

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

**FACTUM OF THE PROPOSED INTERVENER/MOVING PARTY,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
(Motion for Leave to Intervene)**

ADDARIO LAW GROUP LLP

30 Duncan Street, 5th Floor
Toronto, ON M5V 2C3

Samara Sectar (LSO #66737P)

Tel: 416-649-5063

Email: ssector@addario.ca

Tabir Malik (LSO #85565F)

Tel: 416-646-1018

Email: tmalik@addario.ca

Lawyers for the Proposed Intervenor,
British Columbia Civil Liberties
Association

TO: **CIRCLE BARRISTERS**
325 Front St. W., Suite 200
Toronto, ON M5V 2Y1

Sujit Choudhry (LSO# 45011E)
Tel: (416) 436-3679
Sujit.choudhry@circlebarristers.com

MISSISSAUGA COMMUNITY LEGAL SERVICES
130 Dundas St. E., Suite 504
Mississauga, ON L5A 3V8

Sharon Crowe (LSO# 47108R)
Tel: (905) 896-2052 ext. 20
Sharon.crowe@mcls.clcj.ca

ROSS & MCBRIDE LLP
1 King St. W., 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)
Tel: (905) 572-5824
wpoziomka@rossmcbride.com

Counsel for the Appellants

AND TO: **GOWLING WLG (CANADA) LLP**
1 Main St. W.
Hamilton, ON L8P 4Z5

Bevin Shores (LSO# 56161F)
Tel: (905) 540-2468
bevin.shores@gowlingwlg.com

Jordan Diacur (LSO# 65860E)
Tel: (905) 540-2500
jordan.diacur@gowlingwlg.com

Jennifer King (LSO#54325R)
Tel: (905) 549-2468

Counsel for the Respondent

AND TO: **MINISTRY OF THE ATTORNEY GENERAL
CONSTITUTIONAL LAW BRANCH**
4th Floor, McMurtry-Scott Building
720 Bay Street, Toronto, ON M7A 2S9

Andrea Boleiro (LSO# 60034I)

Tel: (416) 551-6263

Andrea.boleiro@ontario.ca

Counsel for the Attorney General

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Proposed Intervenor

FACTUM OF THE BCCLA

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PART I: OVERVIEW

1. The British Columbia Civil Liberties Association (the “**BCCLA**”) seeks leave to intervene on the novel *Charter* damages issues raised on this appeal. The appellants allege that the City of Hamilton enacted and enforced bylaws that violated their *Charter* rights. They seek *Charter* damages as a remedy. To decide this issue, this Court will have to determine the immunity threshold claimants must overcome to collect *Charter* damages for state conduct authorized by unconstitutional bylaws. This is a novel issue before this Court, the determination of which will impact the availability of *Charter* damages for all future claimants. The BCCLA seeks to assist the Court on this novel issue.

2. The BCCLA satisfies the test for obtaining intervention status. It is a national, well-recognized advocacy group and a seasoned intervener in *Charter* litigation. It has intervened on nearly all seminal *Charter* damages cases before the Supreme Court of Canada and assisted this Court as an intervener on several constitutional cases. The BCCLA also has a substantial interest in the subject matter of this appeal given its advocacy and research work on behalf of individuals suffering from homelessness. The BCCLA can consequently provide useful and distinct contributions to the Court on the novel constitutional issues before the Court. Its proposed submissions as enclosed in a draft factum and are on a point of law. It has consulted with the other proposed interveners and reviewed the parties’ appeal facts to ensure its arguments are distinct. The BCCLA does not seek to augment the record, raise new issues, or delay the proceedings. Its intervention will therefore cause no prejudice to the parties.

PART II: SUMMARY OF THE FACTS

3. The appellants are 14 unhoused individuals who claim they were forcibly evicted from their encampments in public parks across the City of Hamilton (the “City”) under a municipal bylaw.¹ The appellants seek to declare the bylaw unconstitutional. They also seek to collect *Charter* damages for harms they allege were caused by the City’s enforcement of the unconstitutional bylaw.²

4. The BCCLA does not take any position on the facts of this appeal.

PART III: ISSUES

5. **Should the Court exercise its discretion to grant the BCCLA leave to intervene on this appeal?** Yes. As detailed below, the BCCLA satisfies the test to be granted leave to intervene.

