Court File No. COA-25-CV-0166

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

- and -

CITY OF HAMILTON

Respondent

APPELLANTS' APPEAL BOOK AND COMPENDIUM – VOLUME 1

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TAB 1

Court File No.:

Superior Court File: CV-21-00077187-0000

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
(Applicants)

-and-

CITY OF HAMILTON

Respondent
(Respondent)

NOTICE OF APPEAL

THE APPELLANTS APPEAL to the Court of Appeal from the judgment of Justice J.A. Ramsay of the Superior Court of Justice (**"Application Judge"**), dated December 23, 2024 made at Hamilton, Ontario.

THE APPELLANTS ASK that the judgment be set aside and a judgment be granted pursuant to s. 134(1) of the *Courts of Justice Act* as follows:

1. Declarations that between August 2021 and August 2023, the City of Hamilton's sheltering restrictions and evictions under By-Law 01-219 (**"by-law"**) were unconstitutional.

2. Orders pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (**"*Charter*"**):

    a. for damages in the amount of $5,000 per Appellant ($70,000 in total) for the common experience of sleep deprivation, loss of belongings, and exposure to the elements caused by the sheltering restrictions and evictions;

    b. for damages in the following amounts ($375,000 in total) for the distinct physical and psychological harms experienced by the Appellants caused by the sheltering restrictions and evictions:

        i. Kristin Heegsma: $75,000;

        ii. Linsley Greaves: $75,000;

        iii. Misty Marshall: $75,000;

        iv. Darrin Marchand: $50,000;

        v. Ammy Lewis: $25,000;

        vi. Mario Muscato: $15,000;

        vii. Sherri Ogden: $10,000;

        viii. Corey Monahan: $10,000;

        ix. Jahmal Pierre: $10,000;

        x. Julia Lauzon: $10,000;

        xi. Ashley MacDonald: $5,000;

xii. Shawn Arnold: $5,000;

xiii. Cassandra Jordan: $5,000; and

xiv. Gord Smyth: $5,000.

3. Their costs on a substantial indemnity basis throughout.

4. Such other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. The Application Judge erred in law by striking Volumes 18 (as amended), 19, and 20 of the Application Record in his Endorsement of December 4, 2024, containing the Appellants' Requests to Admit attaching the Respondent's public documents, and the Respondent's Responses to Requests to Admit admitting the authenticity of these documents, because he failed comply with Rule 51 of the *Rules of Civil Procedure*, whereby authenticated documents become part of the record without the need to be adduced by a witness, by superimposing the additional requirement that any party seeking to rely on authenticated documents must make them exhibits to an affidavit or cross-examination.

2. The Application Judge erred in law by failing to apply the established test for the admissibility of expert opinion evidence in relation to the evidence of Dr. Sharon Koivu and Dr. Andrea Sereda.

3. The Application Judge erred in law by applying the wrong legal test in excluding some of the evidence from the Appellants' doctors in his Endorsement of

November 12, 2024, which included relevant evidence of the Appellants' experience of sheltering restrictions and evictions and the resulting harms.

4. The Application Judge erred in law by basing material determinations, including but not limited to a determination that no Appellant experienced overnight sheltering evictions, on credibility assessments rooted in discriminatory stereotypes regarding persons with mental health and addiction disabilities.

5. The Application Judge erred in law by providing inadequate reasons for rejecting **all** evidence from **all** 14 Appellants regarding their difficulties in accessing shelter, their experiences in shelters, their experience of overnight sheltering evictions, and the disposal of their personal property. This includes, but is not limited to, the following:

    a. treating the evidence of fourteen separate witnesses as a monolith, rejecting **all** of it because "some" witness recollections were "hazy", without explaining which witness' recollections were hazy, and why that warranted rejecting all their evidence and the related evidence from other witnesses;

    b. referring to "some" witness recollections as being "the product of what they were told", without explaining which witnesses' evidence this applied to, what recollections he meant, who told them to provide that evidence, why it warranted rejecting their evidence as to those events they had independently observed, and why it warranted rejecting the evidence of the other witnesses too; and

c. concluding that "many" Appellants' affidavits contained "boilerplate" and "[p]arts obviously … drafted by lawyers" without explaining:

i. which passages the Court viewed as "boilerplate" and "obviously drafted by lawyers" and why, which Appellants' affidavits this applied to, and why this also warranted rejecting the other witnesses' evidence;

ii. why reasonable assistance in the drafting process diminished credibility in a context where unhoused individuals lack the means (i.e. access to computers) to prepare draft affidavits on their own; and

iii. why this warranted also rejecting the corroborating evidence the witnesses gave in cross- and re-examination.

6. The Application Judge was procedurally unfair because he concluded that "many" Appellants' affidavits contained "boilerplate" and "[p]arts obviously … drafted by lawyers" even though the Respondent had not raised any such issue and without notice to the parties.

7. The Application Judge erred in law by ignoring relevant evidence. This includes, but is not limited to:

a. evidence from the Appellants that there were overnight sheltering evictions between August 2021 and August 2023;

b. statements in the Respondent's authenticated public documents that contradict affidavit evidence from the Respondent's employees;

c. evidence that a large majority of persons sheltering outside informed the Respondent they would consider accessing spaces in the emergency shelter system if they were more suitable to their needs;

d. evidence pertaining to the risks created by the Respondent's sheltering restrictions where persons cannot access a 24-hour indoor shelter space;

e. evidence pertaining to the specific harms related to outdoor sheltering evictions (daytime and overnight) that are not associated with homelessness at large;

f. evidence that shelters and overflow shelters were persistently at capacity from August 2021 to August 2023; and

g. evidence pertaining to the particular harms that the City's sheltering restrictions created or contributed to for women, persons with disabilities, and Indigenous persons, including those experienced by the Appellants.

8. The Application Judge erred in law by basing material determinations on no evidence, including, but not limited to:

a. finding no violation of s. 7 of the *Charter* because the Hamilton Police Service allegedly did not engage in overnight evictions between August 2021 and August 2023, without evidence in the record to support this conclusion;

b. finding no violation of s. 7 of the *Charter* based on speculation that unhoused persons in Hamilton had sheltering options available to them

during the relevant period other than the shelter spaces established by the record; and

b. finding no violation of s. 7 of the *Charter* based on a determination that it would be "impossible" for the City to provide "a combination of different shelters" including some shelters with private showers and storage space for belongings.

9. The Application Judge erred in law by determining there was no violation of s. 7 of the *Charter* including, but not limited to, by:

a. failing to apply the established test, or any test, for s. 7 of the *Charter*, or applying the wrong test for s. 7 of the Charter, or in the alternative, providing inadequate reasons that the sheltering restrictions and evictions did not violate s. 7;

b. breaching the doctrine of horizontal *stare decisis* by refusing to follow the decision of the Superior Court of Justice in *The Regional Municipality of Waterloo v. Persons Unknown*, with respect to shelter inaccessibility as a factor in the s. 7 framework governing sheltering restrictions and evictions;

c. failing to apply the established test for a violation of s. 7 to assess the Appellants' claim that daytime sheltering restrictions and evictions were unconstitutional;

d. breaching the doctrine of horizontal *stare decisis* by failing to follow the decision of the Superior Court of Justice in *Kingston (City) v. Doe*, which rejected the argument that interpreting s. 7 to prohibit daytime sheltering restrictions and evictions would amount to expropriating public property;

e. asking the wrong question with respect to whether s. 7 interests were engaged when he compared the risks associated with sheltering outside against the risks associated with sheltering in homeless shelters, since the question before him was a comparison of the risks associated with sheltering outside and the risks associated with remaining outside unsheltered; and

f. applying the wrong test for causation in finding that the Appellants' s. 7 interests were not "put at risk by the enforcement of the by-law" because they were "put at risk by homelessness".

10. The Application Judge erred in in law by determining there was no violation of s. 15 of the *Charter* including, but not limited to, by:

a. failing to apply the established test, or any test, for s. 15 of the *Charter*, applying the wrong test for s. 15 of the *Charter*, or in the alternative, providing inadequate reasons that the sheltering restrictions and evictions did not violate s. 15;

b. applying the wrong test for "disproportionate impact" with respect to the impact of the sheltering restrictions and evictions on women, Indigenous persons, and persons with disabilities;

c. failing to address the Appellants' argument that the sheltering restrictions and evictions discriminated based on the intersecting grounds of race and sex, and to consider the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*; and

d. applying the wrong test for causation in finding that the Appellants' were "disadvantaged by homelessness, not by enforcement of the by-law".

11. The Application Judge erred in law by applying the immunity threshold for Parliament and provincial legislatures of "clearly wrong, in bad faith or an abuse of power" to municipal councils, instead of the "clear disregard" standard.

12. The Application Judge's treatment of the decision of the United States Supreme Court in *City of Grant's Pass v Johnson*, 144 S. Ct. 2022 (2024) as persuasive authority:

a. was procedurally unfair, since the Respondent had not raised it and the Application Judge relied on it without notice to the parties; and

b. was a legal error because of its lack of relevance, since it arose under the Eighth Amendment of the Constitution of the United States (cruel and unusual punishment) and therefore offers no guidance on the interpretation of ss. 7 and 15 of the *Charter*.

13. Legislation including but not limited to:

a. *Courts of Justice Act*, RSO 1990, c C43.

b. *Canadian Charter of Rights and Freedoms*.

14. Jurisprudence including but not limited to:

    a. *The Regional Municipality of Waterloo v. Persons Unknown*, 2023 ONSC 670.

    b. *Kingston (City) v. Doe*, 2023 ONSC 6662.

    c. *Canada (AG) v. Power*, 2024 SCC 26.

    d. *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184.

    e. *Hanish v. McKean*, 2014 ONCA 698.

    f. *Buccilli v. Pillitteri*, 2016 ONCA 775.

15. Such other grounds as counsel may advise and this Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The appeal from the Application Judge's final order dismissing the Appellant's claims lies to the Court of Appeal, pursuant to sections 6(1)(b) and 6(2) of the *Courts of Justice Act*.

January 22, 2025

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Heegsma et al *-and-* **CITY of HAMILTON**

Appellants *(*Applicants) Respondent (Respondent)

Court File No.

Ontario
Court of Appeal

NOTICE OF APPEAL

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TAB 2

Court File No. CV-21-00077187-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	MONDAY, THE 23rd
	)	
MR. JUSTICE RAMSAY	)	DAY OF DECEMBER, 2024

B E T W E E N:

KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO, SHAWN ARNOLD, ~~BRADLEY CALDWELL, CHRISTINE DELOREY, GLEN GNATUK, TAYLOR GOGO-HORNER~~, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS, ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL PIERRE, and LINSLEY GREAVES ~~and PATRICK WARD~~

Applicants

and

CITY OF HAMILTON

Respondent

APPLICATION UNDER 14.05 OF THE *RULES OF CIVIL PROCEDURE*

JUDGMENT

THIS APPLICATION was heard on December 16, 17, and 18, 2024 at the court house, 45 Main Street E., Hamilton, Ontario, L8N 2B7.

ON READING the Further Amended Fresh As Amended Notice of Application dated November 18, 2024, the Application Record of the Applicants contained in volumes 1 through 17 dated November 22, 2024, the Factum of the Applicants dated November

25, 2024, the Application Record of the Respondent contained in one volume dated December 5, 2024, and the Factum of the Respondent dated December 6, 2024, all filed; and on hearing the submissions of the lawyers for the parties:

1. THIS COURT ORDERS AND ADJUDGES that this Application shall be and is hereby dismissed.

2. THIS COURT ORDERS AND ADJUDGES that there shall be no order as to costs of this proceeding.

Issued and entered electronically on behalf of Justice Ramsay by

Alexandre Boulianne Digitally signed by Alexandre Boulianne
Date: 2025.03.14 14:05:34 -04'00'

Local Registrar
45 Main St East
Hamilton, ON
L8N 2B7

Court File No. CV-21-00077187-0000

KRISTEN HEEGSMA et al. - and - CITY OF HAMILTON

Applicants Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
HAMILTON

JUDGMENT

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TAB 3

CITATION: Heegsma v. Hamilton (City), 2024 ONSC 7154
COURT FILE NO.: CV-21-77817
DATE: 2024-12-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Kristen Heegsma, Darrin Marchand, Gord Smyth, Mario Muscato, Shawn Arnold, Cassandra Jordan, Julia Lauzon, Ammy Lewis, Ashley MacDonald, Corey Monahan, Misty Marshall, Sherri Ogden, Jammy Pierre and Linsley Greaves	)	*Sujit Choudry*, *Sharon Crowe, Wade Poziomka, Michelle Sutherland and Curtis Sell* for the Applicants
Applicants	)	
	)	
– and –		*Bevin Shores and Jordan Diacur* for the Respondent
City of Hamilton		
Respondent		
	)	
	)	
	)	**HEARD: December 16 - 18, 2024 at Hamilton**

MR JUSTICE J.A. RAMSAY

[1] The applicants are 14 homeless individuals who apply for a declaration that the City of Hamilton's enforcement of its Parks by-law during the period from August 2021 to August 2023 breached their right under the Charter to life, liberty and security of the person (s.7) and to equal benefit of the law (s.15). They seek damages from the City.

[2] The applicants say that they were evicted from encampments during the period from August 2021 to August 2023 in breach of the Charter, and that they suffered harm as a result.

[3] The record consists of some 10,000 pages. These reasons do not reflect the massive amount of work that was done by both sets of lawyers. Their work has allowed me to deal with the issues in what I hope is a complete but concise manner.

[4] I was reminded by counsel for the applicants that while the legislature represents the will of the people, the court holds the moral compass that is often the only protection for the most vulnerable. I observe that the most vulnerable includes not only the homeless but also the

elderly person and the child who want to use a sidewalk or a city park without tiptoeing through used needles and human faeces.

The by-laws and their enforcement

[5] By-Law 01-219 provides:

> 3. No person shall enter into or be in any park between the hours of eleven in the afternoon (11:00 p.m.) and six o'clock in the forenoon (6:00 a.m.), except where after hours use of a park has been approved by the City.
> 12. Unless authorized by the Director or by permit, no person shall encroach upon or take possession of any park, by any means whatsoever, including the construction, installation or maintenance of any fence or structure, the dumping or storage of any materials, or planting, cultivating, grooming or landscaping, thereon.
> 17. Unless authorized by permit, no person shall dwell, camp or lodge in any park.
> 18. Unless authorized by permit, no person shall place, install or erect any temporary or permanent tent or structure in any park.

[6] By-Law 97-162 provides:

> 16. (12) 12.1 For the purposes of this subsection:
> (a) "cease" means to stop or bring to an end.
> (b) "congregate" means to gather into a group of more than one person.
> (c) "obstruct" means to interfere with or make difficult of passage.
> (d) "officer" means a sworn member of the Hamilton-Wentworth Regional Police Service or municipal by-law enforcement officer appointed by the City of Hamilton.
>
> 12.2 No person shall congregate and sit or stand so as to obstruct the free passage of either pedestrian or vehicular traffic on any streets or sidewalks regulated by this By-law.
>
> 12.3 Any person who obstructs pedestrian or vehicular traffic on a sidewalk or street shall, when directed to do so by an officer, cease such obstruction.
>
> ...
>
> 12.5 Sworn members of the Hamilton-Wentworth Regional Police Service and municipal by-law enforcement officers of the City of Hamilton are authorized to enforce the provisions of this by-law.

[7] Hamilton is a single tier municipality. It is not disputed that it had the authority under the *Municipal Act, 2001*, S.O. 2001 c. 25, to enact the by-laws in question. The by-laws were enforced in accordance with protocols in operation during three time periods.

[8] From October 2020 to August 2021 ("the old protocol") encampments were permitted in public parks as long as they were not on sidewalks or playgrounds. Upon receipt of a complaint the Outreach Team would speak with encampment residents and assess their needs, using a decision assistance tool which is, I take it, a form of questionnaire. The residents were given an "acuity score." If they had a low score they would be given 14 days to leave, and they would be offered housing supports. If they had a high score they would not be given a deadline.

[9] From August 2021 to August 2023 ("the encampment process") the policy was again complaint driven. The Outreach Team would visit, offer supports and seek voluntary compliance. If there was no compliance a trespass notice would be served. The process called for police to execute the notice, but it is not clear that in fact they did. No one was asked to leave at night. City staff would clean up the park if the occupants had left. I find that they did not clean up a park when a resident was present. They did not dispose of property that had not been abandoned. I reject the evidence to the contrary.

[10] Since 2023 ("the new protocol") the policy has been that temporary shelters may be erected indefinitely in parks as long as they are not within a certain distance of sensitive areas, such as schools. There is an enforcement process involving multiple steps.

[11] The position of the applicants is that the enforcement of the by-law during the encampment process period breached their rights because of two circumstances:

a. They were kept from staying overnight when their were insufficient accessible shelter beds to accommodate them; and

b. They were kept from staying during the daytime, that is, they were forced to pack up and move, potentially every morning.

[12] Again, I find that they were not prevented from staying overnight.

[13] If they had been, the City might have been in breach of s.7 of the Charter according to British Columbia jurisprudence (*Victoria (City) v. Adams*, 2009 BCCA 563) which has been adopted by this court in *Waterloo (Regional Municipality) v. Persons Unknown*, 2023 ONSC 670 and *Kingston (City) v. Doe*, 2023 ONSC 6662. I say "might have been" because *Adams* dealt with the case where the by-law allowed the public to stay in parks overnight as long as they did not erect a shelter. The Hamilton by-law prohibits being in a park overnight.

[14] To apply the protection of s.7 of the Charter to eviction during the daytime, I am asked to advance the jurisprudence to the next step. These reasons explain why I decline to do. It is implicit in my reasons that I disagree with the *Adams* and *Waterloo* cases, but it is not necessary to my decision to decline to follow them.

Admissibility of evidence – experts

[15] The applicants object to the evidence of Dr Sharon Koivu. Dr Koivu is a medical doctor who holds a certificate of added competency in addiction medicine. She has experience treating homeless patients. She has visited an encampment. The main focus of her research is addiction. She advocates against safe use sites. She is not an advocate with respect to encampments. She

has spoken to countless homeless persons who were her patients, and she has made observations of them over time. I do not agree with the position of the applicants that as an addiction specialist she is not competent to give expert testimony on homelessness. There is a significant connection between addiction and homelessness. Her evidence is relevant, and she has expertise outside the knowledge of a trier of fact on the question of whether there are health advantages of an encampment over a shelter. Her evidence is admissible.

[16] The respondent objects to the evidence of Leilani Farha and Professor Ameil Joseph.

[17] From 2014 to 2020 Leilani Farha was the United Nations special rapporteur on the right to housing. At present she is global director of The Shift, an international movement to secure the right to housing. It was launched with the United Nations High Commissioner for Human Rights and United Cities and Local Government. She is a lawyer. Her area of expertise is international law. A court can admit expert evidence on international law if it would be helpful. Such experts can help the court with complex technical questions.

[18] Ms Farha's testimony is essentially that eviction from encampments contravenes commentaries on the International Covenant on Economic, Social and Cultural Rights which are not binding on the states parties. She authored one of these commentaries herself with Dr Kaitlyn Schwan. Ms Farha says that conditions in encampments are deplorable.

[19] The applicants offer her evidence on section 1 of the Charter. As I do not arrive at the application of section 1, I do not need to consider her evidence to any great extent.

[20] Professor Ameil Joseph is an associate professor in the School of Social Work of McMaster University in Hamilton. Essentially he deposes that various identity groups are disproportionately homeless. And because discriminatory ideas historically became embedded in our nation's policies, these realities frame how racialized people, disabled people, Indigenous people, and people with mental health issues become more at risk of being homeless as well as how systems view them through a gaze that deems them as threat risk, burden, or in terms of inferiority and undeservingness. His evidence helps me understand some origins of homelessness but not its solution. More particularly it does not help me on the effect of enforcement of the by-laws.

[21] The remaining experts are doctors and researchers. They meet the requirements of *R. v. Mohan,* 1994 SCC 80. They are advocates for the homeless, and often advocates for encampments, but it is to be expected that experts on matters of policy will advocate for one policy or another. It does not prevent them from testifying as experts. It could go to weight.

Admissibility of public documents

[22] There are also public documents in the record. They are admissible under the traditional exception to the hearsay rule. They contain information about shelters and the needs of persons in encampments, among other things.

The applicants

[23] Gordon Smyth is a physically disabled person. He also has anger issues and problems being around people. He was renovicted from his rent-subsidized apartment in June 2021. He refused a shelter bed because, among other things, he could not keep his dog. It was not a service animal. On November 27, 2021 he was placed in a rent-subsidized apartment. He was moved from one site to another. He would have preferred to stay in one place.

[24] The remaining applicants all used or use drugs. Many of the affidavits of the applicants contained boilerplate. Parts were obviously drafted by lawyers. The applicants, apart from Mr Smyth, have mental issues or drug problems which can affect perception and memory. Some of their recollections of being evicted were hazy or were the product of what they were told. I prefer the evidence of the City staff as to what happened in enforcement of the by-law.

[25] Shaun Arnold, Julia Lauzon, Ammy Lewis, Ashley MacDonald, Cory Monahan and Jammy Pierre were housed. All but Cory Monahan remain housed.

[26] Persons who use substances are a difficult demographic to help. They often do not prioritize shelter. Their addiction takes priority over compliance with shelter rules, collecting their chattels from storage, maintaining relationships with family, following up on meetings with potential supports and attending medical appointments. And, of course, money they spend on drugs is money that cannot be used for rent and food.

[27] The applicants are a diverse group, with their own individual needs, desires and outcomes. Some of them tried and failed to get into a shelter. Some prefer an encampment to a shelter. Some have been kicked out of shelters. Some have been victimized in shelters. Some have been victimized in encampments. Seven have been housed and four have refused housing.

[28] Corey Monahan and Shaun Arnold do not like shelters because there are hard drugs there. Shaun Arnold uses methadone to stay off drugs. He says that drug dealers target encampments as well. Mr Arnold has a high acuity score, so the police have on occasion used discretion to allow him to stay in an encampment. He lost his tent to thieves who stole it from the encampment while he was away.

[29] Linsley Greaves reports that shelter residents target him for drugs. He has been a victim of racial profiling by the residents. They assume that he is a dealer because he is black. He stayed in Woods Park in a tent. He even ran a bicycle repair business from his tent. He was evicted under the encampment process. He was offered a room at the Four Points but declined because there was no room for his belongings. An outreach worker got him a new tent. He has been offered other placements, including a residential care facility but he turned them down. In encampments he has run into some of the people who subjected him to racism.

[30] Darrin Marchand suffers from paranoid schizophrenia. He witnessed a serious assault in a shelter which causes him to avoid shelters. He has been victimized in encampments. Locals have urinated on his shelter and stolen from him.

[31] Mario Muscato uses methadone to stay off fentanyl. He feels safer in encampments, but sometimes locals throw things at the tents.

[32] Misty Marshall has tried to get into shelters unsuccessfully because there was no room. She did manage to get into overnight drop-ins a couple of times. At one shelter for women, where the women line up outside for a place, men drive around soliciting them for sex.

[33] Cassandra Jordan was evicted from the Ferguson Street encampment. A hotel room was offered to her. She has experienced arson at an encampment.

[34] Kristen Heegsma has been repeatedly kicked out of shelters. Ashley MacDonald has been unsuccessful in finding place at a shelter. She moved out of an encampment because she did not feel safe. She also couch surfed but found it dangerous. Men often expect sex in return for a place to stay. She has lost six cell phones to theft.

[35] Ammy Lewis could not get into her shelter with her dog. She stayed with her mother when she got out of the penitentiary, but her mother kicked her out. Her tent was repeatedly attacked by people who threw stuff, set fires and stole her belongings whenever she left.

[36] Sherri Ogden was able to stay at the Four Points but got kicked out because of a domestic violence incident.

[37] Ashley MacDonald has housing, but she takes comfort from staying in a tent on occasion. She safe uses, that is, uses in a safe injection site.

The shelter system and the enforcement of the by-law

[38] Under any of the three policies people were never evicted as night approached, as the applicants largely confirm in their depositions. Where they state the contrary, I do not believe them. When they were evicted, they could take their chattels with them, or the City offered to store them, although not permanently. Mario Muscato and Linsley Greaves confirm this.

[39] The City has spent millions of dollars on various programmes to help the homeless and on security to protect the homeless. The City's shelter system is sometimes, but not always full to capacity. But there are overflow facilities available. The shelters do not allow animals, except service animals, because of concerns about allergies and aggressive dogs. The City's budget for homelessness was $61.5 million for fiscal 2022. It has risen since. The City has installed washroom and shower facilities in some parks.

[40] Indigenous persons are over-represented among the homeless. Women are not over-represented, but there are fewer shelter spaces for them, sometimes in smaller proportion than their share of the population. There are as well a significant number of Indigenous women who are homeless.

[41] In September and October 2021 the occupancy rates of the City's shelters were as follows:

Women's shelters	108%
Family shelters	99%

Youth shelters	61%
Men's shelters	97%
Overflow facilities	
Hotel (women)	89%
Hotel (family)	Available ad hoc
Hotel (couples and women)	95%
Men's	38%

[42] In addition to the City shelters there are domestic violence shelters, the YMCA, the YWCA and the Hamilton Regional Indian Centre, but I do not have statistics as to capacity and demand.

[43] It is impossible to be certain, and the numbers change from time to time, but it seems from the City's records that there may be up to 2,000 homeless persons in Hamilton on a given night. The total number of City-run shelter beds could have been 950-odd. The City has identified 506 persons as having stayed in encampments from 2020 to 2021, perhaps 200 at a time. Between May and August 2023 there were from 117 to 165 persons in encampments at a time. As of June 2024 there were 271 people staying in encampments. Records between 2021 and May 2023 were lost to a cyber attack. I infer that there are homeless persons who stay elsewhere than shelters and encampments. They could be sleeping rough, staying in shelters outside the City system, couch surfing or staying short-term with family.

The experts

[44] Dr Stephen Gaetz is a professor of education. He deposed that there is no single cause of homelessness. Pathways into and out of homelessness are neither linear nor uniform. In a 2018 survey the Government of Canada found that on any given night 25,000 to 35,000 people might be homeless. They were a diverse group. Males made up 62%.

[45] Dr Gaetz he offers reasons why homeless persons may prefer encampments to shelters:

a. Fear of other residents;

b. Risk of assault;

c. Not being able to stay with friends;

d. Negative previous experience with public institutions;

e. Lack of facilities to store personal belongings;

f. Couples cannot stay together;

g. Noise;

h. Inability because of mental health to handle communal living; and

i. Communicable disease.

[46] These reasons are all rational factors in the decision not to stay in a shelter, but I note that shelters at least have rules in place that attempt to deal with assault, drugs and theft while encampments do not.

[47] Dr Gaetz deposes that homeless persons have a higher rate of health problems, in spite of a higher rate of use of the health system. Homeless encampments often have a social structure. They offer a sense of community.

[48] Dr Kate Hayman is an emergency physician who treats the homeless. She gives essentially the same reasons as Dr Gates why encampments are preferred by some to shelters. She adds that the rules and structure of shelters can remind occupants of prison. They have to call hourly to reserve a space and they may be told to go to a shelter that is not close to their medical and other supports. She does not know anything about shelters in Hamilton or encampment evictions in Hamilton.

[49] Dr Stephen Hwang is a specialist in internal medicine with training in public health and epidemiology. His primary area of research is homelessness. Homelessness is associated with serious health risks. Sleeping in the open, as opposed to sleeping under shelter, even a makeshift shelter, is much worse. Persons who sleep on the streets or in shelters are at risk of communicable diseases and assault. Persons who sleep outdoors are at risk of sleep deprivation and trench foot. They are unable to access health care and cannot live healthy lifestyles.

[50] Dr Aaron Orkin is a physician and an epidemiologist. He has a Ph.D. as well as an MD. People experiencing homelessness in Canada have restricted but real choices as to housing. They change choices over time. The choices are rational.

[51] He deposes:

> 23. Various disease processes and threats to safety may be associated with homeless encampments. These include for example unsafe use of generators, fires and other heating devices, sanitation, conflicts and assaults, and harms associated with substance use such as overdose. These safety threats have been reported in the popular press in Canada, including instances in Hamilton, Ontario. I am not aware of any epidemiological or public health research on the health and health risks of living in a homeless encampment in Canada or internationally.
>
> 24. Therefore, there is no basis in the public health or epidemiological literature to conclude that living in an encampment is more or less healthy than living in a shelter. There is to my knowledge no available research to support the conclusion that individuals who choose to live in an encampment are making a choice that is

> objectively or universally less (or more) healthy than those who choose to live in a homeless shelter.
>
> 25. The corollary is that there is no available research to support the position that relocating individuals (or communities of individuals) from an encampment to a shelter will serve to protect or improve their health in any objective or absolute way. Stated differently, there is no scientific or health research to support the position that municipalities or other actors can involuntarily relocate people from encampments to shelters in order to protect their health.

[52] The coercion involved in evictions is harmful and choice is helpful.

[53] Dr Kaitlin Schwan has a Ph.D. in social work. She co-authored the National Encampments Protocol with Leilani Farha. She was the senior researcher at the Shift. She is now National Director of the Women's National Housing and Homelessness Network. She studies homelessness among women, girls and gender-diverse people. She concludes that there are too few shelters for this population and that encampments are safer, but not safe. Women face additional challenges from homelessness. They are vulnerable to sexual predation and domestic violence.

[54] Dr Andrea Sereda is a doctor at the Health Clinic in London. She has experience dealing with unhoused persons and persons who inject drugs. She combines office-based care with mobile outreach and street medicine. I do not rely on her evidence. She omitted from her affidavit, but admitted in cross-examination, that she was part of a pressure group created to dissuade the City of London from evicting encampments. She is more than an expert who has views on policy. She is a partisan advocate for one side.

[55] Dr Sharon Koivu was the City's expert. She is a family doctor with experience treating the homeless in London. She is also an addiction physician. She has experience in public health and as an Assistant Professor she teaches, among other things, Indigenous Cultural Safety. She has belonged to such committees as Street Level Women at Risk Committee, the London Homeless Coalition, the Sexual Assault Centre, the Canadian Mental Health Association, Violence Against Women Services, Physicians for Social Responsibility and the Canadian Society of Addiction Medicine.

[56] Dr Koivu deposed that there are serious health risks associated with encampments. They are:

a. Exposure to cold, which can lead to hypothermia or frostbite;

b. Burns and carbon monoxide poisoning from fires that at set for heating and cooking;

c. Trench foot;

d. Wind, lightning and falling branches;

e. Exposure to heat, which can lead to dehydration, which can in turn lead to rhabdomyolysis, a condition associated with muscle cell death and kidney damage;

f. Rodents and diseases carried by rodents;

g. Dog bites;

h. Bacterial, viral and fungal infections caused by exposure to faeces, bodily fluids and needles;

i. Infectious complications, such as sepsis;

j. Arson;

k. Influenza, scabies and lice;

l. Overdose;

m. Sexual violence and sex trafficking;

n. Robbery, assault and theft.

[57] Drugs are often diverted from safe use programmes. That is, recipients of opiates are forced to part with them so that dealers can sell them.

[58] Patients reported to her that drug use increased in encampments. They also reported that stopping drug use is impossible in an encampment. They often progress to fentanyl. Methamphetamine is used to stay awake to guard property.

[59] Community based follow up, such as home care nursing and physiotherapy, require and address. An encampment is not an address. A shelter is an address.

[60] She concludes that encampments are a significant public health risk to the people living in them as well as the surrounding communities. She agrees with Dr Joseph that marginalized people require equity and equality, but she thinks that encampments further marginalize and alienate people; they are a form of colonialization. The sense of security that some occupants have is a false sense of security.

[61] She is concerned that there is a developing, false narrative that encampments are a safe alternative form of housing. That narrative appears in the affidavits of some of the applicants' witnesses. From talking to her patients it appears that it has been a factor in the decision to leave safer environments.

Findings of fact

[62] There is consensus among the medical experts that homelessness itself is associated with health problems. It is obvious that staying outdoors without shelter is harmful, compared to staying under a tent or tarp, in all seasons. Also, being asked to move from an encampment is a cause of stress.

[63] As to the difference between a shelter and an encampment, I prefer the evidence of Dr Koivu to the evidence of the experts called by the applicants to the extent that they disagree. They are based in her 40 years of real life experience. Dr Koivu's opinion has the ring of truth; that is, it makes sense. It is supported by much of the applicants' own evidence. Dr Orkin agrees that nothing in the literature suggests that encampments are better than shelters from a health point of view.

[64] Dr Koivu's concern about the false narrative encouraging people to leave safer alternatives is supported by the evidence of David Buckle, a member of the Outreach Team, who has observed organized groups encouraging encampment residents to resist options other than encampments.

Damages

[65] A municipality is not liable to pay damages simply for enacting a by-law that is unconstitutional: *Canada (AG) v. Power*, 2024 SCC 26. Before damages will be awarded it must be shown that the municipality acted wrongly, in bad faith or in abuse of power. This high threshold was set for Charter breach damages by legislatures. Contrary to the submission of the applicants, I think that the same standard should apply to municipal legislatures. Municipalities legislate with power delegated by the province..

[66] I do not think that the City acted wrongly, in bad faith or in abuse of power in enforcing the by-law. It has not shown a disregard for the applicants' Charter right. The City has not prohibited anyone from erecting temporary, overnight shelter. It has acted in compliance with then-existing Charter jurisprudence including *Victoria (City) v. Adams*, 2009 BCCA 563. That is, in the period of the encampment process, it evicted people in the daytime, but not at night. That is enough to dispose of the application for damages in favour of the respondents.

Section 7 of the Charter

[67] In *Adams,* the court held that when people are not prohibited from sleeping in a public park, a by-law that prohibits the erection of an overnight shelter in the form of tents, tarps and cardboard boxes is overbroad and therefore in contravention of section 7 of the Charter. The issue of a right to set up a semi-permanent camp, as opposed to a temporary shelter taken down each morning, was not before the court in *Adams*: paragraph 99.

[68] In the *Waterloo* case, Valente J. considered *Adams* and the British Columbia cases that followed it in connection with an encampment on a gravel parking lot. He found that there were insufficient shelter spaces in Waterloo and that it followed that the by-law, which prohibited erecting shelter, infringed the right to life and security of the person given by section 7 of the Charter and this "notwithstanding the tremendous and praiseworthy efforts the Region has made and is continuing to make to address the plague of homelessness." He concluded that the law had developed to the point that the Region could not prevent an overnight temporary structure unless

a. there was enough shelter space; and

b. the shelter space was truly accessible in that it met the needs of the homeless population.

[69] I have found that the City did not prevent anyone from staying overnight. I am asked to extend the right to stay in encampments to public parks in the daytime, that is, not to have to tear down and move every day. This extension is said to be conditional on the lack of accessible shelter space that was stipulated as a condition in the Waterloo case.

[70] I find it impossible to extend this conditional "right". First, I do not see the connection between the right and the conditions.

[71] Some barriers to accessibility in shelters suggested to me in the evidence are:

a. They do not allow animals;

b. They do allow animals;

c. They do not allow couples;

d. They only allow couples;

e. They do not permit substance use;

f. They are not effective in preventing substance use;

g. They do not accommodate persons whose mental health issues make it difficult to get along with people.

h. They do accommodate such persons.

[72] A combination of different shelters would be needed to eliminate these "barriers." They would have to have private showers and storage space for belongings. This condition is impossible.

[73] The condition set by the *Waterloo* case is also arbitrary: Some people will not stay in a shelter whether it is available or not. Also, there are many homeless persons who do not use either shelters or encampments, and there is no reason to think that they are all sleeping rough.

[74] The applicants insist that it is only City-run shelters that are relevant to the equation. That is even more arbitrary.

[75] Moreover, shelters also require occupants to move every day, one of the main reasons for preferring indefinite encampments. There is no logical connection between availability of shelter space and harm caused by eviction from encampments. The presence of adequate shelter space is a red herring.

[76] Second, the life, liberty and security of the applicants are not put at risk by enforcement of the by-law. They are put at risk by homelessness. Encampments contribute to this risk. They are lawless, dangerous and unsanitary.

[77] In all this we must not lose sight of the countervailing interest of preserving public parks. It was an important enough public interest that in the Toronto encampment injunction case Schabas J. found that it decided the balance of convenience in favour of the city notwithstanding the risk of irreparable harm: *Black v. Toronto (City)*, 2020 ONSC 6398.

[78] Finally, extending the freedom from enforcement to daytime or indefinite encampment would amount to expropriating property, or at least severely limiting property rights. City officials have noticed that since the implementation of the new protocol some occupants have become more territorial, or possessive of "their" camps. Extension of freedom from enforcement would have the effect of depriving the City of the use and enjoyment of its property.

[79] For these reasons, I do not extend the prohibition on enforcement to daytime or indefinite camping.

Section 15 of the Charter

[80] I do not think that the by-law violates the equality rights of Indigenous persons, women and persons with a disability. The law does not treat them differentially by intent or impact. They are disadvantaged by homelessness, not by enforcement of the by-law.

[81] The fact that a group is over-represented does not by itself prove illegitimate discrimination.

[82] The only characteristic that the applicants all share is homelessness. It is agreed that homelessness is not an enumerated or analogous ground.

Conclusion

[83] The problem of homelessness is of diverse origin. Its resolution will come from diverse input. In *City of Grant's Pass v. Johnson*, 603 US _ , 144 S. Ct. 2202 (2024), the Supreme Court of the United States was dealing with the Eighth Amendment (cruel and unusual punishment) in connection with encampments in public parks. Nevertheless the words of Gorsuch J. are apt and can be adapted to the Canadian context:

> Homelessness is complex. Its causes are many. So may be the public policy responses required to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and deriving those responses. It does not. Almost 200 years ago, a visitor to this country remarked upon the "extreme skill with which the inhabitants of the United States succeed in proposing a common object to the exertions of a great many men, and in getting them voluntarily to pursue it." A. de Tocqueville, Democracy in America 129 (H. Reeve transl. 1961). If the multitude of amicus briefs before us proves one thing, it is that the American people are still at it. Through their voluntary associations and charities, their elected representatives and appointed officials, their police officers and mental health professionals, they display that same energy and skill today in their efforts

to address the complexities of the homelessness challenge facing the most vulnerable among us.

[84] The public is generally sympathetic to the homeless, but it tires of seeing its public spaces appropriated by lawless, unsanitary encampments. There has to be a balance, and the democratic process is best equipped to achieve that balance.

[85] Encampments are a symptom, not a solution. The City is trying to find a solution to homelessness in consultation with numerous others. It has attempted to address the problem with the old protocol, the encampment process and the new protocol. It has limited resources and a duty to its housed constituency. I think I am well advised to leave them to it without interference. Micro-management by judges will not be productive.

[86] The application is dismissed. If anyone seeks costs, submissions not exceeding 3 pages, to which a bill of costs and any offer to settle may be appended, may be uploaded to Case Centre within 10 days for the respondent and 15 days for the applicant.



J.A. Ramsay J.

Released: 2024-12-23

CITATION: Heegsma v. Hamilton (City), 2024 ONSC 7154
COURT FILE NO.: CV-21-77817

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Applicants

– and –

City of Hamilton

Respondent

REASONS FOR JUDGMENT

J.A. Ramsay J.

Released: 2024-12-23

TAB 4

Court File No. CV-21-77187

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE A. J JUSTICE GOODMAN	)))	TUESDAY, THE 8th DAY OF NOVEMBER, 2022

BETWEEN:

ASHLEY POFF, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO and SHAWN ARNOLD

Applicants

and

THE CITY OF HAMILTON

Respondent

ORDER

THIS MOTION, made by the Applicants was heard on this day at the Courthouse, 45 Main Street East, Hamilton, ON, L8N 2B7.

ON READING the Motion Record of the Applicants, filed; and on hearing the submissions of counsel for the Applicants and Respondent,

1. THIS COURT ORDERS that pursuant to Rule 59.06(1) of the *Rules of Civil Procedure*, the Reasons for Judgment of the Honourable Andrew J. Goodman dated November 2, 2021 in this proceeding shall be amended to remove the phrase "...and the Application is dismissed" from paragraph 256 thereof, to clarify that this Honourable Court dismissed the Applicants' motion for an interim injunction, only, and not the Application.

2. THIS COURT ORDERS that leave is granted pursuant to Rules 26.02(c) and 26.03(1) of the *Rules of Civil Procedure* to file a Fresh as Amended Notice of Application in the form attached hereto as Schedule "A".

