

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO,
SHAWN ARNOLD, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS,
ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI
OGDEN, JAHMAL PIERRE, and LINSLEY GREAVES**

Appellants/Responding Parties

- and -

CITY OF HAMILTON

Respondent/Responding Party

- and -

ATTORNEY GENERAL OF ONTARIO

Intervenor

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Proposed Intervenor/Moving Party

MOTION RECORD

ADDARIO LAW GROUP LLP

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Toronto, ON M5V 2C3

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TAB 1

COURT OF APPEAL FOR ONTARIO

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Intervenor

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Proposed Intervenor/Moving Party

NOTICE OF MOTION FOR LEAVE TO INTERVENE

The proposed intervener, the British Columbia Civil Liberties Association (the “**BCCLA**”), will make a motion to Honourable Justice Favreau at 10:00 am on Friday, December 12, 2025 at the courthouse on 130 Queen West, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

☐ In writing under subrule 37.12.1(1) because it is on consent;

☐ In writing as an opposed motion under subrule 37.12.1(4);

☐ In person;

☐ By telephone conference;

☒ By video conference.

THE MOTION IS FOR:

- (a) An order under R 13.03(2) of the *Rules of Civil Procedure* granting the BCCLA leave to intervene in this appeal as a friend of the court;
- (b) An order permitting the BCCLA to file a factum no longer than 15 pages on the appeal, or any such other length the Court may deem appropriate;
- (c) An order permitting the BCCLA to present oral arguments for 15 minutes at the hearing of this appeal, or for such other duration the Court may deem appropriate;
- (d) An order that the BCCLA will not be awarded costs or have costs awarded against it at the appeal;
- (e) An order that no party be awarded costs on this motion for intervention; and
- (f) Any further or other order as the Court may deem appropriate.

THE GROUNDS FOR THE MOTION ARE

- (g) This appeal centers around the City of Hamilton's (the "**City**") removal of the appellants from their encampments under the authority of a municipal bylaw. The appellants challenge the constitutionality of the municipal bylaw and seek *Charter*

damages for harms the appellants allege were caused by the City's actions under an unconstitutional bylaw;

- (h) To defend against the awarding of *Charter* damages, the state can raise good governance concerns. These “good governance” concerns give state actors an immunity threshold that damage claimants must clear to access damages. The height or strength of the immunity threshold is dependent on the type of legal instrument or action deemed to be unconstitutional.
- (i) To decide the appeal, this Court must determine the immunity threshold claimants must overcome to collect *Charter* damages for state conduct under an unconstitutional bylaw;
- (j) This is a novel issue before this Court. The outcome and reasoning of this case will meaningfully shape the scope and availability of *Charter* damages for future claimants;
- (k) The BCCLA is a well-recognized and unaffiliated advocacy group that has been promoting civil liberties across Canada since 1963. It seeks leave to intervene as a friend of the Court on the novel *Charter* damages issue;
- (l) The four factors under the test for intervention favor granting the BCCLA leave to intervene:
 - (i) **Nature of the appeal:** the appeal is a *Charter* case involving issues of public policy and national interest. The BCCLA is a well-recognized

advocacy group that has intervened on hundreds of cases before the Supreme Court of Canada, including almost all seminal *Charter* damages cases. The BCCLA has also intervened in numerous constitutional cases before this Court and in other encampment and bylaw enforcement cases. Given its specialized expertise on the issues on appeal, the BCCLA can offer an important perspective to the Court that is distinct from the immediate parties. The BCCLA also has a real and identifiable interest in this appeal given its advocacy and research work regarding the rights of individuals suffering from homelessness.

- (ii) **Issues arising in the appeal:** this appeal raises issues that have broad implications beyond the immediate parties. It will require the Court to consider a novel *Charter* damages issues which will impact the interests of future claimants. The Court would benefit from the BCCLA's experienced perspective on the issue.
- (iii) **Likelihood that the BCCLA will make useful contributions to resolve the appeal:** the BCCLA has detailed its proposed submissions in a draft factum in its motion record. The submissions are useful as they touch on a novel issue before this Court: what immunity threshold must claimants overcome to collect damages for the enforcement of an unconstitutional municipal bylaw. Drawing on *Charter* damages cases, the BCCLA proposes a framework to determine the appropriate immunity threshold to collect *Charter* damages. The BCCLA also argues that penal negligence is

the appropriate immunity threshold in this case. The BCCLA has reviewed the parties' facts and worked with other proposed interveners to ensure that its arguments are not duplicative.

(iv) **Prejudice to the immediate parties:** granting the BCCLA leave to intervene will not prejudice any party. The BCCLA will not file any additional evidence or unduly expand the issues. Its proposed submissions are on a legal point. Granting the BCCLA leave to intervene will not delay the hearing of this appeal scheduled for February 2026. The BCCLA will abide by any schedule and conditions of intervention imposed by the Court. The BCCLA will not seek costs at the appeal if granted leave to intervene.

- (m) The BCCLA does not seek costs and asks that none be awarded against it;
- (n) The BCCLA relies on R 13.03(2) of the *Rules of Civil Procedure*, RRO 1990, Reg 194;
- (o) Such further and other grounds as counsel may advise and the Court may permit.

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

- (p) Affidavit of Ga Grant affirmed November 13, 2025; and
- (q) Such further and other materials as counsel may advise and the Court may permit.

November 14, 2025

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COA-25-CV-0166
COURT OF APPEAL OF ONTARIO

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Appellants/Responding Parties
- and -

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Respondent/Responding Party

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ATTORNEY GENERAL OF ONTARIO

Intervenor

- and -

**BRITISH COLUMBIA CIVIL LIBERTIES
ASSOCIATION**

Proposed Intervenor/Moving Party

**BCCLA'S NOTICE OF MOTION FOR LEAVE
TO INTERVENE**

ADDARIO LAW GROUP LLP

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KRISTEN HEEGSMA et al.	- and -	CITY OF HAMILTON	-and-	ATTORNEY GENERAL OF ONTARIO	-and-	BCCLA
Applicants (Appellants)		Respondent (Respondent on Appeal)		Intervenor		Proposed Intervenor

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
HAMILTON

**BCCLA’S NOTICE OF MOTION
FOR LEAVE TO INTERVENE**

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Counsel for the Proposed Intervenor

TAB 2

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL
PIERRE, and LINSLEY GREAVES**

Appellants/Responding Parties

- and -

CITY OF HAMILTON

Respondent/Responding Party

- and -

ATTORNEY GENERAL OF ONTARIO

Intervenor

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Proposed Intervenor/Moving Party

**AFFIDAVIT OF GA GRANT AFFIRMED NOVEMBER 13, 2025
(Motion for Leave to Intervene)**

I, GA GRANT of the City of Montreal in the Province of Quebec, solemnly affirm and say:

1. I am Staff Litigation Counsel at the British Columbia Civil Liberties Association (the "BCCLA"), and as such have personal knowledge of the matters contained in this affidavit. Where I do not have personal knowledge, I state the source of my information and believe it to be true. When

referring to the BCCLA’s activities in which I have not personally participated, I have familiarized myself with the relevant facts and have based my account on this knowledge.

2. I affirm this affidavit on behalf of the BCCLA in support of its motion for leave to intervene in this appeal as a friend of the Court under Rule 13.03 of the *Rules of Civil Procedure*.

