR V.1, pp. 16-17, paras. 25-27](#) [“Hundt Aff”].

²¹ Dr. Pauly Aff, [Supp RAR V.2, pp. 214-215, para. 16.](#)

²² Affidavit of David Alton, affirmed June 23, 2025, Exhibit B: “Plan to End Chronic Homelessness” [“PECH”], [RAR V.2, p. 70](#) [“Alton Aff”].

²³ Hundt Aff, Exhibit B: “2024 Point in Time Findings”, [Supp RAR V.1, p. 30.](#)

²⁴ Hundt Aff, [Supp RAR V.1, p. 11, para. 10.](#)

²⁵ *Ibid*, [Supp RAR V.1, p. 11, para. 10.](#)

²⁶ Dr. Pauly Aff, [Supp RAR V.2, p.214-215, para. 16.](#)

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

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

17. If the By-Law is passed, the Region is not prepared to permit sheltering anywhere else on its lands after the Encampment is cleared.²⁸ As of February 17, 2026, the Region had 351 spaces in its emergency shelter system, across eight shelters.²⁹ Of these 351 spaces, none are reserved for Indigenous people.³⁰
18. The K-W Urban Native Wigwam Project (“KWUNWP”) is an Indigenous-led organization with a mission to provide culturally safe and affordable housing for the Indigenous community in the Waterloo region.³¹ The KWUNWP ran the Urban Native Transitional Housing (“UNTH”) Program until its cancellation in November 2024.³² The KWUNWP receives funding from the Region, but, crucially, this funding is not for Indigenous-specific emergency shelter beds.³³ Although it is within the Region’s ability to fund Indigenous-specific emergency shelter beds, it has not.³⁴
19. Approximately 15 months after *Persons Unknown*, the Region presented a new Plan to End Chronic Homelessness (the “PECH”).³⁵ Despite acknowledging that Indigenous people in the Region experience chronic homelessness at a higher rate,³⁶ none of the four PECH

²⁷ *Ibid.*

²⁸ 1st Affidavit of Peter Sweeney, affirmed June 6, 2025, [AR, p. 28-29, paras. 52-55](#) [“1st Sweeney Aff”].

²⁹ 3rd Affidavit of Sara Escobar, affirmed February 20, 2026, [2nd Supp RAR, p. 71, para. 7](#).

³⁰ Hundt Aff, [Supp RAR V.1, p. 12, para. 13](#).

³¹ *Ibid.*, [Supp RAR V.1, pp. 14-15, paras. 17-18 and 20](#).

³² *Ibid.*, [Supp RAR V.1, p. 15, para. 20](#).

³³ Transcript of the Continued 2nd Cross Examination of Peter Sweeney, held on December 12, 2025, [Joint Transcript Brief \[“JTB”\] V.4, Tab 1, p. 94](#) [“2nd Cont. Sweeney XE”].

³⁴ *Ibid.*

³⁵ Alton Aff, [RAR V.2, p. 27, para. 3](#).

³⁶ Alton Aff, Exhibit B: PECH, [RAR V.2, p. 70](#).

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

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

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

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

21. Despite the Region undertaking certain engagement efforts, including consultations with the Lived Experience Working Group⁴² and the PECH Co-Creators Group,⁴³ none of these efforts, nor any other initiatives undertaken by the Region, included specific consultation with

³⁷ *Ibid*, [RAR V.2, p. 87](#).

³⁸ Answers to Undertakings from the Cross-Examination of Doug Spooner on March 6, 2026, [Brief of Answers to Undertakings, Tab 5, Under Advisement #6](#).

³⁹ *Ibid*.

⁴⁰ Updated Answers to Undertakings from the Cross-Examination of Doug Spooner on March 6, 2026, [Supplementary Brief of Answers to Undertakings, Tab 1A, pp. 29-30](#).

⁴¹ 3rd Affidavit of Peter Sweeney, affirmed July 31, 2025, Exhibit A: “Homeless Encampments: Municipal Engagement Guidance”, [Reply Application Record \[“Region’s RAR”\], p. 85](#) [“3rd Sweeney Aff”].

⁴² 3rd Sweeney Aff, [Region’s RAR, p.74, para. 26](#).

⁴³ *Ibid*, [Region’s RAR, p.73, para. 25](#).