3. THIS COURT ORDERS that the title of proceedings herein shall be amended as follows:

Court File No. CV-21-00077187-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO, SHAWN ARNOLD, BRADLEY CALDWELL, CHRISTINE DELOREY, GLENN GNATUK, TAYLOR GOGO-HORNER, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS, ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL PIERRE, LINSLEY GREAVES and PATRICK WARD

Applicants

and

THE CITY OF HAMILTON

Respondent

4. THIS COURT ORDERS that pursuant to Rule 37.07(2) of the *Rules of Civil Procedure* service of notice of this motion on Kristen Heegsma, Bradley Caldwell, Christine Delorey, Glenn Gnatuk, Taylor Gogo-Horner, Cassandra Jordan, Julia Lauzon, Ammy Lewis, Ashley Macdonald, Corey Monahan, Misty Marshall, Sherri Ogden, Jahmal Pierre, Linsley Greaves and Patrick Ward shall be and is hereby dispensed with.

5. THIS COURT ORDERS that there shall be no costs of this motion.

Mr. Justice A.J. Goodman

Schedule A

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO, SHAWN ARNOLD, BRADLEY CALDWELL, CHRISTINE DELOREY, GLENN GNATUK , TAYLOR GOGO-HORNER, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS, ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL PIERRE, LINSLEY GREAVES and PATRICK WARD

Applicants

– and –

CITY OF HAMILTON

Respondent

APPLICATION UNDER RULE 14.05 OF THE *RULES OF CIVIL PROCEDURE*

FRESH AS AMENDED

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on date to be determined by the parties and the Court, at the courthouse, 45 Main Street East, Hamilton, Ontario, L8N 2B7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date June 15, 2022 Issued by _____

Local Registrar

Address of court office: Superior Court of Justice
45 Main Street East
Hamilton ON
L8N 2B7

TO: **CITY OF HAMILTON**

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Toronto, Ontario M5H 1T1

Fax: (416) 952-0298

APPLICATION

1. **The Applicants make application for:**

(a) An order pursuant to pursuant to section 52(1) of the *Constitution Act, 1982,* declaring sections 3 (hours of entrance), 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of City of Hamilton *By-Law No. 01-129* (the "*Parks By-Law*"), and section 16(12) (miscellaneous prohibitions) of City of Hamilton *By-Law No. 86-077* as amended by *By-Law No. 97-162* (the "*Streets By-Law*"), are *either* of no force or effect *or* inapplicable to the Applicants and other homeless individuals who erect tents as a temporary form of shelter, pursuant to section 52(1) of the *Constitution Act, 1982.*

(b) In the event that this Honourable Court suspends any declaration of invalidity issued in relation to the *Parks By-Law* and/or *Streets By-Law*, that any such suspension be for no longer than six months from the date of this Honourable Court's decision.

(c) In the event that this Honourable Court suspends any declaration of invalidity issued in relation to the *Parks By-Law* and/or *Streets By-Law*, an order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") during the period of the suspension, in the form of an interlocutory injunction, that prohibits the City of Hamilton from preventing the erection of tents as a temporary form of shelter by homeless individuals (including the Applicants), and/or giving notice to homeless individuals (including the Applicants) to dismantle and/or move such tents, and/or evicting or removing homeless individuals (including the Applicants) from such tents and/or dismantling such tents, if those tents comply with the following conditions, which are based on the following parameters:

(i) The tent is in an area considered to be a "park" within the meaning of the *Parks By-Law*;

(ii) The tent is at least 50 meters away from a playground, school or childcare centre;

(iii) The tent consists of a grouping of a no more than of six tents; *and*

(iv) The tent be at least 200 meters away from any other grouping of a no more than of six tents.

(d) In the event that this Honourable Court does not suspend any declaration of invalidity issued in relation to the *Parks By-Law* and/or *Streets By-Law*, or the suspension expires without the adoption of measures to replace the provisions declared invalid by this Honourable Court, an order granting a permanent injunction with terms identical to order (c) above.

(e) An order pursuant to section 24(1) of the *Charter* declaring that the City of Hamilton, and/or its agents, pursuant to any purported legal authority, including but not limited to the *Parks By-Law*, the *Streets By-Law*, *Noise Control By-Law No. 11-285* ("*Noise Control By-Law*") and/or the *Public Nuisance By-Law No. 20-077* ("*Public Nuisance By-Law*") violated the *Charter* rights of the Applicants, including section 7 and/or section 15, by preventing them from erecting tents as a temporary form of shelter, and/or giving notice to homeless individuals (including the Applicants) to dismantle and/or move such tents, and/or evicting or removing homeless individuals (including the Applicants) from such tents and/or dismantling such tents, and that such violations cannot be demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*.

(f) In addition, an order pursuant to section 24(1) of the *Charter* for compensatory damages for the physical harm(s) suffered by the Applicants caused by the City of Hamilton and/or its agents pursuant to any purported legal authority, including but not limited to the *Parks By-Law*, the *Streets By-Law*, *Noise Control By-Law*, and/or the *Public Nuisance By-Law* in violation of the *Charter* rights of the Applicants, including section 7 and/or section 15, by preventing them from erecting tents as a temporary form of shelter, and/or giving notice to homeless individuals (including the Applicants) to dismantle and/or move such tents, and/or evicting or removing such tents and/or dismantling such tents.

(g) Costs of this proceeding on a full indemnity basis or in the alternative, on a substantial indemnity basis.

(h) Such further and other relief as counsel may advise to this Honourable Court may deem just.

2. The grounds for the application are:

Overview

(a) The Applicants are 19 individuals who have erected tents or shelters (collectively referred to as "tents"), and thereby have created and lived in encampments ("encampment residents"), in various public parks and/or other public spaces considered parks throughout Hamilton, including J.C. Beemer Park, the greenspace at Strachan and James Streets, Sir. John A. McDonald, Ferguson and Central Park ("encampments"). The City of Hamilton ("City") has forcibly evicted the Applicants and many other homeless individuals from encampments where they resided, pursuant, *inter alia*, to the *Parks By-Law* and/or *Streets By-Law*. These encampments were located in City-owned and operated parks and/or public spaces under the care, control and responsibility of the City.

(b) The Applicants became homeless for the reasons that are common. Housing precarity has become an unfortunate reality in Hamilton, because of raising rental costs, inadequate Ontario Disability Support Program ("ODSP") and Ontario Works benefit levels, and the breakdown of relationships, especially women fleeing domestic abuse at the hands of male partner. Some individuals with complex mental health, addiction and/or trauma cannot function in independent living. Chronically homeless individuals may become trapped in a vicious cycle of homelessness they cannot escape.

(c) The Applicants, like other homeless individuals, have at times not entered shelter for many reasons. The demand for shelter spaces often exceeds supply. As of March 2022, 1,596 people were actively experiencing homelessness in Hamilton, but there are only 96 shelter beds designated by the City of Hamilton for women and 212 for men. There is a dramatic undersupply of shelter spaces for women, a shortage and often complete absence of shelters which permit couples to stay together, and no shelter in Hamilton for indigenous men, couples, youth or Two Spirit individuals. There are also structural barriers in the design of shelters that prevent individuals from using them: admission on a first

come, first served basis, and a limit on the number of nights individuals can stay. The design of the shelter system discriminates on the basis of disability, against individuals with complex mental health, addiction and/or trauma, substance dependencies, and mental health disorders that trigger disruptive behaviour. Shelters do not accommodate Indigenous cultural practices. Shelters are congregate settings where individuals face the risk of assault and theft, and of contracting infectious disease (as happened during the COVID-19 pandemic). Shelters do not permit individuals to keep personal items or pets. They afford individuals little control over their living space. Finally, there is a risk to women queuing to enter shelters from male sexual predators who loiter in the vicinity to target victims who are unable to access shelters.

(d) The Applicants had no choice but to reside in encampments instead of sleeping on the street, because encampments function as mutual aid societies where residents share food, blankets and huddle together to stay warm; provide a buffer that mitigates the risk of rape, sexual assault, theft and assault; mitigate the risk of overdosing; provide an emotional support system for residents; and provide physical care and support for disabled residents. Encampments also provide shelter 24 hours, 7 days a week, which mitigates the risk of hypothermia, sunburn, heatstroke, and dehydration; make life less physically taxing because residents are not transient; enable residents to exert control over substance use; promote mental health; provide a sense of community an reduce isolation; and enable residents to attend to wellness beyond survival. Encampments enable residents to live continuously in a single location, which enhances their access to: medical care; social workers or other system navigators who can help residents access social programs; harm reduction supplies and treatment; medication delivery; food donations; and donations of blankets, clothing, and mobile phones.

(e) Most of the Applicants remain homeless. After being repeatedly evicted from encampments by the City, many Applicants simply "sleep rough" (i.e., without a tent) in various public parks and/or other public or private spaces in an effort to avoid being further targeted for eviction. Without shelter and a community to protect them, they have experienced and face an increased risk of rape, sexual assault, theft, and violence. Because they can no longer reside encampments, they suffer from the health effects of sleeping out

in the open and being exposed to the elements, including hypothermia and chronic sleep deprivation. Because they no longer reside in a fixed location, and/or they have been forced to move to remote locations to avoid further evictions, their access to medical care, addiction treatment, and support services has been greatly impaired. Most do not have a mobile phone.

(f) Among Hamilton's homeless population, Indigenous persons (23%) and women (53%) are overrepresented. The Applicants reflect this diversity. Seven are Indigenous women and three are non-Indigenous women. They also include among their number a transgender black woman, an Indigenous man, and a black man.

(g) The evictions of the Applicants violated sections 7 and 15 rights of the *Charter* in a manner that cannot be justified under section 1. In addition, the relevant provisions of the *Parks By-Law* and/or *Streets By-Law* violate sections 7 and 15 of the *Charter* and cannot be justified under section 1.

Kristen Heegsma

(h) Kristen Heegsma ("Kristen") is a 31 year old Indigenous woman who has been homeless continuously since 2019, after being evicted by family members (although she was occasionally homeless before then). Kristen lives with mental health and substance abuse disorders and receives approximately $900 in ODSP benefits per month to cover her basic needs and special diet. She is not entitled to a shelter allowance while homeless. Even if she received an additional shelter allowance of $497 per month, she would be unable to afford housing.

(i) Between 2019 and Fall 2021, Kristen lived in a tent in encampments. In Summer 2020, Kristen was forcefully evicted from the Ferguson Encampment. She went onto stay in three more encampments and was evicted each time. The last time Kristen slept in a tent was at Wolverton Park, in Fall 2021. During these repeated evictions, she lost her belongings, including her tent.

(j) Since Fall 2021, Kristen has slept on the streets with only a sleeping bag.

(k) Within two to three weeks after being evicted from Wolverton Park, Kristin was raped while sleeping on a public bench outside of City Hall. She has been repeatedly robbed and assaulted. Without even the protection of a tent, she often wakes up to discover that her belongings have been stolen.

(l) Kristen has been unable to access a shelter, for many reasons. Kristen has repeatedly tried to get into a women's shelter, without success. She does not have a phone but has her physician and the Wesley Day Centre regularly call women's shelters on her behalf. They are almost always told that the women's shelters are full. In the past, Kristen was periodically able to access a shelter bed, but was repeatedly service restricted for a variety of reasons, including missing curfew and allegations of domestic violence. Kristen has periodically been in a relationship during her periods of homelessness and has at times been unable to access a shelter bed with her partner.

(m) When Kristen cannot get into a shelter and cannot put up a tent, she usually wanders around all night trying to find somewhere safe, putting her at an increased risk of violence. She has slept in stairwells, on the street outside of an overflow shelter, and on a park bench. As a result, Kristen hardly sleeps at night. Instead, she is up for days at a time, and then crashes. She regularly falls asleep during the day. In late May 2020, she fell asleep while walking and fell, hitting her head and cutting it open.

(n) Kristen would prefer to live in a tent again for the following reasons: a degree of privacy in order to get changed, be removed from the public gaze; improved sleep; protection against the risk of sexual assault, assault and theft by having a physical barrier, locking her tent, and having the protection of friends and allies in an encampment; improved mental health that comes from a sense of belonging and community, which translates into a lower dependence on drugs lower risk of overdose; and maintaining connections to street outreach supports such as medical care.

Cassandra Jordan

(o) Cassandra Jordan ("Cassandra") is a 39 year old Indigenous woman who has been homeless since August or September 2020. Cassandra became homeless after an

unlawful eviction from her rental unit. Cassandra is a person living with disabilities, in receipt of ODSP. Her medical conditions include degenerative disc disease, chronic pain and substance abuse disorder.

(p) When Cassandra first became homeless, she could not access a shelter bed because she was told that they were all full. This led her to erect a tent at the Ferguson Encampment, from which she was eventually evicted. Although she was offered space in a hotel during the eviction, it was not held for her while she coordinated storage of her belongings. In the end, she did not secure a shelter space. She was left on the street. She lost her tent in the eviction.

(q) Cassandra has continued to reside in various encampments after being unable to access women's shelters because they were full. When she resided in an encampment, Cassandra developed a community that looked out for one another which helped to prevent robberies and assaults.

(r) Casandra has been repeatedly evicted from encampments. Cassandra has witnessed a heavy police presence with By-law officers at encampment evictions, along with bobcats and garbage trucks to dispose of peoples' belongings. Cassandra describes the evictions as intimidating, traumatizing and forceful, and she felt that she had no option but to comply with By-law officers' directions to move. She has repeatedly lost her tents in evictions. Having to pack up and move from encampment to encampment is exhausting physically, mentally and emotionally.

(s) Cassandra was subject to a forceful eviction while she was recovering from third degree burns on her legs. This led to her placement in the Barrett Centre, a shelter for individuals experiencing a mental health crisis. There were no shelter beds available when Cassandra was discharged from the Barrett Centre. She once again was forced to sleep on the street. She stayed with her mother in her subsidized rental unit temporarily but was required to leave to avoid breaching the guest rules for subsidized housing

(t) In February 2022, Cassandra attempted to get into Carol Anne's Place, an overflow shelter for women. She was denied entry because she had tested positive for COVID-19. She was forced to sleep outside in the freezing cold without a tent.

(u) Cassandra has continued to attempt to access women's shelters but has not been consistently able to do so because of an ongoing lack of shelter space for women. Without being able to erect a tent in an encampment, Cassandra has been forced to stay on the streets: in tunnels, outside of Tim Horton's, the back of City Hall, and outside of churches. When she has to sleep outside without a tent, she is often alone and in hidden, hard to find spaces. She has been robbed while sleeping outside.

Misty Marshall

(v) Misty Marshall ("Misty") is a 30 year old Indigenous woman who has been homeless for just over two years.

(w) Misty has a past history of opiate use disorder, major depressive disorder with suicidal ideation and asthma and stimulant use disorder. She has a history of abuse in childhood and has been in abusive relationships throughout her adult years. Misty's asthma is exacerbated when she is homeless and living in a tent due to oppressive humidity. While homeless and living in a tent her asthma has deteriorated to point that she has required emergency treatment.

(x) Without access to a shower or laundry facilities, Misty has presented with a severe case of head lice that caused underlying cellulitis (skin infection) to her scalp and ears. She has also had extensive body rashes caused likely by scabies.

(y) A physician treating Misty lost contact with her immediately following her eviction from the Ferguson Encampment. Her physician reconnected with her a year later and reported that Misty had drastically decompensated physically and mentally since she was last seen. Misty's street outreach physician was better able to connect with Misty and treat medical issues, but only when they knew where Misty was living. In the opinion of her physicians, had Misty remained in one place, she would not have decompensated to the extent that she did.

(z) As well, it is difficult to establish trust with Misty and this results in her unwillingness to accept help from people readily. Trust can be established with continuity of connection.

(aa) Since becoming homeless, Misty has been unsuccessful in accessing shelter in the women's shelter system. She has attempted to get into the overflow at Carol Anne's Place, but through hard experience has learned that there is little chance of getting in, even after lining up for entry at 10:00 pm. She sometimes feels that it is not worth trying, because she is that much more at risk of violence if she does not have a plan for the night by 10:00 pm. While lining up outside of Carol Anne's Place, Misty has witnessed men driving around Carol Anne's Place soliciting the women in line for sex.

(bb) Misty has stayed in a tent in several encampments as a result of not getting into the women's shelters. She has been evicted from all of these encampments and has lost belongings in the evictions. In some instances, she was only given 20 minutes notice to move. She has witnessed bobcats removing encampment residents' possessions during the course of eviction. Housing support and shelter was not offered to Misty at the time of her evictions from encampments.

Sherri Ogden

(cc) Sherri Ogden ("Sherri") is a 28 year old Indigenous woman in receipt of ODSP. She has been homeless for the past five years. Like the other applicants, Sherri has not been successful in accessing women's shelters, which has resulted in her staying in tents in encampments, only to be evicted and displaced to other encampments. During the course of these evictions, the City has disposed of her possessions, including her tents.

(dd) Sherri does not have a mobile phone. Staff at the Wesley Day Centre have repeatedly tried to get her into shelter but have been told that they are full. Sherri did secure a hotel stay (with a temporary hotel program funded by the City and staffed by Mission Services) for two weeks with an ex-boyfriend but was kicked out over a false allegation of domestic violence that she tried to dispute. She was banned from the hotel for one month. The hotel program has since ended.

(ee) Sherri's applications for supportive and transitional housing both the YWCA and Indwell have been denied because of her complex mental health issues that allegedly exceed the supports available in these programs.

(ff) Without being able to stay in an encampment in a tent, Sherri sleeps in stairwells, parking garages and in parks with only a blanket. She hardly sleeps.

Christine Delorey

(gg) The applicant Christine Delorey ("Christine") is a 33 year old woman in receipt of Ontario Works. She became homeless for the first time in her life when her father kicked her and her (now former) spouse out of his house in 2019. Without shelter space for her and her spouse as a couple, they erected a tent by the Urban Core Encampment where they could remain together and close to healthcare, food and supports.

(hh) Christine prefers to stay in a shelter but is not always able to access it because they are usually full. She was able to access the City's temporary hotel program with her spouse. However, the City accused them of domestic violence based on a verbal argument, and immediately kicked them out and onto the street without alternative shelter, and without an opportunity to challenge the decision. In February 2021, and while pregnant, she was kicked out of another hotel due to a false accusation of selling drugs.

(ii) In order to access an overflow bed at Carol Anne's Place, she lines up for entry hours before the 10:00 pm entry time. She was successful on some nights, and unsuccessful on other nights. When she is unable to access shelter and is not able to erect a tent, she stays in corridors, couch surfs, sleeps in the open with a sleeping bag, finds a parking garage to hide in and sleep, or wanders the streets without sleeping.

(jj) When there is not a space in shelter, a tent offers Christine protection from the elements, privacy and some degree of safety. Being in a tent eases her mental and emotional wellbeing compared to without because she is more sleep deprived without a tent.

Jahmel Lopierre

(kk) Jahmel Lopierre ("Jammy") is a 32 year old black transgender woman in receipt of OW. She has been diagnosed with PTSD, anxiety, depression and substance abuse disorder. She has been homeless one and off for about three years.

(ll) Most recently, Jammy became homeless after being evicted from the Transitional Living Program at the YWCA.

(mm) Jammy has been kicked out of the temporary hotel program for missing curfew. She fled a women's shelter after being threatened with being issued a form under the *Mental Health Act*.

(nn) Jammy has been denied access to women's shelters when they are full. In some cases, Jammy will change her clothing to present as a male in order to get into men's shelters. Having to change her gender expression and identity in order to access a shelter bed is degrading and harmful to her wellbeing.

(oo) It is difficult for Jammy to function in the congregate shelter system because she feels anxious around large groups of strangers and has trouble sleeping. She has experienced theft in shelters and feels that she has no control over her life.

(pp) Jammy has experienced routine evictions from encampments by police and has been ticketed repeatedly while homeless. She never has a good night's sleep because of a lack of a stable and secure place to stay overnight and feels safer in a tent because she has control over who is around her.

(qq) Jammy no longer erects a tent when she is outside of shelter because of the City's increased enforcement measures. She knows she will just be told to move.

Darrin Marchand

(rr) Darrin Marchand has chosen to live in an encampment because he has had negative experiences in shelters, including witnessing a fellow resident being attacked with a machete by another resident in December 2020. Darrin has also been service-restricted,

or banned, from various shelters at different times, which means that even when he wants to secure shelter where he was not victimized, he is unable to. Darrin has been service restricted from all shelters for long periods, including several consecutive months, leaving him with no option but to sleep on the street.

(ss) Darrin would suffer adverse emotional and physical impacts such as significant levels of stress if he were to be displaced from his encampment. Darrin receives medical care and food support in the encampments.

(tt) At times, Darrin has slept out in the open in the streets for months without a tent. Darrin was the victim of a random shooting while sleeping without a tent on the stairs of a church and believes that he would not have been shot had he been in a tent. It was only when he was shot that a shelter lifted a restriction allowing him to enter, but he was kicked out mid recovery.

Ashley MacDonald

(uu) Ashley MacDonald ("Ashley") is a homeless Indigenous woman, and she has had no other option but to live in an encampment for several reasons, including the ongoing shortage of shelter beds for women in the City, being repeatedly service restricted, or banned, from shelters. Ashley has a substance use disorder and other mental health issues and has faced discrimination in the shelter system. Ashley has also been denied access to supportive and transitional housing programs because of her high acuity needs. Being able to remain in one encampment would allow Ashley the stability she needs to maintain ongoing and recurrent street outreach healthcare, and pursue treatment for her mental health and substance use.

Shawn Arnold

(vv) Shawn Arnold ("Shawn Arnold") chose to live in an encampment because he feels unable to access shelter spaces because he is recovering from past substance use, and reasonably fears that the rampant substance use in shelters is a threat to his sobriety. Shawn was also assessed under the *Encampment Protocol* as being high acuity, and as such was permitted to remain at the J.C. Beemer Park Encampment. While an encampment resident,

Shawn was able to benefit from a nearby methadone treatment program, receive meal support and connect with other social supports including a housing worker that secure his current housing. The stabilized encampment location was critical to securing housing, illustrated by the fact that he almost lost a housing offer after being evicted from his encampment, causing him to lose contact with his housing worker.

Gord Smyth

(ww) Gord Smyth ("Gord") chose to live in an encampment because there is a shortage of affordable housing in the City that has been exacerbated by the COVID-19 pandemic.

(xx) Gord cannot live in a shelter. He has mental health disabilities, including a personality disorder, which make it difficult for him to be around groups of people for sustained periods. Gord also has a dog who would not be allowed in shelters and separating from his pet would have a significant impact on his mental health.

(yy) When living in encampments, Gord has had regular access to community agencies and volunteers who deliver meals, hygiene products, and medical supports.

(zz) Gord was repeatedly evicted from encampments in breach of the *Encampment Protocol*. He was only given 7 days' notice to move. He also was required to move without having had a VISPDT assessment completed. On one occasion, Gord was evicted from an encampment within three hours of having been evicted from another encampment. During the course of his encampment evictions, the City did not offer him alternatives to congregate shelter options that accommodate his disability related needs. The constant evictions and the threat of evictions from encampment were mentally and emotionally draining and demoralizing.

(aaa) After several evictions, a paramedic administered Gord a Service Prioritization Decision Assistance Tool ("VISPDT"), the results of which qualified him to remain in his encampment indefinitely. However, the City refused to accept these results. Although the City presented Gord with rental options, none of them were affordable. Gord was finally

offered a unit with City Housing Hamilton that was subsidized and moved into it on November 27, 2021.

Mario Muscato

(bbb) Mario Muscato ("Mario") is a severely disabled 48 year old Indigenous man who has been homeless since 2017. He was evicted from his accommodation due to an administrative error with Ontario Works. He has resided in encampments when he cannot access shelters.

(ccc) Mario has had negative experiences in the shelter system, including: being unable to access shelter because they are full; being service restricted and routinely being kicked out; having his personal items stolen; experiencing discrimination as a person living with disabilities; and experiencing discrimination as an Indigenous person on the basis of race and creed.

(ddd) Mario does not have the use of his hands and is an amputee. He is a victim of childhood abuse. He has also been diagnosed with opioid use disorder, stimulant use disorder, HIV, post-traumatic stress disorder, major depressive disorder, acquired brain injury, extensive burn injury from neck to face causing chronic pain, severe neuropathy to both upper extremities, and right forearm amputation.

(eee) Mario relies on other encampment residents to assist him with his activities of daily living because he does not have functioning hands. Encampment evictions deny him access to assistance from other residents and friends, for example, to erect a tent, change his clothes, open doors, and cover himself. He cannot erect and dismantle a tent or carry all of his possessions on his own due to his disabilities.

(fff) He has been evicted from encampments and lost his tent on numerous occasions. Evictions are very physically taxing, and this adds to his depressive state where he feels like he would prefer to die.

(ggg) When Mario is forced to sleep in the open, he experiences sleep deprivation, feels unsafe, is not able to meet his basic needs because of a loss of support from other

encampment residents and friends, experiences a deterioration in his mental health and greater sleep deprivation.

(hhh) Although Mario strives to remain connected with medical and housing supports, his constant transiency makes it exceedingly difficult.

Linsley Greaves

(iii) Linsley Greaves ("Linsley") is a 52 year old black man in receipt of OW.

(jjj) Linsley has had periods of homelessness for over ten years. His most recent housing ended two years ago, after his roommates did not pay their share of the rent. Since Linsley's name was on the lease, he was evicted.

(kkk) Linsley has stayed in men's shelters on and off during his periods of homelessness. He has had several negative experiences, including theft, being incited to fight, and having trouble sleeping. Linsley has had several experiences of racism while in shelter, including being repeatedly subjected to the use of the "N" word, being racially profiled, and lacking a sense of community with other Black Canadians.

(lll) Linsley has difficulties functioning in a shelter environment because of his substance use disorder. He is dependent on substances which are not permitted in shelters. This requires him to both hide his drug use and frequently leave. He knows that every time he is absent from the shelter, he risks not being allowed back in.

(mmm) Linsley stayed in a tent in one encampment for almost two years, including during the time the *Encampment Protocol* was in force. During this time, he developed a community. Three women lived beside him for safety and would call out to him if they needed protection.

(nnn) Linsley stopped putting up a tent after his eviction because he knew it would not take long for the City to evict him again. Although he tried to use tarps to provide some protection against the elements, he developed frostbite in his left toes in or about March 2022 when he was sleeping outside with just a blanket. Linsley is slowly losing one of his big toes, and the tips of his other toes.

(ooo) Linsley finds is difficult to sleep in the open because he constantly moves around trying to stay warm and safe. Even without a tent, the City tells him to move along. The constant moving worsens his anxiety. As a result of being unable to sleep properly at night, Linsley falls asleep during the day whenever possible, and has trouble concentrating.

Brad Caldwell

(ppp) Brad Caldwell ("Brad") is a 57 year old homeless man in receipt of the ODSP. He has been homeless for roughly three years. His loss of housing coincided with his wife's passing.

(qqq) Brad has had negative experiences from staying in shelters. He had his possessions stolen more often in shelters than on the street. He has been kicked out of shelter for not securing housing on time, which he could not do because accommodation was not unaffordable. Brad has found the shelter system unreliable. He has been unable to get into shelter because it is full, and he has been kicked out during his stays.

(rrr) When the men's shelter hotel program ended, he was kicked out without a transition plan to alternative shelter. He was forced to sleep on the street.

(sss) Brad has been evicted from various encampment. In some instances he has only received 24 hour notice. He has witnessed evictions where dump trucks and garbage disposal attend and load up residents' tents and possessions. He had not been offered guaranteed shelter prior to eviction.

(ttt) Brad has also been issued roughly fifty to sixty tickets for either sleeping in a public space or in a tent in an encampment. He will comply with a direction to move to avoid escalating the situation, and because of the fear of charges.

(uuu) Brad has difficulty managing his diabetes while homeless because he does not have proper refrigeration to store insulin, and his glucose meter has been stolen from him because it has been mistaken for a digital scale to measure drugs.

(vvv) For Brad, the benefits of staying in a tent include being able to enhance safety through community with other encampment residents, staying warm together to avoid

freezing to death, remaining close to services, and lessening sleep deprivation by stabilizing his immediate environment.

(www) Brad has suffered from infections which have required hospitalization. Because he has been discharged into homelessness where he is exposed to the elements, experiences sleep deprivation, and needs to move, he cannot fully recover and remain healthy.

(xxx) When sleeping in the open, Brad is so physically taxed and tired that his body gives up on him, and he is forced to sleep where his body stops him.

Corey Monahan

(yyy) Corey Monahan ("Corey") is 45 years old, has been homeless for the majority of his life. He is an ODSP recipient.

(zzz) Corey has been diagnosed with fetal alcohol syndrome, attention deficit hyperactivity disorder, and substance abuse disorders. He receives healthcare through the Shelter Health Network and has reported distress sleeping outside, and frustration in not being able to access shelter despite advocacy efforts due to restrictions. His state of homelessness causes mental distress and the stress of it has negatively impacted his mental health.

(aaaa) Despite Corey's best efforts to reside in shelters, he cannot so do so. Space is not always available. Moreover, staying in shelters has significant adverse effects on his mental health, because he does not function well in congregate settings. In some cases, he has had physical altercations with other shelter residents, which have led him to be service restricted.

(bbbb) Corey sleeps in a tent in an encampment. Evictions displace him from encampment to encampment. This has been very destabilizing, psychologically draining and traumatizing. He usually cannot remove all of his possessions and tent in advance of an eviction. He avoids watching City officials tear down his tent because it is traumatizing for him.

Patrick Ward

(cccc) Patrick Ward ("Patrick") is 59 year old man with disabilities. He is an ODSP recipient.

(dddd) Patrick became homeless for the first time in 2017, when the residential care facility that he was renting a room from was abruptly and without notice closed.

(eeee) Upon eviction, he went to a shelter but found was the victim of assaults and theft. The shelter space was detrimental to his mental and emotional wellbeing. He has chosen to erect a tent in an encampment.

(ffff) Patrick has repeatedly been evicted from encampments, and moved along by By-law officers from various locations to other locations, even though those officers are aware that he continues to violate the *Parks By-law* in those new locations. To avoid confrontation with authorities, he has moved to less visible public spaces and into the escarpment.

(gggg) A tent offers Patrick protection from intruders and shields him from animals and the weather. Being routinely evicted from encampments is physically and psychologically draining.

Ammy Lewis

(hhhh) Ammy Lewis ("Ammy") is a 43 year old Indigenous woman. She is an ODSP recipient.

(iiii) Ammy was victim to her landlord's predatory advancements whereby he attempted to extort sex from her. She felt so unsafe that she left her accommodation with her dog who is her constant companion and main source of emotional support. Ammy has been homeless for five months and she has not been accepted into shelter because of her dog.

(jjjj) Ammy relies on her dog for emotional support as well as keeping her safe while she remains without shelter on the street. She sleeps in underground parking lots,

abandoned cars, dumpsters when she does not have a tent. Even without a tent, Ammy is routinely forced to move from where she is in public regardless of the time of day. She has also been assaulted while homeless.

Julia Lauzon

(kkkk) Julia Lauzon ("Julia") is a 24 year old Indigenous woman who is homeless.

(llll) Julia suffers from significant mental health issues and has not been able to get the medical help that she needs because of a lack of phone and a lack of fixed address, which are all related to her homelessness status. As such, she has not been able to follow through on referrals, she has been cut off from ODSP and has no income at all. There have been multiple unsuccessful attempts to get her help for her addictions, but it is difficult to get a hold of her. She has been to the hospital for suicidal ideations.

(mmmm) Julia has stayed on and off in a tent while homeless because she has been denied access to shelter due to a lack of capacity, however she is occasionally able to get into the overnight drop in center at Carol Anne's Place.

(nnnn) Being displaced from her tent and its location results in operating in a constant survival mode that results in her inability to focus on other things such as getting to appointments, including medical appointments because of a lack of concentration due to lost sleep and being in survival mode. Julia has been assaulted while living outside without a tent.

(oooo) Julia has a housing worker from the Hamilton Regional Indian center and is on a waitlist for housing.

Glenn Gnatuk and Taylor Gogo-Horner

(pppp) Glenn Gnatuk ("Glenn") and Taylor Gogo-Horner ("Taylor") are a disabled couple in receipt of ODSP. They became homeless five years ago after being evicted from their rental unit. They began couch surfing with friends and family but that was time limited, and they had a negative experience where Taylor was assaulted by one the friends that they stayed with.

(qqqq) They were once able to remain as a couple in the hotel shelter program, but this was short lived after they were falsely accused of domestic violence and banned for one year.

(rrrr) Taylor has stayed in shelter on only a few occasions and found her separation from Glenn too difficult, causing so much anxiety that she left to return to stay with him in an encampment.

(ssss) They have been routinely evicted from several different locations throughout Hamilton. They have since begun to erect their tents in less visible places to stay hidden and avoid enforcement. Sometimes they pre-emptively move to avoid conflict. The constant movement has been destabilizing for them.

(tttt) When they were without a tent in the winter, they slept on the grounds of the Children's Museum, only with blankets. They feel that they are always on the run which causes them stress. They hardly sleep because they are worried about their safety. They have experienced severe frostbite, causing their fingers to crack and lose sensation.

Chronology and procedural history

(uuuu) On April 18, 2020, residents of a longstanding encampment located at the Sir John A. MacDonald School ("Sir John A. MacDonald Encampment") in Hamilton advised Hamilton Harm Reduction Action League ("KeepingSix") that they had been given notice to dismantle their tents and move within a week. KeepingSix is a community-based organization that defends the rights, dignity, and humanity of people who use drugs. KeepingSix works closely with the Hamilton Social Medicine Response Team ("HAMSMaRT"), an organization made up of physicians, midwives, and peer workers that provides clinical care to individuals who have difficulty accessing the traditional medical system, primarily the homeless and people who use drugs.

(vvvv) On April 21, 2020, KeepingSix and HAMSMaRT attended a regular weekly meeting with the City of Hamilton ("City") to discuss encampment management and raised concerns about the eviction notice provided to the Sir John A. MacDonald Encampment.

(wwww) On April 25, 2020, the City evicted the residents of the Sir John A. MacDonald Encampment. KeepingSix and HAMSMaRT attended the eviction. Several residents moved to the encampment at Jackie Washington Park ("Jackie Washington Park Encampment"), because they had been advised that the City could better support individuals on municipal property.

(xxxx) On April 27, 2020, the City provided an eviction notice to the residents of the Jackie Washington Park Encampment.

(yyyy) On May 6, 2020, the City evicted the residents of the Jackie Washington Park Encampment. In the course of the eviction, residents' belongings were destroyed.

(zzzz) On June 4, 2020, legal counsel from the Hamilton Community Legal Clinic ("HCLC") and Ross and McBride LLP wrote the City Manager, the General Manager of Healthy and Safe Communities and the Director of Housing Services, setting out legal arguments against encampment evictions based on the harm they caused to health and wellbeing, in the context of the COVID-19 pandemic and a shortage of viable alternatives for shelter. They also requested a meeting.

(aaaaa) On June 26, 2020 legal counsel from the HCLC and Ross and McBride LLP, members of HAMSMaRT and Keeping Six met with legal counsel for the City and representatives from the City's housing and Community and Social Services departments. During this meeting, they asked the City to pause on the encampment evictions pending a satisfactory resolution of the shelter needs of encampment residents and provided notice to the City that any further eviction would be challenged in the courts.

(bbbbb) On July 7, 2020, the parties met again to further discuss solutions to encampments in Hamilton. The City was again asked to pause encampment evictions pending resolution and reminded that news of any new evictions would lead the parties into litigation.

(ccccc) On July 10, 2020, the City provided notice of an imminent "clean up" (i.e., eviction) to the residents of the York Encampment and Bay Encampment. Within a day, KeepingSix and HAMSMaRT worked with the residents to remove larger items from the

site, which led the City to decide not to bring heavy equipment to clear the two encampments.

(ddddd) On July 13, 2020, Councillor Narinder Nann proposed a motion at a meeting of the Emergency and Community Services Committee of Hamilton City Council to request the City analyze the *National Protocol for Homeless Encampments in Canada* ("*National Encampments Protocol*") proposed by the United Nations Rapporteur for Housing. The motion carried, with Councillor Terry Whitehead voting against.

(eeeee) On July 22, 2020 legal counsel from HCLC and Ross and McBride LLP wrote a second letter to the City, that alleged that the removal of items necessary for an individual to exist in an encampment, such as a tent or bed, was in effect an eviction.

(fffff) On July 20, 2020, Councillor Jason Farr wrote in an email: "To sum up, I am supportive of dismantling the tents and if staff do not act soon, I will have Council order it."

(ggggg) On July 28, 2020, the City provided notice that it intended to dismantle encampments on July 31, 2020. The City would not commit to refrain from the involuntarily removal of encampment residents.

(hhhhh) On July 29, 2020, counsel for a subset of the current Applicants, KeepingSix and HAMSMaRT commenced proceedings in this Honourable Court for an injunction prohibiting the City from dismantling encampments.

(iiiii) On July 30, 2020, this Honourable Court issued a 10 day interim injunction, in *Bailey et al. v. City of Hamilton*, Hamilton Court File No. CV-20-73435.

(jjjjj) On August 7, 2020, the 10 day injunction was extended on consent to a court date set for September 2020.

(kkkkk) On September 30, 2020, the parties executed a settlement agreement, which consisted of: an *Encampment Protocol* which required the City to assess and accommodate individual needs before evicting encampment residents, which in some cases resulting in residents remaining in certain sanctioned encampments indefinitely, and which established

rules around the permissible size and locations of encampments; and a confidential Letter of Understanding, which included a term that the City could remove the largest Ferguson Encampment.

(lllll) Between September 30, 2020 to August 2021, HCLC, KeepingSix and HAMSMaRT had many disagreements with the City over its failure to comply with the *Encampment Protocol* as a result of the perception that the City was not applying the *Encampment Protocol* in the spirit in which it was negotiated. HCLC repeatedly requested a meeting with the City to discuss possible solutions, to no avail.

(mmmmm) On August 9, 2021, Hamilton City Council voted to repeal the *Encampment Protocol* in an emergency meeting, without notice to, or consultation with, the parties to the settlement agreement who had negotiated the *Encampment Protocol* or encampment residents.

(nnnnn) The City delayed new encampment evictions until August 30, 3021.

(ooooo) On September 9, 2021, a peaceful protest of the revocation of the *Encampment Protocol* took place outside City Hall. Representatives from HCLC, HAMSMaRT, Keeping Six, the YWCA, Hamilton Regional Indian Centre, and the Wesley Day Centre all decried the sudden decision taken without consultation, and implored the City to sit down with stakeholders to develop a new approach to encampments. On the same day, the City released a "Six Step Encampment Response" at a meeting of Hamilton City Council. This policy framework does not adhere to or align with the *National Encampments Protocol*. At the same Council meeting, Dr. Jill Wiwcharuk from HAMSMaRT and Marcie McIlveen from KeepingSix addressed the Council, and informed them of the issues with shelter shortages, and harm to encampment residents from evictions. Stephanie Cox, counsel in the within Application, addressed the Council meeting to raise legal concerns.

(ppppp) On September 17, 2021, the City engaged in encampment evictions at the Durand Encampment and Wellington Park Encampment. On September 20, 2021, a further eviction took place at the J.C. Beamer Park Encampment. On these occasions, the City only provided two hours verbal notice to encampment residents to vacate. The City did not

provide written notice of a By-law infraction. The City did not offer appropriate indoor shelter options prior to the eviction. Subsequently, By-law officers and Hamilton Police Services have regularly attended various encampments and only given verbal notice to vacate.

(qqqqq) On October 4, 2021, the Applicants issued this Notice of Application, and brought a motion for an *ex parte* injunction against the City to prohibit it from using its By-laws to evict encampment residents. This Honourable Court directed that the City refrain from encampment evictions pending its ruling.

(rrrrr) On October 13, 2021, the Manager of Housing Service's reported to City Council that: there was not enough shelter space for encampment residents to move into; the system cannot accommodate all unsheltered person's needs; that "the suitability of those [shelter] beds it needs to be discussed as much as the availability of those beds"; that it was "unconscionable to put these individuals into beds or units without the right supports because it creates in many instances, more stress on the individual, whether it's through isolation, whether it's through not meeting their needs"; that there was nowhere else for people to go than to sleep in encampments; that Hamilton has always had people "sleeping rough even in the winter"; and that during the operation of the *Encampment Protocol*, "many [encampment residents] have had weeks or months potentially of stability which no longer the case, because this has been a tremendous traumatic experience for everybody involved."

(sssss) On November 2, 2021, this Honourable Court dismissed the motion for an interim injunction, in *Poff v. City of Hamilton*, 2021 ONSC 7224.

(ttttt) The City of Hamilton immediately recommenced encampment evictions, notwithstanding the City's awareness that many encampment residents had no indoor shelter options. In some cases, shelters were full at the time of eviction. In other instances, the evicted encampment residents were service restricted from shelter. On November 6, 2021, Councillor Nann Tweeted: "I'm here at Woodlands Park to observe an encampment clearing. I have been informed HPS on-site whom have been providing direct engagement that there are no shelter spaces for the couples nor the individuals remaining here."