A. Overview of the BCCLA’s motion

3. The appellants are 14 individuals who erected and resided in encampments within parks around the City of Hamilton (the “City”). The appeal is about the City’s eviction of the appellants from their temporary shelters under a municipal bylaw. The appellants claim that the bylaw was unconstitutional. They also seek, among other relief, *Charter* damages for the City’s enforcement of unconstitutional bylaws.

4. This appeal is the first appellate case to consider the *Charter* damages framework in the context of municipal bylaws. The reasoning and outcome of this case will impact the scope of remedies available to other claimants.

5. Given its public interest mandate and its depth of experience intervening in *Charter* damages and encampment litigation, the BCCLA seeks leave to intervene on the novel *Charter* damages issues in this case. The BCCLA’s proposed arguments are detailed in its draft factum. The arguments focus on the immunity threshold that claimants must overcome to collect *Charter* damages for misconduct under an unconstitutional municipal bylaw. This is a novel issue before this Court.

6. The BCCLA has retained Samara Sector and Tabir Malik to bring this motion and (if leave is granted) to intervene in this appeal.

B. The BCCLA is a well-recognized, national, and non-partisan advocacy group

7. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group incorporated in 1963. It has thousands of supporters across the country.

8. The objectives of the BCCLA include the promotion, defence, sustainment, and extension of civil liberties and human rights throughout Canada. The BCCLA works to further its objectives in a variety of ways, including:

- (a) preparing position papers and making submissions to governmental bodies at the federal, provincial, and municipal levels concerning the advancement of civil liberties and human rights and the implications for civil liberties and human rights of proposed legislative and policy initiatives;
- (b) assisting individuals who are experiencing violations of their civil liberties or human rights, including assistance in pursuing administrative and informal remedies;
- (c) engaging in public education, including by commenting on current civil liberties and human rights issues in various news media, participating in conferences and other public events at which civil liberties and human rights are discussed, publishing newsletters and producing books and other publications regarding civil liberties and human rights issues, and maintaining a website containing many of the BCCLA's position papers and other public documents; and
- (d) taking action, in its own right, when it perceives violations of civil liberties or human rights by launching complaints with the government or other administrative agencies, or

by appearing in court, sometimes as a plaintiff or applicant, but most often as an intervener in legal proceedings that raise civil liberties issues.

9. The BCCLA’s work is national in scope. It carries on its activities in federal, provincial, and territorial jurisdictions across the country.

C. The BCCLA has extensive experience intervening in cases that concern the subject matter of this appeal

10. The BCCLA has extensive experience intervening in cases implicating civil liberties and human rights. In granting the BCCLA’s contested motion to intervene in *France v. Diab* before this Court, Rouleau J.A. held that the BCCLA had a substantial interest in the case owing to its “broad human-rights mandate” and that it was a “well-recognized group with special expertise and [a] broad membership base” (at para 19). A copy of this decision, issued in Chambers, is attached as **Exhibit “A”**.

11. The Supreme Court of Canada (the “**SCC**”) has granted the BCCLA leave to intervene in more than 100 appeals, making the BCCLA one of the SCC’s most frequent non-government interveners.

12. The BCCLA has intervened in nearly all seminal SCC cases concerning *Charter* damages, which is a central issue in this appeal and the focus of the BCCLA’s proposed submissions. These cases include:

- (a) *Ward v. British Columbia*, [2010 SCC 27](#), in which the SCC developed the current framework for evaluating the availability of damages as a s. 24(1) remedy;

- (b) *Henry v. British Columbia (Attorney General)*, [2015 SCC 24](#), in which the SCC redeveloped the *Ward* framework in the context of the Crown's wrongful non-disclosure;
 - (c) *Ernst v. Alberta Energy Regulator*, [2017 SCC 1](#), in which the SCC determined the availability of *Charter* damages for the actions of a quasi-judicial statutory body; and
 - (d) *Canada v. Power*, [2024 SCC 26](#), in which the SCC confirmed that the state can be held liable for *Charter* damages for drafting and passing a law that is later deemed unconstitutional.
13. The BCCLA has also assisted this Court as an intervener on important constitutional matters, such as:
- (a) *Canada (Attorney General) v. Bedford*, [2012 ONCA 186](#), in which the BCCLA argued that the protection of liberty under s. 7 of the *Charter* encompasses core aspects of personal autonomy;
 - (b) *R. v. Mernagh*, [2013 ONCA 67](#), in which the BCCLA argued that the exemption under the *Marihuana Medical Access Regulations* allowing for medical marijuana violated s. 7 of the *Charter* because it was illusory and operated erratically;
 - (c) *Frank v. Canada (Attorney General)*, [2015 ONCA 536](#), in which the BCCLA argued that revoking the voting rights of non-resident Canadian citizens who have lived outside the country for five consecutive years or more until they re-establish residency in Canada infringes the rights of these citizens under s. 3 of the *Charter*;

- (d) *R. v. Vice Media Canada Inc. and Ben Makuch*, [2017 ONCA 231](#), in which the BCCLA invited the Court to develop a more specific and rigorous framework to guide judges on using their discretionary power to issue production orders against media;
- (e) *Mathur v. Ontario*, [2024 ONCA 762](#), in which the BCCLA argued that the distinction between positive and negative rights to screen out *Charter* claims should be rejected as unhelpful and unprincipled;
- (f) *Alford v. Canada (Attorney General)*, [2024 ONCA 306](#), in which the BCCLA argued that transparency and accountability are fundamental values underpinning parliamentary privilege;
- (g) *Democracy Watch v. Ontario (Integrity Commissioner)*, [2025 ONCA 153](#), in which the BCCLA argued that where the directly impacted parties have no interest in challenging an administrative decision, public interest standing at judicial review proceedings is necessary to uphold the principle of legality.

14. The BCCLA's intervention experience also extends to cases about the eviction of unhoused individuals from public spaces under municipal bylaws, which is the subject matter of this appeal.

These cases include:

- (a) *Victoria (City) v. Adams, et al.*, [2008 BCSC 1363](#) and [2009 BCCA 563](#), involving ss. 7 and 12 *Charter* challenges to a municipal bylaw prohibiting temporary abodes and the construction of temporary structures in a park overnight;

(b) *Abbotsford (City) v. Shantz*, [2015 BCSC 1909](#), involving a s. 7 Charter challenge to municipal bylaws that prohibited sleeping or being in a park overnight or erecting a temporary shelter without permit; and

(c) *Prince George (City) v Stewart*, CA47899, on appeal from [2021 BCSC 2089](#), CA47899, in which the City sought to appeal the lower court’s decision to deny its statutory injunction against the occupants of encampments on municipal property. The Court granted the BCCLA leave to intervene in the appeal on the issue of the test for granting injunctions where *Charter* rights were at stake. The City ultimately withdrew its appeal.

15. The BCCLA is also a public interest litigant in *Zee et al v City of Vancouver and Vancouver Board of Parks and Recreation*, British Columbia Supreme Court File No. S-250745. The case is a Charter challenge to the daytime sheltering restrictions imposed by the City of Vancouver.

D. The BCCLA has a substantial interest in the subject matter of this appeal

16. Part of the BCCLA’s core mandate includes advocating for the rights and liberties of marginalized groups, which includes those experiencing poverty and homelessness.