PART IV: THE LAW AND ANALYSIS

The Four Factors Under the Rule 13.03 Test Favour Granting the BCCLA Leave to Intervene

6. With leave from a panel of the court, Rule 13.03(2) allows any person to intervene as a friend of the court on an appeal.³

¹ Appellants’ factum at para 2.

² Appellants’ factum at para 9.

³ [*Rules of Civil Procedure*](#), RRO 1990, Reg 194 at [R 13.03\(2\)](#).

7. The test for granting leave to intervene is flexible. The court examines the nature of the case, the issues arising, the likelihood of assistance from the proposed intervener, and the potential for prejudice.⁴

8. All four factors weigh in favour of granting the BCCLA leave to intervene on this appeal.

1) The public law nature of this appeal favours granting the BCCLA leave to intervene

9. The test for granting leave to intervene is more relaxed in public law cases such as this one.⁵ The public law issues on this appeal include assessing the constitutionality of bylaws and compensating vulnerable people through *Charter* damages for enforcement of the same.

10. Under the umbrella of public law, *Charter* cases have their own criteria for proposed interveners to satisfy before leave is granted. Case law dictates that proposed interveners in *Charter* cases must satisfy at least one of three criteria:⁶

- a) the proposed intervener is a well-recognized group with special expertise and a broadly identifiable membership base, or
- b) the proposed intervener has an important perspective distinct from the immediate parties; or
- c) the proposed intervener has a real, substantial, and identifiable interest in the subject matter of the proceedings.

⁴ *Christian Heritage Party of Canada v. Hamilton (City)*, 2025 ONCA 700 at [para 7](#) [*Christian*].

⁵ *Christian* at [para 8](#).

⁶ *Christian* at [para 9](#).

11. The BCCLA satisfies all three criteria:

- a) The BCCLA is a well-recognized group with special expertise and a broadly identifiable membership base. The BCCLA is a national, non-profit, non-partisan group that has been advocating for the protection of civil liberties and human rights since 1963.⁷ It has thousands of supporters across the country.⁸ This Court has previously confirmed that the BCCLA is a “well-recognized group with special expertise and [a] broad membership base”.⁹

The BCCLA also has extensive experience intervening in *Charter* cases. The Supreme Court of Canada has granted the BCCLA intervention status in more than 100 appeals, making it one of the most frequent non-government interveners at the highest court in the country.¹⁰ The BCCLA also has specific expertise in the issues before this Court on appeal. It has intervened on nearly all seminal *Charter* damages cases, most recently *Canada v Power*.¹¹ It has intervened numerous times to assist this Court on *Charter* matters.¹² It has also intervened in several other cases concerning the eviction of unhoused individuals under municipal bylaws.¹³

- b) The BCCLA has an important perspective distinct from the immediate parties. The BCCLA has worked collaboratively with other proposed interveners and reviewed the

⁷ Motion Record of the BCCLA [MR], Tab 2, Affidavit of Ga Grant affirmed November 13, 2025 [Grant’s Affidavit] at paras 7-9.

⁸ MR, Tab 2, Grant’s Affidavit at para 7.

⁹ MR, Tab 2, Grant’s Affidavit at para 10, citing the intervention decision of Rouleau J.A. in *France v. Diab* (made in Chambers).

¹⁰ MR, Tab 2, Grant’s Affidavit at para 11.

¹¹ MR, Tab 2, Grant’s Affidavit at para 12.

¹² MR, Tab 2, Grant’s Affidavit at para 13.