(uuuuu) On December 9, 2021, Councillor Nann proposed a motion to the Emergency and Community Services Committee of Hamilton City Council for a human rights based approach to encampment evictions. This motion passed. To date, the approach to responding to encampments outlined in this motion has not come to fruition.

(vvvvv) On March 22, 2022 Councillor Farr proposed a motion that was adopted by City Council, which directs City staff to expedite encampment evictions, and specifically to: issue a Trespass Notice within 12 to 72 hours after staff receive the first complaint regarding unauthorized camping a City or public place; immediately notify the Hamilton Police Service of the Trespass Notice for enforcement purposes; and enforce the By-laws against encampments 24 hours a day, seven days a week. The City of Hamilton allocated $416,673.73 to hire four new By-law officers to ensure that tents were removed from parks within 12 to 72 hours.

(wwwww) In response to Councillor Farr's motion, City staff stated the following at the Council Meeting: "there is currently no capacity for families or couples in the shelter system, but between 15 and 20 spaces each in the men's and women's systems"; "even when there is space available, some people can't access it due to issues such as having a pet or having had past behavioural issues at the shelter that can lead to barred access"; "we do not have enough housing"; and "we do not have enough beds".

(xxxxx) Since the adoption of Councillor Farr's motion, the eviction against encampment residents has dramatically increased, with evictions taking place continuously. Some former encampment residents have gone deeper into hiding to avoid enforcement, making them more vulnerable and disconnected from supports. Individuals are now "sleeping rough" without even a tent to protect them from the elements and provide a basic level of personal security. Some individuals use a patchwork of tarps, blankets and sheets in a desperate attempt to recreate the protection offered by tents.

Causes of homelessness

(yyyyy) Individuals become homeless for a number of different reasons.

(zzzzz) A major reason for homelessness is the housing precarity has become an unfortunate reality in Hamilton.

(i) The costs of rental accommodation have increased sharply, and in some cases has become completely unaffordable.

(ii) ODSP and Ontario Works benefit levels are insufficient, even with a housing allowance.

(iii) Since poverty intersects with, race, indigeneity, and disability, housing precarity is experienced disproportionately by those groups.

(aaaaaa) Another cause of homelessness is the breakdown of relationships.

(i) Women may become homeless when fleeing domestic abuse at the hands of male partners.

(ii) Individuals may also become homeless if they are forced to leave accommodation shared with family or friends.

(bbbbbb) Some individuals with complex mental health, addiction and/or trauma cannot function in independent living.

(cccccc) Chronically homeless individuals may become trapped in a vicious cycle of homelessness they cannot escape.

Why homeless individuals do not go to shelter

(dddddd) Homeless individuals do not enter shelters for many reasons.

(eeeeee) The demand for shelter spaces often exceeds supply, as the Applicants' firsthand experiences attest to. Moreover, aggregate supply and demand mask inequalities in the availability of shelter for different groups:

(i) There is a dramatic undersupply of shelter space for women, which reflects underfunding that is a product of the hidden nature of

homelessness for women and a hierarchy of deservingness that systematically devalues the need of women for shelter.

(ii) There is a shortage, and often a complete absence, of shelters which permit couples to stay together.

(iii) Although Hamilton has a shelter for indigenous women fleeing domestic violence, it does not have a shelter for indigenous men, couples, youth, or Two Spirit individuals.

(ffffff) There are structural barriers in the design of shelters that prevent individuals from using them:

(i) Admission to shelters is on a first come, first served basis, without any prioritization based on need.

(ii) Shelters impose a limit to the number of nights that individuals can stay – they are at best temporary and are never a permanent accommodation solution.

(iii) The design of the shelter system also discriminates on the basis of disability.

(1) Shelters cannot meet the needs of individuals with complex mental health, addiction and/or trauma, who therefore decided not to enter them;

(2) Some disability-related behaviours conflict with shelter policies. Individuals with substance dependencies can neither use them while in shelter, nor bring harm reduction materials into shelters to help them recover from addiction;

(3) Individuals have mental health disorders which may trigger disruptive behaviour in the congregate setting of a shelter; and

(4) It is physically taxing for some disabled individuals with mobility issues to enter and leave shelters every day.

(iv) Shelters do not accommodate Indigenous cultural practices. In addition, the design of shelters may reinforce intergenerational trauma and the lack of trust in institutions arising from the systemic abuse of Indigenous children in residential schools.

(v) Shelters are congregate settings where individuals who have been victims of assault and theft and are unwilling to enter shelter to face that risk again.

(vi) Shelters are congregate settings that create the risk of infectious disease spread, as became apparent during the COVID-19 pandemic.

(vii) Shelters do not permit pets, which provide important emotional support to individuals.

(viii) Shelters do not permit individuals to keep personal items with them, beyond their immediate personal effects.

(ix) Shelter rules afford individuals little or no control over their living space and micromanage them. For example, shelters impose a strict curfew. Moreover, these institutional rules can elicit a trauma response.

(x) Shelters may be situated in remote locations which are hard to reach on foot.

(gggggg) Finally, there is a risk to women queuing to enter shelters from male sexual predators who loiter in the vicinity to target victims who are unable to access shelters.

Why homeless individuals who do not go to shelter erect tents in encampments

(hhhhhh) Homeless individuals who do not shelter for any of the reasons above may choose to erect tents in encampments instead of sleeping on the street, for a number of reasons.

(iiiiii) Encampments give rise to communities that provide individuals with safety:

(i) They function as mutual aid societies, where residents share food, blankets, and even huddle together to stay warm in the cold weather.

(ii) They provide a buffer that mitigates the risk of rape and sexual assault, theft and assault for residents from non-residents.

(iii) They mitigate the risk of overdosing, because of the presence of peers.

(iv) They provide an emotional support system for residents.

(v) The provide physical support and care for disabled residents.

(jjjjjj) Encampments provide health benefits to their residents compared to living in the open:

(i) They provide shelter 24 hours a day, 7 days a week. By contrast, shelters only provide accommodation in the evenings.

(ii) They mitigate the risk of hypothermia, by providing protection from the wind, rain, snow, and cold.

(iii) They mitigate the risk of sunburn, heatstroke, and dehydration, by providing protection against the sun.

(iv) They make life less physically taxing for residents because they are less transient than if they lived in shelters on the street.

(v) They enable residents to exert control over substance use – either to use it, or to avoid them – by enabling them to choose their peer group.

(vi) They promote mental health, by providing a feeling of safety for individuals who distrust institutions, based on negative experiences.

(vii) They provide a sense of community and reduce social isolation.

(viii) They enable residents to attend to their wellness beyond basic survival.

(kkkkkk) Encampments enable their residents to live with greater dignity compared to living in the open:

(i) They provide a modicum of privacy and solitude, essential for many basic functions including sleep.

(ii) They enable couples to live together in the same tent.

(iii) They enable residents to have pets that provide them with emotional support.

(iv) They enable residents to keep personal possessions beyond their immediate personal effects.

(v) They enable residents to come and go as they please without a curfew.

(vi) They enable residents to plan their lives, because they know where they will be sleeping at night.

(vii) They enable residents to satisfy their desire for autonomy.

(viii) They enable residents to build stable relationships with other residents.

(llllll) Encampments enable residents to live continuously in a single location, which enhances their access to:

(i) medical care;

(ii) social workers or other system navigators who can help residents access social programs (e.g. the Ontario Disability Support Program, Ontario Workers, and public housing), and apply for government issued identification;

(iii) harm reduction supplies and treatment;

(iv) medication delivery;

(v) food donations; *and*

(vi) donations of blankets, clothing, and mobile phones.

Harms from encampment eviction

(mmmmmm) Encampment evictions harm residents in many ways.

(nnnnnn) Evictions deprive former encampments residents of the safety that comes from the encampment community:

(i) They face additional hurdles to sharing food and blankets and huddling together to stay warm.

(ii) They lose the buffer that mitigates the risk of rape and sexual assault, theft and assault for residents from non-residents.

(iii) They lose the peer group that mitigates the risk of overdosing.

(iv) They lose the emotional support system provided by other residents.

(v) Disabled residents lose the physical support and care they receive from other residents.

(oooooo) Evictions force former encampment residents to live in the open, which is harmful to their health:

(i) They face a greater risk of hypothermia because they are exposed to the wind, rain, snow, and cold.

(ii) They face a greater risk of sunburn, heatstroke, and dehydration because they are exposed to the sun.

(iii) They face a life that is more physically taxing because their lives are now transient.

(iv) They lose the ability to exert control over substance use, because they can no longer choose their peer group.

(v) They may suffer worsened mental health because they lose a feeling of safety.

(vi) They lose a sense of community and experience increased social isolation.

(vii) They cannot attend to their wellness beyond basic survival.

(pppppp) Evictions undermine the dignity of former encampment residents:

(i) They lose all privacy and the ability to seek solitude.

(ii) Couples face greater hurdles in living together in the same tent.

(iii) They lose the ability keep personal possessions beyond their immediate personal effects.

(iv) They lose the ability to plan their lives, because they no longer know where they will be sleeping at night.

(v) They lose the ability to build stable relationships with other residents.

(qqqqqq) Evictions impede the access of former encampment residents to:

(i) medical care, including the diagnosis and treatment of medical conditions, and treatment for normal life conditions such as pregnancy;

(ii) social workers or other system navigators;

(iii) housing supports and connections;

(iv) harm reduction supplies and treatment;

(v) medication delivery;

(vi) food donations; *and*

(vii) donations of blankets, clothing, and mobile phones.

(rrrrrr) In addition, former encampment residents may move to remote locations to avoid further evictions, which put them at a greater geographical distance from the services and supports listed in the previous paragraph.

(ssssss) The process of eviction harms former encampment residents:

(i) They lose their possessions.

(ii) They experience dislocation.

(iii) They experience emotions of fear, loss, and grief

(iv) They may experience the exacerbation of pre-existing mental health conditions.

(v) They may lose trust in authority in the police, governments and other public institutions.

Section 7

(ttttttt) Sections 3 (hours of entrance), 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of the *Parks By-Law*, and section 16(12) of the *Streets By-Law*, violate section 7 of the *Charter*, because they deprive homeless individuals of their liberty and/or security of the person, in a manner that is not in accordance with the principles of fundamental justice.

(uuuuuu) These violations of section 7 cannot be justified under section 1 of the *Charter*.

(vvvvvv) The eviction of the Applicants from encampments violated section 7 of the *Charter*, because those evictions deprived them of their liberty and/or security of the person, in a manner that was not in accordance with the principles of fundamental justice.

(wwwwww) These violations of section 7 cannot be justified under section 1 of the *Charter*.

(xxxxxx) The interpretation of section 7 of the *Charter* must comply with Canada's international legal obligations under the *International Covenant of Economic, Social and Cultural Rights*, including (but not limited to) Article 11(1), the right to adequate housing.

Section 15

(yyyyyy) Sections 3 (hours of entrance), 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of the *Parks By-Law*, and section 16(12) of the *Streets By-Law*, violate section 15 of the *Charter*, because they discriminate on the basis of race and/or indigeneity, sex, disability, and marital status, either separately or in combination (i.e., intersectional discrimination).

(zzzzzz) These violations of section 15 cannot be justified under section 1 of the *Charter*.

(aaaaaaa) The eviction of the Applicants from encampments violated section 15 of the *Charter*, because those evictions discriminated against them on the basis of race and/or

indigeneity, sex, disability, and marital status, either separately or in combination (i.e., intersectional discrimination).

(bbbbbbb) These violations of section 15 cannot be justified under section 1 of the *Charter*.

(ccccccc) The interpretation of section 15 of the *Charter* must comply with Canada's international legal obligations under the *International Covenant of Economic, Social and Cultural Rights*, including (but not limited to) Article 11(1), the right to adequate housing.

3. The Applicant relies on the following legal instruments:

(a) The *Canadian Charter of Rights and Freedoms*.

(b) The *Constitution Act, 1982*.

(c) *International Covenant on Economic, Social and Cultural Rights*.

(d) City of Hamilton *By-Law No. 01-129* ("*Parks By-Law*").

(e) City of Hamilton *By-Law No. 86-077* as amended by *By-Law No. 97-162* ("*Streets By-Law*").

(f) City of Hamilton *By-Law No. 11-285* ("*Noise Control By-Law*").

(g) City of Hamilton *By-Law No. 20-077* ("*Public Nuisance By-Law*").

(h) Such further and other grounds as counsel may advise and this Honourable Court may permit.

4. The following documentary evidence will be used at the hearing of the Application:

(a) Affidavit of Kirsten Heegsma.

(b) Affidavit of Darrin Marchand.

(c) Affidavit of Gord Smyth.

(d) Affidavit of Mario Muscato.

(e) Affidavit of Shawn Arnold.

(f) Affidavit of Bradley Caldwell.

(g) Affidavit of Christine Delorey.

(h) Affidavit of Glenn Gnatuk and Taylor Gogo-Horner.

(i) Affidavit of Cassandra Jordan.

(j) Affidavit of Julia Lauzon.

(k) Affidavit of Ammy Lewis.

(l) Affidavit of Ashley Macdonald.

(m) Affidavit of Corey Monahan.

(n) Affidavit of Misty Marshall.

(o) Affidavit of Sherri Ogden.

(p) Affidavit of Jahmal Pierre.

(q) Affidavit of Linsley Greaves.

(r) Affidavit of Patrick Ward.

(s) Affidavit of Audrey Davis.

(t) Affidavit of Leilani Farha.

(u) Affidavit of Stephen Gaetz.

(v) Affidavit of Kate Hayman.

(w) Affidavit of Stephen Hwang.

(x) Affidavit of Ameil Joseph.

(y) Affidavit of Olivia Mancini.

(z) Affidavit of Lisa Nussey.

(aa) Affidavit of Andrea Sereda.

(bb) Affidavit of Kaitlin Schwan.

(cc) Affidavit of Medora Uppal.

(dd) Affidavit of Ruth Toskas.

(ee) Such further and other evidence as counsel may advise and this Honourable Court may permit.

June 15, 2022

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KRISTEN HEEGSMA ET AL

Applicants

- AND -

CITY OF HAMILTON

Respondent

Court File No. CV-21-00077817-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
HAMILTON

FRESH AS AMENDED

NOTICE OF APPLICATION

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Ashley Poff, Darrin Marchand, Gord Smyth, Mario Muscato and Shawn Arnold Applicants	-and-	**The City of Hamilton.** Respondent	**Court File No. CV-21-77187**

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT HAMILTON

ORDER

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TAB 5

Poff et al. v. City of Hamilton

77187/21 HAMILTON

Sujit Choudhary for Applicants

Wade Poziomka

Lee O'Keefe

Jordan Dacur for Respondent

Bevin Shores

Case conference endorsement

February 23, 2023 teleconference 4:30 pm

The Respondent's evidentiary motions will precede their filing of responding materials on the Application.

Respondents will file their motion materials within a month. The Applicants will respond within a further month. Applicants will file their motion under s.12 of the *Evidence Act* within a month. The Respondents will file their response within a further month. The hearing will be set for a date after the deadline. The t/c is asked to set one day for a long motion.

James Ramsay

TAB 6

Court File No. CV-21-77187

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR	)	
	)	
JUSTICE J.A. RAMSAY	)	SEPTEMBER 28, 2023

B E T W E E N:

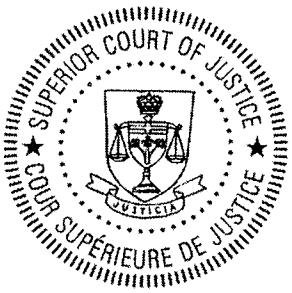
KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO, SHAWN ARNOLD, BRADLEY CALDWELL, CHRISTINE DELOREY, GLEN GNATUK, TAYLOR GOGO-HORNER, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS, ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL PIERRE, LINSLEY GREAVES and PATRICK WARD

Applicants

and

CITY OF HAMILTON

Respondent



ORDER

THIS MOTION, made by the Respondent (moving party) for an Order striking certain affidavit evidence of the Applicants was heard this day by videoconference at the courthouse, 45 Main Street East, Hamilton, Ontario, L8N 2B7.

ON READING the Motion Record and Factum of the Respondent (moving party), the Responding Record and Factum of the Applicants (responding party), and upon being advised of the parties' agreement to resolve this motion upon the terms set forth herein:

1. **THIS COURT ORDERS** that, without prejudice to the Respondent's position with respect to relevance or admissibility of the evidence upon which the Applicants may seek to rely, the Applicants shall not rely on the affidavit of Ruth Toskas sworn June 15, 2022, the Affidavit of Audrey Davis sworn June 13, 2022, the Affidavit of Medora Uppal sworn June 14, 2022, the Affidavit of Lisa Nussey sworn June 14, 2022, Affidavit of Olivia Mancini sworn June 14, 2022, the Affidavit of Medoral Uppal sworn March 3, 2023, and the Affidavit of Lisa Nussey sworn March 10, 2023.

2. **THIS COURT ORDERS** that the issue of costs of this motion shall be deferred to the hearing of this Application.

James Ramsay

Electronically Issued and Entered

Dikena Skendaj Digitally signed by Dikena Skendaj Date: 2023.11.30 10:05:05 -05'00'

Local Registrar
45 Main St. E.
Hamilton, ON L8N 2B7

Court File No. 21-77187

KRISTEN HEEGSMA et. al. - and - CITY OF HAMILTON et al.

Plaintiffs Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
HAMILTON

ORDER

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 King Street W, Suite 1500
Hamilton ON L8P 1A4

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Jordan Diacur (LSO#65860E)
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Lawyers for the respondent

Email for parties served:
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Wade Poziomka: wpoziomka@rossmcbride.com
Sharon Crowe: sharon.crowe@yr.clcj.ca
Sujit Choudhry: sujit.choudhry@hakichambers.com
Ashley Wilson: awilson@kastnerlam.com

File No. H227899

TAB 7

Superior Court of Justice
Cour supérieure de justice

Hamilton

Court File Number / *Numéro de dossier du greffe*

CV-21-77187 **106**

Short title of proceeding
Intitulé abrégé de l'instance

Heegsma v. Hamilton (City)

Appearances
Comparaissent

For the Applicants:

Sujit Choudhry
sujit.choudhry@hakichambers.com

Wade Poziomka
wpoziomka@rossmcbride.com

Ashley Wilson
awilson@kastnerlam.com

For the Respondent:

Bevin Shores (LSO#56161F)
bevin.shores@gowlingwlg.com

Jordan Diacur (LSO#65860E)
jordan.diacur@gowlingwlg.com

□ Order to go in accordance with draft filed /
Ordonnance conforme à l'ébauche déposée.

October 30, 2023

The Applicants move for leave under s.12 of the *Evidence Act* to call more than three expert witnesses. They want to call eight experts. The Respondent is opposed.

The Applicants are homeless individuals in Hamilton. They have commenced the underlying Application to challenge the constitutional validity of certain City of Hamilton by-laws, which prohibit the erection of encampments on public property. The Applicants submit that both the impugned by- laws, and the enforcement of those by-laws against them to evict them from encampments they created, violate their rights under sections 7 and 15 of the Charter in a manner that cannot be justified under section 1. They seek relief under section 24(1) of the Charter (including damages) and section 52 of the Constitution Act, 1982.

In brief, they have to prove that the by-law contravenes s.7 of the Charter in that it deprives the applicants of life or security; it is overbroad, compared to its purpose, and the law goes further than reasonably necessary to achieve its legislative goals.

With respect to s.15, they have to prove that the law creates a distinction in its impa[107] a listed or analogous group.[107]

There is not a great deal of jurisprudence on s.12 of the *Evidence Act*. The parties agree that the factors to be considered include those set out by D.S. Ferguson J. in *K.N.B. v. Wu*, 2005 CanLII 5874:

a. Whether the opposing party objects to leave being granted;

b. The number of expert subjects in issue;

c. The number of experts each side proposes to have opine on each subject;

d. How many experts are customarily called in cases with similar issues?

e. Will the opposing party be disadvantaged if leave is granted because the applying party will then have more experts than the opposing party?

f. Is it necessary to call more than three experts in order to adduce evidence on the issues in dispute?

g. How much duplication is there in the proposed opinions of different experts?

h. Is the time and cost involved in calling the additional experts disproportionate to the amount at stake in the trial?

The factors are not exhaustive and it is not a question of completing a checklist. I have to look at the case as a whole, as far as I can at this stage, the issues raised by the pleadings and the proposed evidence, and decide whether the proposed evidence is necessary, or whether more than three experts would amount to unnecessary “piling on.”

Leilana Farha is a lawyer with expertise in international human rights law and Canada’s international obligations.

Stephen Gaetz is a professor of education. He conducts research on solutions to homelessness.

Kate Hayman is an emergency physician who has been providing health care to unhoused and precariously housed individuals.

Stephen Hwang is a specialist in general internal medicine with training in public health and epidemiology .

Ameil Joseph is professor of social work.

Aaron Orkin is a physician and epidemiologist.

Kaitlin Schwan is a social scientist.

Andrea Sereda is a physician practicing at London Intercommunity Health Centre in on, Ontario. Her practice focuses on homeless people and others. **108**

108

The table of experts provided by the Applicants in their factum shows that all topics are covered by three of their experts. In the other encampment cases, no more than three experts were called. In those cases the applicants were not successful, but the various reasons for judgment suggest that it was not because the applicants did not have enough experts. The Applicants propose to call one lawyer (Farha), three researchers on homelessness (Gates, Joseph, Orkin), two physicians who treat homeless persons (Hayman, Sereda) and two physicians who are epidemiologists and who conduct research on homelessness (Hwang, Orkin).

There is some duplication in the affidavits, for example, as to the reasons individuals might prefer an encampment to a shelter. For a further example, essentially Dr Hwang says that living without shelter is bad for your health, compared to living in a tent. Dr Hayman and Dr Sereda could easily provide the same evidence and could even refer to Dr Hwang's books in support. So could Dr Orkin. There are more experts than are necessary to advance the Applicants' case.

Based on their own summary and the areas of expertise of each expert, I conclude that the Applicants need four experts to prove their case – one lawyer, one expert who researches homelessness, one medical doctor who treats the homeless and one epidemiologist. If this had been a trial, I would have limited them to that number. On an application, however, I think that the disadvantage caused by the excessive number of experts is outweighed by the interest in letting the parties fashion their own case.

I grant leave to the Applicants to call eight expert witnesses. If the parties cannot agree, the Respondents may move to strike portions of affidavits that are duplicated in other affidavits.

Having heard submissions on costs, I fix the costs of this motion at $5,000 and reserve them to the Application judge.



TAB 8

SUPERIOR COURT OF JUSTICE
HAMILTON, ONTARIO

CIVIL FILE NO: CV-21-77187
(NON-JURY)

ENDORSEMENT

HEEGSMA et al V City of Hamilton
(Plaintiff) (Defendant)

Counsels for the Plaintiffs: CHOUDHRY, Sujit

Counsel for the Defendant: SHORES, Bevin

DATE	
May 29, 2024	**Case management conference.** On consent, the following timetable is ordered: Applicants' evidence filed: June 7 Intervenors motions for leave to intervene filed: July 12 Parties' responding materials to motions for leave to intervene filed: July 19 Respondent's evidence filed: August 1 Applicants' reply evidence filed: August 9 Cross-examinations conducted: August 14 to 30 Applicants' Factum filed: September 20 Intervenors' Facta filed: September 27 Respondent's Factum filed: October 9. Motions for leave to intervene will be filed in writing in the form of a factum not exceeding 15 pages in length. Mr Choudry has kindly agreed to let the Canadian Civil Liberties Association, the British Columbia Civil Liberties Association and LEAF know about the timetable and this direction. Jane Ramsay

_____

Justice J. RAMSAY

TAB 9

SUPERIOR COURT OF JUSTICE
HAMILTON, ONTARIO

CIVIL FILE NO: CV-21-77187
(NON-JURY)

ENDORSEMENT

HEEGSMA et al V City of Hamilton
(Plaintiff) (Defendant)

Counsel for the Plaintiffs: Sharon Crowe

Counsel for the Defendant: Bevin Shores

DATE	October 3, 2024

Conference call

1. Cross-examinations are to be completed by October 15, 2024.
2. The hearing of October 16 is vacated. New hearing date is December 16, 2023 – 3 days set aside.
3. Factums are due on November 22 (Applicant) and December 6 (Respondent).
4. Both parties may file a factum not exceeding 45 pages in length.
5. Parties may arrange a further case conference with the trial coordinator in Hamilton to discuss a preliminary evidentiary question.



Mr Justice J.A. RAMSAY

TAB 10

SUPERIOR COURT OF JUSTICE
HAMILTON, ONTARIO

CIVIL FILE NO: CV-21-77187
(NON-JURY)

ENDORSEMENT

HEEGSMA et al V City of Hamilton
(Plaintiff) (Defendant)

Counsel for the Plaintiffs: Sharon Crowe, Wade Poziomka

wpoziomka@rossmcbride.com

Counsel for the Defendant: Bevin Shores
bevin.shores@gowlingwlg.com

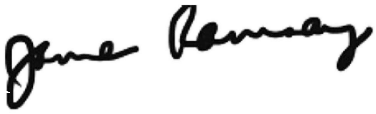
DATE

October 25, 2024

Conference call

If the parties cannot resolve the issue of admissibility of opinion evidence of treating experts, they may file a motion in writing. Moving party's materials, consisting of the affidavits in question plus a factum, by November 4 next, responding party's factum by November 8.

If they cannot resolve the admissibility of two affidavits that were filed after cross-examination, they may file a motion in writing on the same terms with the same timetable.



Mr Justice J.A. RAMSAY

TAB 11

ONTARIO
SUPERIOR COURT OF JUSTICE
HAMILTON

CIVIL FILE NO: CV-21-77187
(NON-JURY)

ENDORSEMENT

HEEGSMA et al. v. City of Hamilton
Applicants Respondents

Counsel for the Plaintiffs: Sharon Crowe, Wade Poziomka

wpoziomka@rossmcbride.com

Counsel for the Defendant: Bevin Shores
bevin.shores@gowlingwlg.com

DATE

November 12, 2024

1. The Applicant moves for leave to file two affidavits containing transcripts of statements of City officials at two meetings of committees of council. The transcriptionists listened to the meetings on YouTube. They are not admissible at this late stage of the proceedings, nor would they be at any stage. First the transcripts purport to record utterances of employees, not debates of council. Debates of council would be of limited use in any event. Second a private transcription is not as reliable as Hansard. Finally, at this stage admission of the transcriptionists' affidavits would require the Respondent to make inquiries about the accuracy of the transcription which might interfere with the scheduled hearing date. Leave to file the affidavits is refused.

2. The Applicant moves to admit four affidavits of treating physicians who are offered as participant experts, and not as expert opinion witnesses, as in *Westerhof v. Gee Estate*, 2015 ONCA 206. In each case the affiant deposes that his or her report is true and attaches the report or reports as exhibits. The Respondent objects to the admissibility of much of the evidence. The Applicant concedes that some of the evidence is inadmissible and has submitted the reports with portions struck through. The parties do not agree with which portions should be struck through. A quick ruling is required, so I shall proceed with my own strikethroughs, in addition to the material struck through by the Applicant, accompanied by brief reasons. I have used a wavy line to strike through to distinguish my redactions from those of the

Applicant, who used a straight line. The reports are contained in the Schedule to this endorsement.

In the case of Dr Lamont, she confirmed in cross-examination that she was not a treating physician in the case of Arnold, Monahan, Ogden and Greaves. She met them once for the purpose of an assessment with a view to providing a report, I infer for the litigation. Her reports on those four persons are not admissible.

In general I have proceeded on the basis that participating doctors can tell us what is in the medical records. They are also entitled to recite the history given by the patient, to the extent that it is relevant to diagnosis and treatment, but its reliability depends on the reliability of the patient. Psychiatrists have a broader use for history than doctors who treat physical ailments. Participant experts are not entitled to give opinions outside the scope of their diagnosis and treatment.

Wiwcharuk reports:

A. Monahan: The first words at the beginning of page 2 quote the patient on a subject not related to medical treatment.
B. Jordan: no additional redaction.
C. Ogden: no additional redaction.
D. Ward: no redaction.
E. Pierre: The last sentence of the second paragraph is opinion that does not relate to the patient's treatment.
F. Muscato: The seventh and eighth sentences of the first paragraph are hearsay that is unrelated to treatment. The second and third sentences of the first full paragraph on page 2 relate effects of brain injury on other people, not the patient. The second full paragraph on page 2, after the word "prosthesis" contains opinion outside the scope of treatment. Likewise the fourth and following sentences of the fourth paragraph of page 2. And the second and following sentences of the last paragraph on page 2. And the first full paragraph of page 3. The second full paragraph consists of utterances of the patient that are not related to treatment.
G. Marshall: no additional redaction.
H. Arnold: no additional redaction.

O'Shea reports:

A. Heegsma: no additional redaction.
B. Lewis: The second and third sentences of the third paragraph of page 1 contain opinion beyond the scope of a treating physician.

Bodkin report:

A. Greaves: no additional redaction.

Lamont reports:

A. Heegsma: no additional redaction.
B. Marchand: no additional redaction.
C. Lewis: no additional redaction.
D. Pierre: no additional redaction.

The Applicant has leave to file affidavits amended as set out in this ruling.

Costs of both motions are reserved.

Mr Justice J.A. RAMSAY

SCHEDULE

Shelter Health Network

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May 31, 2022

Hamilton Community Legal Clinic

100 Main St. E. Suite 203

Hamilton ON L8N 3W4

ATTN: Sharon Crowe and Stephanie Cox

RE: Cory Monahan, dob: April 26, 1976

This is Exhibit "A" referred to in the affidavit of J.U. Wirchanik sworn before me, this 7 day of June 2024

Sharon Crowe
A COMMISSIONER, ETC.

I am a physician with the Shelter Health Network in Hamilton, Ontario. The Shelter Health Network provides healthcare to people who are homeless or precariously housed. Mr Monahan has accessed medical care through the Shelter Health Network since April, 2020. Throughout this time, notes indicate that this gentleman has been homeless and has commonly been sleeping rough (ie: not accessing shelters and instead sleeping outdoors). One note dated March 9, 2022 outlines his distress at sleeping outside in the cold and wishing for help accessing a shelter bed. He had been trying to access a men's shelter bed and had been unable to do so. He notes he "is frustrated he can't get into a shelter" and that he "just wants to feel warm again." At that time, the health care practitioner who saw him advocated for agency staff to use the HIFIS system to check on whether there were service restrictions in place. She was able to help secure a bed for him at Mission Services Men's Centre on that occasion.

~~As is common in the homeless population who often only access healthcare episodically~~, we do not have in depth medical records available for this gentleman. I do know that this gentleman suffers from opioid use disorder, stimulant use disorder and I am convinced that he has undiagnosed mental health issues. He has had near fatal opioid overdoses which required multiple doses of naloxone (opioid antidote) and emergency care. Mr Monahan has mostly made contact with the SHN looking for help with acute skin infections. On July 28, 2020 he saw us with infected bites on his body. Note was made that he was sleeping outside and had no access to a tent. ~~It is likely that if Mr Monahan had had access to a tent, he would have had fewer bug bites resulting in infection.~~

I have spoken to Mr Monahan about his homeless status and he has shared the mental distress this causes him. He has broken down in tears on occasion when he speaks to me about his desperate desire to be housed. I believe that his homeless state causes him deep, ongoing stress that negatively impacts his mental health. This increased state of anxiety is often cited as a reason why people use illicit substances, to cope with stressors that feel insurmountable.

I hope this is helpful. Please let me know how I can be of further assistance.



Dr Jill Wiwcharuk, MD, CCFP (EM)

Shelter Health Network

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L8N 1S2
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Fax: 905-526-7969
Shelterhealthnetwork.ca

This is Exhibit "B" referred to in the affidavit of Jill Winchester sworn before me, this 1 day of June 2022

Sharon Crowe
A COMMISSIONER, ETC.

Hamilton Community Legal Clinic

100 Main St. E. Suite 203

Hamilton ON L8N 3W4

June 1, 2022

ATTN: Sharon Crowe and Stephanie Cox

RE: Cassandra Jordan, dob: April 29, 1983

I am a physician with the Shelter Health Network in Hamilton, Ontario. The Shelter Health Network provides healthcare to people who are homeless or precariously housed. Ms Jordan has accessed medical care sporadically through the Shelter Health Network since October, 2020.

~~As is common in the homeless population who often only access healthcare episodically~~, We do not have in depth medical records available for this woman. I do know that she suffers from opioid use disorder, stimulant use disorder, chronic pain and a recent acetabular fracture and hip dislocation requiring surgery. I am also certain she has significant undiagnosed mental health issues.

On November 24, 2021, I provided medical care to Ms Jordan in her tent at JC Beemer Park. She had sustained a significant burn to the back of her leg two days prior. This was a partial thickness burn that encompassed ¼ of her back upper thigh and was causing her significant pain. If she had presented to hospital, she would likely have been admitted to a specialized burn unit.

While I was assessing her and providing care, there was a large police presence who were engaged in clearing this encampment. Ms Jordan was very distressed in that she had no appropriate options available to her with regards to where she could go. She had a large tent

with significant possessions and was totally overwhelmed as to how to keep her possessions safe.

Follow-up for high quality wound care was paramount to treating this burn. I tried my best to organize follow up for her but it was essentially impossible because she had no idea where she was going to be the following day. She did end up accessing the Barrett Centre (a crisis shelter that is only for short stays up to 5 days usually) and was seen the following day by a nurse practitioner from the SHN. Unfortunately, she left the Barrett Centre after a few days and did not receive any other care for her burn that I am aware of. I saw her two months later in January and her burn had healed by that time.

Given the severity of her injury, if Ms Jordan had not been evicted from her encampment, I would have made it a priority to see her daily for wound care. As it played out, being evicted from the encampment while in the midst of a significant medical issue like that made it impossible for me to follow up with her on an ongoing basis. Her priorities in this case were far more focused on keeping her tent and her possessions and finding a new place to stay than on her medical care. ~~This is a common hierarchy of priorities among people who are homeless.~~

More recently, I saw Ms Jordan during her stay at the Hamilton General Hospital after she sustained an acetabular fracture and hip dislocation secondary to an altercation with police on May 6, 2022. She required surgery at that time. I was involved in providing addiction related care for her during her inpatient stay. She had significant pain from this injury and is likely to develop chronic pain in this hip in the future.

I hope this is helpful. Please be in touch if I can be of further assistance.



Dr Jill Wiwcharuk, MD, CCFP (EM)

Shelter Health Network

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This is Exhibit "C" referred to in the affidavit of Jill Winschanik *sworn before me, this* 7 *day of* June *20*22

Sharon Crowe
COMMISSIONER, ETC.

June 2, 2022

ATTN: Sharon Crowe and Stephanie Cox

RE: Sherri Ogden, dob: July 31, 1993

I am a physician with the Shelter Health Network in Hamilton, Ontario. The Shelter Health Network provides healthcare to people who are homeless or precariously housed. Ms Ogden has accessed medical care through the Shelter Health Network since 2010 when she was 17 years old. Initially she was seen infrequently but she has been seen regularly since September 2020. I am certain she has been homeless since 2020 ~~and I suspect she has been in and out of homelessness her entire adult life.~~

Ms Ogden has a family physician outside of SHN whom she sees sporadically. She has only ever seen SHN practitioners for issues related to contraception, poor sleep or aches/pains and various rashes. I am certain that she has very significant undiagnosed mental health illness. ~~Many people who are homeless are unable to access specialized medical care as they have so many competing priorities in their lives. Medical records do not always capture all the conditions that a homeless individual struggles with because they access care so sporadically and often do not have the time or inclination to address some of the underlying issues.~~

For the majority of the last two years, Ms Ogden has been sleeping rough. At one point she was sleeping in a tent in her mother's back yard. Other times she sleeps outside of the Wesley Day Centre. On November 11, 2021 she came to see me and stated that she wanted to get inside from the cold and asked for help getting into a shelter. I asked Wesley staff to help her with this process. To my knowledge she did not end up securing a shelter bed at that time.

Ms Ogden would often see me with complaints of poor sleep and being tired. Although she would sometimes have a tent, many other times she was sleeping entirely unsheltered. This can result in a lot of anxiety and stress and a feeling of constantly having to be on the look-out. Women in particular

~~describe feeling unsafe sleeping unsheltered outside.~~) I would often see her sleeping in the Wesley Day Centre during the day, simply exhausted from having slept so poorly outside the night before.

Hospital records indicate that Ms Ogden has accessed the emergency department on 10 occasions since the fall of 2020. I notice that all of these visits were for functional pain. Functional pain diagnoses are things like headaches and abdominal pain that can often be related to stress and anxiety but have no underlying pathology and is not associated with any abnormal labwork or imaging. This would be in keeping with the extraordinarily stressful situation that Ms Ogden has been in as she continues to remain homeless, often unsheltered and at times unable to access a shelter bed when she feels she needs one.

I hope this is helpful. Please let me know if I can be of further assistance.

Dr Jill Wiwcharuk, MD, CCFP (EM)

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This is Exhibit "D" referred to in the affidavit of Patrick Ward *sworn before me, this* 7 *day of* June *20*24

Sharon Crowe
COMMISSIONER, ETC.

June 3, 2022

ATTN: Sharon Crowe and Stephanie Cox

RE: Patrick Ward, dob: Dec 17, 1963

I am a physician with the Shelter Health Network in Hamilton, Ontario. The Shelter Health Network provides healthcare to people who are homeless or precariously housed. Mr Ward has accessed medical care sporadically through the Shelter Health Network since February, 2014. I have provided care for him quite regularly since late 2014.

Mr Ward has a past medical history that includes alcohol use disorder, stimulant use disorder, peptic ulcer disease, pancreatitis, hepatitis C, major depressive disorder, osteoarthritis causing chronic pain, previous fractures in spine, pelvis, wrist causing chronic pain and substance-induced psychosis.

According to my notes, Mr Ward has been homeless continually since 2019. Earlier on in this stretch of homelessness, he was couch surfing but for at least the past two years Mr Ward has been sleeping rough.

I have spoken to Mr Ward on numerous occasions about his lack of housing. He was unable to tolerate the close quarters of homeless shelters and all of the stress that these can incur on individuals. He found all the mental health acuity very distressing.

He has done much better from a personal mental health perspective when he was sleeping outside. He has had elaborate set-ups with a tent and a camp which he took great pride in. Even during the coldest winter months, I would see him dressed in layers at a drop-in centre and he would assure me that he had a heating system that was keeping him warm. He would also spend most of the day inside at the drop-in to stay warm during the daytime hours.

I asked where his tent was and he would tell me how he had chosen a location that was deep in the woods on the escarpment or by the railway where people couldn't find him. He was trying hard to avoid detection so that he wouldn't be told he had to pack up his camp and leave. Eventually he would be found and would have to move his tent. Sometimes he would just be moving it a couple hundred meters away. When he had his full camp set-up, he would be able to tell me in detail all the ways he had to stay warm, that he was safe even in the bitter cold and that I should not worry. When he was having to set everything back up in a new location, he would inevitably lose some of the safeguards he had in place to stay warm and he would be extremely cold at night. This constant fear of being detected and having to move his tent was very distressing to Mr Ward and caused him a significant amount of stress.

I hope this is helpful. Please be in touch if I can be of further assistance.

Sincerely,



Dr Jill Wiwcharuk, MD, CCFP (EM)

Shelter Health Network

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L8N 1S2
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Fax: 905-526-7969
Shelterhealthnetwork.ca

This is Exhibit "F" referred to in the affidavit of Jill Wiwcharuk
sworn before me, this 7
day of June 20 24
Sharon Crowe
A COMMISSIONER, ETC.

June 8, 2022

ATTN: Sharon Crowe and Stephanie Cox

RE: Jahmal (Jammy) Pierre, dob: Dec 20, 1989

I am a physician with the Shelter Health Network in Hamilton, Ontario. The Shelter Health Network provides healthcare to people who are homeless or precariously housed.

Ms Pierre is a trans woman who suffers from stimulant use disorder and opiate use disorder. She has rarely sought help through the Shelter Health Network so the medical history I can provide is very limited. She has only been seen on three occasions and these were all related to opiate overdoses in 2020. On one occasion in August she had an unintentional opiate overdose and was hospitalized in the Intensive Care Unit for a period of time. She was encouraged to follow up with doctors at the YWCA after that incident and that is when she saw my SHN colleagues. Ms Pierre described this overdose as entirely unintentional. She had used a contaminated supply of methamphetamine and did not know that there was street fentanyl in the supply that she had received. Ms Pierre was lucky to have survived as I have had had many opiate-naive patients in the exact same situation who have died in this scenario.