17. To that end, in addition to the litigation mentioned above, the BCCLA is actively engaged in research, advocacy, open letters and submissions related to social supports for those experiencing homelessness. These efforts include:

(a) “Joint letter from the BCCLA and Pivot to the Federal Housing Advocate: Submission on the Review of Encampments in Canada: Evictions of Hasting Tent City” (April 4, 2023);

- (b) “Injunctions Will Not Solve Homelessness: BCCLA Reacts to Prince George Withdrawing Tent City Appeal” (March 29, 2022);
- (c) “Open Letter from the BCCLA demanding that the Vancouver Park Board withdraw its request for an injunction to remove people from CRAB Park” (December 1, 2021);
- (d) “Joint Letter to City of Vancouver regarding Decriminalizing Poverty”, (March 11, 2021);
- (e) “Joint letter to Vancouver Park Board on by-law amendment regarding sheltering in parks” (July 28, 2020); and
- (f) “Safety for People in Homeless Encampments” (May 21, 2020).

E. The BCCLA’s intervention will not unduly delay the appeal or prejudice the parties

18. If granted leave to intervene, to avoid any prejudice or delay, the BCCLA:

- (a) will abide by any schedule set by the Court;
- (b) will not file any additional evidence, unduly expand the issues, or add to the record;
- (c) will not seek costs;
- (d) will not unreasonably delay or lengthen the hearing of this appeal;
- (e) has developed unique arguments in consultation with the other proposed interveners and by reviewing the parties’ facts on appeal; and
- (f) will comply with any terms and conditions imposed on its intervention.

19. The BCCLA seeks no costs on this motion and requests that none be awarded against it.

AFFIRMED remotely by Ga Grant)
 in the City of Richmond, in the Province of British)
 Columbia, before me at the City of Toronto, in the)
 Province of Ontario, this 13 day of November 2025,)
 in accordance with O. Reg 431/20, Administering)
 Oath or Declaration Remotely.)



A COMMISSIONER
 Tabir Malik (LSO #85565F)



GA GRANT

This is Exhibit “A” referred to in the Affidavit of Ga Grant affirmed remotely at the City of Richmond, in the Province of British Columbia, before me at the City of Toronto, in the Province of Ontario this 13 day of November 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

A handwritten signature in black ink, appearing to read 'Tabir Malik', is positioned above a horizontal line.

A COMMISSIONER

Tabir Malik (LSO #85565F)

COURT OF APPEAL FOR ONTARIO

DATE: 20130509

DOCKET: M42235, M42240, M42242, M42243 (C53812, C55441)

P.S. Rouleau J.A. (In Chambers)

IN THE MATTER OF an appeal of a committal order pursuant to s. 49 of the
Extradition Act, S.C. 1999, c. 18

AND IN THE MATTER OF an application for judicial review pursuant to s. 57 of
the *Extradition Act*, S.C. 1999, c. 18

BETWEEN

The Attorney General of Canada, on behalf of the Republic of France

Respondent

and

Hassan Naim Diab

Appellant

and

Canadian Civil Liberties Association, Amnesty International, British Columbia
Civil Liberties Association, Canadian Association of University Teachers

Proposed Interveners

AND BETWEEN

The Minister of Justice of Canada

Respondent

and

Hassan Naim Diab

Applicant

and

Canadian Civil Liberties Association, Amnesty International, British Columbia
Civil Liberties Association, Canadian Association of University Teachers

Proposed Interveners

Marlys A. Edwardh and Daniel Sheppard, for the applicant/appellant

Janet Henchey and Jeffrey G. Johnston, for the respondent

Mark Sandler, for the proposed intervener, the Canadian Association of
University Teachers

James Stribopoulos, for the proposed intervener, the Canadian Civil Liberties
Association

Lorne Waldman, for the proposed intervener, Amnesty International

Brendan van Niejenhuis and Justin Safayeni, for the proposed intervener, the
British Columbia Civil Liberties Association

Heard: May 2, 2013

Rouleau J.A.:

A. OVERVIEW

[1] The applicant/appellant has been ordered committed and surrendered for extradition to France. He has appealed the extradition judge's committal order and applied for judicial review of the Minister of Justice's surrender order. Amnesty International, the Canadian Civil Liberties Association (the "CCLA"), the British Columbia Civil Liberties Association (the "BCCLA"), and the Canadian

Association of University Teachers (“CAUT”) have each brought a motion for leave to intervene in the proceedings. The motions were heard together. The Crown opposed the interventions, while the applicant/appellant consented. For the reasons that follow, I grant Amnesty International, the CCLA, and the BCCLA leave to intervene in the proceedings. I decline to grant CAUT leave to intervene.

B. FACTS

[2] Dr. Hassan Naim Diab was born in Lebanon in 1953. He became a Canadian citizen in 2006. He is a university sociology professor in Ottawa. In 2008, the Republic of France submitted a request to Canada to extradite Dr. Diab to stand trial in France on charges related to a 1980 terrorist bombing of a synagogue in Paris, which killed four people, injured over forty others, and destroyed a significant amount of property. The Record of the Case (“ROC”) submitted to Canada by France included the evidence of a French handwriting expert which purported to identify Dr. Diab as one of the bombers (the “Bisotti Report”), as well as information whose source and circumstances of reception were unknown (“intelligence evidence”).

[3] At the committal stage of his extradition proceedings, Dr. Diab tendered the evidence of three leading forensic document examiners who provided strong criticism of the Bisotti Report. On this basis, Dr. Diab argued that the Bisotti Report was “manifestly unreliable” and ought not to be considered on the issue of committal. One aspect of Dr. Diab’s legal argument was that if expert evidence in

a ROC is found to lack threshold reliability such that it would not be admissible in a Canadian court, then it should be considered manifestly unreliable for the purposes of an extradition proceeding. The extradition judge disagreed with this proposed approach. He further decided that the Bisotti Report could not be declared manifestly unreliable without weighing the competing inferences offered by the defence's three experts with those put forth in the Report, which falls outside the role of an extradition judge. The extradition judge also found that there was sufficient evidence to grant the application for committal and ordered Dr. Diab's committal on June 6, 2011.

[4] At the surrender stage of his extradition proceedings, Dr. Diab submitted to the Minister of Justice that if he were surrendered to France, among other things, he would be tried on the basis of the secret intelligence contained in the ROC, which may have been derived from torture-based interrogations. The Minister of Justice nevertheless ordered Dr. Diab's surrender on April 4, 2012.

[5] Dr. Diab appealed the decision of the extradition judge granting committal and sought judicial review of the Minister of Justice's decision to surrender him to France. The issue in the committal appeal is whether the evidence in the ROC is sufficient to grant committal; and a focus of the appeal is whether the evidence contained in the Bisotti Report is "manifestly unreliable", as well as the test for making such a finding in the circumstances of this case. The issue in the application for judicial review is whether the Minister's decision to surrender Dr.

Diab was reasonable. One focus of the judicial review is Dr. Diab's concerns about the use of intelligence and torture-derived evidence in the French trial, as well as the appropriate standard of proof to show that evidence is drawn from torture-based interrogations.