¹³ MR, Tab 2, Grant’s Affidavit at paras 14-15.

parties' appeal facta to ensure that its arguments are distinct from the other parties' submissions.¹⁴ Its proposed arguments are detailed in its draft factum.¹⁵ The BCCLA proposes (i) a framework for determining the immunity threshold that claimants must overcome to collect *Charter* damages, and (ii) that the immunity threshold to collect *Charter* damages for state conduct under an unconstitutional bylaw is penal negligence.

- c) The BCCLA has a real and identifiable interest in the subject matter of this appeal. The subject matter of this appeal concerns the rights of individuals experiencing homelessness. The BCCLA has an identifiable interest in this subject matter both because of its broad mandate to protect civil liberties, and also its specific research, advocacy, and open letter campaigns in support of the rights of individuals experiencing homelessness.¹⁶

2) The issues in this appeal have implications beyond the immediate parties, which favors granting leave

12. Issues that have broader implications than the immediate dispute between the parties weigh in favor of the Court granting leave.¹⁷ On *Charter* matters, it is especially important for courts to have a diversity of perspectives that reflect the wide-ranging impacts of the decision.¹⁸

13. This issues in this case will impact individuals beyond just the immediate parties. The appellants seek *Charter* damages for harms they allege they suffered because of the City's enforcement of unconstitutional municipal bylaws. The Court will determine the availability of

¹⁴ MR, Tab 2, Grant's Affidavit at para 18(e).

¹⁵ MR, Tab 3, The BCCLA's draft factum on appeal if granted leave.

¹⁶ MR, Tab 2, Grant's Affidavit at paras 8, 16-18.

¹⁷ *Jones v. Tsige*, 2011 CanLII 99894 (Ont. Ct. App) at para 24 [*Jones*].

¹⁸ *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Ont. Div. Ct.) at para 9.

these damages under a four-stage framework developed by the Supreme Court of Canada in *Vancouver (City) v. Ward*:¹⁹

- i. At stage 1, the claimant must prove a *Charter* breach.
- ii. At stage 2, the claimant must prove that damages would fulfil at least one of the three functions of compensation, deterrence, or vindication.
- iii. At stage 3, the state may raise countervailing concerns – such as good governance – to demonstrate that damages are inappropriate or unjust in the circumstances. If the state raises good governance concerns, then the Court may impose a minimum threshold of gravity (“**immunity threshold**”) that claimants must overcome before they can collect *Charter* damages.²⁰
- iv. At stage 4, the court assesses the quantum of damages.

14. Stages 1 and 2 are uncontroversial. However, the interpretation of stage 3 in the context of municipal bylaws is a novel issue before this Court. Specifically, this Court must determine for the first time the immunity threshold claimants must overcome to collect damages for the enactment and enforcement of an unconstitutional bylaw.

15. This Court’s decision will meaningfully impact the availability of *Charter* damages for future claimants. The Court could consequently benefit from the BCCLA’s specialized *Charter*

¹⁹ 2010 SCC 27 at para 61 [*Ward*].

²⁰ *Ward* paras 33, 43.

damages expertise, which includes intervening in *Ward*, other seminal Charter *damages* cases, and cases involving the enforcement of municipal bylaws.²¹

3) The BCCLA will make a useful and distinct contribution in this appeal

16. While some overlap on the issues and arguments between the proposed intervener and the parties is permitted,²² the BCCLA has worked with other proposed interveners and reviewed the parties' facts to ensure that its submissions are useful and distinct.²³

17. The BCCLA's proposed arguments are detailed in its draft factum.²⁴ The BCCLA makes two submissions. **First**, the immunity threshold that claimants must overcome to collect *Charter* damages for state conduct under an unconstitutional bylaw is "clear disregard" for the claimants' *Charter* rights. The BCCLA analyzes seminal *Charter* damages cases to develop a framework for determining the immunity threshold. **Second**, "clear disregard" connotes penal negligence. The BCCLA argues that in light of the Supreme Court's decision in *Power* last year, the "clear disregard" standard – which once connoted recklessness or wilful blindness – must be readjusted to include penal negligence. These submissions are distinct from those of all parties and proposed interveners.