In November of 2020, I was doing outreach work and saw Ms Pierre slumped over on the sidewalk. I approached her and quickly recognized that she had suffered an opiate overdose. It required many doses of the opiate anecdote naloxone to get her to start breathing spontaneously on her own. Once again, she was very lucky to survive. I saw her later that day in the emergency department where she had been brought by EMS. Unfortunately, she was not at a point where she was ready to engage with treatment for her substance use disorders. Given this, she continues to be at an extremely high risk of overdose in the future.

I hope this is helpful. If there is any way I can be of further assistance, please let me know.

Sincerely,

Dr Jill Wiwcharuk, MD, CCFP (EM)

Shelter Health Network

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This is Exhibit "F" referred to in the affidavit of Jill Winchuk sworn before me, this 1 day of June 20 24

Sharon Crowe
A COMMISSIONER, ETC.

Hamilton Community Legal Clinic

100 Main St. E. Suite 203

Hamilton ON L8N 3W4

June 9, 2022

ATTN: Sharon Crowe and Stephanie Cox

RE: Mario Muscato, dob: Oct 31,1973

I am a physician with the Shelter Health Network in Hamilton, Ontario. I also practice addiction medicine at The Hamilton Clinic. I regularly provide healthcare to people who are homeless or precariously housed. Mr Muscato has been a patient of mine since early 2019 and I see him both at SHN clinics and at The Hamilton Clinic. I often see him several times a week for medical care. Mr Muscato has been homeless the entire time I have cared for him. He is often unable to access shelter beds due to service restrictions and shelters being at capacity. For this reason, he often ends up sleeping rough. Despite Mr Muscato's very significant disabilities, he has never been prioritized for housing in an effective way.

Mr Muscato has very significant disabilities. He suffers from opioid use disorder, stimulant use disorder, HIV, post-traumatic stress disorder, major depressive disorder, acquired brain injury, left partial forearm amputation, extensive burn injuries to neck and face resulting in chronic pain, severe neuropathy to both upper extremities, right forearm amputation, tendon and nerve grafts to left forearm resulting in severely compromised use of this arm.

Mr Muscato suffered a near fatal electrocution in 2018 which resulted in the partial amputation of his left forearm. He also had severe burn injuries to his right forearm and there was extensive grafting that needed to be done to try to salvage any use of this hand/arm. Unfortunately, the grafting was only partially successful. So Mr Muscato now has extremely limited use of his right forearm. He is unable to fully extend the arm, and his fingers are

permanently fixed in a claw-like grip. He has no sensation to any of these fingers which puts him at a constant risk of further injury. For example, he has seen me for burns to these fingers from the top of an electic stove that he was cleaning and he didn't even know that the stove was hot. In the winter, he has suffered frostbite injuries to this hand due to an inability to feel the cold.

When he suffered this near fatal electrocution, he also ended up with a bleed in his brain. This eventually improved with time, but I believe he has been left with a significant acquired brain injury. People with acquired brain injuries struggle with things like memory, mood lability (ie: are often quick to anger and have difficulties with their emotions), chronic headaches, etc. They will have a harder time managing psychiatric diagnoses such as anxiety and depression and have a high propensity for addictions.

Mr Muscato would be eligible for a right arm prosthesis but the process to obtain one requires multiple appointments and fittings. His precarious housing situation, rarely having reliable access to a phone, his acquired brain injury and the chaotic lifestyle that ensues due to his unstable addictions have made it impossible for him to follow up as is necessary to obtain a prosthesis.

Mr Muscato's mental health has suffered. As I mentioned, he has posttraumatic stress disorder both from adverse events in childhood (physical and sexual abuse) as well as from the electrocution injury in 2018. In order to use drugs intravenously, he relies on other people to inject him due to his disability. He has spoken to me on numerous occasions of feeling so depressed that he would like to die by overdose and to do that he feels he would need to trick someone into injecting too much fentanyl.

Another significant health issue of Mr Muscato's is that he has untreated HIV. In order to benefit from medications for HIV, an individual has to be able to take medications consistently. If this is not possible, it is highly likely that the virus will become treatment-resistant and therefore harder to treat. Because Mr Muscato's lifestyle is so chaotic, He has never been able to access medications consistently. He is a target on the street due to his disability and often has his belongings stolen. So When he does have medications on him, more often than not, they are lost or stolen within a few days. From a practical standpoint, it would be near impossible for him to even open a standard pharmacy bottle of pills on his own. Given his untreated HIV, he is at risk of developing AIDS down the road if he does not find enough stability to start accessing medications regularly.

Mr Muscato sees me regularly in most part for addictions related care. He wants to access opioid replacement therapy and stop using street drugs. To get to a therapeutic dose of opioid replacement therapy (ie: methadone), he needs to access a pharmacy every day to receive his dose. This consistency has been his biggest struggle. His housing instability is the main factor behind this inability to access a pharmacy daily. Because he bounces between shelters, encampments and couch surfing, he can rarely count on being able to access medications from

one geographic location every day. For example, someone that is housed knows that they will wake up in the same place every day and can simply build a routine of waking up and walking to a nearby pharmacy for their daily dose of medication. Mr Muscato does not have this luxury.

On April 11, 2019, note is made in Mr Muscato's chart that "this patient needs housing above all else" and this is reiterated in his medical chart over the subsequent years. This is specifically because his most critical medical issues are simply not being effectively treated while housing is so unstable. There were times when he would receive two weeks of opioid agonist therapy consistently but then he would be service restricted from a shelter or moved from an encampment and he would lose that stability and have to restart again down the road.

Mr Muscato has spoken to me on numerous occasions about difficulties that he encounters in the shelter system. He has cited racism as one of the issues that he faces. He feels that he is commonly discriminated against due to his Indigenous status. He also has difficulty in congregate settings because his physical needs are so different than others'. For example, he needs much more time to eat a meal due to his compromised ability to manipulate utensils. He also often needs much longer in bathrooms or other hygiene facilities due to his disability. He has people getting angry at him when he cannot complete tasks in the same time that it takes an able-bodied individual to do so.

I hope this has been helpful. Please be in touch if there is any further way I can be of assistance.

Sincerely,

Dr Jill Wiwcharuk, MD, CCFP (EM)

Shelter Health Network

82 Stinson St
Hamilton, Ontario
L8N 1S2
Phone: 905-526-7137
Fax: 905-526-7969
Shelterhealthnetwork.ca

This is Exhibit "G" referred to in the affidavit of J.M. Winchank sworn before me, this 7 day of June 20 24

Sharon Crowe
A COMMISSIONER, ETC.

Hamilton Community Legal Clinic

100 Main St. E. Suite 203

Hamilton ON L8N 3W4

June 9, 2022

ATTN: Sharon Crowe and Stephanie Cox

RE: Mysty Marshall, dob: Dec 18, 1991

I am a physician with the Shelter Health Network in Hamilton, Ontario. The Shelter Health Network provides healthcare to people who are homeless or precariously housed. I first met Ms Marshall when she was living in a tent on Ferguson Avenue in the summer of 2020. Since that time she has remained homeless. Prior to that, she was couch surfing or staying in budget motels (which is also a form of homelessness). I am unsure how long she was in that position.

To my knowledge, Ms Marshall has a past medical history of opiate use disorder, stimulant use disorder, major depressive disorder with suicidal ideation and asthma. She has a history of abuse in childhood and has been in abusive relationships throughout her adult years.

I saw Ms Marshall initially for asthma exacerbations when she was homeless and living in a tent on Ferguson Avenue. The heat and humidity were very oppressive and this often exacerbates asthma in people who are unable to access cooler indoor air. I saw her on October 1st and was able to reassess her the following week. I noted that her asthma had worsened and she needed some emergency treatment at that time. I was glad that she was in the same area because knowing that she was at risk of deteriorating medically, I was able to reassess her and provide the emergency treatment when it was needed.

In September, 2021, I again saw Ms Marshall at a drop-in centre for individuals experiencing homelessness. She was extremely disheveled, had dirty clothes and extensive matting of her

hair with a severe case of head lice that was causing underlying cellulitis (skin infection) to her scalp and ears. She also had an extensive body rash that was likely caused by scabies. ~~It was clear she had had no access to shower or laundry facilities for a long period of time~~. I suspected that she was profoundly depressed as well.

Despite having an addiction to opioids, she has not been ready to engage with treatment. Nor does she readily engage with anyone regarding her mental health. It is noted that she does not accept help from people readily. ~~This is not at all uncommon in the Indigenous population who face systemic racism in many colonial institutions,~~ often preferring to avoid ~~these institutions altogether.~~

~~In instances like this, what is needed above all else is regular contact with someone to slowly build trust over time~~. Once Ms Marshall was evicted from the encampment on Ferguson Avenue, I did not see her for a year and when I did finally see her again, she had drastically decompensated physically and mentally. When I knew where she was living, I was able to follow up with her from a medical perspective and treat the issues that were surfacing. ~~It is my opinion that if she had remained in one place, she would not have decompensated to the extent that she did. I would also have had a chance to build more of a relationship with her and help build the trust that many people require to start engaging in addictions and mental health treatment.~~

I hope this is helpful. Please be in touch if I can be of further assistance.

Sincerely,



Dr Jill Wiwcharuk, MD, CCFP (EM)

Shelter Health Network

82 Stinson St
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Phone: 905-526-7137
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This is Exhibit ....H..... *referred to in the affidavit of* ....SM Wowchanik..... *sworn before me, this* .....7..... *day of* ..... June ..... 20 22.....
.....
Sharon Crowe ...COMMISSIONER, ETC.

Hamilton Community Legal Clinic

100 Main St. E. Suite 203

Hamilton ON L8N 3W4

June 10, 2022

ATTN: Sharon Crowe and Stephanie Cox

RE: Shawn Arnold, dob: July 23, 1969

I am a physician with the Shelter Health Network in Hamilton, Ontario. The Shelter Health Network provides healthcare to people who are homeless or precariously housed. I am also a physician with The Hamilton Clinic which is an addiction medicine clinic. Mr Arnold has been a regular patient of mine both through the SHN and The Hamilton Clinic since 2020 although I sporadically provided care to him since 2018.. His past medical history is significant for opiate use disorder, stimulant use disorder, attention deficit hyperactive disorder, hepatitis C (recently treated) and chronic left shoulder pain.

I saw Mr Arnold regularly during 2021. He was living in a tent at JC Beemer Park in the winter of 2020/21. Prior to that time, he only came to see me sporadically but would always talk about his desire to treat his opioid use disorder and get on opioid agonist therapy (ie: methadone). However, he was unable to follow up regularly enough to do so. Getting to a therapeutic dose of methadone requires attending a pharmacy daily for doses and not missing appointments. From at least the summer of 2020 (and possibly earlier), Mr Arnold was homeless and regularly sleeping outside. He found the crowded conditions in shelters too hard to manage and he would end up sleeping outside or couch surf somewhere.

Once he was settled at JC Beemer Park, Mr Arnold was able to see me regularly and attend a pharmacy daily. He was able to stay on a methadone maintenance program for well over a year and used much less illicit street drugs than he had ever used previously. Because of his

consistency, I was also able to treat his hepatitis C. He followed through on the entire two month program of anti-virals and is now cured from hepatitis C. This is something that can only be achieved when people are able to take their medications daily. Otherwise, treatment resistant strains of hepatitis can develop.

~~If Mr Arnold had been forced to move from place to place the entire winter, it is clear to me that he would not have reached the level of stability he did with regards to treatment of his addiction and his hepatitis C. He was able to engage with housing workers who ultimately knew where to find him and were able to follow up with him because he was in one place. This led to him becoming housed later in 2021.~~

I hope this is helpful. Please let me know if I can be of further assistance.

Sincerely,

Dr Jill Wiwcharuk, MD, CCFP (EM)

McMaster University

TIMOTHY O'SHEA, BSc, MD, MPH, FRCPC
Internal Medicine, Infectious Diseases, Medical Microbiology
Associate Professor, Department of Medicine
Faculty of Health Sciences
McMaster University

Hamilton Health Sciences

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June 13, 2022

To Whom It May Concern:

Hamilton Community Legal Clinic
100 Main St. E. Suite 203
Hamilton ON L8N 3W4

Attention: Sharon Crowe and Stephanie Cox

Re: (Kristen Heegsma, DOB 1990/10/20)

I am a physician with the Shelter Health Network (SHN) and the Hamilton Social Medicine Response Team (HAMSMaRT), two organizations that provide medical care to individuals affected by homelessness or housing precarity. I have worked with the SHN since its inception in 2007, and similarly joined HAMSMaRT at its formation in 2016. I first met Ms. Heegsma in July of 2021 and have been seeing her on average once every two weeks since then. To the best of my knowledge, Kristen has been homeless for at least the past 4 years.

Kristen has the following medical conditions:

1) Crohn's disease
2) Opioid Use Disorder
3) Stimulant Use Disorder
4) Attention Deficit Hyperactivity Disorder
5) Post-traumatic stress disorder

~~It is my opinion that each of Ms. Heegsma's medical conditions have been negatively impacted by her lack of access to stable housing.~~ ~~Due to her lack of housing~~ Kristen has enormous barriers to accessing consistent medical care, leading to a pattern of starting and stopping treatments which has been in some cases counterproductive to her goal of improving her overall wellbeing. ~~Furthermore the trauma that she has experienced (outlined below) as a direct result of her lack of housing has further exacerbated her underlying mental health conditions to a severe extent.~~ Despite her being able to see me on a fairly regular basis over the past six months Kristen's overall condition continues to fluctuate, ~~and our progress has been far below what I would expect if she were stably housed.~~

It is important to note that Ms. Heegsma's health status has fluctuated in concert with the degree to which her shelter status has been stabilized or destabilized. There have, for example, been short periods of time when Ms. Heegsma has been able to access shelter within the city's hotel shelter program, and briefly through a transitional housing program run by the YWCA. ~~Although in no ways ideal,~~ These brief sojourns allowed Kristen some space to focus more on her health needs, and allowed,

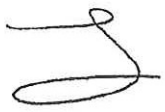
for instance, time to more effectively titrate medications for the treatment of opioid use disorder and for some of her mental health concerns. However, for the majority of the last year Kristen has lived outside. She has stayed both within small formal encampments and when forced to has sought shelter elsewhere, including sleeping in stairwells and seeking shelter ~~in situations which put her physical safety in jeopardy~~. ~~Again, although it is clear that sleeping in a tent in a park is not a desired outcome, Kristen's health was dramatically better in this situation then when she was in less safe, less stable, settings.~~ Kristen described feeling safe in the most recent park where she sought shelter due to the presence of others that looked out for her, and as well secondary to the fact that those involved in caring for her, including my clinic, knew where to find her if we needed to. Shortly after this small encampment was cleared Kristen began alternating her time sleeping outside on park benches, stairwells and abandoned buildings with staying inside with a male acquaintance who assaulted her multiple times physically and emotionally. As a result her mental health has significantly deteriorated, and her stability with respect to her opioid use disorder has dramatically worsened.

~~Due to the profound impact of Kristen's housing status on her physical and mental health~~ much of our appointments end up focusing on securing a more stable housing arrangement. Kristen is often reluctant to access shelter beds, with the primary reason being that she is fearful of her physical safety in a congregate shelter setting, after suffering physical assaults within shelter previously. Kristen has also previously been restricted from accessing shelter space due to behaviours related to her underlying mental health and substance use disorders, leading to a lack of trust with the shelter system. Nevertheless we have attempted on multiple occasions to secure shelter space for Kristen particularly through the cold winter months between December 2021 and March 2022. On at least three occasions we called multiple shelters for women from my clinic office and on each occasion were told that there was no shelter space available for Kristen; on each occasion we were asked to check back the following day.

Kristen's health has clearly suffered to a significant extent due to her homelessness and housing precarity. She has several medical conditions which in ideal circumstances could be managed effectively, however given her circumstances we have struggled to make consistent progress in terms of improving her health. ~~Furthermore her health status has been negatively impacted by policies which have led to her displacement from settings in which she has managed to achieve some degree of stability~~.

I would be happy to answer further questions as required.

Sincerely



Timothy O'Shea, BSc, MD, MPH, FRCPC
Internal Medicine, Infectious Diseases, Medical Microbiology
Associate Professor, Department of Medicine
Consultant Physician – Inpatient Addiction Service
Faculty of Health Sciences
McMaster University

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Hamilton Community Legal Clinic
100 Main St. E. Suite 203
Hamilton ON L8N 3W4

Attention: Sharon Crowe and Stephanie Cox

Re: (Ammy Lewis, DOB 1978/07/04)

I am a physician with the Shelter Health Network (SHN) and the Hamilton Social Medicine Response Team (HAMSMaRT), two organizations that provide medical care to individuals affected by homelessness or housing precarity. I have worked with the SHN since its inception in 2007, and similarly joined HAMSMaRT at its formation in 2016. I first met Ms. Lewis in March of 2021 and have been seeing her on average once every two weeks since then. To the best of my knowledge, Kristen has been homeless for at least the past 3 years.

Kristen has the following medical conditions:

- HIV infection
- Opioid Use Disorder
- Stimulant Use Disorder
- Post-traumatic stress disorder

~~It is my opinion that each of Ms Lewis' medical conditions have been negatively impacted by her lack of access to stable housing.~~ Due to her lack of housing Ammy has faced enormous barriers to accessing consistent medical care. As well Ammy's search for housing has been all consuming for her, making it very difficult to act upon recommendaitons from her healht care team with respect to her chronic medical conditions. ~~Furthermore the trauma that she has experienced (outlined below) as a direct result of her lack of housing has further exacerbated her underlying mental health conditions to a severe extent~~. Despite her being able to see me on a fairly regular basis over the past six months Ammy's overall condition has overall deteriorated, and our progress has been far below what I would expect ~~if she were stably housed~~.

I first met Ammy when she was briefly housed in a rooming house in Hamilton. Ammy had been released from detention centre and was initially homeless, seeking shelter in a local park with her dog in the spring of 2020. She was able to access housing from this location, however she was unfortunately assaulted by the landlord at that location and evicted shorlty thereafter. Since that time Ammy has been homeless and sleeping rough. Ammy was able to find some relateive stability while staying at a park which she choose due to its proximity to her pharmacy. Overall she stayed in this location for about two months, during which time she was able to get her medications daily and attend clinic visits with me. Furthermore she was able to engage with city housing workers during this time, in large part thanks to her being in a reliable place where she could be tracked down. Ammy was evicted from this park in late summer of 2021, and has been moving from place to place since. This most recent period of Ammy's life has been characterized by extreme instability. She has lost all of her belongings on multiple occasions, been subjected to verbal harrassment and has on at least two occasions been physically assaulted at her camping site. Ammy has become increasingly desperate to find shelter due to the trauma that she is suffering on a day to day basis. Unfortunately, despite engagement with my clinic and city housing workers, suitable inside accomodation has not been found. Barriers to this include shelters being full when we have attempted to call, and Ammy's devotion to her dog, who she does not want to leave despite the fact that shelters have refused to admit her with her dog. ~~With all of the above contributing, Ammy's mental and physical health have suffered severely.~~

~~Ammy's health has clearly suffered to a significant extent due to her homelessness and housing precarity.~~ She has several medical conditions which in ideal circumstances could be managed effectively, however given her circumstances we have struggled to ~~make consistent progress~~ in terms of improving her health. ~~Furthermore her health status has been negatively impacted by policies which have led to her displacement from settings in which she has managed to achieve some degree of stability.~~

I would be happy to answer further questions as required.

Sincerely,

Timothy O'Shea, BSc, MD, MPH, FRCPC
Internal Medicine, Infectious Diseases, Medical Microbiology
Associate Professor, Department of Medicine
Faculty of Health Sciences
McMaster University

TO/lb

To Whom It May Concern

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I assessed Linsley Greaves on December 15 2022 in my outpatient clinic. He was brought in my paramedics, and presented with 2 weeks of worsening left foot infection and worsening right soft tissue injury. He had been repeatedly evicted from his encampment locations by the City of Hamilton in the few weeks prior, and his belongings kept getting wet, while the weather was fluctuating above and below freezing. This had led to tissue injury and infection of both feet.

On examination of the left foot, there was extensive skin sloughing/desquamation of ankle and hindfoot on dorsal side with capillary bleeding across ulcerated area; skin more intact midfoot then more sloughing forefoot. The first toe was autoamputated, with ulceration in this area, then other toes insensate and gangrenous without signs of circulation. There was an intensely foul odour.

On examination of the right foot, there was edema and erythema over midfoot and forefoot, and gangrenous blackened toes with loss of sensation and no evidence of circulation.

I was concerned for osteomyelitis (bone infection), dry gangrene (dead or necrotic tissue), wet gangrene (dead or necrotic tissue with superimposed bacterial infection of the dead tissue), and cellulitis (skin infection). I sent him immediately to the emergency department, where he was admitted, and ultimately underwent amputation of his left leg below the knee.

~~It is my medical opinion that the repeated eviction of Mr. Greaves from his encampment during wet weather with temperatures around 0 degrees celsius resulted in repeated freezing and thawing of tissue, and this directly caused frostbite and subsequent wet gangrene requiring amputation of his left leg below the knee, leaving him permanently disabled.~~

Claire Bodkin MD CCFP

McMaster University
DEPARTMENT OF PSYCHIATRY AND BEHAVIOURAL NEUROSCIENCES

June 20, 2023

ATTN: Sharon Crowe

RE: Heegsma, Kristen DOB: 1990-10-20

I am a psychiatrist with both the Hamilton Social Medicine Response Team and the Shelter Health Network in Hamilton, Ontario. Both services provide health care to people who are unhoused or precariously housed.

I have been Ms. Heegsma's treating psychiatrist since November 2021 and can confirm that she has diagnoses of Post-Traumatic Stress Disorder (PTSD), Borderline Personality Disorder, Generalized Anxiety Disorder, Depression, and Opioid and Stimulant use disorders (severe).

When I first met with Ms. Heegsma, another physician providing care to her had expressed significant concern for mental health and referred her to me. Ms. Heegsma had just been evicted from a tent in Corktown neighbourhood by the City of Hamilton. She had been repeatedly evicted from encampments previously. Following this particular eviction, she experienced an exacerbation of PTSD symptoms as well as severe suicidal ideation and described feeling the most desperate she had in her entire life. Additionally, because her tent had been destroyed, she was sleeping on a park bench in the days following the encampment eviction. Despite daily attempts to get into shelter, there were no spaces available. A few days after the eviction from her tent in Corktown neighbourhood and while she was sleeping on the park bench, she was the victim of a violent sexual assault. This caused additional severe worsening of her mental health conditions and substance use. She also had her belongings stolen repeatedly.

Ms. Heegsma has since spent brief amounts of time in shelter and in YWCA transitional housing, though has also been asked to leave those spaces due to her complex health needs and those services being unable to offer the required level of support. She has thus continued to spend most of her time living outside. When she is living in a tent and surrounded by community, there is notable improvement in her sense of personal safety, and we are able to initiate treatment for her conditions, and members of our team are able to reliably locate Ms. Heegsma for follow-up. Unfortunately, she is unable to remain in one place for very long due to ongoing pressure from By-Law officers and Police to move repeatedly. While Ms. Heegsma has identified goals of working toward stabilization of her mental health and substance use, her ongoing experiences of being unhoused and focus on day-to-day survival have made it very difficult for the focus of any appointments to move beyond trying to help her find ways to have her most basic survival needs met. As a result, her mental health conditions and substance use disorders have remained under-treated and continue to cause her immense suffering.

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It is my opinion that repeated encampment evictions, and in particular the encampment eviction in November 2021 and subsequent sexual assault, have been a major contributor to the ongoing instability in Ms. Heegmsa's mental health and worsening of her substance use disorders over the past three years. This has been exacerbated by the ongoing lack of available, suitable shelter spaces or permanent housing options.

Please feel free to contact me should any further information be required.

Sincerely,

R. Lst

Dr. Rachel Lamont, MD, FRCPC
Psychiatrist, Hamilton Social Medicine Response Team and Shelter Health Network
Assistant Professor
Department of Psychiatry and Behavioural Neurosciences
McMaster University
Email: lamonr@mcmaster.ca
Phone: 1-833-426-7678
Fax: 1-833-563-2210

McMaster University
DEPARTMENT OF PSYCHIATRY AND BEHAVIOURAL NEUROSCIENCES

Dec 14, 2023

ATTN: Sharon Crowe

RE: Darrin Marchand (DOB Oct 15 1966)

I am a psychiatrist with both the Hamilton Social Medicine Response Team and the Shelter Health Network in Hamilton, Ontario. Both services provide health care to people who are unhoused or precariously housed.

I have known Mr. Marchand since May 2023 and can confirm that he has diagnoses of Psychosis (substance-induced vs. schizophrenia), and opioid and stimulant use disorders (severe).

Mr. Marchand has shared his story with me, dating back prior to my involvement with him. He has endured numerous traumas in his life which impact the way he views himself, regulates his emotions, and relates to other people. In the summer of 2021, he was evicted from an encampment along Strachan St in Hamilton and again from an encampment on Rebecca St during that summer. Following this, he gave up on trying to stay in a tent and slept outside in the open. He describes feeling a sense of hopelessness and despair following these encampment evictions, and that his substance use escalated. For Mr. Marchand, there is a direct link between his substance use (particularly that of stimulants) and symptoms of psychosis. As his substance use escalated and mental health declined further, he continued on a downward trajectory in terms of his wellbeing. Additionally, while sleeping out in the open in Dec 2021, he was shot by a gun in the shoulder, which has contributed to additional ongoing trauma symptoms. Mr. Marchand said that he felt much more secure in a tent with community who looked out for each other, something that is not possible when sleeping alone outside, as he had resorted to doing because of repeated evictions.

RE: Darrin Marchand (DOB Oct 15 1966)

Mr. Marchand shared that he has avoided living in encampment because of the toll eviction has taken on his well being. He said he feels like he is losing his mind because he cannot function living outside; he has been repeatedly kicked out of and service-restricted from shelters in the city. At present, he contemplates suicide regularly because he cannot stay in shelter, he cannot stay in a tent, and staying outside is becoming unbearable. He cannot sleep for long for fear of being assaulted or having his possessions stolen, leading to profound sleep deprivation. This sleep deprivation has further destabilized his mental health condition as well as contributed to escalation in substance use. The last time Mr. Marchand was housed was in 2017.

~~It is my opinion that repeated encampment evictions have been a major contributor to the deterioration in Mr. Marchand's mental health and worsening of his substance use disorders over the past 3 years~~.

Please feel free to contact me should any further information be required.

Sincerely,

R. Lst

Dr. Rachel Lamont, MD, FRCPC
Psychiatrist, Hamilton Social Medicine Response Team and Shelter Health Network
Assistant Professor
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McMaster University
DEPARTMENT OF PSYCHIATRY AND BEHAVIOURAL NEUROSCIENCES

May 11, 2023

ATTN: Sharon Crowe

RE: Jahmal (Jammy) Pierre, DOB Dec 20, 1989

I am a psychiatrist with both the Hamilton Social Medicine Response Team and the Shelter Health Network in Hamilton, Ontario. Both services provide health care to people who are unhoused or precariously housed.

I have known Ms. Pierre since fall 2021 and can confirm that she has diagnoses of PostTraumatic Stress Disorder (PTSD), generalized anxiety disorder, depression, and opioid and stimulant use disorders (severe).

Ms. Pierre has shared her story with me, prior to my involvement with her. In March 2019, she was evicted from her apartment at 881 King St and had nowhere to go, as she had a dog, and shelters do not accept pets. Her income is through OW and thus did not have enough to cover rent for a new apartment. Thus, she went and bought a tent for herself and her dog. Due to repeated evictions from the city over the course of several months in 2019, she had to move her tent once every few days. At one point, several months into living outside, her tent was taken down and thrown out as part of a city-led encampment eviction, while she was away at a store. She had left her dog in the tent and her dog was gone when she returned.

~~Individuals suffering from complex mental health conditions and substance use disorders, in particular individuals who have suffered repeated traumatic events, commonly experience a marked decline in their mental health and substance use following repeated traumatic events.~~ Ms. Pierre describes the repeated forced movement of her belongings and particularly the loss of her dog as highly traumatic. Following this, she suffered worsening PTSD symptoms, depressive symptoms, and anxiety disorder symptoms. As is common with individuals who have comorbid substance use disorders, the worsening of her mental health conditions drove increased substance use. She has subsequently suffered multiple overdoses from the toxic street drug supply, which include an ICU admission in August 2020 as well as ER visit in November 2020.

Given ongoing severe mental health symptoms, high levels of substance use, and lack of appropriate housing options for Ms. Pierre, ~~as well as the constant threat of being forced to move,~~ she continues to spend most of her time living outside, and has largely given up on trying to set up a tent because of the trauma that repeated evictions cause. She is thus living rough, and ~~forced to~~ stay awake for prolonged periods to protect her personal safety. This has led to

profound sleep deprivation, which further exacerbates her underlying mental health conditions and substance use. She has had brief times in shelter and in the YWCA but has also been asked to leave those spaces due to her complex health needs and those services being unable to offer the required level of support.

It is my opinion that repeated encampment evictions have been a major contributor to the profound deterioration in Ms. Pierre's mental health and worsening of her substance use disorders over the past four years. This is due to the profound stress caused by the constant threat of encampment eviction, the impact of eviction itself, encampment eviction causing the loss of a beloved pet, and the resultant need to live outside without the protection a tent can afford, causing extreme sleep deprivation, which further exacerbates symptoms of her mental health conditions.

Please feel free to contact me should any further information be required.

Sincerely,

R. Lamont

Dr. Rachel Lamont, MD, FRCPC
Psychiatrist, Hamilton Social Medicine Response Team and Shelter Health Network
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McMaster University
DEPARTMENT OF PSYCHIATRY AND BEHAVIOURAL NEUROSCIENCES

October 5, 2023

ATTN: Sharon Crowe

RE: Lewis, Ammy (1978-07-04)

I am a psychiatrist with both the Hamilton Social Medicine Response Team and the Shelter Health Network in Hamilton, Ontario. Both services provide health care to people who are unhoused or precariously housed.

I have been Ms. Lewis' treating psychiatrist since October 2021 and can confirm that she has diagnoses of Post-Traumatic Stress Disorder (PTSD), Borderline Personality Disorder, Generalized Anxiety Disorder, Depression, and Opioid and Stimulant use disorders (severe).

Ms. Lewis was referred to me in October 2021 by another physician providing care to her, who noted significant concern for her mental health. Ms. Lewis had recently been released from a federal penitentiary and had returned to Hamilton in late 2020. She was briefly housed after her release, though reports having suffered sexual assault from her landlord and she left that residence. Ms. Lewis lived outside for the latter part of 2021 and most of 2022 in a tent with her dog. She was evicted by the city from a tent in November 2021 which led her to have to return to an abusive living situation, causing considerable decline in her mental health. She then returned to living outside because of the harm of that situation. Ms. Lewis suffered chronic severe suicidal ideation, an exacerbation of symptoms of Post-Traumatic Stress Disorder and Depression, and worsening of her substance use disorders while living outside. She would regularly report to me her intense fear of having her tent taken down and belongings stolen. She was unable to go to shelter because of her dog, as her dog was her main source of support and companionship.

~~It is my opinion that encampment evictions and the threat thereof repeated threat have been major contributors to the ongoing instability in Ms. Lewis' mental health and worsening of her substance use disorders from 2021-2022.~~ Due to considerable support from our team and outside agencies, Ms. Lewis was able to secure housing in 2023.

McMaster University | DEPARTMENT OF PSYCHIATRY AND BEHAVIOURAL NEUROSCIENCES

HAM SMaRT

Please feel free to contact me should any further information be required.

Sincerely,

R. Lamont

Dr. Rachel Lamont, MD, FRCPC
Psychiatrist, Hamilton Social Medicine Response Team and Shelter Health Network
Assistant Professor
Department of Psychiatry and Behavioural Neurosciences
McMaster University
Email: lamonr@mcmaster.ca
Phone: 1-833-426-7678
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TAB 12

ENDORSEMENT SHEET FOR CIVIL MOTION/APPLICATION

ACTION COMMENCED AT: Hamilton Superior Court of Justice

SHORT TITLE OF PROCEEDINGS: Heegsma et al v. City of Hamilton

COURT FILE NO.: CV-21-00077187-0000

BEFORE: Justice Ramsay

HEARD ON: November 19, 2024

COUNSEL:

Sharon Crowe, Sujit Choudhry, Wade Poziomka, Curtis Sell and Michelle Sutherland for the plaintiff
Bevin Shores and Jordan Diacur – Gowlings LLP for defendant

MOVING PARTY ☒ Plaintiff ☐ Defendant ☐ Other

RELIEF REQUESTED: Further Amendments to the Fresh as Amended Notice of Application

☐ **ORDER SIGNED** ☒ **ON CONSENT**

☐ **UNOPPOSED** ☐ **NO ONE APPEARED**

☐ **ADJOURNED TO** Click here to enter a date.

ENDORSEMENT:

Order to go in terms of draft on consent.

Date: November 19, 2024

Mr Justice J.A. Ramsay

TAB 12A

ONTARIO
SUPERIOR COURT OF JUSTICE
HAMILTON

CIVIL FILE NO: CV-21-77187
(NON-JURY)

ENDORSEMENT

HEEGSMA et al. v. City of Hamilton
Applicants Respondents

Counsel for the Plaintiffs: Sharon Crowe, Wade Poziomka

wpoziomka@rossmcbride.com

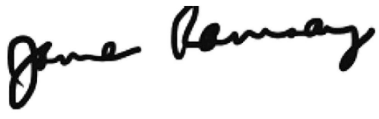
Counsel for the Defendant: Jordan Diacur
Jordan.diacur@gowlingwlg.com

Dec. 4, 2024

Case conference

It is the eve of the hearing. I cannot very well let the parties exchange materials on this simple motion about whether three volume of City documents of various sorts should be admitted into evidence. They are not necessary to understand the issues. The motion was heard at the case conference. The parties knew ahead of time that they had 10 minutes for oral argument on this simple discrete point. Leave is given the respondents to bring the motion without further formality. It is allowed for these reasons.

Volumes XVIII, XIX and XX of the application record might have been admissible if they had been introduced before cross-examinations but admitting them now would be prejudicial to the respondents. The expert witnesses could have relied on the documents in their affidavits or in cross-examination. The requests to admit authenticity do not constitute notice that the documents would be admitted into evidence. These three volumes of the application record are struck.



TAB 13

Court File No. CV-21-00077817-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

The Honourable Justice J.A. Ramsay	))	Wednesday, the 4th day of December, 2024

B E T W E E N

KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO, SHAWN ARNOLD, ~~BRADLEY CALDWELL, CHRISTINE DELOREY, GLEN GNATUK, TAYLOR GOGO-HORNER~~, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS, ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL PIERRE, and LINSLEY GREAVES

Applicants

and

CITY OF HAMILTON

Respondent

ORDER

THIS MOTION, made by the Respondent, to strike Volumes 18 (as amended), 19, and 20 of the Application Record, was heard December 4, 2024 by teleconference at the court house, 45 Main Street E., Hamilton, Ontario, L8N 2B7.

ON HEARING the oral submissions of the lawyers for the parties:

1. **THIS COURT ORDERS** that the Respondents shall be and are hereby granted leave to bring this motion at the December 4, 2024 teleconference without further formality.

2. **THIS COURT ORDERS** that Volumes 18 (as amended), 19, and 20 of the Application Record shall be and are hereby struck.

Issued and entered electronically by

Alexandre Boulianne Digitally signed by Alexandre Boulianne
Date: 2025.03.14 14:16:53 -04'00'

Local Registrar
45 Main St East
Hamilton, ON
L8N 2B7

HEEGSMA et al.	**and**	**CITY OF HAMILTON**	Court File No: CV-21-00077817-0000
Applicants		**Respondent**	

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Hamilton

ORDER

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Lawyers for the Applicants

TAB 14

ONTARIO
SUPERIOR COURT OF JUSTICE

Electronically issued
Délivré par voie électronique : 04-Oct-2021
Hamilton

RRIN MARCHAND, GORD SMYTH, MARIO MUSCATO & SHAWN ARNOLD

Applicants

- and –

CITY OF HAMILTON

Respondent

APPLICATION UNDER RULE 14.05 OF THE *RULES OF CIVIL PROCEDURE*

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on date to be determined by the parties and the Court, at the court house, 45 Main Street East, Hamilton, Ontario, L8N 2B7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS

YOU BY CONTACTING A LOCAL LEGAL AID OFFICE. **161**

Date October 4, 2021 Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
45 Main Street East
Hamilton ON
L8N 2B7

TO: **CITY OF HAMILTON**
Ron Sabo
Stephen Spracklin
City of Hamilton Legal Division
Tel: (905) 546-2424 ext. 3143
Fax: (905) 546-4370
Email: Ron.Sabo@hamilton.ca
Stephen.Spracklin@hamilton.ca

AND TO: The Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th floor
Toronto, Ontario M5G 2K1
Fax: (416) 326-4015

AND TO: The Attorney General of Canada
120 Adelaide Street West, Suite 400
Toronto, Ontario M5H 1T1
Fax: (416) 952-0298

1. The Applicants make application for:

(a) An Order declaring that, particularly in the context of the novel COVID-19, and intersected with Hamilton's homelessness and housing crisis, sections 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of By-Law No. 01-129 (the "Parks By-Law"), and section 16(12) (miscellaneous prohibitions) of By-Law No. 86-077 as amended by By-Law No. 97-162 (the "Streets By-Law), by-laws enacted by the City of Hamilton (the "City" or the "Respondent"), violates the rights of the Applicants and other homeless individuals under ss. 7 and/or 12 and/or 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and that such violation cannot be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*;

(b) An Order declaring that sections 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of the Parks By-Law and section 16(12) of the Streets By-Law are of no force or effect to the extent that they unjustifiably violate the Applicants' rights to due process, unreasonable seizure, security of person, cruel and unusual treatment, and equality under the law, under the *Charter* and should be read down;

(c) A Declaration that the City's action or proposed action to involuntarily evict or remove the Applicants and other homeless individuals from the encampment and/or dismantle the encampments, whether by reliance on the Parks By-Law, the Streets By-Law or otherwise, without having suitable alternative accommodations for these individuals violates the rights of the Applicants and other individuals under ss. 1, 2, 11, and/or 47(2) of the Ontario *Human Rights Code*, R.S.O 1990 c. H.9 (the "*Code*");

(d) A Declaration that the verbal notices to dismantle homeless encampments in Hamilton, and any other such notice or government action or proposed action which would have the effect of removing tents, shelters and/or the personal belongings of the Applicants and other

violates the rights of the Applicants and other homeless individuals under ss. 7 and/or 12 and/or 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and that such violation cannot be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*;

(e) A Declaration that the verbal notice to dismantle two homeless encampments in Hamilton, and any other such notice or government action or proposed action which would have the effect of removing tents, shelters and/or the personal belongings of the Applicants and other homeless individuals, is unlawful, void, and of no force or effect;

(f) An injunction prohibiting the Respondent from taking further steps to evict or remove the Applicants and other homeless individuals from encampments in parks and/or other public spaces considered parks within the City of Hamilton as set out below in paragraph (g), including but not limited to issuing or enforcing orders for eviction and removal made under the Parks By-Law, Streets By-Law and/or any other City By-Law, the *Trespass to Property Act* RSO 1990, c T.21, the *Provincial Offences Act*, R.S.O. 1990, c. P.33, c C-46 or the City of Hamilton By-laws;

(g) An Order that the Applicants and homeless individuals be permitted to remain in parks and/or other public spaces considered parks in the City of Hamilton, and to maintain their encampments, including overnight, where such encampments are located:

(i) in an area considered to be a "park" within the meaning of By-law No. 01-219 ("Parks by-law");

(ii) 50 meters away from a playground, school or childcare centre; and

(iii) in groupings of a maximum of six tents. Additional groupings of six tents must be at least 200 meters away from all other groupings.

(h) An Order that there be no costs in this proceeding;

may deem just; and

(j) Such further and other relief as to this Honourable Court may deem just.

2. The grounds for the application are:

(a) On March 17, 2020, the Province of Ontario issued a Declaration of Emergency under the *Emergency Management and Civil Protection Act*, RSO 1990, c. E.9 (the "*EMCPA*") due to the outbreak of the coronavirus disease 2019 (COVID-19). COVID-19 is a novel coronavirus that was declared a pandemic by the World Health Organization on March 11, 2020. A "pandemic" is declared when a new disease for which people do not have immunity spreads globally beyond expectations. By virtue of the provincial order, City of Hamilton Mayor Fred Eisenberger also declared a state of emergency.

(b) Physical distancing is known to be the central health strategy for managing the health impact of COVID-19, at both population and individual levels. Public health guidance for all Hamiltonians and all Ontarians consistently emphasizes the critical importance of adequate physical distancing, including maintaining a distance of at least two metres from people outside of one's household, and "sheltering in place." Individuals experiencing homelessness are unable to comply with physical distancing directives. Reliance on shelters that are funded by the City, many of which are congregate living settings, bring many people into close contact with one another, sharing the air and touching surfaces, increasing the risk of COVID-19 transmission.