C. ISSUES AND THE LAW

[6] The issue in these motions is whether Amnesty International, the BCCLA, the CCLA, and CAUT should be granted leave to intervene in Dr. Diab's appeal of the extradition judge's committal order and/or his application for judicial review of the Minister's surrender order, as friends of the court, pursuant to s. 23(1) of the *Criminal Appeal Rules*, SI/93-169, and rules 13.02 and 13.03(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[7] All parties to these motions agree on the principles applicable to granting leave to intervene. The court must consider the nature of the case, the issues which arise in it, and particularly, the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties: *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167. This court elaborated in *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, 98 O.R. (3d) 792, at para. 2, that in a *Charter* case, the proposed intervener generally

also meets at least one of three “*Dieleman*”¹ criteria: either that the intervener has a real, substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broad, identifiable membership base. The rules regarding intervention are also relaxed in *Charter* cases, in recognition of the fact that such issues impact others who are not party to the litigation: *Peel*, at p. 167. The overarching consideration is always that identified in *Peel*, however, which requires the proposed intervener to show that they will make a useful contribution beyond that which would be offered by the parties and without causing an injustice to the immediate parties: *R. v. McCullough* (1995), 24 O.R. (3d) 239 (C.A.), at p. 243. See also *Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A.).

D. POSITIONS OF THE PARTIES

(1) Amnesty International

[8] Founded in 1961, Amnesty International is an international organization operating in 162 countries that works to prevent human rights violations. It seeks leave to intervene in the judicial review proceedings, and proposes to make submissions on the standard of proof to be met by a person claiming the use of torture-derived evidence in an extradition context. Specifically, if granted leave to intervene, Amnesty International will argue that a person sought must establish a

¹ *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Gen. Div.), at p. 39.

“plausible connection” between evidence put forward by the requesting state and torture, which will trigger the Minister’s duty to make inquiries; and that if the Minister finds a “real risk” that the evidence is derived from torture, the Minister must refuse to extradite the person sought. Amnesty International has argued that it will draw on its expertise and special knowledge of international human rights law and jurisprudence in making these submissions.

(2) The CCLA

[9] The CCLA is a national organization constituted to promote respect for fundamental human rights and civil liberties. It seeks leave to intervene in Dr. Diab’s appeal and judicial review proceedings in order to make submissions on two main issues: 1) the ability of an extradition judge to engage in a limited weighing of the evidence at the committal stage, placed in a broader context of concerns about all types of unreliable evidence that could be used by a requesting state and 2) whether it would violate s. 7 of the *Charter* to surrender an individual where information from unknown sources, provided in unknown circumstances, will be relied on as evidence in the foreign trial. The CCLA states that it will bring its expertise in balancing competing rights and interests, and its distinct national perspective, to bear on these issues and to place them in a wider context.

(3) The BCCLA

[10] Incorporated in 1963, the BCCLA is a non-profit advocacy group that aims to promote, defend, sustain, and extend civil liberties throughout British Columbia and Canada. It seeks leave to intervene in the judicial review proceedings in order to make submissions regarding the proper procedure for the Minister to follow in assessing whether a person sought will be tried on the basis of torture-derived evidence in the requesting state. Specifically, the BCCLA will argue that once a person sought has discharged their burden of proof of demonstrating a “plausible connection” between the evidence and torture, the Minister must either rebut that plausible connection or satisfy himself that the person sought can fully and fairly challenge the use of torture-derived evidence in the requesting state. The BCCLA has further proposed to discuss, in practical terms, the types of evidence that can demonstrate or rebut a plausible connection, and the types of protections the requesting state must offer to allow for the challenge of torture-tainted evidence. The BCCLA submits that in making these arguments, it will rely on its expertise in issues relating to the interplay between civil liberties and national security, foreign relations, and law enforcement.

(4) CAUT

[11] Established in 1951, CAUT is a national representative for Canadian academic personnel and represents 68,000 professors, librarians, researchers, and other academic professionals. CAUT's mandate includes the defence of

academic freedom, equality and human rights for academic staff, and the protection of the integrity of scholarly work. CAUT seeks leave to intervene in Dr. Diab's committal appeal. CAUT argues that it has a real and substantial interest in this proceeding, as well as a distinct perspective to offer, because of its involvement in issues related to intellectual rigour, scientific and academic integrity, and the standards to be applied to evaluate the adequacy and reliability of scholarly work. If granted leave to intervene, CAUT proposes to assist the court in determining how threshold reliability is appropriately evaluated in the context of a discipline such as handwriting analysis, and specifically the impact of flawed and biased methodology on the threshold reliability of expert evidence.

(5) The Crown

[12] The Crown does not dispute the particular areas of expertise of Amnesty International, the CCLA, or the BCCLA, or their substantial interest in this case. The Crown submits, however, that the submissions of Amnesty International, the CCLA, and the BCCLA are duplicative of those already being advanced by Dr. Diab. Further, the proposed interveners' attempts to differentiate their submissions from those of Dr. Diab improperly expand the scope of the proceedings in this court, thereby doing an injustice to the Crown. They therefore should not be permitted to intervene.

[13] The Crown does dispute that CAUT has a substantial interest in the committal appeal and asserts that CAUT's submissions are duplicative of Dr.

Diab's. Crown counsel also argued that CAUT is putting itself forward on appeal as a new expert on the reliability of the Bisotti Report. The Crown's position is that CAUT ought not to be granted leave to intervene.

E. ANALYSIS

[14] I am to consider the nature of the case, the issues which arise in it, and the ability of each proposed intervener to make a useful contribution to this case without causing injustice to the parties, as well as the three *Dieleman* criteria.

[15] The Crown argued that the prompt and expeditious nature of extradition proceedings requires intervention to be granted only sparingly. I do not consider that a different test for intervention in extradition proceedings is warranted. Prejudice to a party, including delay, is certainly a factor to be considered, but each motion for leave to intervene, whether it is in a committal appeal, in a judicial review of a surrender order, or in any other appeal, must be decided on its own facts.

[16] Several issues which arise in this case are of significant public importance. Questions at issue in this case which transcend the litigation between the immediate parties include: what qualifies as manifestly unreliable expert evidence in a ROC, particularly when the extradition decision is almost totally dependent on that expert opinion? how should an extradition judge determine the sufficiency of the evidence contained in a ROC in such circumstances? if intelligence evidence may be used at the trial in the requesting state, is surrender

in violation of s. 7 of the *Charter*? how can a person sought show that torture-derived evidence may be used at their foreign trial? how may or must the Minister respond to allegations of torture-derived evidence? The importance of these questions and their constitutional dimensions favour intervention.

[17] I disagree with the Crown's submission that Amnesty International, the CCLA, and the BCCLA offer merely "me-too submissions", which duplicate Dr. Diab's arguments without contributing further to the resolution of the appeal. Interveners need not take a different position than the appellant or make arguments that are different than those advanced by the appellant. The issue is whether they can assist the court or illuminate the issues before it due to their "special knowledge and expertise", which allows them "to place the issue in a slightly different perspective": *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (C.A.), at p. 398.

[18] I am satisfied that Amnesty International can offer a unique international perspective, particularly upon the standards of proof applicable to demonstrating that torture-derived evidence forms part of the case against the person sought. In my view, the CCLA also brings a broad, informed perspective to two issues. First, how the sufficiency of the evidence ought to be determined by the extradition judge at the committal stage, particularly in the circumstances of this appeal where the outcome on committal was based almost wholly on an expert report that the appellant argues was unreliable and upon which it would be dangerous

to convict. Second, whether it violates the *Charter* to permit surrender in the face of the possible use of intelligence evidence at the foreign trial. It is also my opinion that the BCCLA proposes a distinctive two-stage analysis, and some practical considerations, as to how torture-based evidence can be dealt with at the ministerial stage of extradition proceedings.

[19] Furthermore, I am satisfied that Amnesty International, the CCLA, and the BCCLA each have a substantial interest in this case owing to their broad human-rights mandates, offer a distinct, comprehensive perspective on the issues, and are well-recognized groups with special expertise and broad membership bases.