²¹ MR, Tab 2, Grant's Affidavit at para 12-14.

²² *Elementary Teachers' Federation et al v. Her Majesty*, [2018 ONSC 6318](#) (Ont. Div. Ct) at [para 10](#).

²³ MR, Tab 2, Grant's Affidavit at para 18(e).

²⁴ MR, Tab 3, The BCCLA's draft factum on appeal if granted leave.

4) The BCCLA's intervention will not cause prejudice to the immediate parties

18. A late-stage intervention or a proposed intervener seeking to augment the factual record can cause injustice to the immediate parties.²⁵ Prejudice does not result simply because a proposed intervener cares about the outcome of an appeal.²⁶

19. The BCCLA's intervention will not cause any prejudice. The BCCLA does not seek to supplement the record, expand the issues, or delay the proceedings in any way.²⁷ It also takes no position on the facts or the ultimate outcome of this appeal. It proposes to intervene on a novel point of law through a brief factum and brief oral submissions. The BCCLA has brought this motion well in advance of the hearing of this appeal in February 2026. It will abide by any existing or future schedule set by this Court.²⁸ It is not seeking costs on this motion and will not seek costs at the appeal if granted leave.²⁹

PART V: ORDER REQUESTED

20. The BCCLA respectfully requests an order:

- a) granting the BCCLA leave to intervene in this appeal as a friend of the court pursuant to R 13.03(2) of the *Rules of Civil Procedure*;
- b) permitting the BCCLA to file a factum of no longer than **15** pages, or any other length as this Court may deem appropriate;

²⁵ *Jones* at [para 26](#).

²⁶ *Christian* at [paras 15](#) and [26](#); *Trinity* at [para 10](#).

²⁷ MR, Tab 2, Grant's Affidavit at para 18(b), (d).

²⁸ MR, Tab 2, Grant's Affidavit at para 18(a)-(f).

²⁹ MR, Tab 2, Grant's Affidavit at para 19.

- c) permitting the BCCLA to present oral arguments for **15** minutes at the hearing of this appeal, or for any other duration as this Court may deem appropriate;
- d) that the BCCLA will not be awarded costs or have costs awarded against it on this motion or at the appeal; and
- e) any further or other order as this Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 13th DAY OF NOVEMBER
2025



ADDARIO LAW GROUP LLP
30 Duncan Street, 5th Floor
Toronto, ON M5V 2C3

Samara Sector (LSO #66737P)
Tel: 416-649-5063
Email: ssector@addario.ca

Tabir Malik (LSO #85565F)
Tel: 416-646-1018
Email: tmalik@addario.ca

Counsel for the Proposed Intervenor,
British Columbia Civil Liberties
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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Christian Heritage Party of Canada v. Hamilton (City)*, [2025 ONCA 700](#)
2. *Jones v. Tsige*, [2011 CanLII 99894](#) (Ont. Ct. App)
3. *Trinity Western University v. Law Society of Upper Canada*, [2014 ONSC 5541](#) (Ont. Div. Ct)
4. *Vancouver (City) v. Ward*, [2010 SCC 27](#)
5. *Elementary Teachers’ Federation et al v. Her Majesty*, [2018 ONSC 6318](#) (Ont. Div. Ct)

SCHEDULE “B”

RELEVANT STATUTES

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

Leave to Intervene in Divisional Court or Court of Appeal

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

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

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Samara Sector (66737P)

Tel: 416-649-5063

Email: ssector@addario.ca

Tabir Malik (85565F)

Tel: 416-646-1018

Email: tmalik@addario.ca

Counsel for the Proposed Intervenor

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

FACTUM

ADDARIO LAW GROUP LLP

30 Duncan Street, 5th Floor
Toronto, ON M5V 2C3

Samara Sectar (66737P)

Tel: 416-649-5063
Email: ssector@addario.ca

Tabir Malik (85565F)

Tel: 416-646-1018
Email: tmalik@addario.ca

Counsel for the Proposed Intervenor