(c) Prior to the COVID-19 outbreak, individuals experiencing homelessness routinely reported being unable to access city shelter beds due many barriers, including shelters being over capacity and individuals facing shelter restrictions (or "bans"). Despite City efforts, this has continued to be the case throughout the COVID-19 pandemic, in particular for women and couples. Individuals who want to obtain a shelter bed are frequently unable to do so.

shelters, sometimes due to outbreaks of COVID-19, and other times it is simply a question of capacity.

(d) Since the beginning of the COVID-19 pandemic, there has been a significant increase in the number of people sleeping in homeless encampments. Many individuals are choosing or are forced to sleep in encampments for a variety of reasons, including difficulties they have experienced within the shelter system, mental health issues and drug use, and shelters that do not permit animals or allow couples to stay together. Since the COVID-19 pandemic was declared, many people have chosen to sleep in encampments at least in part due to their desire to avoid contracting COVID-19 in a high-risk congregate living setting of a homeless shelter.

(e) The growth in numbers and the visibility of homeless encampments must also be considered in the context of an ongoing affordable housing crisis – federally, provincially and in Hamilton itself. Individuals who are in receipt of social assistance or are low income have extremely limited housing options. Displaced encampment residents are therefore placed in an impossible and dire situation of being unable to remain encamped, being unable to access shelter space, and unable to afford housing costs.

(f) Homeless encampments have arisen in places where there are services in place nearby, such as hygiene facilities, safe consumption sites, meal programs and access to water. This is critical because COVID-19 led to the closure of many fast food restaurants and public restrooms where individuals who are homeless would otherwise be able to clean themselves and, critically in the context of the pandemic, wash their hands.

(g) Individuals in those encampments have indeed been accessing support provided through those encampments, including but not limited to regular access to food, clothing, healthcare and supervised substance use; assistance with tasks such as obtaining an OHIP card and

bringing meals, blankets, bedding, hygiene products, and medial supports such as insulin injections.

(h) On August 9, 2021, the Respondent repealed an Encampment Protocol that had been reached as part of a settlement of Court File No. CV-20-73435 in the fall of 2020. The Encampment Protocol had created a person-centred approach, which required, *inter alia*, the City to assess and accommodate individual needs before requiring the person to leave their encampment. In some instances, individuals assessed to be higher acuity were permitted to remain encamped indefinitely. The Respondent voted to return to "pre-pandemic enforcement" of By-laws which prohibits camping in parks.

(i) The Respondent delayed By-law enforcement until August 30, 3021. Following the revocation of the Encampment Protocol, many community advocates for the homeless population decried the decision and urged the Respondent to reconsider. Rallies were held and community stakeholders delegated to the Emergency and Community Services Committee.

(j) On September 9, 2021, the City released an "Information Report", which provided a six step process for responding to and enforcing By-law infractions concerning encampments.

(k) Despite the public outcry, on September 17, 2021, the Respondent began removing people from encampments. Known locations of encampment dismantlement included Durand and Wellington Park. A further dismantlement took place on September 20, 2021 at JC Beamer Park. At each instance, residents were given two hours' notice to vacate. Individuals never received actual written notice of a By-law infraction, nor were they offered appropriate indoor shelter options prior to the dismantlement. Since then, By-law officers and Hamilton Police Services have regularly attended various encampments and given verbal

enforcement of encampment removals.

(l) If the Applicants and other homeless individuals in the encampment are further summarily removed and their encampment dismantled, they face a risk of substantial harm in the form of destabilization; psychological trauma; exacerbated mental stress and addiction relapse; loss of worldly possessions; difficulty obtaining necessaries of life (e.g., food, water, shelter, healthcare); exposure to extreme weather; and a severing from service providers. Some individuals will have no choice but to resort to individually sleeping rough and/or in the open, which places them at an increased risk of being physically assaulted and of suffering adverse mental and physical health effects of poor sleep routine and exposure to the elements. They will be forced into an uncertain situation of re-locating, which is in some cases inhibited by mobility impairments and mental and cognitive impairments.

(m) Dismantling encampments and removing their residents puts individuals who are the most predisposed to experiencing the most severe symptomology and worst health outcomes of COVID-19 at a higher and unnecessary risk of contracting COVID-19 if they are moved into congregate living facilities such as homeless shelters. This is a per se health risk and also heightens the risk of negative mental health impacts due to increased fear and/or anxiety of contracting COVID-19.

I. Parties

(n) The Applicants are homeless individuals who have been encamped in various public parks and/or other public spaces considered parks throughout the City of Hamilton. These parks and/or other public spaces include JC Beemer Park, the greenspace at Strachan and James Streets, and Central Park (the 'encampments'). Some of the Applicants have erected tents or other shelters in these parks and/or other public spaces to protect themselves from the elements, to give them privacy, and to store and protect their essential belongings like food,

and medical supplies. After being repeatedly told to vacate, other Applicants simply "sleep rough" in various public parks and/or other public spaces in an effort to avoid being further targeted for removal. The Applicants view their ability to erect a tent or shelter within their community, and to store their essential belongings, as integral to their ability to safely shelter in place in the midst of a global pandemic so long as they are homeless.

(o) The Applicants Darrin Marchand ("Darren"), Ashley Poff ("Ashley"), and Mario Muscato ("Mario") are currently residing at various City Parks after being removed from encampments. The Applicant Shawn Arnold ("Shawn") is currently residing at various City Parks after leaving JC Beemer Park on or about August 30, fearing that the Respondent would soon attend to dismantle the encampment. The Applicant Gord Smyth ("Gord") is currently residing at Central Park.

(p) While City staff have, in some cases, made offers of indoor shelter to some residents of the encampments, the Applicants, justifiably, do not feel that these shelter spaces meet their needs.

(q) While some of the residents of the encampments have been offered spaces in hotels or buildings temporarily converted into shelter space, for a variety of reasons these offers have not adequately met the needs of the Applicants and other encampment residents. Many of them have spent time in shelters or hotels and have either been evicted or left of their own accord because of safety concerns. The strict rules in place in such settings are often excessively paternalistic and people who use drugs are routinely discriminated against in the shelter system.

(r) Each of the Applicants has their own further distinct and personal reasons for having been or remaining encamped in their respective locations.

shelters, including witnessing a fellow resident being attacked with a machete by another resident in December 2020. Darrin has also been service-restricted, or banned, from various shelters at different times. Darrin receives medical care and food support in the encampments. Darrin would suffer adverse emotional and physical impacts such as significant levels of stress if he were to be displaced from his encampment.

(t) Ashley chose to live in an encampment for several reasons, including the ongoing shortage of shelter bed for women in the City, being repeatedly service restricted, or banned, from shelters. Ashley has a substance use disorder and other mental health issues, and has faced discrimination in the shelter system. Being able to remain in one location would allow Ashely the stability she needs to pursue treatment for her mental health and substance use.

(u) Shawn chose in live in an encampment because he feels unable to access shelter spaces because he is recovering from past substance use, and reasonably fears that the rampant substance use in shelters is a threat to his sobriety. Shawn was also assessed under the previous Encampment Protocol as being high acuity, and as such was permitted to remain at JC Beemer Park. Shawn was able to benefit from a nearby methadone treatment program, receive meal support and connect with other social supports.

(v) After living independently for 30 years and facing eviction, Gord chose to live in an encampment because there is a shortage of affordable housing in the City that has been exacerbated by the COVID-19 pandemic. Gord has mental health disabilities including a personality disorder, which make it difficult for him to be around groups of people for sustained periods. Gord also has a dog who would not be allowed in shelters, and separating from his pet would have a significant impact on his mental health. Gord has had regular access to community agencies and volunteers who deliver meals, hygiene products, and medical supports. Gord would suffer severe upset if he were to be evicted

Gord also has mobility difficulties that would make relocating even more onerous.

(w) After being evicted due to an administrative error with Ontario Works, Mario chose to live in an encampment after being repeatedly service restricted – or banned – from shelters, and experiencing the rampant theft that is synonymous with shelter life. Although Mario strives to stay connected with medical and housing supports, his constant transiency makes it exceedingly difficult.

(x) The Applicants are members of historically marginalized groups, including people with disabilities, Indigenous people, people in receipt of social assistance, and people with substance use disorders. These marginalized groups are disproportionately overrepresented among Hamilton's homeless population.

(y) The Applicants and other homeless individuals do not have access to accommodations that permit them to comply with "stay at home" or physical distancing measures.

(z) The Respondent, The City of Hamilton ("Hamilton") is a municipality in the Province of Ontario, and is constituted as a body corporate pursuant to s 2 (1) of the *City of Hamilton Act*, 1999, SO 1999, c 14, Sch C (the "*City of Hamilton Act*" or the "*Act*"). Hamilton is governed by a City Council. The City deals with local issues including public transit, parks and public spaces, streets and sidewalks, community safety, police relations, affordable housing, and homelessness. The verbal notice to dismantle encampments was issued by the Respondent's Director of Housing Services (the "Director").

(aa) The encampments on City-owned and operated parks and/or public spaces are public parks and/or spaces under the care, control and responsibility of the Respondent and the Respondent's Director of Housing Services.

Charter applies to the City's by-laws, including the Parks By-Law and/or Streets By-Law, and the City's action in enforcing its by-laws.

II. The Parks By-Law

(cc) The relevant sections of the Parks By-Law read as follows:

§1(r). Definitions

"park" means any land, and land covered by water and all portions thereof owned by or made available by lease, agreement, or otherwise to the City, that is or hereafter may be established, dedicated, set apart or made available for use as a public open space or golf course, and that has been or hereafter may be placed under the jurisdiction of the Director including any and all buildings, structures, facilities, erections, and improvements located in or on such land, save and except where such land is governed by other by-laws of the City.

§ 12. Encroachment.

Unless authorized by the Director or by permit, no person shall encroach upon or take possession of any park, by any means whatsoever, including the construction, installation or maintenance of any fence or structure, the dumping or storage of any materials, or planting, cultivating, grooming or landscaping, thereon.

...

§ 3. Hours of Entrance.

3. No person shall enter into, or be in any park between the hours of eleven in the afternoon (11:00 p.m.) and six o'clock in the forenoon (6:00 a.m.), except where after hours use of a park has been approved by the City.

...

§ 17. Camping and Lodging.

Unless authorized by permit, no person shall dwell, camp or lodge in any park.

...

§ 18. Tents and structures.

Unless authorized by permit, no person shall place, install or erect any temporary or permanent tent or structure in any park.

to enforce the prohibitions set out under the Parks By-Law. These include informal enforcement measures such as informing a person of the provisions of the Parks By-Law, ordering a person to stop the contravening activity, ordering them to remove their property, or ordering them to leave the park.

III. The Streets By-Law

(ee) The relevant sections of the Streets By-Law read as follows:

§ 16. Miscellaneous Prohibitions

[…]

(12) 12.1 For the purposes of this subsection:

(a) "*cease*" means to stop or bring to an end.

(b) "*congregate*" means to gather into a group of more than one person.

(c) "*obstruct*" means to interfere with or make difficult of passage.

(d) "*oficer*" [sic] means a sworn member of the Hamilton-Wentworth Regional Police Service or a municipal by-law enforcement officer appointed by the City of Hamilton.

General:

12.2 No person shall congregate and sit or stand so as to obstruct the free passage of either pedestrian or vehicular traffic on any streets or sidewalks regulated by this By-law.

12.3 Any person who obstructs pedestrian or vehicular traffic on a sidewalk or street shall, when directed to do so by an officer, cease such obstruction.

[…]

Enforcement:

12.5 Sworn members of the Hamilton-Wentworth Regional Police Service and municipal by-law enforcement officers of the City of Hamilton are authorized to enforce the provisions of this by-law

(a) As previously stated, on September 17, 2021, Municipal Law Enforcement and members of the Hamilton Police Services began dismantling encampments at Durand Park and Wellington Park. A further dismantlement took place on September 20, 2021, at JC Beemer Park. The majority of the residents were disbursed into other green space with no alternative shelter.

(b) To date, the Applicants have not received formal notice of dismantlement under the Parks By-Law, the Streets By-Law, or any other City By-Law. However, the City has demonstrated a clear intention to continue with the dismantlement of encampments, with a motion before City Council this week to expedite enforcement of same.

V. Enforcement of the Parks By-Law and/or Streets By-Law against Homeless Individuals Sheltering-in-Place is Unconstitutional

a. Infringement of section 7

(c) The Parks By-Law and/or the Streets By-Law infringes the Applicants' and other homeless individuals' rights to life, liberty and security of the person by preventing them from engaging in essential life sustaining activities in public space and from creating shelter for themselves, when they have no other viable alternative.

(d) The Parks By-Law and/or the Streets By-Law further infringes the Applicants' and other homeless individuals' rights under s. 7 by preventing them from meeting essential needs, such as providing themselves with shelter which would allow them to stay safe and dry and protected from the elements, to safely store necessities-of-life such as food, water, clothing, bedding, sentimental belongings, personal hygiene supplies, medication and medical supplies, and to sleep and rest.

(e) In the context of the COVID-19 pandemic and affordable housing crisis, the Parks By-Law and/or the Streets By-Law and the proposed action of the Respondent further infringes the

of adequate housing with necessary supports and no alternative but to move into either unsafe congregate living situations or other places (like hotels) where they stand little chance of success. It further deprives the Applicants and other homeless individuals of the liberty to make their own decisions about matters fundamentally impacting their lives, such as where and how to safely shelter in place. One of the hotels that people may be forced to go to is inappropriate for their circumstances. They require lengthy transit trips to return to the supports they depend upon, including supervised injection sites and medical facilities, social workers, mental health services, etc. Individuals experiencing homelessness are not provided funds for public transit. Some of these facilities also have curfews and other onerous rules that numerous individuals experiencing homelessness have been unable to follow which has led to their removal from these facilities.

(f) Depriving individuals experiencing homelessness of the ability to provide themselves with safe, warm, dry shelter in public spaces in Hamilton exposes the Applicants and other homeless individuals to additional health and safety risks. It also causes serious, state-imposed stress and interferes with their ability to make this basic and fundamental decision to take practical steps to protect themselves from the elements.

(g) The Parks By-Law and/or the Streets By-Law prevents the Applicants and other homeless individuals from living together in a manner which allows them to provide each other safety and security. This constitutes a deprivation of their liberty and security of the person.

(h) These deprivations are not in accordance with the principles of fundamental justice because they are contrary to the principle that no one should be subject to sanction for engaging in activities when there is no realistic opportunity to avoid those activities, or for engaging in those activities which are necessary to sustain an individual's safety and well-being. These deprivations are also contrary to the principle of fundamental justice that laws must not be

Charter.

(i) These s. 7 violations are not justifiable under s. 1 of the *Charter*.

b. Infringement of section 12

(j) The Parks By-Law and/or the Streets By-Law also constitutes an interference with the rights of the Applicants and other homeless individuals' right under s. 12 of the *Charter* to be free of cruel and unusual punishment.

(k) As a result of the Parks By-Law and/or the Streets By-Law, individuals experiencing homelessness are deprived of sleep and the ability to provide themselves shelter, and are subject to being moved along, having their belongings seized, destroyed and/or disposed of, and being forced to pay for the cost of the disposal of their belongings, simply for engaging in activities when there is no realistic opportunity to avoid those activities, or for engaging in those activities which are necessary to sustain their safety and well-being.

(l) These s. 12 violations are not justifiable under s. 1 of the *Charter*.

c. Infringement of section 15

(a) The Parks By-Law and/or the Streets By-Law also discriminates against the Applicants and other homeless individuals in violation of s. 15 of the *Charter*. The Applicants are all members of groups protected by s. 15, and in some cases they are members of multiple protected groups. These groups include Indigenous people, and people with mental and physical disabilities (including but not limited to mobility impairments and substance use disorders). The homeless population more generally also consists disproportionately of people who are members of groups protected by s. 15. For the Applicants, their status as a person experiencing homelessness is immutable and undeniably connected to their status as a member of these historically disadvantaged groups.

and other homeless individuals by making it impossible for them to perform essential life-sustaining activities, and provide each other with support and protection, without sanction. The Parks By-Laws and/or the Streets By-Law, in their application to the Applicants and other homeless individuals, are based on the premise that the needs of the homeless, including their need to sleep, rest, be peaceful, protect their belongings, and remain warm and dry, are not worthy of respect, concern and consideration. The Parks By-Law and/or the Streets By-Law has the effect of perpetuating or promoting the view that the homeless are less worthy of recognition or value as a human being or a member of Canadian society.

(c) These s. 15 violations are not justifiable under s. 1 of the *Charter*.

VI. Enforcement of the Parks By-Law and/or the Streets By-Law against Homeless Individuals Sheltering-in-Place violates the Ontario *Human Rights Code*

(d) The Applicants and other individuals experiencing homelessness have a right under the *Code* to be free from discrimination with respect to services and accommodation, and to be accommodated to the point of undue hardship in the provision or receipt of same;

(e) The Applicants and other individuals experiencing homelessness include people with disabilities (including but not limited to mobility impairments and substance use disorders, i.e. addictions), people in receipt of social assistance, and Indigenous people. These are protected characteristics under the *Code*. Individuals with the aforesaid protected characteristics are overrepresented within the sheltered and unsheltered homeless population.

(f) The Applicants and other individuals experiencing homelessness have experienced both direct discrimination within the shelter system and its temporary expansion into hotels, as well as adverse-effects discrimination due to the City's failure to accommodate their needs arising from *Code*-protected characteristics. The failure in the duty to accommodate is based, in particular, on the geographical location of hotel rooms and shelters as well as the

nightly bedtime check-ins, which the Applicants in some cases cannot follow.

(g) Additionally, those Applicants and other individuals who use drugs may be less likely to be accepted into a hotel solely due to their drug use, which constitutes further direct discrimination against these individuals.

(h) Many shelters also have rules in place that prohibit couples from accessing the same shelter together, which engages the *Code*-protected grounds of family status and marital status.

(i) While the Respondent threatens to dismantle encampments and remove the Applicants from their respective city parks and/or other public spaces, they have failed to provide the Applicants with appropriate, adequate and acceptable alternate housing in a manner consistent with their obligations under the *Code*.

(j) The application and/or enforcement of the Parks By-Law and/or the Streets By-Law has a disproportionate adverse effect on the Applicants and other individuals experiencing homelessness with the aforesaid *Code*-protected characteristics, and thereby constitutes constructive discrimination;

(k) By actively and/or constructively discriminating against, and/or failing to accommodate the *Code*-protected characteristics of the Applicants, the Respondent has infringed the rights of the Applicants and other homeless individuals with respect to services (s. 1) and accommodation (s. 2) under the *Code*.

Other Grounds

(a) The *Canadian Charter of Rights and Freedoms*, ss. 1, 7,12, 15, and 24;

(b) The *Constitution Act, 1982,* s. 52;

(c) The Ontario *Human Rights Code*, R.S.O. 1990 c. H.9, ss. 1, 2, 11 and 47(2);

(e) The *Trespass to Property Act* RSO 1990, c T.21;

(f) The *Provincial Offences Act*, R.S.O. 1990, c. P.33, c C-46;

(g) The *Rules of Civil Procedure*, RRO 1990, Reg 194, rr. 14.05, 38, 39; and

(h) Such further and other grounds as counsel may advise and this Honourable Court may permit.

2. The following documentary evidence will be used at the hearing of the application:

(a) Affidavit of Darren Marchand, sworn on September 29, 2021;

(b) Affidavit of Ashley Poff, sworn on September 28, 2021;

(c) Affidavit of Mario Muscato, sworn on September 28, 2021;

(d) Affidavit of Gord Smyth, sworn on September 29, 2021;

(e) Affidavit of Shawn Arnold, sworn on September 29, 2021;

(f) Affidavit of Gillian (Jill) Wiwcharuk, sworn on October 3, 2021;

(g) Affidavit of Tim O'Shea, sworn October 4, 2021;

(h) Affidavit of Marcie McIlveen, sworn October 4, 2021;

(i) Affidavit of Olivia Mancini, sworn October 4, 2021;

(j) City of Hamilton By-law No. 01-219

(k) Encampment Protocol 2020

(l) Information Report, Encampment Response Update, September 9, 2021

permit.

October 4, 2021

HAMILTON COMMUNITY LEGAL SERVICES
100 Main Street E., Ste. 203
Hamilton, ON L8N 3W4

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Lawyers for the Applicants

ASHLEY POFF *et al*
Applicants

-and-

CITY of HAMILTON
Respondents

Court File No.

Ontario
Superior Court of Justice

PROCEEDING COMMENCED AT HAMILTON

NOTICE OF APPLICATION

HAMILTON COMMUNITY LEGAL CLINIC
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Electronically issued / Délivré par voie électronique : 04-Oct-2021
Court File No./N° du dossier du greffe: CV-21-00077187-0000

TAB 15

Court File No. CV-21-00077187-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR.	)	MONDAY, THE 9TH
	)	
JUSTICE .J. GOODMAN	)	DAY OF SEPTEMBER, 2024

B E T W E E N:

KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO, SHAWN ARNOLD, BRADLEY CALDWELL, CHRISTINE DELOREY, GLEN GNATUK, TAYLOR GOGO-HORNER, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS, ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL PIERRE, LINSLEY GREAVES and PATRICK WARD

Applicants

and

CITY OF HAMILTON

Respondent

APPLICATION UNDER 14.05 OF THE *RULES OF CIVIL PROCEDURE*

ORDER

THIS MOTION, brought by the Applicants to amend the Notice of Application was read this day, at 45 Main Street E., Hamilton ON L8N 2B7.

ON READING the Consent of the Parties, filed.

1. **THIS COURT ORDERS** that leave is granted pursuant to Rule 26.02 (b) and 26.03(2) of the *Rules of Civil Procedure* to file an Amended Fresh as Amended Notice of Application in the form attached hereto as Schedule "A".

Justice

Issued and entered electronically by

Alexandre Boulianne

Digitally signed by Alexandre Boulianne
Date: 2024.09.12 16:14:20 -04'00'

Local Registrar
45 Main St East
Hamilton, ON
L8N 2B7

Schedule A

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO, SHAWN ARNOLD, BRADLEY CALDWELL, CHRISTINE DELOREY, GLENN GNATUK , TAYLOR GOGO-HORNER, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS, ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL PIERRE, LINSLEY GREAVES and PATRICK WARD

Applicants

– and –

CITY OF HAMILTON

Respondent

APPLICATION UNDER RULE 14.05 OF THE *RULES OF CIVIL PROCEDURE*

AMENDED FRESH AS AMENDED NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on date to be determined by the parties and the Court, at the courthouse, 45 Main Street East, Hamilton, Ontario, L8N 2B7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date June 15, 2022 Issued by _____

Local Registrar

Address of court office: Superior Court of Justice
45 Main Street East
Hamilton ON
L8N 2B7

TO: **CITY OF HAMILTON**

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Fax: (416) 326-4015

AND TO: **The Attorney General of Canada**

120 Adelaide Street West, Suite 400

Toronto, Ontario M5H 1T1

Fax: (416) 952-0298

APPLICATION

1. The Applicants make application for:

(a) An order pursuant to pursuant to section 52(1) of the *Constitution Act, 1982,* declaring sections 3 (hours of entrance), 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of City of Hamilton *By-Law No.* ~~*01-129*~~ ***01-219*** (the "*Parks By-Law*"), and section 16(12) (miscellaneous prohibitions) of City of Hamilton *By-Law No. 86-077* as amended by *By-Law No. 97-162* (the "*Streets By-Law*"), are *either* of no force or effect *or* inapplicable to the Applicants and other homeless individuals who erect tents as a temporary form of shelter, pursuant to section 52(1) of the *Constitution Act, 1982*.

(b) In the event that this Honourable Court suspends any declaration of invalidity issued in relation to the *Parks By-Law* and/or *Streets By-Law*, that any such suspension be for no longer than six months from the date of this Honourable Court's decision.

(c) In the event that this Honourable Court suspends any declaration of invalidity issued in relation to the *Parks By-Law* and/or *Streets By-Law*, an order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") during the period of the suspension, in the form of an interlocutory injunction, that prohibits the City of Hamilton from preventing the erection of tents as a temporary form of shelter by homeless individuals (including the Applicants), and/or giving notice to homeless individuals (including the Applicants) to dismantle and/or move such tents, and/or evicting or removing homeless individuals (including the Applicants) from such tents and/or dismantling such tents, if those tents comply with the following conditions, which are based on the following parameters:

(i) The tent is in an area considered to be a "park" within the meaning of the *Parks By-Law*;

(ii) The tent is at least 50 meters away from a playground, school or childcare centre;

(iii) The tent consists of a grouping of a no more than of six tents; *and*

(iv) The tent be at least 200 meters away from any other grouping of a no more than of six tents.

(d) In the event that this Honourable Court does not suspend any declaration of invalidity issued in relation to the *Parks By-Law* and/or *Streets By-Law*, or the suspension expires without the adoption of measures to replace the provisions declared invalid by this Honourable Court, an order granting a permanent injunction with terms identical to order (c) above.

(e) An order pursuant to section 24(1) of the *Charter* declaring that the City of Hamilton, and/or its agents, pursuant to any purported legal authority, including but not limited to the *Parks By-Law*, the *Streets By-Law*, *Noise Control By-Law No. 11-285* ("*Noise Control By-Law*") and/or the *Public Nuisance By-Law No. 20-077* ("*Public Nuisance By-Law*") violated the *Charter* rights of the Applicants, including section 7 and/or section 15, by preventing them from erecting tents as a temporary form of shelter, and/or giving notice to homeless individuals (including the Applicants) to dismantle and/or move such tents, and/or evicting or removing homeless individuals (including the Applicants) from such tents and/or dismantling such tents, and that such violations cannot be demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*.

(f) In addition, an order pursuant to section 24(1) of the *Charter* for compensatory**, deterrence and vindication** damages for the physical harm(s) suffered by the Applicants caused by the City of Hamilton and/or its agents pursuant to any purported legal authority, including but not limited to the *Parks By-Law*, the *Streets By-Law*, *Noise Control By-Law*, and/or the *Public Nuisance By-Law* in violation of the *Charter* rights of the Applicants, including section 7 and/or section 15, by preventing them from erecting tents as a temporary form of shelter, and/or giving notice to homeless individuals (including the Applicants) to dismantle and/or move such tents, and/or evicting or removing such tents and/or dismantling such tents.

(g) Costs of this proceeding on a full indemnity basis or in the alternative, on a substantial indemnity basis.

(h) Such further and other relief as counsel may advise to this Honourable Court may deem just.

2. The grounds for the application are:

Overview

(a) The Applicants are 19 individuals who have erected tents or shelters (collectively referred to as "tents"), and thereby have created and lived in encampments ("encampment residents"), in various public parks and/or other public spaces considered parks throughout Hamilton, including J.C. Beemer Park, the greenspace at Strachan and James Streets, Sir. John A. McDonald, Ferguson and Central Park ("encampments"). The City of Hamilton ("City") has forcibly evicted the Applicants and many other homeless individuals from encampments where they resided, pursuant, *inter alia*, to the *Parks By-Law* and/or *Streets By-Law*. These encampments were located in City-owned and operated parks and/or public spaces under the care, control and responsibility of the City.

(b) The Applicants became homeless for the reasons that are common. Housing precarity has become an unfortunate reality in Hamilton, because of raising rental costs, inadequate Ontario Disability Support Program ("ODSP") and Ontario Works benefit levels, and the breakdown of relationships, especially women fleeing domestic abuse at the hands of male partner. Some individuals with complex mental health, addiction and/or trauma cannot function in independent living. Chronically homeless individuals may become trapped in a vicious cycle of homelessness they cannot escape.

(c) The Applicants, like other homeless individuals, have at times not entered shelter for many reasons. The demand for shelter spaces often exceeds supply. As of March 2022, 1,596 people were actively experiencing homelessness in Hamilton, but there are only 96 shelter beds designated by the City of Hamilton for women and 212 for men. There is a dramatic undersupply of shelter spaces for women, a shortage and often complete absence of shelters which permit couples to stay together, and no shelter in Hamilton for indigenous men, couples, youth or Two Spirit individuals. There are also structural barriers in the design of shelters that prevent individuals from using them: admission on a first

come, first served basis, and a limit on the number of nights individuals can stay. The design of the shelter system discriminates on the basis of disability, against individuals with complex mental health, addiction and/or trauma, substance dependencies, and mental health disorders that trigger disruptive behaviour. Shelters do not accommodate Indigenous cultural practices. Shelters are congregate settings where individuals face the risk of assault and theft, and of contracting infectious disease (as happened during the COVID-19 pandemic). Shelters do not permit individuals to keep personal items or pets. They afford individuals little control over their living space. Finally, there is a risk to women queuing to enter shelters from male sexual predators who loiter in the vicinity to target victims who are unable to access shelters.

(d) The Applicants had no choice but to reside in encampments instead of sleeping on the street, because encampments function as mutual aid societies where residents share food, blankets and huddle together to stay warm; provide a buffer that mitigates the risk of rape, sexual assault, theft and assault; mitigate the risk of overdosing; provide an emotional support system for residents; and provide physical care and support for disabled residents. Encampments also provide shelter 24 hours, 7 days a week, which mitigates the risk of hypothermia, sunburn, heatstroke, and dehydration; make life less physically taxing because residents are not transient; enable residents to exert control over substance use; promote mental health; provide a sense of community an reduce isolation; and enable residents to attend to wellness beyond survival. Encampments enable residents to live continuously in a single location, which enhances their access to: medical care; social workers or other system navigators who can help residents access social programs; harm reduction supplies and treatment; medication delivery; food donations; and donations of blankets, clothing, and mobile phones.

(e) Most of the Applicants remain homeless. After being repeatedly evicted from encampments by the City, many Applicants simply "sleep rough" (i.e., without a tent) in various public parks and/or other public or private spaces in an effort to avoid being further targeted for eviction. Without shelter and a community to protect them, they have experienced and face an increased risk of rape, sexual assault, theft, and violence. Because they can no longer reside encampments, they suffer from the health effects of sleeping out

in the open and being exposed to the elements, including hypothermia and chronic sleep deprivation. Because they no longer reside in a fixed location, and/or they have been forced to move to remote locations to avoid further evictions, their access to medical care, addiction treatment, and support services has been greatly impaired. Most do not have a mobile phone.

(f) Among Hamilton's homeless population, Indigenous persons (23%) and women (53%) are overrepresented. The Applicants reflect this diversity. Seven are Indigenous women and three are non-Indigenous women. They also include among their number a transgender black woman, an Indigenous man, and a black man.

(g) The evictions of the Applicants violated sections 7 and 15 rights of the *Charter* in a manner that cannot be justified under section 1. In addition, the relevant provisions of the *Parks By-Law* and/or *Streets By-Law* violate sections 7 and 15 of the *Charter* and cannot be justified under section 1.

Kristen Heegsma

(h) Kristen Heegsma ("Kristen") is a 31 year old Indigenous woman who has been homeless continuously since 2019, after being evicted by family members (although she was occasionally homeless before then). Kristen lives with mental health and substance abuse disorders and receives approximately $900 in ODSP benefits per month to cover her basic needs and special diet. She is not entitled to a shelter allowance while homeless. Even if she received an additional shelter allowance of $497 per month, she would be unable to afford housing.

(i) Between 2019 and Fall 2021, Kristen lived in a tent in encampments. In Summer 2020, Kristen was forcefully evicted from the Ferguson Encampment. She went onto stay in three more encampments and was evicted each time. The last time Kristen slept in a tent was at Wolverton Park, in Fall 2021. During these repeated evictions, she lost her belongings, including her tent.

(j) Since Fall 2021, Kristen has slept on the streets with only a sleeping bag.

(k) Within two to three weeks after being evicted from Wolverton Park, Kristin was raped while sleeping on a public bench outside of City Hall. She has been repeatedly robbed and assaulted. Without even the protection of a tent, she often wakes up to discover that her belongings have been stolen.

(l) Kristen has been unable to access a shelter, for many reasons. Kristen has repeatedly tried to get into a women's shelter, without success. She does not have a phone but has her physician and the Wesley Day Centre regularly call women's shelters on her behalf. They are almost always told that the women's shelters are full. In the past, Kristen was periodically able to access a shelter bed, but was repeatedly service restricted for a variety of reasons, including missing curfew and allegations of domestic violence. Kristen has periodically been in a relationship during her periods of homelessness and has at times been unable to access a shelter bed with her partner.

(m) When Kristen cannot get into a shelter and cannot put up a tent, she usually wanders around all night trying to find somewhere safe, putting her at an increased risk of violence. She has slept in stairwells, on the street outside of an overflow shelter, and on a park bench. As a result, Kristen hardly sleeps at night. Instead, she is up for days at a time, and then crashes. She regularly falls asleep during the day. In late May 2020, she fell asleep while walking and fell, hitting her head and cutting it open.

(n) Kristen would prefer to live in a tent again for the following reasons: a degree of privacy in order to get changed, be removed from the public gaze; improved sleep; protection against the risk of sexual assault, assault and theft by having a physical barrier, locking her tent, and having the protection of friends and allies in an encampment; improved mental health that comes from a sense of belonging and community, which translates into a lower dependence on drugs lower risk of overdose; and maintaining connections to street outreach supports such as medical care.

Cassandra Jordan

(o) Cassandra Jordan ("Cassandra") is a 39 year old Indigenous woman who has been homeless since August or September 2020. Cassandra became homeless after an

unlawful eviction from her rental unit. Cassandra is a person living with disabilities, in receipt of ODSP. Her medical conditions include degenerative disc disease, chronic pain and substance abuse disorder.

(p) When Cassandra first became homeless, she could not access a shelter bed because she was told that they were all full. This led her to erect a tent at the Ferguson Encampment, from which she was eventually evicted. Although she was offered space in a hotel during the eviction, it was not held for her while she coordinated storage of her belongings. In the end, she did not secure a shelter space. She was left on the street. She lost her tent in the eviction.

(q) Cassandra has continued to reside in various encampments after being unable to access women's shelters because they were full. When she resided in an encampment, Cassandra developed a community that looked out for one another which helped to prevent robberies and assaults.

(r) Casandra has been repeatedly evicted from encampments. Cassandra has witnessed a heavy police presence with By-law officers at encampment evictions, along with bobcats and garbage trucks to dispose of peoples' belongings. Cassandra describes the evictions as intimidating, traumatizing and forceful, and she felt that she had no option but to comply with By-law officers' directions to move. She has repeatedly lost her tents in evictions. Having to pack up and move from encampment to encampment is exhausting physically, mentally and emotionally.

(s) Cassandra was subject to a forceful eviction while she was recovering from third degree burns on her legs. This led to her placement in the Barrett Centre, a shelter for individuals experiencing a mental health crisis. There were no shelter beds available when Cassandra was discharged from the Barrett Centre. She once again was forced to sleep on the street. She stayed with her mother in her subsidized rental unit temporarily but was required to leave to avoid breaching the guest rules for subsidized housing

(t) In February 2022, Cassandra attempted to get into Carol Anne's Place, an overflow shelter for women. She was denied entry because she had tested positive for COVID-19. She was forced to sleep outside in the freezing cold without a tent.

(u) Cassandra has continued to attempt to access women's shelters but has not been consistently able to do so because of an ongoing lack of shelter space for women. Without being able to erect a tent in an encampment, Cassandra has been forced to stay on the streets: in tunnels, outside of Tim Horton's, the back of City Hall, and outside of churches. When she has to sleep outside without a tent, she is often alone and in hidden, hard to find spaces. She has been robbed while sleeping outside.

Misty Marshall

(v) Misty Marshall ("Misty") is a 30 year old Indigenous woman who has been homeless for just over two years.

(w) Misty has a past history of opiate use disorder, major depressive disorder with suicidal ideation and asthma and stimulant use disorder. She has a history of abuse in childhood and has been in abusive relationships throughout her adult years. Misty's asthma is exacerbated when she is homeless and living in a tent due to oppressive humidity. While homeless and living in a tent her asthma has deteriorated to point that she has required emergency treatment.

(x) Without access to a shower or laundry facilities, Misty has presented with a severe case of head lice that caused underlying cellulitis (skin infection) to her scalp and ears. She has also had extensive body rashes caused likely by scabies.

(y) A physician treating Misty lost contact with her immediately following her eviction from the Ferguson Encampment. Her physician reconnected with her a year later and reported that Misty had drastically decompensated physically and mentally since she was last seen. Misty's street outreach physician was better able to connect with Misty and treat medical issues, but only when they knew where Misty was living. In the opinion of her physicians, had Misty remained in one place, she would not have decompensated to the extent that she did.

(z) As well, it is difficult to establish trust with Misty and this results in her unwillingness to accept help from people readily. Trust can be established with continuity of connection.

(aa) Since becoming homeless, Misty has been unsuccessful in accessing shelter in the women's shelter system. She has attempted to get into the overflow at Carol Anne's Place, but through hard experience has learned that there is little chance of getting in, even after lining up for entry at 10:00 pm. She sometimes feels that it is not worth trying, because she is that much more at risk of violence if she does not have a plan for the night by 10:00 pm. While lining up outside of Carol Anne's Place, Misty has witnessed men driving around Carol Anne's Place soliciting the women in line for sex.

(bb) Misty has stayed in a tent in several encampments as a result of not getting into the women's shelters. She has been evicted from all of these encampments and has lost belongings in the evictions. In some instances, she was only given 20 minutes notice to move. She has witnessed bobcats removing encampment residents' possessions during the course of eviction. Housing support and shelter was not offered to Misty at the time of her evictions from encampments.

Sherri Ogden

(cc) Sherri Ogden ("Sherri") is a 28 year old Indigenous woman in receipt of ODSP. She has been homeless for the past five years. Like the other applicants, Sherri has not been successful in accessing women's shelters, which has resulted in her staying in tents in encampments, only to be evicted and displaced to other encampments. During the course of these evictions, the City has disposed of her possessions, including her tents.

(dd) Sherri does not have a mobile phone. Staff at the Wesley Day Centre have repeatedly tried to get her into shelter but have been told that they are full. Sherri did secure a hotel stay (with a temporary hotel program funded by the City and staffed by Mission Services) for two weeks with an ex-boyfriend but was kicked out over a false allegation of domestic violence that she tried to dispute. She was banned from the hotel for one month. The hotel program has since ended.

(ee) Sherri's applications for supportive and transitional housing both the YWCA and Indwell have been denied because of her complex mental health issues that allegedly exceed the supports available in these programs.

(ff) Without being able to stay in an encampment in a tent, Sherri sleeps in stairwells, parking garages and in parks with only a blanket. She hardly sleeps.

Christine Delorey

(gg) The applicant Christine Delorey ("Christine") is a 33 year old woman in receipt of Ontario Works. She became homeless for the first time in her life when her father kicked her and her (now former) spouse out of his house in 2019. Without shelter space for her and her spouse as a couple, they erected a tent by the Urban Core Encampment where they could remain together and close to healthcare, food and supports.

(hh) Christine prefers to stay in a shelter but is not always able to access it because they are usually full. She was able to access the City's temporary hotel program with her spouse. However, the City accused them of domestic violence based on a verbal argument, and immediately kicked them out and onto the street without alternative shelter, and without an opportunity to challenge the decision. In February 2021, and while pregnant, she was kicked out of another hotel due to a false accusation of selling drugs.

(ii) In order to access an overflow bed at Carol Anne's Place, she lines up for entry hours before the 10:00 pm entry time. She was successful on some nights, and unsuccessful on other nights. When she is unable to access shelter and is not able to erect a tent, she stays in corridors, couch surfs, sleeps in the open with a sleeping bag, finds a parking garage to hide in and sleep, or wanders the streets without sleeping.

(jj) When there is not a space in shelter, a tent offers Christine protection from the elements, privacy and some degree of safety. Being in a tent eases her mental and emotional wellbeing compared to without because she is more sleep deprived without a tent.

Jahmel Lopierre

(kk) Jahmel Lopierre ("Jammy") is a 32 year old black transgender woman in receipt of OW. She has been diagnosed with PTSD, anxiety, depression and substance abuse disorder. She has been homeless one and off for about three years.

(ll) Most recently, Jammy became homeless after being evicted from the Transitional Living Program at the YWCA.

(mm) Jammy has been kicked out of the temporary hotel program for missing curfew. She fled a women's shelter after being threatened with being issued a form under the *Mental Health Act*.

(nn) Jammy has been denied access to women's shelters when they are full. In some cases, Jammy will change her clothing to present as a male in order to get into men's shelters. Having to change her gender expression and identity in order to access a shelter bed is degrading and harmful to her wellbeing.

(oo) It is difficult for Jammy to function in the congregate shelter system because she feels anxious around large groups of strangers and has trouble sleeping. She has experienced theft in shelters and feels that she has no control over her life.