[20] In my view, the submissions being proposed by these interveners will not significantly broaden the scope of the proceedings. Their intervention will not prejudice either of the immediate parties to the litigation, as they have undertaken not to augment the record, duplicate submissions already made, or seek costs in relation to the appeal. Moreover, this appeal is being case-managed and any delay occasioned by the interveners can thereby be kept to a minimum.

[21] Despite their commendable intentions and the able advocacy of their counsel, I am not however satisfied that CAUT will perform a like service to the hearing of this appeal. CAUT proposes to discuss how threshold reliability of expert evidence may be assessed by an extradition judge, particularly in the context of handwriting analysis. However, the evidence of three experts on this

very issue was before the extradition judge and on his committal appeal, the appellant focuses almost exclusively on that evidence and that issue. CAUT's proposed submissions will be duplicative of those of the appellant. Furthermore, while important, the issue of the threshold reliability of expert evidence regularly comes before this court and I see little benefit in receiving CAUT's submissions as to how a court is to approach this issue. Therefore, I would deny CAUT leave to intervene in the committal appeal.

F. CONCLUSION

[22] Leave to intervene in the judicial review proceedings is granted to Amnesty International, the BCCLA, and the CCLA; the CCLA is further granted leave to intervene in the committal appeal. All interveners are subject to the following conditions:

- i. they shall take the record as it exists and not seek to augment it;
- ii. they may each file a factum not to exceed 15 pages in length;
- iii. the facta of the interveners are to be filed within 14 days hereof;
- iv. the CCLA is to file only one factum dealing with both the committal appeal and the judicial review issues;
- v. they may each have up to 15 minutes for oral argument, subject to the discretion of the panel; and
- vi. the interveners shall not seek costs nor be exposed to costs in the appeal.

[23] I decline to grant CAUT leave to intervene in these proceedings.

[24] Any issues arising as a consequence of this decision, including the timing and length of the respondent's factum, can be dealt with as part of the case management process.

[25] There will be no award as to the costs of these motions.

Released: May 10, 2013

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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GORD SMYTH, MARIO MUSCATO, SHAWN
ARNOLD, CASSANDRA JORDAN, JULIA
LAUZON, AMMY LEWIS, ASHLEY
MACDONALD, COREY MONAHAN, MISTY
MARSHALL, SHERRI OGDEN, JAHMAL
PIERRE, and LINSLEY GREAVES**

Appellants/Responding Parties
- and -

CITY OF HAMILTON

Respondent/Responding Party

- and -

ATTORNEY GENERAL OF ONTARIO

Intervenor

- and -

**BRITISH COLUMBIA CIVIL LIBERTIES
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Proposed Intervenor/Moving Party

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Applicants (Appellants)		Respondent (Respondent on Appeal)		Intervenor		Proposed Intervenor

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
HAMILTON

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COURT OF APPEAL FOR ONTARIO

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Appellants

- and -

CITY OF HAMILTON

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO

Intervenor

- and -

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Proposed Intervenor

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PART I: OVERVIEW

1. This case involves the relationship between *Charter* damages and municipal bylaws. The case raises questions about the extent to which municipalities are immunized from being held accountable for their unconstitutional bylaws. In the *Charter* damages analysis, the state has an opportunity to demonstrate that awarding damages interferes with “good governance.” If the state can so prove, it is afforded some immunity from damages. Claimants then must overcome a minimum immunity threshold to collect *Charter* damages.

2. On this appeal, if the bylaws are found unconstitutional, the Court will decide the level of the minimum immunity threshold claimants must overcome to receive *Charter* damages for the unconstitutional bylaws. This is a novel question before the Court. The BCCLA argues that municipalities are not insulated by the same good governance concerns as other levels of government. *Charter* damages are more readily accessible when municipalities breach the constitution compared to legislatures. Unlike legislatures, municipalities are creatures of statute. As a result, unlike legislatures, municipalities do not enjoy constitutional status, parliamentary privilege, or parliamentary sovereignty. These characteristics justify giving legislatures a higher level of immunity from *Charter* damages for their enactments. The respondent asks this Court to treat municipalities as though they are legislatures in the context of *Charter* damages.¹ Doing so would be an error.

3. The BCCLA makes two arguments. **First**, to access *Charter* damages for the enforcement of unconstitutional bylaws, claimants must show the municipality had “clear disregard” for the claimant’s *Charter* rights.

4. When a legal instrument (statute, regulation, bylaw, policy) authorizes unconstitutional

¹ Respondent’s factum at para 143(b).

conduct, the state can raise the good governance defence to prevent court damages awards from chilling the state's ability to enact and enforce laws. This good governance concern raises a threshold immunity that benefits the state which applicants must overcome to collect damages.

5. The Supreme and appellate Court cases reviewed below show that immunity thresholds sit on a scale depending on the nature of the unconstitutional legal instrument. The State's most protective immunity threshold is reserved for conduct authorized by unconstitutional primary legislation (statute). In the Supreme Court's *Mackin* (2002) and *Power* (2024) decisions, the Court clarified that for claimants to access *Charter* damages for misconduct authorized by a statute, they must prove that the statute was clearly unconstitutional, abusive, or enacted in bad faith. Conversely, the Supreme Court clarified in *Conseil* (2020) that state conduct authorized by ministerial policies are given no protective good governance immunity. The middle of the spectrum of protection is reserved for "subordinate legislation" such as regulations, where the underlying statute did not mandate the regulation, as in *Brazeau* (ONCA, 2020). The immunity threshold for subordinate legislation is that the state showed a "clear disregard" for the *Charter*.

THE IMMUNITY THRESHOLD SCALE FOR CONDUCT UNDER A LEGAL INSTRUMENT
--

Immunity threshold:

Clearly unconstitutional
Bad faith
Abuse of power

Clear disregard

No immunity

Legal instrument

Statute
[*Mackin/Power*]

Subordinate legislation
 (where the underlying statute does
 not prescribe the unconstitutional
 conduct)
[*Brazeau*]

Ministerial policies
[*Conseil*]

6. The jurisprudence canvassed above demonstrates that the level of immunity protection depends on how closely related the legal instrument is to the legislature. Judicial scrutiny of the

legislature's powers risks three significant constitutional principles: parliamentary privilege, parliamentary sovereignty, and separation of powers. The legislature's core power is enacting statutes. When claimants seek damages for the state's enforcement of a statute, good governance demands the high immunity threshold to respect the three constitutional principles.

7. Municipal bylaws, however, are subordinate legislation. They are not enacted by legislatures. Because of their subordinate status, the only constitutional principle risked by judicial scrutiny of a bylaw is the separation of powers. This justifies a moderate immunity threshold for claimants to clear when seeking damages for the enforcement of unconstitutional bylaws (the "clear disregard" standard).

8. **Second**, the BCCLA argues that the minimum threshold of "clear disregard" connotes negligence. This Court in *Brazeau* defined "clear disregard" as recklessness or wilful blindness to the unconstitutional nature of the instrument. However, last year in *Power*, the Supreme Court held that the highest immunity threshold a claimant must clear for *Charter* damages – the "clearly unconstitutional" standard – means the government that implemented the instrument was reckless or wilfully blind to the instrument's unconstitutionality. If *Power* and *Brazeau* are read together, then, the highest immunity threshold (for statutes) and the moderate immunity threshold (for subordinate legislation) are now identical. This cannot be the case given the differing constitutional principles at stake for primary versus subordinate legislation.