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

PART III – ISSUES AND LAW

22. ALS will address the following legal issues,

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

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

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

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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

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

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

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

⁴⁴ Hundt Aff, [Supp RAR V.1 p.19, para. 34](#).

⁴⁵ *Kanyinda*, para. 48; *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), para. 27.

⁴⁶ *R v. Sharma*, [2022 SCC 39](#), para. 31; *Andrews v. Law Society of British Columbia*, [\[1989\] 1 S.C.R. 143](#), at p. 164.

⁴⁷ *Kanyinda*, paras. 42, 51 (per the majority) and 155-158 (per Rowe J., concurring).

26. There is no rigid template to govern how a disproportionate impact at step one is established.⁴⁸

Two types of evidence that are helpful in proving that a law has a disproportionate impact are:

1) evidence about the full context of the claimant group's situation,⁴⁹ and 2) evidence about the outcomes that the challenged law has produced in practice on the group.⁵⁰

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

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

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

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

⁴⁸ *Kanyinda*, para. 51.

⁴⁹ *Kanyinda*, para. 73; *Fraser*, paras. 56-59.

⁵⁰ *Kanyinda*, para. 73.

⁵¹ *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, para. 17; *Withler v Canada (Attorney General)*, 2011 SCC 12, para 2.

⁵² *Kahkewistahaw*, para. 17.

⁵³ *Kanyinda*, para. 37.

⁵⁴ *Procureur général du Québec c. Luamba*, 2024 QCCA 1387, para. 157; *Fraser*, para 48.

⁵⁵ *Ibid*, para. 160.

⁵⁶ *Sharma*, para. 49 [italics in original].

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

31. The first step of the s. 15(1) inquiry requires a contextual consideration of a claimant group’s intersecting identities and realities, and this assessment must be grounded in the group’s unique situation.⁵⁷ The Indigenous residents of the Encampment have a unique situation. The Indigenous residents are a subset of the overall affected group – the general homeless population – yet would be disproportionately impacted *because* of their Indigenous identities.
32. The outcomes of the law can be demonstrated using statistical evidence, “especially if the pool of people adversely affected by a criterion or standard includes *both* members of a protected group *and* members of more advantaged groups,”⁵⁸ although statistical evidence is not a requirement.⁵⁹
33. Despite the disproportionate overrepresentation of Indigenous homeless persons in the Region, there are no emergency shelters that provide exclusive support or specific spaces for Indigenous people.⁶⁰ Other subgroups such as men, women, gender-diverse, and youth, all have dedicated shelters or spaces to address their unique needs. For the Indigenous homeless population, since the UNTH shut down, there is no such space.
34. Respectfully, ALS submits that eviction would more harshly disrupt the family, community, cultural, and safety networks of Indigenous residents, and that the Encampment provides a rare space where these Indigenous residents have access to community and can foster collective

⁵⁷ *Kanyinda*, para. 41.

⁵⁸ *Fraser*, para. 58 [italics in original].

⁵⁹ *Kanyinda*, para. 54; *Sharma*, paras. 36 and 49.

⁶⁰ Hundt Aff, [Supp. RAR V.1 pp. 12-13, para. 13](#).

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

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

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

ii. The By-Law Exacerbates Disadvantage

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

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

⁶¹ 4th Affidavit of Peter Sweeney, affirmed on January 9, 2026, [Supp AR, p.80, para 20](#) ["4th Sweeney Aff"].

⁶² *Sharma*, para. [50](#).

⁶³ *Kanyinda*, para. [67](#).

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

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

a) The Social Context

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

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

⁶⁴ *Sharma*, para. 52.

⁶⁵ *Kanyinda*, para. 67; *Fraser*, para. 78.

⁶⁶ *Kanyinda*, para. 63.

⁶⁷ *Kanyinda*, para. 63.

⁶⁸ *Ibid*, para. 64.

⁶⁹ *Ibid*, para. 84.