(pp) Jammy has experienced routine evictions from encampments by police and has been ticketed repeatedly while homeless. She never has a good night's sleep because of a lack of a stable and secure place to stay overnight and feels safer in a tent because she has control over who is around her.

(qq) Jammy no longer erects a tent when she is outside of shelter because of the City's increased enforcement measures. She knows she will just be told to move.

Darrin Marchand

(rr) Darrin Marchand has chosen to live in an encampment because he has had negative experiences in shelters, including witnessing a fellow resident being attacked with a machete by another resident in December 2020. Darrin has also been service-restricted,

or banned, from various shelters at different times, which means that even when he wants to secure shelter where he was not victimized, he is unable to. Darrin has been service restricted from all shelters for long periods, including several consecutive months, leaving him with no option but to sleep on the street.

(ss) Darrin would suffer adverse emotional and physical impacts such as significant levels of stress if he were to be displaced from his encampment. Darrin receives medical care and food support in the encampments.

(tt) At times, Darrin has slept out in the open in the streets for months without a tent. Darrin was the victim of a random shooting while sleeping without a tent on the stairs of a church and believes that he would not have been shot had he been in a tent. It was only when he was shot that a shelter lifted a restriction allowing him to enter, but he was kicked out mid recovery.

Ashley MacDonald

(uu) Ashley MacDonald ("Ashley") is a homeless Indigenous woman, and she has had no other option but to live in an encampment for several reasons, including the ongoing shortage of shelter beds for women in the City, being repeatedly service restricted, or banned, from shelters. Ashley has a substance use disorder and other mental health issues and has faced discrimination in the shelter system. Ashley has also been denied access to supportive and transitional housing programs because of her high acuity needs. Being able to remain in one encampment would allow Ashley the stability she needs to maintain ongoing and recurrent street outreach healthcare, and pursue treatment for her mental health and substance use.

Shawn Arnold

(vv) Shawn Arnold ("Shawn Arnold") chose to live in an encampment because he feels unable to access shelter spaces because he is recovering from past substance use, and reasonably fears that the rampant substance use in shelters is a threat to his sobriety. Shawn was also assessed under the *Encampment Protocol* as being high acuity, and as such was permitted to remain at the J.C. Beemer Park Encampment. While an encampment resident,

Shawn was able to benefit from a nearby methadone treatment program, receive meal support and connect with other social supports including a housing worker that secure his current housing. The stabilized encampment location was critical to securing housing, illustrated by the fact that he almost lost a housing offer after being evicted from his encampment, causing him to lose contact with his housing worker.

Gord Smyth

(ww) Gord Smyth ("Gord") chose to live in an encampment because there is a shortage of affordable housing in the City that has been exacerbated by the COVID-19 pandemic.

(xx) Gord cannot live in a shelter. He has mental health disabilities, including a personality disorder, which make it difficult for him to be around groups of people for sustained periods. Gord also has a dog who would not be allowed in shelters and separating from his pet would have a significant impact on his mental health.

(yy) When living in encampments, Gord has had regular access to community agencies and volunteers who deliver meals, hygiene products, and medical supports.

(zz) Gord was repeatedly evicted from encampments in breach of the *Encampment Protocol*. He was only given 7 days' notice to move. He also was required to move without having had a VISPDT assessment completed. On one occasion, Gord was evicted from an encampment within three hours of having been evicted from another encampment. During the course of his encampment evictions, the City did not offer him alternatives to congregate shelter options that accommodate his disability related needs. The constant evictions and the threat of evictions from encampment were mentally and emotionally draining and demoralizing.

(aaa) After several evictions, a paramedic administered Gord a Service Prioritization Decision Assistance Tool ("VISPDT"), the results of which qualified him to remain in his encampment indefinitely. However, the City refused to accept these results. Although the City presented Gord with rental options, none of them were affordable. Gord was finally

offered a unit with City Housing Hamilton that was subsidized and moved into it on November 27, 2021.

Mario Muscato

(bbb) Mario Muscato ("Mario") is a severely disabled 48 year old Indigenous man who has been homeless since 2017. He was evicted from his accommodation due to an administrative error with Ontario Works. He has resided in encampments when he cannot access shelters.

(ccc) Mario has had negative experiences in the shelter system, including: being unable to access shelter because they are full; being service restricted and routinely being kicked out; having his personal items stolen; experiencing discrimination as a person living with disabilities; and experiencing discrimination as an Indigenous person on the basis of race and creed.

(ddd) Mario does not have the use of his hands and is an amputee. He is a victim of childhood abuse. He has also been diagnosed with opioid use disorder, stimulant use disorder, HIV, post-traumatic stress disorder, major depressive disorder, acquired brain injury, extensive burn injury from neck to face causing chronic pain, severe neuropathy to both upper extremities, and right forearm amputation.

(eee) Mario relies on other encampment residents to assist him with his activities of daily living because he does not have functioning hands. Encampment evictions deny him access to assistance from other residents and friends, for example, to erect a tent, change his clothes, open doors, and cover himself. He cannot erect and dismantle a tent or carry all of his possessions on his own due to his disabilities.

(fff) He has been evicted from encampments and lost his tent on numerous occasions. Evictions are very physically taxing, and this adds to his depressive state where he feels like he would prefer to die.

(ggg) When Mario is forced to sleep in the open, he experiences sleep deprivation, feels unsafe, is not able to meet his basic needs because of a loss of support from other

encampment residents and friends, experiences a deterioration in his mental health and greater sleep deprivation.

(hhh) Although Mario strives to remain connected with medical and housing supports, his constant transiency makes it exceedingly difficult.

Linsley Greaves

(iii) Linsley Greaves ("Linsley") is a 52 year old black man in receipt of OW.

(jjj) Linsley has had periods of homelessness for over ten years. His most recent housing ended two years ago, after his roommates did not pay their share of the rent. Since Linsley's name was on the lease, he was evicted.

(kkk) Linsley has stayed in men's shelters on and off during his periods of homelessness. He has had several negative experiences, including theft, being incited to fight, and having trouble sleeping. Linsley has had several experiences of racism while in shelter, including being repeatedly subjected to the use of the "N" word, being racially profiled, and lacking a sense of community with other Black Canadians.

(lll) Linsley has difficulties functioning in a shelter environment because of his substance use disorder. He is dependent on substances which are not permitted in shelters. This requires him to both hide his drug use and frequently leave. He knows that every time he is absent from the shelter, he risks not being allowed back in.

(mmm) Linsley stayed in a tent in one encampment for almost two years, including during the time the *Encampment Protocol* was in force. During this time, he developed a community. Three women lived beside him for safety and would call out to him if they needed protection.

(nnn) Linsley stopped putting up a tent after his eviction because he knew it would not take long for the City to evict him again. Although he tried to use tarps to provide some protection against the elements, he developed frostbite in his left toes in or about March 2022 when he was sleeping outside with just a blanket. Linsley is slowly losing one of his big toes, and the tips of his other toes.

(ooo) Linsley finds is difficult to sleep in the open because he constantly moves around trying to stay warm and safe. Even without a tent, the City tells him to move along. The constant moving worsens his anxiety. As a result of being unable to sleep properly at night, Linsley falls asleep during the day whenever possible, and has trouble concentrating.

Brad Caldwell

(ppp) Brad Caldwell ("Brad") is a 57 year old homeless man in receipt of the ODSP. He has been homeless for roughly three years. His loss of housing coincided with his wife's passing.

(qqq) Brad has had negative experiences from staying in shelters. He had his possessions stolen more often in shelters than on the street. He has been kicked out of shelter for not securing housing on time, which he could not do because accommodation was not unaffordable. Brad has found the shelter system unreliable. He has been unable to get into shelter because it is full, and he has been kicked out during his stays.

(rrr) When the men's shelter hotel program ended, he was kicked out without a transition plan to alternative shelter. He was forced to sleep on the street.

(sss) Brad has been evicted from various encampment. In some instances he has only received 24 hour notice. He has witnessed evictions where dump trucks and garbage disposal attend and load up residents' tents and possessions. He had not been offered guaranteed shelter prior to eviction.

(ttt) Brad has also been issued roughly fifty to sixty tickets for either sleeping in a public space or in a tent in an encampment. He will comply with a direction to move to avoid escalating the situation, and because of the fear of charges.

(uuu) Brad has difficulty managing his diabetes while homeless because he does not have proper refrigeration to store insulin, and his glucose meter has been stolen from him because it has been mistaken for a digital scale to measure drugs.

(vvv) For Brad, the benefits of staying in a tent include being able to enhance safety through community with other encampment residents, staying warm together to avoid

freezing to death, remaining close to services, and lessening sleep deprivation by stabilizing his immediate environment.

(www) Brad has suffered from infections which have required hospitalization. Because he has been discharged into homelessness where he is exposed to the elements, experiences sleep deprivation, and needs to move, he cannot fully recover and remain healthy.

(xxx) When sleeping in the open, Brad is so physically taxed and tired that his body gives up on him, and he is forced to sleep where his body stops him.

Corey Monahan

(yyy) Corey Monahan ("Corey") is 45 years old, has been homeless for the majority of his life. He is an ODSP recipient.

(zzz) Corey has been diagnosed with fetal alcohol syndrome, attention deficit hyperactivity disorder, and substance abuse disorders. He receives healthcare through the Shelter Health Network and has reported distress sleeping outside, and frustration in not being able to access shelter despite advocacy efforts due to restrictions. His state of homelessness causes mental distress and the stress of it has negatively impacted his mental health.

(aaaa) Despite Corey's best efforts to reside in shelters, he cannot so do so. Space is not always available. Moreover, staying in shelters has significant adverse effects on his mental health, because he does not function well in congregate settings. In some cases, he has had physical altercations with other shelter residents, which have led him to be service restricted.

(bbbb) Corey sleeps in a tent in an encampment. Evictions displace him from encampment to encampment. This has been very destabilizing, psychologically draining and traumatizing. He usually cannot remove all of his possessions and tent in advance of an eviction. He avoids watching City officials tear down his tent because it is traumatizing for him.

Patrick Ward

(cccc) Patrick Ward ("Patrick") is 59 year old man with disabilities. He is an ODSP recipient.

(dddd) Patrick became homeless for the first time in 2017, when the residential care facility that he was renting a room from was abruptly and without notice closed.

(eeee) Upon eviction, he went to a shelter but found was the victim of assaults and theft. The shelter space was detrimental to his mental and emotional wellbeing. He has chosen to erect a tent in an encampment.

(ffff) Patrick has repeatedly been evicted from encampments, and moved along by By-law officers from various locations to other locations, even though those officers are aware that he continues to violate the *Parks By-law* in those new locations. To avoid confrontation with authorities, he has moved to less visible public spaces and into the escarpment.

(gggg) A tent offers Patrick protection from intruders and shields him from animals and the weather. Being routinely evicted from encampments is physically and psychologically draining.

Ammy Lewis

(hhhh) Ammy Lewis ("Ammy") is a 43 year old Indigenous woman. She is an ODSP recipient.

(iiii) Ammy was victim to her landlord's predatory advancements whereby he attempted to extort sex from her. She felt so unsafe that she left her accommodation with her dog who is her constant companion and main source of emotional support. Ammy has been homeless for five months and she has not been accepted into shelter because of her dog.

(jjjj) Ammy relies on her dog for emotional support as well as keeping her safe while she remains without shelter on the street. She sleeps in underground parking lots,

abandoned cars, dumpsters when she does not have a tent. Even without a tent, Ammy is routinely forced to move from where she is in public regardless of the time of day. She has also been assaulted while homeless.

Julia Lauzon

(kkkk) Julia Lauzon ("Julia") is a 24 year old Indigenous woman who is homeless.

(llll) Julia suffers from significant mental health issues and has not been able to get the medical help that she needs because of a lack of phone and a lack of fixed address, which are all related to her homelessness status. As such, she has not been able to follow through on referrals, she has been cut off from ODSP and has no income at all. There have been multiple unsuccessful attempts to get her help for her addictions, but it is difficult to get a hold of her. She has been to the hospital for suicidal ideations.

(mmmm) Julia has stayed on and off in a tent while homeless because she has been denied access to shelter due to a lack of capacity, however she is occasionally able to get into the overnight drop in center at Carol Anne's Place.

(nnnn) Being displaced from her tent and its location results in operating in a constant survival mode that results in her inability to focus on other things such as getting to appointments, including medical appointments because of a lack of concentration due to lost sleep and being in survival mode. Julia has been assaulted while living outside without a tent.

(oooo) Julia has a housing worker from the Hamilton Regional Indian center and is on a waitlist for housing.

Glenn Gnatuk and Taylor Gogo-Horner

(pppp) Glenn Gnatuk ("Glenn") and Taylor Gogo-Horner ("Taylor") are a disabled couple in receipt of ODSP. They became homeless five years ago after being evicted from their rental unit. They began couch surfing with friends and family but that was time limited, and they had a negative experience where Taylor was assaulted by one the friends that they stayed with.

(qqqq) They were once able to remain as a couple in the hotel shelter program, but this was short lived after they were falsely accused of domestic violence and banned for one year.

(rrrr) Taylor has stayed in shelter on only a few occasions and found her separation from Glenn too difficult, causing so much anxiety that she left to return to stay with him in an encampment.

(ssss) They have been routinely evicted from several different locations throughout Hamilton. They have since begun to erect their tents in less visible places to stay hidden and avoid enforcement. Sometimes they pre-emptively move to avoid conflict. The constant movement has been destabilizing for them.

(tttt) When they were without a tent in the winter, they slept on the grounds of the Children's Museum, only with blankets. They feel that they are always on the run which causes them stress. They hardly sleep because they are worried about their safety. They have experienced severe frostbite, causing their fingers to crack and lose sensation.

Chronology and procedural history

(uuuu) On April 18, 2020, residents of a longstanding encampment located at the Sir John A. MacDonald School ("Sir John A. MacDonald Encampment") in Hamilton advised Hamilton Harm Reduction Action League ("KeepingSix") that they had been given notice to dismantle their tents and move within a week. KeepingSix is a community-based organization that defends the rights, dignity, and humanity of people who use drugs. KeepingSix works closely with the Hamilton Social Medicine Response Team ("HAMSMaRT"), an organization made up of physicians, midwives, and peer workers that provides clinical care to individuals who have difficulty accessing the traditional medical system, primarily the homeless and people who use drugs.

(vvvv) On April 21, 2020, KeepingSix and HAMSMaRT attended a regular weekly meeting with the City of Hamilton ("City") to discuss encampment management and raised concerns about the eviction notice provided to the Sir John A. MacDonald Encampment.

(wwww) On April 25, 2020, the City evicted the residents of the Sir John A. MacDonald Encampment. KeepingSix and HAMSMaRT attended the eviction. Several residents moved to the encampment at Jackie Washington Park ("Jackie Washington Park Encampment"), because they had been advised that the City could better support individuals on municipal property.

(xxxx) On April 27, 2020, the City provided an eviction notice to the residents of the Jackie Washington Park Encampment.

(yyyy) On May 6, 2020, the City evicted the residents of the Jackie Washington Park Encampment. In the course of the eviction, residents' belongings were destroyed.

(zzzz) On June 4, 2020, legal counsel from the Hamilton Community Legal Clinic ("HCLC") and Ross and McBride LLP wrote the City Manager, the General Manager of Healthy and Safe Communities and the Director of Housing Services, setting out legal arguments against encampment evictions based on the harm they caused to health and wellbeing, in the context of the COVID-19 pandemic and a shortage of viable alternatives for shelter. They also requested a meeting.

(aaaaa) On June 26, 2020 legal counsel from the HCLC and Ross and McBride LLP, members of HAMSMaRT and Keeping Six met with legal counsel for the City and representatives from the City's housing and Community and Social Services departments. During this meeting, they asked the City to pause on the encampment evictions pending a satisfactory resolution of the shelter needs of encampment residents and provided notice to the City that any further eviction would be challenged in the courts.

(bbbbb) On July 7, 2020, the parties met again to further discuss solutions to encampments in Hamilton. The City was again asked to pause encampment evictions pending resolution and reminded that news of any new evictions would lead the parties into litigation.

(ccccc) On July 10, 2020, the City provided notice of an imminent "clean up" (i.e., eviction) to the residents of the York Encampment and Bay Encampment. Within a day, KeepingSix and HAMSMaRT worked with the residents to remove larger items from the

site, which led the City to decide not to bring heavy equipment to clear the two encampments.

(ddddd) On July 13, 2020, Councillor Narinder Nann proposed a motion at a meeting of the Emergency and Community Services Committee of Hamilton City Council to request the City analyze the *National Protocol for Homeless Encampments in Canada* ("*National Encampments Protocol*") proposed by the United Nations Rapporteur for Housing. The motion carried, with Councillor Terry Whitehead voting against.

(eeeee) On July 22, 2020 legal counsel from HCLC and Ross and McBride LLP wrote a second letter to the City, that alleged that the removal of items necessary for an individual to exist in an encampment, such as a tent or bed, was in effect an eviction.

(fffff) On July 20, 2020, Councillor Jason Farr wrote in an email: "To sum up, I am supportive of dismantling the tents and if staff do not act soon, I will have Council order it."

(ggggg) On July 28, 2020, the City provided notice that it intended to dismantle encampments on July 31, 2020. The City would not commit to refrain from the involuntarily removal of encampment residents.

(hhhhh) On July 29, 2020, counsel for a subset of the current Applicants, KeepingSix and HAMSMaRT commenced proceedings in this Honourable Court for an injunction prohibiting the City from dismantling encampments.

(iiiii) On July 30, 2020, this Honourable Court issued a 10 day interim injunction, in *Bailey et al. v. City of Hamilton*, Hamilton Court File No. CV-20-73435.

(jjjjj) On August 7, 2020, the 10 day injunction was extended on consent to a court date set for September 2020.

(kkkkk) On September 30, 2020, the parties executed a settlement agreement, which consisted of: an *Encampment Protocol* which required the City to assess and accommodate individual needs before evicting encampment residents, which in some cases resulting in residents remaining in certain sanctioned encampments indefinitely, and which established

rules around the permissible size and locations of encampments; and a confidential Letter of Understanding, which included a term that the City could remove the largest Ferguson Encampment.

(llllll) Between September 30, 2020 to August 2021, HCLC, KeepingSix and HAMSMaRT had many disagreements with the City over its failure to comply with the *Encampment Protocol* as a result of the perception that the City was not applying the *Encampment Protocol* in the spirit in which it was negotiated. HCLC repeatedly requested a meeting with the City to discuss possible solutions, to no avail.

(mmmmm) On August 9, 2021, Hamilton City Council voted to repeal the *Encampment Protocol* in an emergency meeting, without notice to, or consultation with, the parties to the settlement agreement who had negotiated the *Encampment Protocol* or encampment residents.

(nnnnn) The City delayed new encampment evictions until August 30, 3021.

(ooooo) On September 9, 2021, a peaceful protest of the revocation of the *Encampment Protocol* took place outside City Hall. Representatives from HCLC, HAMSMaRT, Keeping Six, the YWCA, Hamilton Regional Indian Centre, and the Wesley Day Centre all decried the sudden decision taken without consultation, and implored the City to sit down with stakeholders to develop a new approach to encampments. On the same day, the City released a "Six Step Encampment Response" at a meeting of Hamilton City Council. This policy framework does not adhere to or align with the *National Encampments Protocol*. At the same Council meeting, Dr. Jill Wiwcharuk from HAMSMaRT and Marcie McIlveen from KeepingSix addressed the Council, and informed them of the issues with shelter shortages, and harm to encampment residents from evictions. Stephanie Cox, counsel in the within Application, addressed the Council meeting to raise legal concerns.

(ppppp) On September 17, 2021, the City engaged in encampment evictions at the Durand Encampment and Wellington Park Encampment. On September 20, 2021, a further eviction took place at the J.C. Beamer Park Encampment. On these occasions, the City only provided two hours verbal notice to encampment residents to vacate. The City did not

provide written notice of a By-law infraction. The City did not offer appropriate indoor shelter options prior to the eviction. Subsequently, By-law officers and Hamilton Police Services have regularly attended various encampments and only given verbal notice to vacate.

(qqqqq) On October 4, 2021, the Applicants issued this Notice of Application, and brought a motion for an *ex parte* injunction against the City to prohibit it from using its By-laws to evict encampment residents. This Honourable Court directed that the City refrain from encampment evictions pending its ruling.

(rrrrr) On October 13, 2021, the Manager of Housing Service's reported to City Council that: there was not enough shelter space for encampment residents to move into; the system cannot accommodate all unsheltered person's needs; that "the suitability of those [shelter] beds it needs to be discussed as much as the availability of those beds"; that it was "unconscionable to put these individuals into beds or units without the right supports because it creates in many instances, more stress on the individual, whether it's through isolation, whether it's through not meeting their needs"; that there was nowhere else for people to go than to sleep in encampments; that Hamilton has always had people "sleeping rough even in the winter"; and that during the operation of the *Encampment Protocol*, "many [encampment residents] have had weeks or months potentially of stability which no longer the case, because this has been a tremendous traumatic experience for everybody involved."

(sssss) On November 2, 2021, this Honourable Court dismissed the motion for an interim injunction, in *Poff v. City of Hamilton*, 2021 ONSC 7224.

(ttttt) The City of Hamilton immediately recommenced encampment evictions, notwithstanding the City's awareness that many encampment residents had no indoor shelter options. In some cases, shelters were full at the time of eviction. In other instances, the evicted encampment residents were service restricted from shelter. On November 6, 2021, Councillor Nann Tweeted: "I'm here at Woodlands Park to observe an encampment clearing. I have been informed HPS on-site whom have been providing direct engagement that there are no shelter spaces for the couples nor the individuals remaining here."

(uuuuu) On December 9, 2021, Councillor Nann proposed a motion to the Emergency and Community Services Committee of Hamilton City Council for a human rights based approach to encampment evictions. This motion passed. To date, the approach to responding to encampments outlined in this motion has not come to fruition.

(vvvvv) On March 22, 2022 Councillor Farr proposed a motion that was adopted by City Council, which directs City staff to expedite encampment evictions, and specifically to: issue a Trespass Notice within 12 to 72 hours after staff receive the first complaint regarding unauthorized camping a City or public place; immediately notify the Hamilton Police Service of the Trespass Notice for enforcement purposes; and enforce the By-laws against encampments 24 hours a day, seven days a week. The City of Hamilton allocated $416,673.73 to hire four new By-law officers to ensure that tents were removed from parks within 12 to 72 hours.

(wwwww) In response to Councillor Farr's motion, City staff stated the following at the Council Meeting: "there is currently no capacity for families or couples in the shelter system, but between 15 and 20 spaces each in the men's and women's systems"; "even when there is space available, some people can't access it due to issues such as having a pet or having had past behavioural issues at the shelter that can lead to barred access"; "we do not have enough housing"; and "we do not have enough beds".

(l) Since the adoption of Councillor Farr's motion, the eviction against encampment residents has dramatically increased, with evictions taking place continuously. Some former encampment residents have gone deeper into hiding to avoid enforcement, making them more vulnerable and disconnected from supports. Individuals are now "sleeping rough" without even a tent to protect them from the elements and provide a basic level of personal security. Some individuals use a patchwork of tarps, blankets and sheets in a desperate attempt to recreate the protection offered by tents.

Causes of homelessness

(yyyyy) Individuals become homeless for a number of different reasons.

(zzzzz) A major reason for homelessness is the housing precarity has become an unfortunate reality in Hamilton.

(i) The costs of rental accommodation have increased sharply, and in some cases has become completely unaffordable.

(ii) ODSP and Ontario Works benefit levels are insufficient, even with a housing allowance.

(iii) Since poverty intersects with, race, indigeneity, and disability, housing precarity is experienced disproportionately by those groups.

(aaaaaa) Another cause of homelessness is the breakdown of relationships.

(i) Women may become homeless when fleeing domestic abuse at the hands of male partners.

(ii) Individuals may also become homeless if they are forced to leave accommodation shared with family or friends.

(bbbbbb) Some individuals with complex mental health, addiction and/or trauma cannot function in independent living.

(cccccc) Chronically homeless individuals may become trapped in a vicious cycle of homelessness they cannot escape.

Why homeless individuals do not go to shelter

(dddddd) Homeless individuals do not enter shelters for many reasons.

(eeeeee) The demand for shelter spaces often exceeds supply, as the Applicants' firsthand experiences attest to. Moreover, aggregate supply and demand mask inequalities in the availability of shelter for different groups:

(i) There is a dramatic undersupply of shelter space for women, which reflects underfunding that is a product of the hidden nature of

homelessness for women and a hierarchy of deservingness that systematically devalues the need of women for shelter.

(ii) There is a shortage, and often a complete absence, of shelters which permit couples to stay together.

(iii) Although Hamilton has a shelter for indigenous women fleeing domestic violence, it does not have a shelter for indigenous men, couples, youth, or Two Spirit individuals.

(ffffff) There are structural barriers in the design of shelters that prevent individuals from using them:

(i) Admission to shelters is on a first come, first served basis, without any prioritization based on need.

(ii) Shelters impose a limit to the number of nights that individuals can stay – they are at best temporary and are never a permanent accommodation solution.

(iii) The design of the shelter system also discriminates on the basis of disability.

(1) Shelters cannot meet the needs of individuals with complex mental health, addiction and/or trauma, who therefore decided not to enter them;

(2) Some disability-related behaviours conflict with shelter policies. Individuals with substance dependencies can neither use them while in shelter, nor bring harm reduction materials into shelters to help them recover from addiction;

(3) Individuals have mental health disorders which may trigger disruptive behaviour in the congregate setting of a shelter; and

(4) It is physically taxing for some disabled individuals with mobility issues to enter and leave shelters every day.

(iv) Shelters do not accommodate Indigenous cultural practices. In addition, the design of shelters may reinforce intergenerational trauma and the lack of trust in institutions arising from the systemic abuse of Indigenous children in residential schools.

(v) Shelters are congregate settings where individuals who have been victims of assault and theft and are unwilling to enter shelter to face that risk again.

(vi) Shelters are congregate settings that create the risk of infectious disease spread, as became apparent during the COVID-19 pandemic.

(vii) Shelters do not permit pets, which provide important emotional support to individuals.

(viii) Shelters do not permit individuals to keep personal items with them, beyond their immediate personal effects.

(ix) Shelter rules afford individuals little or no control over their living space and micromanage them. For example, shelters impose a strict curfew. Moreover, these institutional rules can elicit a trauma response.

(x) Shelters may be situated in remote locations which are hard to reach on foot.

(gggggg) Finally, there is a risk to women queuing to enter shelters from male sexual predators who loiter in the vicinity to target victims who are unable to access shelters.

Why homeless individuals who do not go to shelter erect tents in encampments

(hhhhhh) Homeless individuals who do not shelter for any of the reasons above may choose to erect tents in encampments instead of sleeping on the street, for a number of reasons.

(vi) Encampments give rise to communities that provide individuals with safety:

(i) They function as mutual aid societies, where residents share food, blankets, and even huddle together to stay warm in the cold weather.

(ii) They provide a buffer that mitigates the risk of rape and sexual assault, theft and assault for residents from non-residents.

(iii) They mitigate the risk of overdosing, because of the presence of peers.

(iv) They provide an emotional support system for residents.

(v) The provide physical support and care for disabled residents.

(jjjjjj) Encampments provide health benefits to their residents compared to living in the open:

(i) They provide shelter 24 hours a day, 7 days a week. By contrast, shelters only provide accommodation in the evenings.

(ii) They mitigate the risk of hypothermia, by providing protection from the wind, rain, snow, and cold.

(iii) They mitigate the risk of sunburn, heatstroke, and dehydration, by providing protection against the sun.

(iv) They make life less physically taxing for residents because they are less transient than if they lived in shelters on the street.

(v) They enable residents to exert control over substance use – either to use it, or to avoid them – by enabling them to choose their peer group.

(vi) They promote mental health, by providing a feeling of safety for individuals who distrust institutions, based on negative experiences.

(vii) They provide a sense of community and reduce social isolation.

(viii) They enable residents to attend to their wellness beyond basic survival.

(kkkkkk) Encampments enable their residents to live with greater dignity compared to living in the open:

(i) They provide a modicum of privacy and solitude, essential for many basic functions including sleep.

(ii) They enable couples to live together in the same tent.

(iii) They enable residents to have pets that provide them with emotional support.

(iv) They enable residents to keep personal possessions beyond their immediate personal effects.

(v) They enable residents to come and go as they please without a curfew.

(vi) They enable residents to plan their lives, because they know where they will be sleeping at night.

(vii) They enable residents to satisfy their desire for autonomy.

(viii) They enable residents to build stable relationships with other residents.

(llllll) Encampments enable residents to live continuously in a single location, which enhances their access to:

(i) medical care;

(ii) social workers or other system navigators who can help residents access social programs (e.g. the Ontario Disability Support Program, Ontario Workers, and public housing), and apply for government issued identification;

(iii) harm reduction supplies and treatment;

(iv) medication delivery;

(v) food donations; *and*

(vi) donations of blankets, clothing, and mobile phones.

Harms from encampment eviction

(mmmmmm) Encampment evictions harm residents in many ways.

(nnnnnn) Evictions deprive former encampments residents of the safety that comes from the encampment community:

(i) They face additional hurdles to sharing food and blankets and huddling together to stay warm.

(ii) They lose the buffer that mitigates the risk of rape and sexual assault, theft and assault for residents from non-residents.

(iii) They lose the peer group that mitigates the risk of overdosing.

(iv) They lose the emotional support system provided by other residents.

(v) Disabled residents lose the physical support and care they receive from other residents.

(oooooo) Evictions force former encampment residents to live in the open, which is harmful to their health:

(i) They face a greater risk of hypothermia because they are exposed to the wind, rain, snow, and cold.

(ii) They face a greater risk of sunburn, heatstroke, and dehydration because they are exposed to the sun.

(iii) They face a life that is more physically taxing because their lives are now transient.

(iv) They lose the ability to exert control over substance use, because they can no longer choose their peer group.

(v) They may suffer worsened mental health because they lose a feeling of safety.

(vi) They lose a sense of community and experience increased social isolation.

(vii) They cannot attend to their wellness beyond basic survival.

(pppppp) Evictions undermine the dignity of former encampment residents:

(i) They lose all privacy and the ability to seek solitude.

(ii) Couples face greater hurdles in living together in the same tent.

(iii) They lose the ability keep personal possessions beyond their immediate personal effects.

(iv) They lose the ability to plan their lives, because they no longer know where they will be sleeping at night.

(v) They lose the ability to build stable relationships with other residents.

(qqqqqq) Evictions impede the access of former encampment residents to:

(i) medical care, including the diagnosis and treatment of medical conditions, and treatment for normal life conditions such as pregnancy;

(ii) social workers or other system navigators;

(iii) housing supports and connections;

(iv) harm reduction supplies and treatment;

(v) medication delivery;

(vi) food donations; *and*

(vii) donations of blankets, clothing, and mobile phones.

(rrrrrr) In addition, former encampment residents may move to remote locations to avoid further evictions, which put them at a greater geographical distance from the services and supports listed in the previous paragraph.

(ssssss) The process of eviction harms former encampment residents:

(i) They lose their possessions.

(ii) They experience dislocation.

(iii) They experience emotions of fear, loss, and grief

(iv) They may experience the exacerbation of pre-existing mental health conditions.

(v) They may lose trust in authority in the police, governments and other public institutions.

Section 7

(ttttt) Sections 3 (hours of entrance), 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of the *Parks By-Law*, and section 16(12) of the *Streets By-Law*, violate section 7 of the *Charter*, because they deprive homeless individuals of their liberty and/or security of the person, in a manner that is not in accordance with the principles of fundamental justice.

(uuuuuu) These violations of section 7 cannot be justified under section 1 of the *Charter*.

(vvvvvv) The eviction of the Applicants from encampments violated section 7 of the *Charter*, because those evictions deprived them of their liberty and/or security of the person, in a manner that was not in accordance with the principles of fundamental justice.

(wwwwww) These violations of section 7 cannot be justified under section 1 of the *Charter*.

(xxxxxx) The interpretation of section 7 of the *Charter* must comply with Canada's international legal obligations under the *International Covenant of Economic, Social and Cultural Rights*, including (but not limited to) Article 11(1), the right to adequate housing.

Section 15

(yyyyyy) Sections 3 (hours of entrance), 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of the *Parks By-Law*, and section 16(12) of the *Streets By-Law*, violate section 15 of the *Charter*, because they discriminate on the basis of race and/or indigeneity, sex, disability, and marital status, either separately or in combination (i.e., intersectional discrimination).

(zzzzzz) These violations of section 15 cannot be justified under section 1 of the *Charter*.

(aaaaaaa) The eviction of the Applicants from encampments violated section 15 of the *Charter*, because those evictions discriminated against them on the basis of race and/or

indigeneity, sex, disability, and marital status, either separately or in combination (i.e., intersectional discrimination).

(bbbbbbb) These violations of section 15 cannot be justified under section 1 of the *Charter*.

(ccccccc) The interpretation of section 15 of the *Charter* must comply with Canada's international legal obligations under the *International Covenant of Economic, Social and Cultural Rights*, including (but not limited to) Article 11(1), the right to adequate housing.

3. The Applicant relies on the following legal instruments:

(a) The *Canadian Charter of Rights and Freedoms*.

(b) The *Constitution Act, 1982*.

(c) *International Covenant on Economic, Social and Cultural Rights*.

(d) City of Hamilton *By-Law No. ~~01-129~~ **01-219*** ("*Parks By-Law*").

(e) City of Hamilton *By-Law No. 86-077* as amended by *By-Law No. 97-162* ("*Streets By-Law*").

(f) City of Hamilton *By-Law No. 11-285* ("*Noise Control By-Law*").

(g) City of Hamilton *By-Law No. 20-077* ("*Public Nuisance By-Law*").

(h) Such further and other grounds as counsel may advise and this Honourable Court may permit.

4. The following documentary evidence will be used at the hearing of the Application:

(a) Affidavit of Kirsten Heegsma.

(b) Affidavit of Darrin Marchand.

(c) Affidavit of Gord Smyth.

(d) Affidavit of Mario Muscato.

(e) Affidavit of Shawn Arnold.

(f) Affidavit of Bradley Caldwell.

(g) Affidavit of Christine Delorey.

(h) Affidavit of Glenn Gnatuk and Taylor Gogo-Horner.

(i) Affidavit of Cassandra Jordan.

(j) Affidavit of Julia Lauzon.

(k) Affidavit of Ammy Lewis.

(l) Affidavit of Ashley Macdonald.

(m) Affidavit of Corey Monahan.

(n) Affidavit of Misty Marshall.

(o) Affidavit of Sherri Ogden.

(p) Affidavit of Jahmal Pierre.

(q) Affidavit of Linsley Greaves.

(r) Affidavit of Patrick Ward.

(s) Affidavit of Audrey Davis.

(t) Affidavit of Leilani Farha.

(u) Affidavit of Stephen Gaetz.

(v) Affidavit of Kate Hayman.

(w) Affidavit of Stephen Hwang.

(x) Affidavit of Ameil Joseph.

(y) Affidavit of Olivia Mancini.

(z) Affidavit of Lisa Nussey.

(aa) Affidavit of Andrea Sereda.

(bb) Affidavit of Kaitlin Schwan.

(cc) Affidavit of Medora Uppal.

(dd) Affidavit of Ruth Toskas.

(ee) Such further and other evidence as counsel may advise and this Honourable Court may permit.

June 15, 2022

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Court File No. CV-21-00077187-0000

KRISTEN HEEGSMA et al. **- and -** **CITY OF HAMILTON**
Applicants Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT HAMILTON

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Counsel to the Applicants

TAB 16

Court File No. CV-21-00077187-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ASHLEY POFF, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO & SHAWN ARNOLD

Applicants

- and -

CITY OF HAMILTON

Respondent

NOTICE OF CONSTITUTIONAL QUESTION

The Applicants intend to question the constitutional validity and/or applicability of sections 12, 17 and 18 of the Respondent's By-Law 01-129 and section 16(12) of the Respondent's By-Law No. 86-077 as amended by By-Law No. 97-162; and to claim a remedy under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Ontario.

The question is to be argued on such date as is determined by the Court at the John Sopinka Courthouse, 45 Main St E, Hamilton, ON L8N 2B7.

FACTS GIVING RISE TO CONSTITUTIONAL QUESTION:

1. The Applicants are individuals living in homeless encampments in the City of Hamilton.

2. The Applicants have erected tents or other shelters in these encampments to protect themselves from the elements, to give them privacy, and to store and protect their essential belongings like food, water, clothing, bedding, sentimental belongings, personal hygiene supplies, medication and medical supplies. The Applicants view their ability to erect a tent or shelter within their community, and to store their essential belongings, as integral to their ability to safely shelter in place in the midst of an affordable housing crisis and a global pandemic so long as they are homeless.

3. The Respondent has previously relied on sections 12 (encroachment), 17 (camping and lodging) and 18 (tents and structures) of By-Law No. 01-129 (the "Parks By-Law"), and section 16(12) (miscellaneous prohibitions) of By-Law No. 86-077 as amended by By-Law No. 97-162 (the "Streets By-Law), by-laws enacted by the City of Hamilton to forcibly remove individuals

experiencing homelessness from their encampments during the current affordable housing crisis and global pandemic.

4. The Respondent has previously relied upon, or it is reasonably foreseeable that the Respondent will rely upon, the aforementioned By-laws to forcibly remove individuals experiencing homelessness from their encampments during the current affordable housing crisis and global pandemic

5. On September 17 and 20, 2021, the Respondent further forcibly removed and/or threatened to forcibly remove individuals experiencing homelessness, from their current encampments. Although the Respondent did not provide written notice of its intentions, the Applicants believe that it seeks to rely on the aforementioned By-laws to forcibly remove individuals from encampments.

6. The Applicants contend, and the Respondent has acknowledged, that there are insufficient spaces in its shelter system to house all encampment residents who are displaced.

7. The Applicants contend, and the Respondent has acknowledged, that there are insufficient supports in place to assist all encampment residents who are displaced, particularly high acuity individuals.

8. The Applicants contend, and the Respondent has acknowledged, that there is a dire shortage of affordable housing in Hamilton.

9. As such, the Applicants contend that they will suffer irreparable harm if they are forcibly removed.

10. Such further and other material facts are to be adduced at the hearing of this Application, as may be permitted by the Court.

LEGAL BASIS FOR CONSTITUTIONAL QUESTION:

Violation of constitutional rights

1. Sections 12, 17 and/or 18 of By-Law 01-129 (the "Parks By-Law") and/or section 16(12) of By-Law No. 86-077 as amended by By-Law No. 97-162 (the "Streets By-Law"), collectively referred to hereinafter as the "By-Laws", infringe the rights of the Applicants and other individuals experiencing homeless under sections 7, 12 and/or 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

Infringement of *Charter* section 7

2. The By-Laws infringe the Applicants' and other homeless individuals' rights to life, liberty and security of the person by preventing them from engaging in essential life sustaining activities in public space and from creating shelter for themselves, when they have no other viable alternative.
3. The By-Laws further infringe the Applicants' and other homeless individuals' rights under s. 7 by preventing them from meeting essential needs, such as providing themselves with shelter which would allow them to stay safe and dry and protected from the elements, to safely store necessities-of-life such as food, water, clothing, bedding, sentimental belongings, personal hygiene supplies, medication and medical supplies, and to sleep and obtain rest.
4. In the context of an affordable housing crisis and the COVID-19 pandemic, the By-Laws and the proposed action of the Respondent further infringes the Applicants' and other homeless individuals' rights under s. 7 by giving them no provision of adequate housing with necessary supports and no alternative but to move into either unsafe congregate living situations or other places (like hotels) where they stand little chance of success. It further deprives the Applicants and other individuals experiencing homelessness of the liberty to make their own decisions about matters fundamentally impacting their lives, such as where and how to safely shelter in place. Some of these facilities also have curfews and other onerous rules that numerous individuals experiencing homelessness have been unable to follow which has led to their eviction from these facilities.
5. Depriving individuals experiencing homelessness of the ability to provide themselves with safe, warm, dry shelter in public spaces in Hamilton exposes the Applicants and other individuals experiencing homelessness

to additional health and safety risks. It also causes serious, state-imposed stress and interferes with their ability to make the basic and fundamental decision to take practical steps to protect themselves from the elements.

6. The By-Laws prevent the Applicants and other individuals experiencing homelessness from living together in a manner which allows them to provide each other safety and security. This constitutes a deprivation of their liberty and security of the person.
7. These deprivations are not in accordance with the principles of fundamental justice because they are contrary to the principle that no one should be subject to sanction for engaging in activities when there is no realistic opportunity to avoid those activities, or for engaging in those activities which are necessary to sustain an individual's safety and well-being. These deprivations are also contrary to the principle of fundamental justice that laws must not be arbitrary. As a result, the By-Laws contravene s. 7 of the *Charter*.
8. These s. 7 violations are not justifiable under s. 1 of the *Charter*.