9. This Court must therefore recalibrate the "clear disregard" standard so that it sits below the recklessness standard from *Power*. Penal negligence is appropriate given the limited constitutional principles at risk when judges review subordinate legislation for *Charter* compliance.

PART II: SUMMARY OF THE FACTS

10. The BCCLA takes no position on the facts of this appeal.

PART III: ISSUES

11. The BCCLA takes no position on the outcome of this appeal. Its submissions relate to the following issue raised on appeal: **What immunity threshold must claimants overcome to collect *Charter* damages for state conduct authorized by an unconstitutional bylaw?** The BCCLA submits that to collect *Charter* damages, claimants must prove that the municipality demonstrated a “clear disregard” for the claimant’s *Charter* rights. “Clear disregard” connotes a negligence standard.

PART IV: THE LAW

A. The immunity threshold for state conduct authorized by an unconstitutional bylaw is “clear disregard”

1) Claimants must clear an immunity threshold for the Court to award *Charter* damages where the state raises good governance concerns

a) Good governance concerns may weigh against awarding *Charter* damages

12. *Vancouver v. Ward* establishes the framework for awarding *Charter* damages.² The Supreme Court developed a four-part test to determine whether damages are a “just and appropriate remedy” for a *Charter* breach under s. 24(1)³:

- i. At stage 1, the applicant must establish a *Charter* breach for which damages are claimed.
- ii. At stage 2, the applicant must prove that damages would fulfil at least one of three functions: compensation, vindication, or deterrence.

² [2010 SCC 27](#) [*Ward*]

³ *Ward* at para [61](#)

- iii. At stage 3, the state may raise countervailing considerations – such as good governance concerns – to demonstrate that damages are inappropriate or unjust in the circumstances.⁴ The applicant then has the burden to rebut these considerations.
- iv. At stage 4, the court must assess the quantum of damages.⁵

b) Claimants can overcome good governance concerns by clearing an immunity threshold

13. The logic of the good governance concern is that damages may chill government work.⁶ The concern describes a compendium of policy factors that justify restricting the state’s liability.⁷ However, damages can equally encourage effective governance by deterring unconstitutional conduct.⁸

14. The Supreme Court has held that claimants may overcome good governance concerns by proving the state’s conduct meets a “minimum threshold of gravity” (the “**immunity threshold**”).⁹ The threshold will depend on the misconduct at issue and the type of governance concern the state raises.¹⁰

2) State conduct authorized by legal instruments raises unique good governance concerns

15. Awarding *Charter* damages for state misconduct authorized by a legal instrument (statute, regulations, policies) raises a category of good governance concerns that are distinct from the good governance related to discretionary state misconduct. This implication flows from a review of the five leading Supreme Court cases regarding state immunity from *Charter* damages:

⁴ *Ward* at para 33

⁵ *Ward* at para 46

⁶ *Ward* at para 38

⁷ *Henry* at para 39

⁸ *Ward* at para 38

⁹ *Ward* at para 39; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at para 42.

¹⁰ *Ward* at paras 39, 43.

i. Regarding state misconduct authorized by a legal instrument:

1. *Mackin v. New Brunswick (Minister of Finance)*¹¹ involved enactment and enforcement of a valid statute that was later found unconstitutional. The Court was concerned that awarding Charter damages may deter the state from enforcing valid statutes. This policy concern triggered the Court to adopt a high immunity threshold. To successfully access *Charter* damages, the claimant must prove that statute was “clearly wrong, in bad faith, or an abuse of power”.
2. In *Canada (Attorney General) v. Power*,¹² the Court confirmed that the state could be liable for damages for Ministers drafting and tabling a bill that is enacted into law by Parliament but subsequently declared invalid.¹³ The Court confirmed that the high immunity threshold from *Mackin* applied but reformulated the threshold as “clearly unconstitutional”, in bad faith, or an abuse of power.¹⁴
3. *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*,¹⁵ involved unconstitutional conduct authorized by a government policy.¹⁶ The Court held that that this policy context raised no good governance concerns about interfering with legislative powers and thus no immunity threshold was warranted.¹⁷

¹¹ [2002 SCC 13](#) [*Mackin*].

¹² [2024 SCC 26](#) [*Power*].

¹³ *Power* at paras [14](#), [116](#).

¹⁴ *Power* at paras [23](#), [59](#), [97](#), [116](#).

¹⁵ [2020 SCC 13](#) [*Conseil*].

¹⁶ *Conseil* at para [165](#).

¹⁷ *Conseil* at para [166](#) and [170](#).

ii. Regarding discretionary state misconduct:

1. *Henry v. British Columbia (Attorney General)*¹⁸ involved the Crown withholding disclosure from the defence in violation of the accused's *Charter* rights.¹⁹ The good governance concern was that the spectre of liability could influence prosecutorial decision making and make prosecutors more "defensive".²⁰ This would undermine public interest in having prosecutors fulfil their duty to effectively prosecute crime. The Court formulated the immunity threshold as follows: the applicant would have to prove that the Crown intentionally withheld information, knowing that that the information was material to the defence and would likely impinge on the accused's ability to make full answer and defence;²¹ and
2. *Ernst v. Alberta Energy Regulator*²² involved an administrative tribunal's decision to penalize an individual in breach of their *Charter* rights. The Court held that the good governance concerns barred *Charter* damages entirely. Damages would distract from the Board's statutory duties, compromise decision-making and impartiality, and allow collateral attacks against the Board's decisions.²³

16. The unconstitutional conduct in *Mackin/Power/Conseil* was authorised by a legal instrument. The unconstitutionality was sourced in the legal instrument, not any discretionary state

¹⁸ [2015 SCC 24](#) [*Henry*].

¹⁹ *Henry* at para [21](#).

²⁰ *Henry* at paras [39-40](#).

²¹ *Henry* at para [31](#).

²² [2017 SCC 1](#) [*Ernst*].

²³ *Ernst* at paras [6](#), [47](#), [55](#).

action. The good governance issues in those cases related to court concern that awarding damages would chill the state from enacting and enforcing a presumptively valid legal instrument before it is declared unconstitutional.

17. The above good governance concern is distinct from the governance concerns in *Ernest* or *Henry*, where claimants sought damages for discretionary state action (a prosecutors discretionary decision to provide disclosure and a statutory board's discretionary adjudication of a case). *Henry/Ernst* were about misapplying or abusing statutory or common law powers. No legal instrument authorized the unconstitutional conduct in *Henry/Ernst*. The resulting governance concern was about making the executive more defensive or biased in making discretionary decisions, rather than interfering with the enactment or enforcement of a valid legal instrument.

3) The immunity threshold for state conduct authorized by legal instruments sits on a scale

18. The unique governance concern of interfering with the enactment or enforcement of a valid legal instrument attracts in turn a unique set of immunity thresholds that sit on a scale.

19. On one end are cases like *Mackin/Power*, involving state misconduct authorized by primary legislation (statutes). This end of the scale attracts the highest immunity threshold. Applicants must demonstrate the state action was clearly unconstitutional, in bad faith, or an abuse of power. On the other end is state misconduct authorized by government policies which, under *Conseil*, attract no immunity threshold.²⁴ In the middle of the scale sit cases like *Brazeau v. Canada (Attorney General)*,²⁵ involving state misconduct authorized by regulations where the primary statute did not require the regulation to authorize the *Charter* breach.²⁶ This Court held that such

²⁴ *Conseil* at [para 179](#).