⁷⁰ *Dr. Pauly Aff*, [Supp RAR V.2 pp. 214-215, para. 16.](#)

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

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

43. Calvin Sharpe (“Mr. Sharpe”), an Indigenous person who has spent some time staying in the Encampment, has provided insight to the ways the eviction could exacerbate existing disadvantages for unhoused Indigenous peoples. Mr. Sharpe is a Status First Nation from The Chippewas of Rama First Nations who has been homeless on and off for most of his life.⁷⁴ Until April 1, 2025, he was being housed by the KWUNWP’s transitional housing program.⁷⁵ The UNTH Program was cancelled in November 2024.⁷⁶ As of May 30, 2025, he stated that he mostly walks around at nighttime and sleeps when he can during the day.⁷⁷ He has experienced racism from police and shelter workers because of his race, and has been robbed, attacked, and kicked out of a shelter for standing up to these racist acts.⁷⁸ Mr. Sharpe remains

⁷¹ Hundt Aff, [Supp RAR V.1 p. 12-13, para. 13.](#)

⁷² Hundt Aff, [Supp RAR V.1 pp. 12-13, para. 13](#); Sharpe Aff, [RAR V.1, p. 21, para. 10.](#)

⁷³ Hundt Aff, [Supp RAR V.1 p.17, para 27.](#)

⁷⁴ Sharpe Aff, [RAR V.1, pp. 19-20, paras. 3 and 8.](#)

⁷⁵ *Ibid*, [RAR V.1, p. 20, para 8.](#)

⁷⁶ *Ibid*, [Supp RAR V.1, p. 15, para. 20.](#)

⁷⁷ *Ibid*, [RAR V.1, p. 21, para 12.](#)

⁷⁸ *Ibid*, [RAR V.1, p. 21, para 10.](#)

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

44. Mr. Sharpe’s experience is sadly not unique. One outreach worker has said that a common reason that people do not leave encampments is that they cannot follow the rules that are imposed on them in shelters or supportive housing.⁸⁰ Although Mr. Sharpe does not wish to live in the Encampment,⁸¹ as evidenced by his and the other Named Respondents’ experiences with chronic homelessness, the Encampment has sadly become the best option available.
45. The eviction and displacement of homeless persons can increase stigma within society and disrupts an individual’s community connections.⁸² People who live in encampments may have had difficult experiences throughout their lives when interacting with school, legal, and healthcare systems.⁸³
46. The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls states that Indigenous women and girls are at a heightened risk of interpersonal violence due to poverty and homelessness, and that the absence of basic economic, social, and political rights contributes to Indigenous women and girls becoming targets for violence.⁸⁴ The unwillingness of institutions to address these issues maintains this status quo.⁸⁵
47. Threats to human security, which includes the right of people to live with dignity, free from poverty, are experienced by Indigenous women on a daily basis.⁸⁶ Indigenous peoples can be

⁷⁹ *Ibid*, [RAR V.1, p. 20, para 8](#).

⁸⁰ Affidavit of Angela Allt, affirmed June 20, 2025, [RAR V.2, p. 22, para 19](#).

⁸¹ Sharpe Aff, [RAR V.1 p.21, para. 10](#).

⁸² Dr. Pauly Aff, [Supp RAR V.2 pp.216-219, para. 20](#).

⁸³ Transcript of the Cross-Examination of Dr. Bernie Pauly, December 15, 2025, [JTB V.4, p.216 Q. 112](#) [“Dr. Pauly XE”].

⁸⁴ Affidavit of Lynn Kubis, affirmed July 7, 2025, Exhibit F: “Reclaiming Power and Place” Chapter 7: Confronting Oppression, [RAR V.4 p. 199](#).

⁸⁵ *Ibid*.

⁸⁶ *Ibid*, pp. [203-204](#).

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

b) The Political Context

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

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

⁸⁷ Hundt Aff, [Supp RAR V.1 p.20, para. 36.](#)

⁸⁸ Dr. Pauly XE, [JTB V.4 pp. 201-202 Q. 72](#); Hundt Aff, [Supp RAR V.1 p.18, para. 30.](#)

⁸⁹ *Sharma*, dissent, at para. 193, citing F. Faraday, “One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada” (2020), 94 *S.C.L.R.* (2d) 301, at p. 310; J. Koshan, “Intersections and Roads Untravelling: Sex and Family Status in *Fraser v Canada*” (2021), 30:2 *Const. Forum* 29, at p. 31.

⁹⁰ 2nd Affidavit of Sara Escobar, sworn July 7, 2025, Exhibit C, [RAR V.3, p. 149.](#)

⁹¹ *Ibid.*

⁹² *Ibid.*, p. 142.