Infringement of *Charter* section 12

9. The By-Laws also constitute an interference with the rights of the Applicants and other homeless individuals' right under s. 12 of the Charter to be free of cruel and unusual punishment.
10. As a result of the By-Laws, individuals experiencing homelessness are deprived of sleep and the ability to provide themselves shelter, and are subject to being moved along, having their belongings seized, destroyed and/or disposed of, and being forced to pay for the cost of the disposal of their belongings, simply for engaging in activities when there is no realistic opportunity to avoid those activities, or for engaging in those activities which are necessary to sustain their safety and well-being.
11. These s. 12 violations are not justifiable under s. 1 of the Charter.

Infringement of *Charter* section 15

12. The By-Laws also discriminate against the Applicants and other individuals experiencing homelessness in violation of s. 15 of the *Charter*. The Applicants are all members of groups protected by s. 15, and in some cases they are members of multiple protected groups, including people with mental and physical disabilities. The homeless population more generally also consists disproportionately of people who are members of groups protected by s. 15. For the Applicants, their status as a person experiencing homelessness is immutable and undeniably connected to their status as a member of these historically disadvantaged groups.
13. The By-Laws derogate from the dignity of the Applicants and other individuals experiencing homelessness by making it impossible for them to perform essential life-sustaining activities, and provide each other with support and protection, without sanction. The By-Laws, in their application to the Applicants and other individuals experiencing homelessness, are based on the premise that the needs of the homeless, including their need to sleep, rest, be peaceful, protect their belongings, and remain warm and dry, are not worthy of respect, concern and consideration. The By-Laws have the effect of perpetuating or promoting the view that individuals experiencing homelessness are less worthy of recognition or value as a human being or a member of Canadian society.
14. These s. 15 violations are not justifiable under s. 1 of the *Charter*.

Other grounds

15. Such further and other legal basis as are to be adduced at the hearing of this Application, as may be permitted by the Court.

October 4, 2021

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ASHLEY POFF *et al*
Applicants

-and-

CITY of HAMILTON
Respondent

Court File No. CV-21-00077187-0000

Ontario
Superior Court of Justice

PROCEEDING COMMENCED AT HAMILTON

NOTICE OF CONSTITUTIONAL QUESTION

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TAB 17

COA-25-CV-0166
Court File No: CV-21-00077187

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KRISTEN HEEGSMA et al.
Applicants

- and -

CITY OF HAMILTON
Respondent

P R O C E E D I N G S A T A P P L I C A T I O N H E A R I N G

BEFORE THE HONOURABLE, JUSTICE J. RAMSAY
on December 16, 2024, at the CITY OF HAMILTON, Ontario

APPEARANCES:

S. Crowe	Counsel for the Applicants
W. Poziomka	Counsel for the Applicants
S. Choudhry	Counsel for the Applicants
C. Sell	Counsel for the Applicants
M. Sutherland	Counsel for the Applicants
J. Diacur	Counsel for the Respondent
B. Shores	Counsel for the Respondent

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

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LEGEND

[sic] Indicates preceding word has been reproduced verbatim and is not a transcription error

(ph) Indicates preceding word has been spelled phonetically

TRANSCRIPT ORDERED: February 6, 2025 (confirmed to go ahead)

TRANSCRIPT COMPLETED: February 20, 2025

ORDERING PARTY NOTIFIED: March 8, 2025

MONDAY, DECEMBER 16, 2024

THE COURT: Good morning.

W. POZIOMKA: Good morning, Your Honour.

THE COURT: Yes. We actually haven't met, although I feel I know you all very well.

W. POZIOMKA: So, Your Honour, my name is Wade Poziomka.

THE COURT: Oh yeah, okay.

W. POZIOMKA: And I appear along with co-counsel, Sujit Choudhry.

THE COURT: Yes.

W. POZIOMKA: Sharon Crowe.

THE COURT: Yes.

S. CROWE: Good morning.

W. POZIOMKA: Michelle Sutherland.

THE COURT: Yes.

W. POZIOMKA: And Curtis Sell, as counsel...

THE COURT: Right.

W. POZIOMKA: ...for the Applicants.

THE COURT: Okay.

B. SHORES: Good morning, Your Honour. My name is, Bevin Shores, last name, S-H-O-R-E-S, first initial B. And I'm here with my co-counsel, Jordan Diacur.

THE COURT: I - yeah. By process of elimination. Okay.

B. SHORES: Thank you, Your Honour.

THE COURT: Well, we shouldn't really have people standing up if we're - if they're content to stay they can do that, but I'll try and get you a bigger courtroom tomorrow, okay?

W. POZIOMKA: Thank you, Your Honour.

THE COURT: Or, or an overflow or something.

W. POZIOMKA: Okay.

THE COURT: Yes. So, you want to start, Mr. Poziomka?

W. POZIOMKA: Yes, Your Honour. Thank you. I'll just start by giving you a bit of a roadmap of our presentation and make a few brief comments, and then turn it over to Mr. Choudhry this morning.

So, Mr. Choudhry will provide an overview of our case, after which Ms. Crowe will discuss the history of the various encampment protocols in the park's By-law in question today. She'll also take you through the Applicant's evidence. Mr. Choudhry will then present our legal arguments, and Ms. Crowe will speak to the quantum of damages we're seeking in this case.

And as I mentioned, Your Honour, I'll start with a few brief comments. And the first is that the Applicant's here today do not live in encampments by choice. They want stable, secure and affordable housing. And unfortunately, Your Honour, you'll hear extensive evidence today that there's a dramatic shortage of housing.

In the absence of housing options, the Applicant's have had to make hard choices in imperfect circumstances. One choice that's sometimes available to them is emergency shelter spaces. But the demand for shelter beds often exceeds the supply. And even when shelter spaces are available, barriers imposed render those spaces

inaccessible to some without homes. So, if there aren't enough housing options and there's insufficient shelter beds, what are the most vulnerable members of our society to do?

Your Honour, we are mindful that homelessness isn't just a municipal issue and we're not here to cast blame on the City of Hamilton. The failings start well above the municipality and obviously the provincial and federal funding is insufficient to tackle this issue, not just for the City of Hamilton, but for municipalities across the province. But it is the municipalities who have to tackle the end result on the ground. People who have nowhere to go, who are on public property in our parks. The face of poverty, which has sometimes been hidden away, is no longer hidden.

Now, we don't come before this court lightly, Justice Ramsay, seeking judicial intervention on a complex social issue....

THE COURT: I prefer to be addressed as, Your Honour.

W. POZIOMKA: My apologies, Your Honour.

THE COURT: Not at all, not at all. That's just my preference.

W. POZIOMKA: But there is a need for judicial intervention to provide safeguards for a vulnerable segment of our society. Times change. What's in place today with respect to how the municipality addresses encampments may not be in place tomorrow. Councils come and go. And because this is a

vulnerable group without the means to frequently seek judicial intervention, we ask that you carefully consider the right judicial response in this situation, even though the 2023 protocol now permits encampments under certain conditions. Nobody wants encampments, and again, we are not casting blame on the City. We recognize the need for a multi-prong solution involving the provincial and federal governments, but until that time, Your Honour, we find ourselves in a bleak situation, and the municipality is not alleviated from the obligation to protect this vulnerable segment of the population, even if they're not solely at fault for it.

In these terrible circumstances, the Applicants submit that it's far better to be able to stay in a tent, which provides at least some protection from the elements, some personal security, some privacy and some stability, because the alternative is to sleep rough on the streets, completely out in the open and exposed to the elements.

It's important to understand why encampments exist and we're certainly not here to romanticize or idealize encampments. We expect that our friends are going to lay the blame with the Applicants for their homelessness, to suggest that staying in encampments is a matter of preference by individuals who don't want to play by the rules, and that is simply not the case. In fact, the respondent itself has helped to explain the real

reasons why encampments exist. And I want to draw your attention to two such explanations from the record. Both of these are examples from City Reports that are in the record. And when I'm referencing to you, Your Honour, I'll be using the master numbers from case center unless you direct otherwise.

THE COURT: No, I prefer - that's what I prefer.

W. POZIOMKA: Okay. Thank you. The first is found at A9211, and that's in the Applicant's Compendium at Tab 8, and the document is entitled, "Encampment Pilot Evaluation" dated January 18th, 2023. It was prepared by Michelle Baird, then Director of Housing Services Division, and Monica Ciriello, the Director of By-law and Licensing Services Division, both of whom are respondent witnesses in these proceedings. And the document was Exhibit C to the Affidavit of Daniel Blake, who was Acting Director of Housing Services Division.

So, at A9211, at the bottom of that page....

THE COURT: Oh, I forgot to tick off "Master." Yes?

W. POZIOMKA: And, Your Honour...

THE COURT: Yes?

W. POZIOMKA: ...if it assists, we can direct you to that page if....

THE COURT: I've got - I've got it.

W. POZIOMKA: Okay. So, you'll see at the bottom o that page there's a highlighted portion that starts there, and I'm going to read this. I am only going to read twice, very briefly, so I'm not going to

stand up here reading paragraphs to you this morning, Your Honour, but:

> The presence of encampments continues to be complex in the result of several interconnected issues, including a lack of affordable housing, subsidized housing, and housing with supports in the community, as well as low social assistance rates, an increased cost of living, substance use and the existence of real or perceived barriers to accessing emergency shelter system. As a result, finding simple solutions is difficult. Since the beginning of the Pilot to the end of November, 2022, 12 people living in encampments have transitioned into housing directly through the efforts of housing focused Outreach. But there are still individuals living in encampments who are not, for a constellation of reasons that are specific to each individual, currently able to transition to housing. In order to transition into housing, more support is required, such as community support and support from other levels of government for programs that may assist people to transition to housing.

THE COURT: Don't let me interrupt you, and if it's - if it's appropriate that one of your colleagues answer this question, that's okay. But the question I have is what you actually want me to order, because you don't seem to have a problem with the By - the present situation, but I mean,

the By-law is valid or is invalid. So, what, what is it that you want me to order?

S. CROWE: Sir, would you like us to answer that at this point? It might be helpful to, to clarify....

THE COURT: Sure.

S. CROWE: Right. So, so...

THE COURT: Yeah.

S. CROWE: ...and this is - this is a point that's set out in paragraph one of our Factum.

THE COURT: Yeah.

S. CROWE: And the case - since in the wake of the enactment of the 2023...

THE COURT: Yeah.

S. CROWE: ...Encampment protocol...

THE COURT: Yeah.

S. CROWE: ...the case which was commenced before them, evolved into a retroactive case...

THE COURT: Yeah.

S. CROWE: ...in relation to the period between August 2021 and August 2023.

THE COURT: Yeah.

S. CROWE: And the relief that the Applicant's seek in relation to that 24 month period is, is for a combination of, of declarations, that during that period, encampment bans and evictions were unconstitutional and consequent on those declarations that certain *Charter* damages should be awarded to them.

THE COURT: Okay.

S. CROWE: Okay? And so the - in, in that respect, if I may, Your Honour, this - the posture of this

case is different than the *Kingston* and *Waterloo* cases that...

THE COURT: Yeah.

S. CROWE: ...me and my friends will be taking you through, because those were injunctions in real time...

THE COURT: Yeah.

S. CROWE: ...where the bans were in place at those times. And, and here - and to be clear, Your Honour, we take no position on the constitutionality of the 2023 Encampment Protocol, it, it's...

THE COURT: Right.

S. CROWE: ...- we have decided it's premature to advance any arguments on it because we're not - we're not aware of how it's, in our, in our sense - like...

THE COURT: Okay.

S. CROWE: ...is that - Your Honour, is that helpful?

THE COURT: Yeah, that's it. That helps me. You have probably uploaded a draft order?

S. CROWE: Yeah, yes, Your Honour, we'll take, we'll take care of that, Your Honour.

THE COURT: During the day. Good. Thank you.

S. CROWE: I appreciate that.

THE COURT: Okay. Go ahead. Sorry.

W. POZIOMKA: Okay. Gave me a chance to have a glass of water. Thank you. The second that I wanted to refer you to, Your Honour, is a t Tab 7 of the Applicant's Compendium. And that begins at A9209. This is the Encampment Observation Report

prepared by Michelle Baird, again, who was the predecessor to Daniel Blake as the Director of Housing Services Division.

THE COURT: Yes.

W. POZIOMKA: And you'll also see a highlighted portion there, Your Honour:

> With both housing and emergency shelter largely in accessible, and with more individuals entering into unsheltered homelessness, the constellation of existing supports is unable to meet the growing demand. More people are confronted with the reality of living in an encampment. A lifestyle that contributes to worsen physical and mental health outcomes, and often associated with increased substance use.

Your Honour, one point I'll make - note just for housekeeping is that obviously while we disagree with the Ruling with respect to the request to admit under Rule 51, we have abided by it and we've removed volumes 18 to 20 from the Application Record, and our Compendium does not rely on those three volumes.

THE COURT: Right. Okay. Thank you.

W. POZIOMKA: And the last point that I want to make to you this morning, Your Honour, is that City Councillors are elected officials in a democracy, represent the will of Hamiltonians. But this court, you, when sitting and applying the *Charter of Rights and Freedoms*, at least in my view, is a

sole and moral compass, protecting the vulnerable who cannot afford to safeguard their own interests.

The *Charter* applied in this case, in a case of this nature, is very similar to Human Rights legislation. And as Justice Sopinka, who this courthouse is named after, said in *Zurich Insurance* in 1992, along with Supreme Court:

> Often the final refuge of the disadvantaged and the disenfranchised.

Thank you, Your Honour.

S. CHOUDHRY: Your Honour, good morning.

THE COURT: Good morning.

S. CHOUDHRY: It's nice to meet you in person. For the record, my name is Sujit Choudhry. I'm one of the counsel team for the Applicants. And as my colleague Mr. Poziomka said, my task is to give you an overview. And just for your reference, Sir, because I see that you're making notes, I'm going to be - my submissions are based on paragraphs one to nine of our Factum. So, subsequent to the hearing, if you want to see anymore details you can find it there.

So, Your Honour, the, the Applicants are 14 individuals who either are or have been unhoused in Hamilton. Eight are women, eight are indigenous, two are black and one is a transgender woman. As I mentioned, they commenced this Application back in 2021, and then in 2023, in the wake of the

enactment of the Encampment Protocol, their challenge is retroactive to the period between August 2021 and August 2023. And there is a common point or the common element to the Applicant's cases is that the Applicants erected tents or shelters. We call these encampments, colloquially, on public property, and the City, in our submission, evicted the Applicants from their encampments, forcing them to what we call live rough. And in this case, Your Honour, there's - we refer to the living circumstances of the unhoused as falling into three categories. For the convenience sake there's living - there's overnighting in shelters or emergency shelters, specifically. Then that sometimes is called staying in shelter. Then there's living in an encampment, which is to live in a tent or under a tarp. And then there's what we call living rough. And living rough is to stay outside but to not be living under a tent or a tarp of some kind. And so the, the encampment, in our submission, the, the - during this time period, the ban on encampments and the evictions that occurred, violated the Applicant's Section 7 rights, both overnight and during daytime. Overnight bans were unconstitutional because shelters supply what's insufficient to meet demand, leaving the Applicants no choice but to sleep outside. Other times shelter beds were, in theory, available but were often inaccessible to individuals with disabilities, couples and people with pets. The Applicants were forced to sleep rough and faced

increased health risks, which tents would have mitigated, depriving them of their security of the person and life. The overnight encampment bans and evictions also deprive them of their liberty as shelter is critical to any individual's dignity and independence. The daytime bans and evictions, in our submission, also deprive the Applicants of their security of the person and life, because they lost the benefits - the potential health benefits of 24/7 shelter, including the risk - reducing the risks of hypothermia and dehydration, easier access to medical care and access to essential items, and the ability to form community to protect their safety. It also deprived them of their liberty because encampments would have enabled them to live with some degree of dignity and privacy.

These deprivations of these protected interests under Section 7 do not - did not accord with the principles of fundamental justice for two reasons. First, they were overbroad because they interfered with conduct that did not necessarily conflict with public use of parks; and second, they were grossly disproportionate in their effects on the Applicants, whatever the public interest at stake that further the City's interests.

In addition, the bans and evictions on encampments also violated Section 15 of the *Charter*. They discriminated on the basis of sex, because they had a disproportionate impact on women, who receive a much lower proportion of shelter beds then their

share of the unhoused and indeed the general population. Being unable to sleep in encampments increased women's risk for sexual assault.

The encampment bans also discriminated on the basis of race since indigenous persons are over-represented among Hamilton's population. And on the - and they also discriminated on the basis of the combination of sex and race, because they have a particular severe impact on indigenous women like eight of the Applicant's.

The encampment ban and evictions also discriminated based on disability against persons with mental health and/or substance use disabilities, who are more likely to face service restrictions in shelter; against persons with physical disabilities whose mobility issues may make it physically taxing for them to enter and leave shelter every day, and to pack up their belongings every day. And individuals with substance dependencies who cannot use them in shelter.

In our respectful submissions, these violations are - I'm sorry, Sir?

THE COURT: Okay.

S. CHOUDHRY: I, I can list those for you again if you like.

THE COURT: Well, no, it's substance....

S. CHOUDHRY: Yeah. I'll - so there's three types of disabilities, Sir. There, there's....

THE COURT: Yeah, yeah, it's just substance abuse. It's against the law for them to use them anywhere. They can even - they're not even allowed to possess the substances.

S. CHOUDHRY: Well, Sir, it's, it's, substance dependency is a form of disability, recognized in law.

THE COURT: I know, yeah. I know, but it's still....

S. CHOUDHRY: I understand. Well, look, so - Your Honour, I understand the concern so maybe I can - I'll make a note to try to address your concerns when we get to that point of the argument.

THE COURT: Sure. No, no, you've got it, so yeah.

S. CHOUDHRY: Okay. And then if I could shift to Section 1 of the *Charter*. The core point is that a blanket ban on encampments was not minimally impairing. That a minimally impairing alternative would have been conditions on the creation of encampments, limiting their size and their number, and their set backs from parks, from schools, from paths. For example, as set out in the notice, and quite frankly as set out in the 2020 Encampment Protocol that Ms. Crowe will describe, and in the 2023 Protocol. There were other means available. And then finally in terms of relief, and I think our friends will have quite a spirited debate on this, we are seeking declarations that there were - that during that 24 month period, that the City's bans were unconstitutional, and then consequent on those declarations, that damages are owed to the

Applicants for the psychological and physical harms they suffered.

And so, Your Honour, subject to your questions on the overview, I'd like to turn it over to my co-counsel Ms. Crowe to lead the evidence of the Applicants.

THE COURT: Yes, sure.

S. CHOUDHRY: Thank you, Sir.

S. CROWE: Good morning, Your Honour.

THE COURT: Good morning.

S. CROWE: Before I begin, I understand that a couple of the Applicants are in the courtroom today, and with your indulgence I'd like to take a moment to introduce them to the court?

THE COURT: Yes, please.

S. CROWE: Thank you, very much. And first we have Gord Smyth, if you can identify yourself.

THE COURT: Yes.

GORD SMYTH: Your Honour.

S. CROWE: Thank you, very much. And Jahmal Pierre as well. And I think that's it. Thank you, very much, Your Honour.

THE COURT: Thank you.

S. CROWE: Okay. I'd like to begin with the encampment protocol, the processes that have been engaged between 2020 to the present date. And, Your Honour, I do have an enormous amount of references, and I'm mindful of the time, and so what I plan to do is to identify each reference but I won't take you to all of them...

THE COURT: Okay. I pretty much...

S. CROWE: ...for the interests of time.
THE COURT: ...read, already, but - so that will help if...
S. CROWE: Okay.
THE COURT: ...take me to them - or if you mention them.
S. CROWE: Perfect.
THE COURT: I'll write them down.
S. CROWE: Thank you. Okay. So, first the 2020 Protocol, which is found at Volume 1, Tab 1, of the Applicant's Compendium, beginning at A9184.
THE COURT: Yes.
S. CROWE: Okay. So, as you know there was a previous application where five applicants sought an injunction prohibiting the City from dismantling encampments during the COVID 19 pandemic. The parties subsequently reached a settlement resulting in the 2020 Protocol.

The 2020 Protocol required the City to assess and accommodate individual needs before evicting encampment residents. In some cases residents were able to remain encamped indefinitely. So, I'd like to highlight a few aspects of that 2020 Protocol, starting at paragraph two, which is the VI-SPDAT
THE COURT: Sorry?
S. CROWE: VI-SPDAT
THE COURT: Oh. Oh yeah.
S. CROWE: And so the V - yeah.
THE COURT: I didn't know that's how you pronounce it.

S. CROWE: Yeah, it stands for the Vulnerability Index Service Prioritization Decision Assistance Tool. Just rolls of your tongue.
THE COURT: Yeah.
S. CROWE: So, the VI-SP....
THE COURT: It's a questionnaire.
S. CROWE: Pardon?
THE COURT: It's a questionnaire.
S. CROWE: Yeah, it is.
THE COURT: Yeah.
S. CROWE: Yeah. The VI-SPDAT was aimed to assess the degree of someone's vulnerability.
THE COURT: The title is longer than the questionnaire, probably.
S. CROWE: In....
THE COURT: And the result is acuities, or...
S. CROWE: That's right.
THE COURT: ...or that they call acuity.
S. CROWE: That's right, with the intention of trying to sort out what type of supports an individual might need, and what kind of environment they might function well in. So, paragraph three of this Protocol explains that the VI-SPDAT tool would, "Determine the path for how individuals sleeping rough are approached and engaged." And in simple terms, as Your Honour pointed out, it meant that someone's score on a VI-SPDAT would be used to determine whether someone could stay in an encampment. If they scored below a 13, there would be a maximum of 14 days where the individual could be remain encamped. And during the 14 day period, City agencies were to engage with the individual

with the objective of connecting them with housing or other supports. I'm just going to have a glass of water.

I'd next like to draw your attention to the 4th bullet point, which required the City to "Determine previous, if any, barriers effecting access into the system and attempt to resolve them." So, paragraph four of this Protocol explains that someone would be considered high acuity if they had a score of 13 or more. The 2020 Protocol contemplated undefined special circumstances where an assessment beyond the VI-SPDAT would be required.

At paragraph five, the Protocol states:

> Where a person experiencing homelessness is assessed as high acuity, and there is no available option for supportive housing, Outreach efforts would continue, but the person would not be required to move in 14 days.

So, in effect, someone who was - score - determined to be high acuity could remain encamped and wouldn't be subject to the 14 day movement rule.

Paragraph six states that:

> If the assessment found the individual had shelter or housing options available for which the transition would not cause trauma or

> decline in mental health, as determined by the City's Mental Health and Street Outreach Program, the City may remove such persons and their possessions under such legal authorities as may be employed.

And this was effectively the enforcement clause.

Lastly, the 2020 Protocol set out prohibited areas where people could not be in encampments, including no more than five tents per cluster, not on sidewalks, roadwalks,*[sic]* boulevards, no blocking of an entrance or an exit that was deemed to be a fire route, and at least 50 metres from a playground, school or childcare centre.

So, we've just gone over the - the elements of the Protocol and I want to highlight a few themes that emerge from that Protocol. And the first is, as you pointed out, the idea of acuity or vulnerability, which was central to determining whether someone should be allowed to stay in an encampment. There is an implicit acknowledgment that moving someone who has high acuity, from their encampment, might be detrimental. And later on Mr. Choudhry will address some of the City's evidence with respect to the known acuity or vulnerability of individuals living in encampments.

Second, the fourth bullet point of paragraph four, acknowledged that there may be barriers to accessing housing and shelter supports. Mr.

Choudhry touched on these barriers in his overview, and you will hear extensive evidence from the Applicant's, the Applicant's witnesses, and even the City's witnesses, about the very real barriers to accessing housing and shelter.

Third, paragraph six, which is the enforcement clause, implicitly acknowledged that moving some individuals, high acuity or not, could cause trauma or a decline in their mental health. And it is the trauma of displacement that we will ask you to keep in mind going forward.

Fourth, the City will claim that there has never been overnight enforcement of its By-laws and protocols, and uses this claim to allege that its actions have always been *Charter* compliant. Of note, this 2020 Protocol does not indicate that there are any time periods that were off limits for enforcement. And I will come back to this notable gap in the next two Encampment Protocols, as well as the Park's By-law momentarily. But I would like to highlight from the outset that there is a conspicuous absence of any written policy, protocol or directive that substantiates the City's claim that it never carried out overnight encampment evictions. Nor did the City's witness from Hamilton Police Services, in this proceedings, provide evidence about any time prohibitions for enforcement. Simply put, it is a black hole in the Respondent's evidence.

On August 9th of 2021, City Council voted to repeal the 2020 Protocol in an emergency meeting, effective August 30th, and return to what it called "Pre-Protocol Enforcement of City By-laws, that prohibit camping on City property, including park areas." And this is found at paragraph one of the Respondent's record, Tab 2, number B1440. It's also Exhibit A to the October 5th, 2021 Affidavit of Monica Ciriello.

So, moving on to this 2021 Protocol, which I'm going to call the 2021 process as it's identified in the document....

THE COURT: The Encampment Process.

S. CROWE: Yes, the 2021 Process. So, on the repeal of the 2020 Protocol, the Respondent implemented an encampment process for responding to encampments. The ultimate objective of this process was to prohibit encampments. It consisted of six steps beginning with a complaint to municipal law enforcements, or MLE, and ending with a site clean-up. Enforcement of trespass notices that were issued by MLE, was done by the Hamilton Police Services, or HPS. And this process was in place until the adoption of the current protocol in August 2023. So, again, I'd like to highlight a few aspects of this 2021 process.

First, after a complaint about a By-law violation was received, MLE would attend to determine whether or not there was a violation and seek what it called "voluntary compliance." Voluntary

compliance is a term that you will hear from the respondent over and over, and we submit that it is wholly misleading. In fact, voluntary compliance often means that people left because they felt that they had no choice. They wanted to avoid further escalation or interaction with MLE or the police. And you will hear evidence on this point from several applicants, and it will become clear that there was nothing truly voluntary about leaving when you were told that were not allowed to be where you are and that you have to leave. Voluntary compliance still amounts to an eviction and is just as traumatic or - and harmful as any other kind of eviction.

Second, although step three purports to offer various services through the Housing Focus' Street Outreach Team, such as connection to shelter and a development of a housing plan, the fact remains that during the two year period of this 2021 process, shelters were full, they were often inaccessible and housing remained completely out of reach form many people living in encampments.

Third, as with the 2020 Protocol, there is no mention that enforcement will not take place overnight. Indeed, steps four and five state that a verbal trespass order is issued by MLE, which then triggers enforcement by the police. Paragraph two of - sorry, this is - I'm now on page B1443, goes into more detail about the coordination between MLE and the police to enforce the trespass

notice, because the *Trespass to Property Act* is "a Provincial Act enforced by HPS." Again, without any mention of timeframes that were off limits. And while the respondent will claim that MLE did not enforce trespass notices, meaning carry out evictions overnight because MLE does not work overnight, there is certainly no suggestion that HPS, who was enforcing trespass notices issued by MLE, was not at liberty to enforce - enforce overnight under the 2021 process.

At the bottom of paragraph - sorry, the bottom paragraph of B1445, the report contemplates that counsel could direct licensing and By-law to enforce the 2021 process seven days a week, inclusive of evenings and weekends. And while we don't know what became of this specific possibility, we can say that at the very least what was considered was continuous enforcement and no overnight exemption.

So, I'll wrap up with the 2021 process by drawing your attention to paragraph five of that same page, B1443, that confirms that amidst the process that amounted to a total ban on encampments, occupancy pressures existed, particularly for women. Challenges remain in access to available beds and in a number of instances capacity is not available. Occupancy pressures is another term that the respondent repeatedly uses to refer to the shelter system but the plain language meaning is that the shelters are full.

Monica Ciriello is the Director of By-law and Licensing Services for the City's Planning and Economic Development Department. Paragraph ten of her July 29th, 2024 Affidavit, found at Volume 1, Tab 4 of the Applicant's Compendium, at A9202, makes an emphatic statement that under the 2021 protocol, the 2021 process and the 2023 protocol:

> MLE does not take enforcement action at night or as night is approaching. People are not and have not been removed or told to move overnight. More generally, MLE officers do not work overnight. MLE officers are empowered to use discretion in enforcing By-laws, such as exercising leniency in poor weather or other extenuating circumstances. Additionally, MLE officers do not remove people from tents or temporary structures, or dismantle or remove temporary shelters that are occupied.

Your Honour, there is so much to unpack in that paragraph. First, the claim that MLE does not take enforcement action at night - so the claim that MLE does not take enforcement action at night, but night is not defined with any kind of timeframe. Second, the respondent attempts to reinforce its position that MLE officers do not work overnight and as such cannot carry out overnight encampment evictions, however, the 2020 Protocol references legal authorities that may be employed by the City, such as the police, for enforcement. The 2021

process specifically tasks the police with the enforcement of the trespass notices issued by MLE. There is certainly no suggestion and no evidence, again, that HPS doesn't work overnight, and there is no evidence of any kind that HPS would not be at liberty to enforce the City's protocols and trespass orders overnight.

Third, despite MLE's ability to use discretion not to evict people in bad weather, you will hear applicant evidence that this is precisely what happened.

Lastly, the claim that MLE does not remove people from tents or temporary structures, or dismantle or remove them while they are occupied, warrants some dissection. Indeed, you will not hear evidence that our applicants were dragged out of their tents by MLE or the police, but they were told to leave and they exited their tents as a result. And the respondent is attempting to make a meaningless distinction.

At page A9205, the cross-examination - is the cross-examination of Ms. Ciriello.

THE COURT: I'm sorry, the page?

S. CROWE: A9205.

THE COURT: Yes.

S. CROWE: And starting at question 24, Ms. Ciriello explains how MLE have a - and HPS, or the police, have a partnership working "very collaboratively on a number of compliance and

enforcement measures." It is abundantly clear that the City is responsible for enforcement measures undertaken by HPS.

Moving on to the 2023 Protocol.

In August 2023, the Council adopted this Protocol, which is found at A9189 of the Applicant's Compendium, and that's at Tab 3. My apologies. And so this Protocol allows unhoused persons to erect tents in public parks, subject to restrictions including five tents per grouping, 50 metres in between groupings of tents, prohibitions on encampments on sidewalks, roadways or boulevards, and encumbering entrances, exits, fire routes, distance requirements from schools, playgrounds and childcare centres, and restrictions based on environmental considerations.

The restrictions in this protocol are similar to what was in the 2020 protocol, and they are also similar to the relief requested in the, in the Amended Notice of Application, which is at A4335 of the fresh, as amended, Application Record. And those restrictions were that, what we were seeking in this Application, are that tents be in a park under the park's By-law, at least 50 metres away from a school, playground or childcare centre, in groupings of no more than six tents, and at least 200 metres away from other groupings. The 2023 Protocol also added new prohibited spaces and distance requirements from several locations including sports fields and dog parks.

So, before we move on to the applicant's stories, I'll wrap up with section 3 of the park's By-law, 01-219, found at Volume 1, Tab 6, of the Applicant's Compendium, A9207, which sets out the hours in which the public is permitted to use parks. So, section 3(1) of the park*[sic]* prohibits entry or access to a park except during the times that it is open to the public.

3(1) - three - sorry, 3(2) sets park hours as either a) the hours posted on a sign or notice; or b) where there is no posted sign or notice, the park "shall only be open to the public each day from 6 a.m. until 11 p.m."

And I raise section 3 of the Park's By-law to further demonstrate how individuals were not reasonably able to stay in parks overnight. The By-law itself prohibits overnight access.

The respondent claims, in paragraph 19 of its Factum, that the applicants concede that encamping was permitted overnight simply because they were, at different times, able to remain in a public park for an extended duration. But I want to be clear that there's absolutely no concession by the applicants that staying in the parks overnight was in fact permitted. On the contrary, several of the applicants detail overnight and early morning, for example, prior to 6 a.m., enforcement. Several others describe wandering around all night not

knowing where they could stay. Of note, during the course of cross-examinations, my friends never asked any of the applicants if they were aware that they could in fact remain in a park overnight during the two-year period between the 2020 and the 2023 Protocols. And such a gap into what is such - should be a central question put to the applicants, must invite the court's skepticism of the respondent's claim.

So, I'd like to share some of our client - our applicants' experiences to help the court understand why it was essential for them to be able to stay in encampments during their periods of homelessness.

I'll begin with a summary of how the applicants came - became - came to be homeless. Then discuss what shelter options - sorry....

THE COURT: So just - it was the same By-law throughout.

S. CROWE: Yes.

THE COURT: And the By-law always said you can't be in a park after 11.

S. CROWE: That's correct.

THE COURT: Okay.

S. CROWE: So, I'll begin with a summary of how the applicants came to be homeless and then discuss what shelter options were available or more accurately unavailable to them during their homelessness. And then I'll move on to their experiences in encampments, and lastly, conclude

with an exploration of the impact of encampment evictions. I will be referencing the Applicants' Affidavits, several of the cross-examinations and any related medical evidence. I'll also reference evidence from the City's own witnesses that corroborates the applicants' experiences in several key aspects.

The first being that some of the, some of the causes of homelessness, including high rents and low social assistance rates; the second being the consistent lack of shelter capacity; the third being the various barriers to accessing shelter; and lastly, the need for housing supports and the importance of individual autonomy or choice in deciding where people live.

The City witnesses validate and confirm our clients' experiences, and collectively, the applicants' experts and even some of the respondent's witnesses, paint a consistent picture of individuals who have not had consistent, reliable, predictable access to shelter or housing during their homelessness.

Before we get into the specific evidence, I also want to highlight the nature of the health care and the medical evidence that is part of this application.

So, you'll see that health care for the applicants involved are provided by two organizations who are

social medicine organizations who provide health care to people who are experiencing homelessness in various unconventional settings. And those two organizations are, HAMSMaRT, which stands for the Hamilton Medical Social Response Team*[Hamilton Social Medicine Response Team, HAMSMaRT]*, and the Shelter Health Network.

There is some overlap in the physicians who work for these organizations, and both work, operate as a group practice model.

While the applicants sometimes see their doctor, social workers and other health care providers in office, HAMSMaRT and the Shelter Health Network, also provide medical care in shelters, drop-in centres and encampments.

So, when we discuss the medical evidence that we have tendered for the individual applicants, it's important to understand how providing healthcare to people experiencing homelessness often looks different to more conventional types of health care. There's a helpful explanation for how it differs in the cross-examination of Dr. Wiwcharuk, which is found in the transcript of the continued cross-examination at Volume 4, Tab 82 of the Application record, number A5387. So, this is Dr. Wiwcharuk's cross-examination. And at question 85, she explains:

> Classically, you might have the idea of a

patient coming in and you have a 40 minute intake and you discuss all your past medical history with all previous reports, and that is a very privileged way of being able to access health care. It is not the reality of the majority of the people that are - have significant mental health and addiction histories.

And in her re-direct, which is at Volume 4, Tab 81 of the Application Record, page A5404 - sorry?

THE COURT: You mean her re-examination?

S. CROWE: Okay.

THE COURT: No, that's okay. I'm fine.

S. CHOUDHRY: Okay, sorry.

THE COURT: No, no. I'll let you know if I want you to slow down.

S. CHOUDHRY: Sorry, Justice - sorry, Your Honour. It's just....

THE COURT: It's okay. Her re-examination?

S. CROWE: Yes.

THE COURT: All right.

S. CROWE: Beginning at question 70.

THE COURT: Yes.

S. CROWE: She explains how there are several doctors with both HAMSMaRT and Shelter Health Network, as well as nurses, nurse practitioners and social workers. And in addition to having the access to patient charts and hospital records, they can access patient information from several unusual sources of information, such as pharmacies, shelter workers and social assistance workers who

collectively work together to provide what Dr. Wiwcharuk called a "circle of care."

The applicants and their doctors will give evidence about the lost connections with health care providers that can happen when someone is repeatedly displaced. Mr. Choudhry will expand on this part, including addressing the medical expert evidence that is, again, consistent with our applicants' experiences.

So, we would ask you, that when you're considering the, the medical evidence before the court, that it should be considered in the context of the reality of what seeking and receiving health care looks like when someone is homeless.

Our friends claim that information gathered from medical charts and doctors who were part of a group practice amounts to hearsay, and we say it is not because it is a reasonable and practical way of gathering patient information. To require affidavits from each doctor or each practitioner involved in a particular aspect of a patient's care, would impose an impossible standard of proof on our applicants.

So....

THE COURT: Well, it's hearsay, but isn't it admissible and a well known exception to the hearsay rule?

S. CROWE: Well, we would certainly agree with you. I'll leave my friends to expand on it if they, if they wish to. Okay.

THE COURT: It just goes to weight, that's all.

S. CROWE: Right. Okay. So, let's talk about the applicants. So, Kristen Heegsma, our lead applicant, and so her first Affidavit sworn June 7th, 2024, is found at Volume 1, Tab 9 of the Compendium, at page A9214. Kristen is a 31 year-old indigenous woman who receives ODSP. She has post-traumatic stress disorder, depression, anxiety, opioid and stimulant use disorder, and borderline personality disorder. She has been homeless almost continuously since 2019. She became homeless after fleeing an abusive relationship and moving in with her grandparents who subsequently kicked her out because they mistakenly believed that she was reconciling with her abusive ex-partner. She stayed in encampments for periods of time, ranging from a week to five months. She was able to stay in encampments for longer periods prior to the repeal of the 2020 Protocol. She left encampments after being told by By-law officers that she had to leave, and that she had no choice - she felt that she had no choice. She would pack up as many belongings as she could, but often lost some of her belongings because she could not pack everything. Kristen did want to access shelter during her periods of homelessness. She - but she faced several barriers. In her words, women's shelters are "almost always full." And without a phone she had to walk from shelter to

shelter to find a bed. At times she gives up on calling shelters, knowing that they will just be full. The City suggests this means that there were times that may have - that there may have been times when shelter was available, but Kristen would simply not engage. Kristen was clear about this point in cross-examination. At a certain point she didn't need to go to shelter because she already knew that they were full. She had that foundational knowledge and she would speak to other women who were homeless, as well as City workers, to let her know of any potential shelter openings. And that's found at her cross-examination at page A4726 of the Application Record, question 286. Her doctor's office and former drop-in centre regularly also tried to find her shelter but were unable to do so.

So, turning to the Affidavit of her doctor, Dr. O'Shea, at page A9226, Tab 11 of the Applicants' Compendium, in the third paragraph, Dr. O'Shea describes some of the problems that Kristen had accessing a shelter bed. And I'm sorry, I don't have this in front of me, so just give me a moment to pull it up.

THE COURT: Yeah, I've got it.

S. CROWE: Okay. Dr. O'Shea writes:

> Kristen is often reluctant to access shelter beds for the primary reason being that she is fearful of her physical safety in a congregate shelter setting after suffering physical

> assaults within shelter previously. Kristen has also previously been restricted from accessing shelter space due to behaviours related to her underlying mental health and substance use disorders, leading to a lack of trust with the shelter system. Nevertheless, we have attempted on multiple occasions to secure shelter space for Kristen, particularly through the cold winter months between December 2021 and March 2022. On at least three occasions we called multiple shelters for women from my clinic office and on each occasion we were told that there was no shelter space available for Kristen. On each occasion we were asked to check back the following day.

So, while Kristen has periodically been able to access a shelter bed, she has also been service restricted or kicked out. Once for a year from the hotel program for several reasons including missing curfew after working a night shift; a relationship breakdown that made her ineligible for a couple's hotel; and behaviours related to her mental health and substance use disorders. She also couldn't stay in shelter with her partner and when she was in a relationship.

So, it just - circling back to the term, "service restriction", because that will come up repeatedly in the proceedings, so a service restriction is a effectively a shelter ban that prohibits an individual from staying in a particular shelter for

a period of time. And the applicants will give evidence about a wide range of conduct that can trigger a service restriction, leading to bans that can stay in place for days, weeks, months and sometimes even longer. Both the applicants and the respondent witnesses agree that service restrictions can be the result of behaviour that is related to someone's mental health or substance use disability. And I'll address the specific aspects of the evidence shortly.

My friends want you to accept that service restrictions are only used in the narrowest of circumstances to respond to incidents of violence, reporting to claim that individuals who are service restricted are the authors of their own misfortune. But this is false. There is in fact a wide range of - wide spectrum of behaviour that can lead to a service restriction.

Jahmal did - sorry, Kristen did have a brief period of being housed while staying at the YWCA in around mid to late 2021, however, after about three to four months, after having stolen - having money stolen from her room, she was discharged from the program and again found herself homeless.

Kristen has slept unsheltered on the streets, on benches, heating grates and in stairwells. Sometimes she uses a sleeping bag, tarp and blanket. And when she cannot find somewhere to

sleep she walks around all night where men try to solicit her for sex.