²⁵ [2020 ONCA 184](#) [*Brazeau*].

²⁶ *Brazeau* at [para 67](#).

regulations attracted a lower immunity threshold than *Mackin*. In *Brazeau*, the applicants had to prove the “minimum” threshold that the state acted in “clear disregard” of the applicant’s *Charter* rights.²⁷

4) Immunity threshold depends on the proximity between the legal instrument and the legislature

20. *Power* confirms that the immunity scale for legal instruments is based on how closely related the legal instrument is to the legislature.

a) *Power* provides the principles for assessing immunity

21. The Supreme Court noted in *Power* that the immunity assessment “must focus on the branches of government implicated by the claim”.²⁸ Different forms of state conduct raise different concerns about “constitutional design and institutional relationships.”²⁹

22. In *Power* the Court clarified that judicial scrutiny into state action authorized by a statute threatens three constitutional principles:³⁰ (1) parliamentary sovereignty, under which federal and provincial legislatures can make or repeal any law within their constitutional authority,³¹ (ii) separation of powers, which prevents any one branch from having “undue” influence over the other,³² and (iii) parliamentary privilege, which shields some areas of legislative activity from external review.³³

23. To respect these three constitutional principles, the Court concluded that claimants had to clear the highest immunity threshold to get *Charter* damages for conduct authorized by statutes.

²⁷ *Brazeau* at paras [67](#), [87](#); followed in *Francis v. Ontario*, [2021 ONCA 197](#) at paras [65-67](#), [79](#), and [93](#).

²⁸ *Power* at para [74](#)

²⁹ *Power* at para [74](#)

³⁰ *Power* at paras [80-84](#)

³¹ *Power* at paras [81](#), [49](#)

³² *Power* at para [82](#)

³³ *Power* at para [84](#)

b) *Power* reconciles the immunity thresholds for legal instruments under existing jurisprudence

24. Given the reasoning from *Power*, the requisite immunity threshold will depend on the relationship between the legal instrument and the legislature. The closer the relationship, the more likely that the three constitutional principles from *Power* will demand a higher minimum immunity threshold from damages. This approach explains the various immunity thresholds described in *Mackin/Power*, *Brazeau*, and *Conseil*.

25. Statutes are directly enacted by federal or provincial legislatures. When damages are sought for misconduct authorized by a statute, the misconduct is rooted directly in the exercise of those legislative powers. The constitutional principles from *Power* apply squarely and justify the highest immunity threshold.

26. Ministerial policies, on the other hand, have no relationship with the legislature.³⁴ Policies are enacted by the executive.³⁵ When unconstitutional conduct is authorized by a ministerial policy, the misconduct has no connection with the legislatures. The constitutional principles from *Power* are inapplicable, removing any immunity threshold.

27. Subordinate legislations, such as regulations, are products of delegated legislative authority. Unlike statutes, they are not enacted by the federal or provincial legislature directly. The relationship between the legislature and subordinate legislation is even more removed where the underlying statute does not mandate the specific regulation. In such cases, the unconstitutional conduct is not directly attributable to the legislature. For example, in *Brazeau*, the regulations at issue authorized the unconstitutional practice of prolonged solitary confinement. The underlying statute did not require the regulation authorize prolonged solitary confinement. The misconduct

³⁴ *Conseil* at para [177](#).

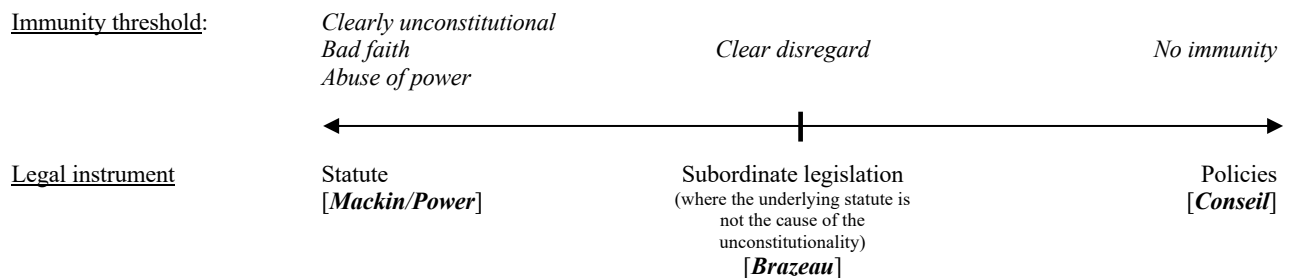
³⁵ *Conseil* at para [177](#).

for which the claimant sought damages was a product of the regulation and not the statute.

28. Given the indirect relationship between subordinate legislation and the legislature, some of the constitutional principles from *Power* apply while other do not. For instance, judicial scrutiny of subordinate legislation risks infringing the separation of powers principles since the subordinate legislation is a product of delegated *legislative* power. However, principles of parliamentary privilege or sovereignty do not apply.

29. Given the limited constitutional principles at stake, a moderate immunity of “clear disregard” is warranted for state conduct authorized by a subordinate legislation. Arguably, if the primary legislation mandated the subordinate legislation, a higher immunity threshold would be warranted.³⁶ For instance, if the underlying statute in *Brazeau* mandated the regulation that authorized prolonged solitary confinement, then judicial scrutiny of the regulation would entail scrutinizing the statute. All three constitutional principles in *Power* would be live and warrant the claimants’ clearing the highest immunity threshold before they could collect *Charter* damages.

THE IMMUNITY THRESHOLD SCALE FOR CONDUCT UNDER A LEGAL INSTRUMENT
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³⁶ *Francis* at para [83](#); the Court of Appeal supports this very conclusion.

5) The immunity threshold for bylaws is “clear disregard”

30. Where the underlying statute does not mandate the specific bylaw, the immunity threshold for state conduct under an unconstitutional bylaw must be the minimum threshold of “clear disregard”.

31. Municipal bylaws are subordinate legislation, like regulations.³⁷ For instance, the bylaw at issue on appeal (Bylaw 01-219) was enacted by the City of Hamilton and not the Ontario legislature.³⁸ The Ontario legislature delegated the authority to the City to enact the bylaw under the *Municipal Act*.³⁹

32. The above analysis justifying a lower immunity threshold for subordinate legislation applies to municipally enacted bylaws. Municipalities do not have constitutional status.⁴⁰ They do not enjoy parliamentary privilege.⁴¹ They do not attract parliamentary sovereignty as their power derives from statute not the constitution. Municipal conduct however triggers the separation of powers principle since municipalities exercise delegated legislative powers, separate from the executive or the judiciary.⁴² The limited application of the constitutional principles from *Power* justifies the lower immunity threshold for municipal bylaws.

B. The “Clear disregard” standard includes negligence

1) “Clear disregard” is the minimum immunity threshold

33. *Ward* was the first case to articulate the “clear disregard” standard as the minimum threshold claimants had to overcome given the good governance concerns related to legal

³⁷ *RWDSU v. Dolphin Delivery Ltd.*, [1986 CanLII 5](#) (SCC) at [para 39](#); *Clublink Corporation ULC v. Oakville (Town)*, [2019 ONCA 827](#) at para [34](#).

³⁸ *Heegsma v. Hamilton (City)*, 2024 ONSC 7154 at [para 7](#); Appellant’s factum at para 12.