50. Neither the PECH nor the Transition Protocol contemplate the principles of UNDRIP. While the Region has stated that it provides funding to Indigenous-focused services such as Crow Shield Lodge and Healing of the Seven Generations,⁹³ this funding, as of December 12, 2025, does not include funding for Indigenous-specific emergency shelter beds,⁹⁴ despite it being within the Region's mandate to do so.⁹⁵
51. This approach demonstrates that simply allocating funding, without consultation or culturally informed planning, does not address the specific needs of Indigenous residents, and in fact risks perpetuating existing disadvantage.
52. The Region has demonstrated that it has the ability to fund emergency shelter for specific equity-seeking groups. For example, the Region funds shelters that are reserved for women and persons who are gender diverse, youth, and persons with complex medical needs.⁹⁶ The existence of these shelters shows that there is capacity to provide shelter and housing services to specific groups of people within the Region.
53. Despite clear evidence that Indigenous people in the Region are disproportionately affected by homelessness, the Region proceeded without Indigenous-specific planning. This omission is not neutral in its impact. Rather, it exemplifies a failure to achieve or even attempt to achieve substantive equality under s.15(1). This political commitment to neutrality over actual responsiveness that perpetuates and exacerbates disadvantage.

c) The Legislative Context

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

⁹³ 4th Sweeney Aff, [Supp AR pp. 77-78, para. 7.](#)

⁹⁴ 2nd Cont. Sweeney XE, [JTB V.4 pp. 93-94 Q. 241.](#)

⁹⁵ *Ibid*, p. [94 Q. 245.](#)

⁹⁶ Factum of the Named Respondents, [pp. 15-16, para. 35.](#)

⁹⁷ *Sharma*, para. [56.](#)

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

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

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

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

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

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

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

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

⁹⁸ *Kanyinda*, para. 65.

⁹⁹ Affidavit of Dilupneet Kang, affirmed January 9, 2026, Exhibit B: “Schedule “C”: Transition Protocol” to By-law with Tracked Amendments (“Transition Protocol”), [Supp AR, pp.116-7](#) [“Kang Aff”].

¹⁰⁰ Kang Aff, Exhibit A: the “Amended By-law”, [Supp AR, pp. 94-95](#).

¹⁰¹ *Kanyinda*, para 7.

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

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

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

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

¹⁰² *Kanyinda*, para. 94.

¹⁰³ *Carter v Canada (Attorney General)*, 2015 SCC 5, at para. 94, citing *R. v. Oakes*, [1986] 1 S.C.R. 103.

¹⁰⁴ Spooner Aff, AR p.361, para. 37.

¹⁰⁵ *Ibid.*, p. 361, para. 38.

¹⁰⁶ *Ibid.*

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

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

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

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

¹⁰⁷ *Ibid.*, pp. 362-363, para. 42.

¹⁰⁸ "Kitchener Central Transit Hub Update," dated Oct. 7, 2025, Ex 1 to Transcript of the Cross-Examination of Doug Spooner, Mar. 6, 2026, *JTB V.5*, p.178.

¹⁰⁹ *Ibid.*, *JTB V.5*, p.147, Q.76.

¹¹⁰ Spooner Aff, *AR* pp. 362-363, paras. 42-44.

¹¹¹ *Kanyinda*, para. 99.

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

PART IV – ORDER SOUGHT

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

68. Additionally, the Intervener Aboriginal Legal Services requests,

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

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



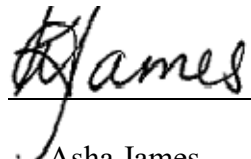
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CERTIFICATE

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



Asha James

April 9, 2026

SCHEDULE A – LIST OF AUTHORITIES

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

Carter v Canada (Attorney General), [2015 SCC 5](#)

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

Kahkewistahaw First Nation v. Taypotat, [2015 SCC 30](#)

Procureur général du Québec c. Luamba, [2024 QCCA 1387](#)

Quebec (Attorney General) v Kanyinda, [2026 SCC 7](#)

R. v. Oakes, [\[1986\] 1 S.C.R. 103](#)

R v. Sharma, [2022 SCC 39](#)

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

[670](#)

Withler v Canada (Attorney General), [2011 SCC 12](#)

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

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

Rights and freedoms in Canada

1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

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

THE REGIONAL MUNICIPALITY OF
WATERLOO
Applicant

and

PERSONS UNKNOWN AND TO BE ASCERTAINED
Respondents

Court File No: CV-25-00000750-0000

SUPERIOR COURT OF JUSTICE

Proceedings commenced in WATERLOO REGION

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