³⁹ *Municipal Act, 2001*, SO 2001, c 25 at [s. 11\(3\)](#).

⁴⁰ *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#) at para [2](#).

⁴¹ *Prud'homme v. Prud'homme*, [2002 SCC 85](#) at para [49](#); municipalities also have no constitutional authority.

⁴² *Nelson (City) v. Marchi*, [2021 SCC 41](#) at para. [43](#).

instruments.⁴³ The Supreme Court however did not define what the standard meant.

34. A decade later in *Brazeau*, this Court confirmed that “clear disregard” was lower than the *Mackin* standard. *Brazeau* dealt with the *Charter* damages for unconstitutional prolonged solitary confinement under regulations to the *Correctional and Conditional Release Act*.⁴⁴ This Court reviewed the *Mackin* standard but did not apply it.⁴⁵ It instead concluded that the minimum immunity threshold of “clear disregard” from *Ward* applied since the unconstitutional conduct was not authorized by a statute – a lower minimum immunity threshold than *Mackin* was necessary.⁴⁶

35. The *Brazeau* Court went on to define “clear disregard” as state recklessness or wilful blindness as to the constitutionality of the regulation.⁴⁷

2) *Power* says wilful blindness and reckless is the highest immunity threshold

36. Four years after *Brazeau*, the Supreme Court in *Power* clarified the highest immunity threshold from *Mackin* of “clearly wrong, in bad faith, or an abuse of power”. The Court rearticulated the “clearly wrong” standard as “clearly unconstitutional”.⁴⁸ The Court rejected that the standard included negligence as negligence did “not reflect the high standard demanded by the constitutional principles” at issue when primary legislation is involved.⁴⁹

37. The Court ultimately concluded that the highest immunity threshold of “clearly unconstitutional” connoted recklessness or wilful blindness as to the constitutionality of the statute.⁵⁰

⁴³ *Ward* at para [43](#).

⁴⁴ *Brazeau* at para [20](#).

⁴⁵ *Brazeau* at paras [62-65](#).

⁴⁶ *Brazeau* at paras [66-67](#).

⁴⁷ *Brazeau* at para [87](#).

⁴⁸ *Power* at paras [99](#), [103-104](#), [112](#).

⁴⁹ *Power* at para [102](#).

⁵⁰ *Power* at para [105](#).

3) “Clear disregard” must connote negligence

38. Following *Power*, the highest and middle immunity thresholds are identical.

39. This cannot be. “Clearly unconstitutional” and “clear disregard” cannot mean the same thing. Primary legislation and subordinate legislation have never, and cannot now, be subject to the same immunity threshold. It would be wrong to afford municipalities (or other delegated authorities) the same immunity as legislatures given that none of the constitutional justifications for the higher immunity for statutes apply to municipal bylaws.

40. This Court now has an obligation to redefine the “clear disregard” standard from *Brazeau* so that it sits below the *Mackin/Power* standard of reckless/wilful blindness. Recklessness and wilful blindness are criminal law fault standards.⁵¹ Recklessness means the subject knew of the risk and proceeded in the face of it.⁵² Wilful blindness connotes knowing of the need to make an inquiry about the risk but choosing not to.⁵³ Neither standard requires intentional or malicious conduct. The standards are subjective and inquire about the subject’s state of mind.

41. A step below these subjective standards is the objective standard of penal negligence.⁵⁴ The standard is a higher than the civil negligence standard.⁵⁵ It requires a “marked departure” from the standard expected of a reasonable subject in the circumstances.⁵⁶ The person’s subjective knowledge or personal circumstances are irrelevant.⁵⁷

42. Penal negligence is the appropriate threshold in the municipal context for two reasons.

⁵¹ *Brazeau* at [para 87](#).

⁵² *Brazeau* at para 87.

⁵³ *Brazeau* at para 87.

⁵⁴ *R. v. Galletta*, 2020 ONCA 60 at [para 7](#): describing penal negligence as an objective standard; *R. v. Sullivan*, 2020 ONCA 333 at paras [80](#); [83](#), aff’d 2022 SCC 19: penal negligence is the lowest standard; *R. v. Zora*, 2020 SCC 14 at [paras 29-30](#): describing the subjective standards being higher than the objective standards.

⁵⁵ *R. v. Galletta*, 2020 ONCA 60 at [para 7](#).

⁵⁶ *R. v. Galletta*, 2020 ONCA 60 at [para 7](#).

⁵⁷ *R. v. Galletta*, 2020 ONCA 60 at [para 8](#).

First, the threshold is commensurate with the constitutional principles at stake when awarding *Charter* damages against municipalities. *Power* dismissed negligence as an immunity threshold for misconduct under a statute because the standard was too low to preserve the three constitutional principles at risk.⁵⁸ Since only one of the three constitutional principles from *Power* are at issue when awarding damages against municipalities, negligence is a justifiable immunity threshold in this context.

43. **Second**, penal negligence is still a sufficiently high threshold and will not result in automatic liability. The standard is not civil negligence. It requires the municipality to act in “marked departure” from the standard expected of a reasonable municipality. The inquiry will depend on the evidentiary record but may turn on the extent of the unconstitutionality of the bylaw or on the existence of legal precedent that shows the bylaw was unconstitutional before the municipality enacted it. It may also turn on (i) the existence of evidence that the bylaw could have injured the claimants (ex. through the work of advocacy groups), and (ii) that a reasonable municipality in the circumstances would have known of the harms before it enacted the bylaw.

PART V: ORDER REQUESTED

44. The BCCLA takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 14th DAY OF NOVEMBER 2025



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⁵⁸ *Power* at para [102](#).

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Schedule “A”
Relevant Legal Authorities

1. *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002 SCC 13](#)
2. *Canada (Attorney General) v. Power*, [2024 SCC 26](#)
3. *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020 SCC 13](#)
4. *Brazeau v. Canada (Attorney General)*, [2020 ONCA 184](#)
5. *Vancouver (City) v. Ward*, [2010 SCC 27](#)
6. *Henry v. British Columbia (Attorney General)*, [2015 SCC 24](#)
7. *Ernst v. Alberta Energy Regulator*, [2017 SCC 1](#)
8. *Francis v. Ontario*, [2021 ONCA 197](#)
9. *RWDSU v. Dolphin Delivery Ltd.*, [1986 CanLII 5](#) (SCC)
10. *Clublink Corporation ULC v. Oakville (Town)*, [2019 ONCA 827](#)
11. *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#)
12. *Prud'homme v. Prud'homme*, [2002 SCC 85](#)
13. *Nelson (City) v. Marchi*, [2021 SCC 41](#)
14. *R. v. Galletta*, [2020 ONCA 60](#)
15. *R. v. Sullivan*, [2020 ONCA 33](#), aff'd 2022 SCC 19
16. *R. v. Zora*, [2020 SCC 14](#)

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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GORD SMYTH, MARIO MUSCATO, SHAWN
ARNOLD, CASSANDRA JORDAN, JULIA
LAUZON, AMMY LEWIS, ASHLEY
MACDONALD, COREY MONAHAN, MISTY
MARSHALL, SHERRI OGDEN, JAHMAL
PIERRE, and LINSLEY GREAVES**

Appellants

- and -

CITY OF HAMILTON

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO

Intervenor

- and -

**BRITISH COLUMBIA CIVIL LIBERTIES
ASSOCIATION**

Proposed Intervenor

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COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
HAMILTON

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COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
HAMILTON

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