Kristen and her then partner stay - also stayed at a friend's apartment in mid-January 2022, but her friend was evicted, meaning that Kristen was also evicted. She then couch-surfed with her father, who was also evicted. In December 2022, or January 2023, she couch-surfed in a rooming house where she encountered a person with whom she had had a previous conflict. Over 48 hours, that person and others held Kristen hostage and beat her, breaking her nose and giving her black eyes. They stole her bank card, I.D., gift cards and her, and her ODSP benefits for the month. Needless to say, it was deeply traumatizing.

When we talk about the impact of encampment evictions on Kristen, it's important to note that she has been evicted from encampments several times over the years. She was evicted from an encampment in the fall of 2021 after the injunction was denied in the *Poff* case. A By-law officer told her that she had one day to move because they were shutting down all encampments and we were no longer allowed to stay and "I had to figure out something else."

In the following three weeks she was assaulted seven times by a male acquaintance. She was robbed three times and she was raped while sleeping on a park bench outside of City Hall. Understandably, these incidents worsened her mental health and

substance use. When she can neither stay in a shelter nor in a tent, she usually wanders around all day trying to find somewhere safe, which put her at increased risk of violence. She hardly sleeps. She's up for days at a time and regularly falls asleep during the day.

In late May, 2020, she fell asleep while walking and hit her head and cutting it open. When she's unable to use a tent, she experiences a lack of privacy for even basic needs such as getting changed and being out of the public gaze. She's exposed to the elements. She has a diminished sense of security without any physical barrier of a tent or having friends in close proximity. She experiences an increased sense of despair, leading to increased substance use. The deterioration of her mental health, which - and increased isolation when she is forced to hide, leading to an increased risk of overdose and fewer connections with street outreach, medical supports and an increased risk of violence and theft. And that is found at Tab 9, number A9217, and paragraph 33 of our Factum.

Now, I want to link Kristen, who is indigenous, and our other female applicants who are also indigenous, with the evidence of Audrey Davis, because there are unique circumstances when understanding both the impact of encampment evictions and the safety of shelter space for indigenous individuals. So, before going any further with the applicants, I'd like to refer you

to the Affidavit and cross-examination of Audrey Davis, found at - I'm sorry, just one moment. It's page A5601 of the Application Record, and if you give me a moment I can give you the Tab as well if needed.

THE COURT: No, no, that's fine...

S. CROWE: No, you're okay?

THE COURT: ...the page is good.

S. CROWE: Okay. Thank you. So, Audrey Davis is the Executive Director for the Hamilton Regional Centre, or HRIC. HRIC runs many programs for indigenous people in Hamilton, including programs intended to support individuals experiencing homelessness. In paragraphs 5 to 7 of her Affidavit, Ms. Davis gives a very brief overview of how indigenous people have been displaced from the land in Canada for centuries, including through residential schools and the 60's scoop. At page 5605, starting at paragraph 22, she describes some of the barriers to housing faced by indigenous people, including acts of discrimination where indigenous people are mysteriously screened out after viewing a unit, or an HIC worker identifies that they are calling from an indigenous organization and the individual is no longer a candidate.

Okay. So, I would like to draw your attention to paragraph 23, and I'm sorry, just give me a moment to pull that up myself.

THE COURT: Yeah, no, I just need a moment anyway.

S. CROWE: Okay.

THE COURT: Okay. Yes?
S. CROWE: Thank you. This is at Tab 66 of the Application Record.
UNIDENTIFIED VOICE: What volume?
S. CROWE: Sorry?
UNIDENTIFIED VOICE: What volume?
S. CROWE: Volume 4. And I'm sorry it's taking me a moment to call this up. Sorry, my computer is just a little bit slow loading this.
THE COURT: That's okay.
S. CROWE: Okay. So, paragraph three. The Affidavit reads:

> It is particularly hard to house people considered to be 'street-entrenched'. This refers to people who have deeply established patterns that inhibit their ability to establish trust and maintain connections with support services, including housing supports. Often times the combination of factors such as insufficient income, lack of access to services, unresolved trauma, mental health and substance abuse disorders, relationship breakdowns, make it extremely challenging to connect individuals with housing.

And I'd ask you to keep this idea of someone who is street-entrenched, and how this can become a barrier unto itself in accessing housing, in mind, particularly when we are talking about our indigenous applicants.

Okay. So, moving on to Cassandra Jordan, which is at Volume 1, Tab 13 of the Compendium. She is a 39 year old indigenous woman who receives ODSP. She has degenerative disc disease, chronic pain, opioid and stimulant use disorder. She became homeless since August - or September 2021 - sorry, 2020, after being unlawfully evicted from her rental unit.

So, her Affidavit was, unfortunately, mistakenly omitted from our Compendium, so we'll refer you to Tab 28, sorry, Volume 2, Tab 28 of the Application Record, beginning at A4732.

So, after being evicted, Cassandra's first course of action was to try to get into shelters, but when she called shelters she was told that they were full. And without her own phone she used a phone at the Wesley Day Centre until it was shut down, and "called and called, and called, and called just to be rejected, rejected, rejected, rejected." Eventually she concluded that the women's shelters are almost always full and stopped calling every day. She also had help from several outreach workers who tried to get into a shelter but were unable to do so. She was once able to access a spot on the floor at Carole-Anne's Place for two nights. On the third night, Carole-Anne's Place was either full or she was denied access because she had tested for - positive for COVID 19.

Cassandra's experience is that Carole-Anne's Place sometimes prioritizes women who have stayed there the night before, who are sick and are very old. She could line up at Carole-Anne's Place - which opens at 10:00 - at 5:30 and still not get a space. It is difficult for her to continuously move with her belongings in and out of shelter. Her experience is that theft is rampant at Carole-Anne's Place. She - there was one incident where she tried to use a wheelchair accessible washroom stall to bring her belongings in - sorry. Generally, she tries to use a wheelchair accessible washroom stall to bring her belongings into the stall with her to protect against theft. One time the stall was not available, the accessible stall was not available, and her suitcase and her clothing were stolen outside of her stall.

Cassandra was discharged from Mary's Place because of her abusive ex-partner kept on showing up at the shelter, and they informed her that her presence put other women at risk and told her that she would have to enter shelter outside of Hamilton, but she could not leave because her supports were in Hamilton. And that's part of the cross-examination found at Volume 2, Tab 29 of the Application Record.

Cassandra was evicted from the Ferguson Encampment on August 15th - sorry, October 15th, 2020. She lost her tent because By-law threw it away. She was offered a hotel spot and asked for a day to

store her belongings but unfortunately the hotel could not accommodate that request. She was told that her hotel - her spot would be held until the next morning, but it was unfortunately given away. She called shelters to try to get a bed and had workers call on her behalf. They were told that the shelters were full. She then moved to a different park at JC Beemer. She did not have her own tent but shared a tent with others until she was able to get her own. And she stayed there for approximately a year until November 24th, 2021, when the City evicted residents following a fire. Now, Cassandra had been receiving treatment for a serious leg burn, it was unrelated to the fire, and had been using a walker and didn't have anywhere to store her belongings at the time of the eviction. She was admitted to the Barrett Centre, which is a crisis centre, for five days and then discharged. And when she was discharged, she learned that shelters were once again full.

Cassandra has also couch-surfed while homeless. She was able to temporarily stay with her mom after being discharged from the Barrett Centre, but since her mother lives in subsidized housing, she could not let Cassandra stay for an extended period without jeopardizing her mother's tenancy. In January, 2024, Cassandra briefly stayed with her boyfriend, but he was abusive and she left. Cassandra's also slept completely unsheltered or sleeping rough as Mr. Choudhry explained. Cassandra contacted shelters after leaving her

mother's place but again she was told that they were full. So, she slept unsheltered outside, including in a tunnel, on the sidewalk outside Carole-Anne's Place, on heating vents, behind City Hall and outside a church. In the middle of winter she sought safety and warmth with others on the heating vents outside City Hall. The City boarded up the vents and the police removed everyone, and she feared that she would freeze to death.

So, I just want to circle back for a moment to her statement that she slept on a sidewalk outside Carole-Anne's Place. So, we know from paragraph 26 of Cassandra's Affidavit, as well as the Affidavit of Medora Uppal, that Carole-Anne's Place is an overflow shelter for women. An overflow shelter exists because the women's shelters are full. And Cassandra, like some of our other female applicants, have experienced that even the overflow shelter is full - can be full. And as a result, she has slept outside the overflow shelter on the sidewalk. And she is not the only female applicant who stays outside of Carole-Anne's Place.

Now, the respondent may suggest that sidewalks are not permitted locations under any of the protocols, and perhaps even blame Cassandra for staying in a prohibited space, but for Cassandra and the other Applicants like her, the continuum of being unable to access shelter, overflow shelter or even stay on a sidewalk, is profoundly unjust.

THE COURT: I'm sorry, is profoundly?

S. CROWE: Unjust.

THE COURT: Thank you.

S. CROWE: So, turning to the impact of encampment evictions on Cassandra.

So, when she was evicted from JC Beemer, she did not receive proper - appropriate wound care for her burn. She had been seeing Dr. Wiwcharuk(ph) but lost contact with her after being removed from that encampment. And that's found in the Affidavit of Dr. Wiwcharuk(ph), at Volume 4, Tab 80 of the Application Record, pages A9235 to A9236.

Cassandra witnessed a heavy police presence with By-law officers at encampment evictions, along with Bobcats and garbage trucks to dispose of belongings. And that's at paragraph 13 and 16 of her Affidavit. She describes evictions as intimidating, traumatizing and forceful, and felt that she had no option but to comply with directions to move. Packing up and moving for Cassandra is exhausting physically, mentally and emotionally. She's lost essential belongings including her tent, from encampment evictions. And without a tent she's had to sleep outside. She finds it difficult to sleep and is so exhausted at times that she doesn't know what day it is and finds it harder to abstain from substances. She's been robbed. She also feels "all crippled up" and cannot walk properly from having to continuously move all of her belongings around. When she is in an encampment with people she trusts, they look out

for each other. They take steps to prevent theft, and they can huddle together to stay warm, and she can have a bit of time to rest. Despite the 2023 Protocol, Cassandra was asked to move her tent three times at B(ph)front(ph), sometimes a matter of only 20 feet. Each move required her to move all of her belongings, which is very difficult for her in light of her disabilities and pain.

So, moving on to Misty Marshall. Misty Marshall is a 32 year old indigenous woman who receives approximately $340 a month from Ontario Works. She has anxiety, depression, post-traumatic stress disorder, opioid and stimulant use disorder, and asthma. She became homeless in 2020. Prior to becoming homeless, she had rented Airbnb's and stayed in hotels. Her wallet was stolen, she lost all of her cash and I.D., and without I.D. she could no longer rent a room. So, like Kristen and Misty, on becoming homeless - sorry, and Cassandra - on becoming homeless, Misty did want to stay in shelter. But she was repeatedly told by other women that the shelters were always full. In April or May of 2021, Social Navigation, which is a arm of - the paramedics arm of the Hamilton Police Services, contacted shelters on Misty's behalf, but were told that shelters were full. She also tried to get into the overflow space at Carole-Anne's Place. And like Cassandra, she explained her experience where women line up for hours to try to secure a spot at 10 p.m. As of May 2022, she had been unable to get into a spot at Carole-Anne's

Place because they were consistently full. By 2024 she was able to stay once. Misty was unable to access overnight drop-in centres at Willow's Place, which is sometimes full even during the day. She was occasionally able to access overnight drop-in at the Hub, which is a drop-in centre for people experiencing homelessness during cold alerts, but high demand meant that she could only stay for an hour or so. She currently attempts to access shelter beds approximately twice a week but has been unsuccessful.

Misty has been evicted from several encampments. She's witnessed the City showing up with Bobcats. Once she was given 20 minutes notice to leave. In 2021, she stayed in a tent by the outdoor heating vents at City Hall. The City then blocked the heating vents in the middle of the winter. She did not bother to put up tents very much since 2022, because in her words the City had ramped up enforcement and she would be required to move. She also stayed with different friends in their tents. Following in the repeal of the 2020 Protocol, police suddenly came and told people they could only stay for a week or two, followed by the City showing up with bulldozers. She explained that people started using tarps at that point because they were easier to put than tents, even though they provided less security and less protection to the elements. Misty also experienced an overnight eviction. At Tab 15 - sorry, let me just get you the Volume. Tab 15, Volume 1 of the Compendium, at

A9242. She describes an incident around early May, 2022, where she was huddled under a tarp and a blanket with friends. At 11 p.m. the police showed up and told her that, "the park was closing and they had to leave." The police warned them that they would return in a half hour to make sure they had left. Misty left to avoid getting arrested or further escalation.

Misty's cross-examination took place over two years after her May 12th, 2022 Affidavit. By contrast, her May 2022 Affidavit was sworn only two weeks after this event, meaning that it was much fresher in her mind. And while the respondent points out that she could not remember the date, during her cross-examination, her account of the incident was true to what was contained in her Affidavit. So, the cross-examination does not detract from the accuracy of the statement. In the same paragraph, which is paragraph 24 of the Respondent's Factum, the City appears to be attempting to further undermine Misty's credibility by suggesting that her claim that she was evicted from the Ferguson Encampment in 2020 is precluded by a settlement to which she was not a party.

Misty also couch-surfed with friends and acquaintances starting in 2020 and more regularly in 2022 after realizing she would not be able to put up a tent. And this is at Volume 3, Tab 15, page A9241 of the Compendium, paragraphs 22 and 29.

Misty sometimes wanders around at night in search of somewhere to stay. She's slept outside and sheltered in various locations, and also as I mentioned, under a tarp. When she does not have a stable place to stay overnight, she sometimes only gets one to two hours of sleep, and sometimes she's slept for days. She has trouble concentrating and has, at times, been unable to keep up with her mental health treatment. In contrast, when she was able to stay at the Ferguson Encampment for several months, her daughter was better able to connect with her. She had access to food delivery and she could sleep better. She lost contact with her doctor immediately following her eviction from Ferguson, and when they reconnected a year later, Dr. Wiwcharuk(ph) noted that she had "drastically decompensated." Outside an encampment she had been repeatedly robbed, sometimes left with only the clothes on her back. She has been exposed to the element while using a tarp instead of a tent and had her belongings stolen while staying under a tarp. When wandering the streets in search of shelter, she has seen men driving around Carole-Anne's Place while women await in line, appearing to solicit women for sex. Men have followed her in cars, again, trying to solicit her for sex. She has been sexually assaulted three times since June 2022 while couch-surfacing with male acquaintances. Misty's experience is that some men expect sex from her in exchange for shelter. She has been threatened with sexual assaults many more times. She's at increased risk of sexual assault during

winter when she feels compelled to seek indoor shelter.

The next applicant is Sherri Ogden, a 31 year old indigenous woman who is....

THE COURT: All right. I'll interrupt you there and we'll take the morning break.

S. CROWE: Okay.

MADAM REGISTRAR: Order, all rise. Court is recessed for 20 minutes.

R E C E S S

U P O N R E S U M I N G:

MADAM REGISTRAR: Order, all rise. The Superior Court of Justice has now resumed. Please be seated. A reminder that there are no electronic recordings or pictures allowed, and all cell phones should be on mute or turned off. No food or drink except for water. Thank you. Please be seated.

THE COURT: Yes. Go ahead.

S. CROWE: Thank you. I am mindful of the time so I will try to move at a reasonable pace.

THE COURT: Well, you've got a day and a half.

S. CROWE: Right.

THE COURT: And then you don't, so. So, you fill that however you feel appropriate.

S. CROWE: Thank you. Okay. Sherri Ogden. Sherri is a 31 year old indigenous woman who receives ODSP benefits. She has depression and substance use disorders and also experiences functional pain. She became homeless in 2017 after she had been living with her mom but left because of a strained

relationship. She has stayed in several encampments ranging in periods of time from a few days to seven months. She's been evicted from almost every encampment. For a while she would take down her tent every morning and then return at night to avoid enforcement. But By-law eventually caught up and showed up at her tent at 5:30 a.m. And that is found at Volume 3, Tab 56 of the Compendium, the Applicant's Compendium, starting at question - I'm sorry....

THE COURT: I'm sorry. You gave me - did you give me the page number?

S. CROWE: A9259.

THE COURT: Thank you.

S. CROWE: Oh, I'm sorry, it is A9 - sorry, A4951, beginning at question 133. So, Sherri describes a situation where she was taking her tent down in the day, putting it back up at night and then eventually By-law caught on, in her words, to what she was doing and started showing up earlier. And so when she was asked what time in the morning they would show up, she indicated 5:30. And when she was asked how she knew it was at 5:30, she indicated that's because she has a cell phone and would check the time on her phone when somebody showed up. She also indicated that she recognized the By-law officer who was showing up at 5:30 and telling her to leave. And when she was - when she refused to leave, the By-law officer called police who showed up approximately ten minutes later and evicted her. She eventually gave up her tent

because she thought it would prevent her from being targeted by the police and By-law.

Sherri has repeatedly been unable to access shelter. She has not stayed in a shelter since 2022 because her experience up to that point has been that they are consistently full. Despite not having a phone, she repeatedly called shelters asking for a bed. Staff at the former Wesley Day Centre would also call for her but the shelters were always full. She stayed in the hotel program with her then program for two weeks, but was kicked out after a false allegation of domestic abuse, and she was able to stay at Carole-Anne's Place once.

Sherri has slept rough, including on the side of the road, in parking lots, church door steps and in stairwells and parking garages.

Encampment evictions have led Sherri to lose her belongings, including her tent when the City enforced an eviction with bulldozers. She finds it very difficult to sleep without a tent and when she cannot stay in one location. She stated in her Affidavit that she could sleep better and felt safer when she stayed in encampments with friends. It was easier for her to concentrate and feel healthier. Worrying about encampment evictions causes her heightened stress and anxiety from constantly having to be "on the lookout." She's often exhausted during the day, and although she has a housing worker with the Hamilton Regional

Indian Centre, she's been told that she is "too unwell" to get into supportive housing.

Moving on to Jammy Pierre. Jammy is a 34 year old black transgender woman who is in the courtroom today, in receipt of Ontario Works and also employed part-time. She's been diagnosed with post-traumatic stress disorder, anxiety, depression and substance use disorder. She had been homeless on and off for about three years. Most recently she became homeless after being evicted from the transitional living program at the YWCA. She was able to obtain housing on June 1st, 2023 and remains housed. While Jammy was homeless, she was periodically able to access shelters and temporary hotel programs, but she was repeatedly kicked out for several reasons: because she was curfewed; she got into an argument with staff; staff threatened to involuntarily hospitalize her and she left in order to avoid involuntarily committal; she was also restricted - service restricted from shelters for drug use for period of time ranging from a day to a week; she also lost her bed after stepping away once for only a few minutes. Jammy's also experienced shelters to be full sometimes. She has sometimes been able to access an overflow bed in Carole-Anne's Place, but she would never know if she would be able to secure a spot until 10:30 or 11:00, and if there wasn't a space available, she was going to have to figure out at that point where she was going to stay for the night. When the women's shelters were full, she sometimes accesses

a men's shelter by changing her gender expression and appearance, which is understandably very difficult for her. A men's shelter turned her away because of her gender expression. It was suggested that she go somewhere else that would be more in line with her, with her appearance. Lastly, she has lost phones and her I.D. due to thefts while staying at Carole-Anne's Place.

Jammy has stayed at several encampments and each time she's evicted by the police, and eventually she also gave up once trying to put up a tent, knowing that the City would soon tell her to move. Sometimes she would be told to move within a half hour of setting up a tent. Jammy also stays outside sometimes without a tent as a result.

Without a stable place to stay, Jammy would sometimes get two hours of sleep, sometimes no sleep at all, and sometimes would stay up in order to try to protect her belongings. And this exasperated her underlying mental health substance and substance - mental health symptoms and her substance use. Wandering the streets in search of somewhere to stay also puts her at an increased risk of theft and assault.

The repeated forced out of encampment evictions were traumatic and contributed to a worsening of her post-traumatic stress, her depression and her anxiety. And that is found at - in the Affidavit

of Dr. Lamont, who is the treating psychiatrist for, for Jammy. And that is at A9272.

Darrin Marchand. So, Darrin I believe is actually in the courtroom as well today. There he is at the back, Your Honour. Thank you, Darrin. He is a 58 year-old man in receipt of ODSP. He's been diagnosed with psychosis related to substance use, opioid and stimulant use disorders. He has been homeless since 2017 - his land - after his landlord threatened him with eviction and he left his apartment.

Darrin had a particularly traumatic event happen while staying at the Salvation Army on December 17th, 2020. While staying at a Salvation Army, he witnessed the aftermath of a hatchet attack by one shelter resident on another resident. He was so traumatized that he was admitted to a crisis centre for a few days. On being discharged from the crisis centre, he discovered that he had been banned from all shelters and had to stay on the streets. He has since tried to return to the Salvation Army in April 2022, but again was told that he was service restricted. That same month, April 2022, he was denied access to mission services due to what he was told was a conflict of interest, that nature of which we are uncertain. Darrin was also service restricted from Good Shepherd after he was falsely accused of threatening a staff member. He continues to struggle with staying in shelters following the

December 2022 hatchet attack. He finds it difficult to sleep in shelters because of the noise. He's also experienced theft in shelters including the theft of his mother's ashes.

More recently, Darrin has been able to access shelter for shorter periods, but his trauma related to the December 2020 attack continues to manifest when he stays in shelter. And when he's unable to access a shelter bed, he's occasionally gone to the hospital and lied about his health condition in order to get warm.

Darrin has stayed in several encampments in different locations, but has been evicted by the police and By-law repeatedly. As a result, he experiences a sense of hopelessness when he's unable to stay in an encampment and also unable to stay at a shelter.

In the summer of 2021, Darrin was evicted from two different encampments and moved to different green spaces after receiving verbal warnings to avoid further criminalization, and eventually he gave up in staying in formal encampments. He's also slept rough. He sometimes spends his days and nights wandering outside searching for a place to rest and sleep where he will not be ticketed or required to move.

On December 2, 2021, Darrin was living unsheltered and a man shot him in the shoulder while he was on

church doorsteps. He was admitted to hospital and later discharged to the Good Shepherd, which waived its service restriction considering he was recovering from a gunshot wound. But he was kicked out two months later, again because of an allegation of a threat of violence which he denies.

When he cannot stay in an encampment and cannot access shelter, he wanders around all day. He thinks about his predicament, he becomes depressed, he feels isolated. Repeated encampment evictions have led him to lose belongings. He's lost connections with supports including healthcare and food programs. He feels hopeless following his evictions, leading him to escalate his substance abuse, which then triggers his psychosis.

When Darrin is able to stay and attend in a secure location, he felt increased protection from assaults and reprieve from the weather, and improved sense of privacy as well as a place to store his belongings and have improved sleep.

Ashley MacDonald, who is also an indigenous woman in receipt of benefits under ODSP. She has obsessive compulsive disorder, fetal alcohol disorder, depression and substance use disorder. She's been homeless on and off throughout her life. Most recently, she became homeless in 2020 after being unlawfully evicted. Thankfully, Ashley was able to get into subsidized supportive housing on June 29th, 2023. However, it's been difficult for

her to transition into housing after so many years of homelessness. She was lonely, particularly because she was used to being around people all the time, and her new housing program did not allow guests until recently. So she still spends some time in a tent but is spending more time in her apartment as time goes on. And Ashley's experience aligns with what Audrey Davis has referred to as being "street-entrenched."

Of note, Ashley was homeless for almost the entire time between the repeal of the 2020 Protocol and the introduction of the 2023 Protocol in August 2023, she's repeatedly been evicted from several parks, even when there is no shelter space available to her.

She was in an encampment during the 2020 Protocol for a longer period of time, which allowed her - which allowed high acuity individuals to remain encamped. Ashley was told to stay in one place because she was "too high acuity to be in a shelter." She doesn't want to risk confrontation or criminal charges, so she feels she has no choice but to leave when an encampment eviction takes place.

Like the other female applicants, Ashley has also experienced shelters to be full. She couldn't access shelters when she was in a relationship, because there was no space for heterosexual couples. Even if her partner was able to get into

a men's shelter, it would have been unsafe for Ashley to separate from him, knowing that she could not get her own shelter bed. And without a cell phone, it was difficult for her to reconnect with her partner if they were separated. Eventually she developed an understanding that the women's shelters are always full, because there are more women on the street then men, and it was easier for men to get into shelters.

Ashley's also been service restricted from shelters, and once, since she was kicked out of Carole-Anne's Place despite having been followed and assaulted by her former landlord. And she was also kicked out of a temporary hotel program.

As a result of encampment evictions, Ashley lost many of her belongings, including tents, when the City *[indiscernible]*.

She found encampment evictions to be traumatizing. She repeatedly lost connections with various supports including health care. As a result, she was at greater risk of overdose and assaults because she was more isolated after the evictions, and because she used to choose encampment sites in close proximity to safe injection sites.

Moving on to Shawn Arnold. He's a 55 year-old man in receipt of ODSP benefits. He has opiate use disorder, stimulant use disorder, attention deficit, hyper activity disorder....

THE COURT: I'm sorry. Sorry. I - who is this?
S. CROWE: Shawn Arnold.
THE COURT: All right. Yeah. Go ahead.
S. CROWE: His homelessness began in 2020 after he had been staying with a friend but the friend sold his house. He has had brief periods of homelessness since and at present he is presently housed in a hotel after a fire at the YMCA where he had been staying. He's stayed in several encampments, shelters and on the streets unsheltered, as well as having couch-surfed.

He was evicted by a By-law or the police from the Ferguson Encampment. He witnesses police and By-law officers disposing of people's belongings and tents, and he decided to move in order to avoid the risk of losing his belongings. He then went to another encampment and during this time he was able to remain for several months because he was told that he scored 16, or very high acuity, on that VI-SPDAT assessment; and that gave him the right to remain during the 2020 Protocol. But when that Protocol was repealed, Shawn was told that he had to leave.

Shawn's explained that he doesn't function well in shelters because of the crowded conditions and because he is recovering from substance use and he's concerned that being exposed to the drug use in shelters will compromise his sobriety.

He's wandered the streets for days without sleeping after being evicted from a park.

When Shawn was in an encampment, he felt that he could sleep and rest while - for an extended period. Without an encampment and without the protection of a tent, he struggled to sleep without any privacy or protection from the community. He has lost belongings through encampment evictions, including his tent. And when he was able to remain in place, he was able to benefit from a nearby Methadone treatment program, receive meal support and connect with other social supports.

When Shawn was evicted from JC Beemer, he actually almost lost housing that was being offered to him, because his housing worker couldn't find him.

Lastly, Shawn was exposed to the element - the elements, when he was without a tent.

Next, Gord Smyth. Gord is 57 years old and in receipt of ODSP benefits. His - his disabilities include depression, personality disorder, COPD, diabetes, heart disease and degenerative disk disease. He also uses a mobility scooter.

He became homeless on June 30th, 2021, after his landlord served him with an eviction notice to demolish the building.

So, Gord has kind of a unique story because he kind of had this sense of looming or impending homelessness. Prior to receiving the eviction notice, there had been talk over the course of three years that the building may be sold. And because Gord had lived there for several years and paid such low rent, he felt that he had a target on his back as a result. So, when he thought that he might be facing eviction and realized that he would not be able to afford market rent, new market rent rates, he began to do some research and he contacted and visited shelters. He spoke with residents about their experiences, and he learned several things that then shaped his decisions going forward. So, he learned that he would not be able to bring most of his belongings. This is someone who had been housed for approximately 30 years. He learned that he would not be able to bring his dog, whom he considers to be a service animal, into shelter. He also worried that the congregate living environments of staying in a dorm environment would trigger his personality disorder, leading to potentially violent behaviour. He then purchased about three-thousand(ph) dollars in supplies so he could live outside.

Gord was able to obtain subsidized housing in November 27 - on November 27th, 2021, and remains housed. During his period of homelessness, however, he stayed in several encampments. At first he was able to stay for seven days and then given a verbal notice to move from By-law. And

then he was evicted from three more encampments, each time without that VI-SPDAT assessment that was supposed to take place under the 2020 Protocol. He was threatened with eviction from a fourth encampment, but Social Navigation eventually intervened, did that VI-SPDAT and told him that he scored 13, meaning that he was high acuity and able to move - and able to remain. But the City's Encampment Task Force didn't accept this score. They completed it again, gave him a lower score of only 11 and then told him that he'd have to move. And at that point Gord decided that he was going to refuse to leave that park.

He wanted to ensure that he could afford any new housing. Previously, he had been paying 525 in rent of his ODSP benefits of approximately 1150. He eventually accepted an offer of an affordable unit, but the landlord withdrew the offer and he was able to accept his current housing because it's subsidized.

Gord was evicted during bad weather and found it difficult to move everything to a new location time and time again. He was in a....

THE COURT: Sorry. This was three times or the fourth time he wasn't evicted?

S. CROWE: That's right.

THE COURT: Okay. So, you're talking now about the three times that he was, yeah. Okay.

S. CROWE: That's correct. So, he found it difficult to more. He was in a mobility scooter

and had a large amount of survival items that he had purchased. He felt anxious everyday worrying if and when he would be evicted, or if he left, if he were to return and his tent would be torn down. Conversely, when he was able to stay in one place he had some peace of mind and could connect with various supportive services, including the housing supports that eventually helped him get into housing.

Moving on to Mario Muscato. Mario is a 51 year-old indigenous man in receipt of ODSP benefits. He lost his right hand and the majority of his fingers on his left hand after being electrocuted in 2018. He also has an opioid and stimulant use disorder, HIV, post-traumatic stress disorder, major depressive disorder, an acquired brain injury and extensive neck and face burns resulting in chronic pain. He's been homeless since 2017 after he was evicted.

Mario has also experienced shelters to be full. He finds that access is unpredictable. He often walks around not knowing where he's going to be able to stay for the night. He's also repeatedly been service restricted from shelters. He was ban from one of the three men's shelters and discovered that the other two shelters were full. He sometimes has missed curfew, sometimes only by a couple of minutes, which leads him to losing his bed. He's also been falsely accused of bringing in alcohol, and of note indicates that he does not drink. He

was ban for over a month after staff suspected that he was using a drug - drugs, because he had been in the washroom for what they thought was too long. In reality, because of his disabilities, he has very limited use of his hands and it takes him a long time to use the washroom.

Mario has also experienced theft in shelters and he found - he finds that service restrictions are often imposed without any kind of formal investigation and all it takes is for a staff member to make a quick decision or not, not like you in order to trigger a service restriction.

He also feels that he's sometimes targeted by other shelter residence because of his disabilities. In his words, "people are going to want to play with the tough guy and there you go, the fight's on. They figure, you know, if they can slap someone like me around, then people will be afraid of them."

Mario has been service restricted from getting into fights that he did not instigate. The longest restriction has been approximately six months.

He's also been service restricted from hotel programs. In the first instance, a person made an allegation against him but later admitted that they had made it up. He was admitted a second time on the basis of the person recanting their allegation,

only to be restricted again. One restriction lasted between two-and-a-half and three months. He has stayed in encampments in several locations. He's been able to stay for varying amounts of time from days to seven months, and the seven months was at the Ferguson Encampment during the time of the 2020 Protocol. He's been repeatedly evicted by By-law and the police, and sometimes, like other applicants, he moves pre-emptively in order to avoid confrontation or attracting attention from the police or the public.

So, Outreach workers have suggested to Mario that they - they could get him into a lodging home. Now, Mario has some concerns about this that I'd like to just explain. So, first of all, he's heard from other people who have stayed in lodging homes as well as a housing worker, that his entire ODSP cheque gets taken by the lodging home, with the exception of $150 that's distributed as an allowance. Mario knows that he can't survive on only $150 a month, and he also understands that not all lodging homes help with tasks such as cooking and laundry. Lastly, he understands that lodging homes were more with people with mental issues and did not feel like he belonged. He would like to get into housing though. He's very clear about that, and during his cross-examination stated that, "I think the public needs to know..." sorry, "...needs to be aware of the fact that we are here because the rents are very, very high." And he

would even consider living with multiple roommates in order to secure housing.

Because of his disabilities, most notably his hand deformities, he's unable to carry many belongings around or put up or take down a tent on his own. And when he doesn't have a stable place to stay, he ends up again wandering around, he hardly sleeps and sometimes doesn't sleep at all. And so as a result of this chronic sleep deprivation, he often finds himself groggy during the day and has trouble concentrating, keeping track of appointments and having the physical energy to make it to appointments. He also feels like he has less personal security.

Linsley Greaves. Linsley is a 54 year-old black man who was previously in receipt of Ontario Works Benefits before going on to ODSP benefits around December 2022. He uses a wheelchair after having an amputation of his leg below the knee in December 2022. He's had periods of Homelessness for over ten years. Most recently he became homeless in 2020 after he was evicted. He stayed in various locations after being homeless in 2020, including shelters, encampments, couch surfing and unsheltered on the streets. One of his reservations about staying in shelters, even though he does periodically access shelters, is that his past street life, in his words, comes back to haunt him. He feels like he gets targeted with theft,

property damage and people trying to start fights. And he's also experienced racism in shelters.

Linsley has a past dependency on crystal meth that made him both worry about getting caught using in shelter and getting kicked out if he left to use and was not inside during the right times. He also has difficulty sleeping in shelters because of the noise and has discomfort sleeping around shelters.

Linsley was able to stay in an encampment at Woodlands Park for almost two years during the time that overlapped with the 2020 Protocol, but By-law officers eventually attended and told him that the City wants their park back. The encampment's residents were given three days to leave. Everyone left but Linsley stayed because he had been there for so long without causing issues and thought that he would be able to stay. But the City showed up with its truck, bulldozers and surrounded Linsley and some supporters and told him that he had to leave. And while the City did initially offer to store some of his belongings, Linsley took them up on this offer but then subsequently was unable to find the person to contact to follow-up with retrieving his belongings and ended up losing them.

Before Woodlands, Linsley had difficulty being able to stay in one encampment location for more than a night, because the City would come in the middle of the night, according to him, at 4 a.m. or 6 a.m. and tell him that he had to leave.

And so on this issue of overnight enforcement, the respondent falsely suggests that Linsley retracted his statement that evictions took place overnight. But in fact during cross-examination, Linsley stood firm that he had been evicted overnight more than once.

So, turning to the questioning that's at Volume 2, Tab 24 of the Application Record, page A4694, beginning at question 101, Linsley describes being told to move everywhere:

> Before that, it was hard to stabilize for one night. They would come in the middle of the night at four - four o'clock or six o'clock, and it's just upsetting.

And while Linsley wasn't sure if it was By-law attending in the middle of the night, he's familiar with the enforcement process and knows, at question 102, that they, presumably the City, had both By-law and officers. He didn't think it was By-law, but in general it was the "officers" telling him that he couldn't stay there and had to pack up and leave. Further, in response to question's 103 and 104, Linsley explains that he was evicted overnight by officers in more than one location, including Ferguson Station and City Hall. And even though he can't put a specific time on it, he said that it would happen later than usual. In his words, "very late." Even though he couldn't give a precise time, he was consistent with his evidence of

overnight enforcement. And at question 110, when asked about whether there were other times in addition to Ferguson, where he was required to move during the night, he answers, "Well, late evening is still night too, but yeah, generally around late evening." The only concession that it might not have been the middle of the night - was that it might not have been in the middle of the night, even though he was clear that it did happen overnight.

In fact, what my friends have written in the last sentence of paragraph 23 of their Factum, and I'm sorry, you're just going to have to give me a moment to pull that up.

J. DIACUR: B1976.

S. CROWE: Thank you. And...

J. DIACUR: It's the Master, yeah.

S. CROWE: ...B - yes. B1976?

THE COURT: Mm-hmm.

J. DIACUR: Correct, yeah.

S. CROWE: Thank you. I apologize for that. So, it states that Linsley Greaves acknowledged that, that he - it might not have occurred at night, but he just felt that it might have been - happened at night because he had been asleep. But, Your Honour, the question that is actually at 109, this is the question that was posed at 109 to Mr. Greaves, and not his answer. I hope that's clear.

THE COURT: Yeah. Let me just - whose idea was it to put, to put four pages on one face of a page?

S. CROWE: I'm sorry?

THE COURT: I'm saying to the - the court reporter has put four pages so you have to keep going up and down, but it's all right, I've got it.

UNIDENTIFIED VOICE: That's sort of my fault, Your Honour.

THE COURT: Oh.

UNIDENTIFIED VOICE: Otherwise the record would have been, I think broken records for the length, so we tried to compress it a bit by getting the court reporter to....

THE COURT: Oh, it's already pretty record breaking. Okay. So, there was no accurate clock. I - he said, "I just felt as if it was way past, like, the middle of the night in general. It was later in the evening." Yeah, okay.

S. CROWE: I'm sorry, I'm resorting to a paper copy.

THE COURT: Okay. I've got it, you know. Yeah, I see it.

S. CROWE: Okay. So, the last sentence reads that, "Upon cross-examination, Mr. Greaves acknowledged that he was not actually sure that this had occurred at night. He just felt as if it was - been because he, he had been asleep." But this is in fact the question that was put to him, that Mr. Greaves does not...

THE COURT: Right.

S. CROWE: ...does not acknowledge that. So, just to phrase it...

THE COURT: He doesn't - yeah.

S. CROWE: ...that is something that he would - he was acknowledging, is, is not accurate.

THE COURT: Okay.

S. CROWE: Linsley lost his tent during the eviction from Woodlands Park. He stayed wherever he could including on a heating vent behind the Family Courthouse with about 14 others where they slept "sausage style on the vent." The vents were subsequently turned off. He then went to a parking lot with some of the same people from the heating vents, but it was fenced off after about a week. He stayed in other locations, but everywhere he went it felt like the By-law or police were buzzing around telling him that he had to leave.

Linsley had a housing worker who discussed the possibility of getting him into a residential care facility. But his understanding is that they are for elderly people and he's not sure if it would be a stable environment for him.

One place that was mentioned was not viable for him because it is not wheelchair accessible. So, without a tent, Linsley experienced sleep deprivation and would often fall asleep during the day. He has trouble concentrating. His anxiety worsened and he was exposed, exposed to the elements. Linsley developed frostbite in his left foot after sleeping outside with only blankets in the winter of 2021 or 2022 - into 2022 I should say. He lost his left big toe as a result. And then weeks leading to December 15th, 2022, he had been repeatedly evicted and his belongings kept wet while temperatures fluctuated above and below

freezing. Paramedics with the City's Social Navigation Program were concerned about his leg and brought him to Dr. Bodkin, who, who is with HAMSMaRT and routinely treats encampment residents. Dr. Bodkin examined Linsley's leg and was so concerned about this new injury that she sent him to the hospital where he underwent an amputation below the left knee. As a result, Linsley is now permanently disabled and he uses a wheelchair. The loss of his leg has been devastating both physically and mentally he feels ashamed and his mental health has been negatively impacted. It's also impacted his family relationships where he feels that he can't face his daughter in his new state.

Cory Monahan. Cory is 48 years old and in receipt of ODSP benefits, and his disabilities include fetal alcohol syndrome, ADHD, back pain, opioid and stimulant use disorder. He's been homeless for the majority of his life, with his last housing in 2021, but he was unlawfully evicted.

As of June 2022, he had been on the waiting list for subsidized housing for years.

After being evicted and running out of money for a hotel, Cory put up a tent in Carter Park. After three days he was evicted by police and By-law when they showed up with trucks and bulldozers. He packed up his belongings to avoid a confrontation, and then went on to stay in several more

encampments for varying amounts of times before he was evicted again. He's continued to be evicted from his encampments and losing his belongings multiple times in the process. With respect to shelters, Cory does periodically stay in a shelter, but he does not feel comfortable in general living with groups of strangers and he finds this to be destabilizing. He also has a history of substance use and he tries to way - stay away from what he calls harder street drugs.

Mission Services had a shelter program where alcohol use was permitted, but he was uncomfortable being exposed to alcohol because of his fetal alcohol syndrome disorder and left after three days. More recently, Cory now has a dog that is not permitted inside shelter. He's had repeated experiences where he's told that there is shelter space available, only to be told that they're full when he shows up.

After Cory's eviction from Carter Park, he gave up and slept wherever he could. He stopped taking care of himself and lost 15 pounds. And that's at A9364. He feels that he's at an increased risk of theft when he has to continuously pack up and move his belongings, because it's easy for someone to grab something from his, from his buggy.

He has dislocated his shoulder after he was repeatedly woken up by By-law and evicted before sunrise, because he was rushing around and injured

himself. And that's at A9360, question 206 of his cross-examination.

So, Cory states that he was told to move first thing in the morning while it was still dark out. And my friend's tried to undermine his statement by pointing out that on re-direct he did not know what time it was. But what they didn't mention is that even though he didn't know what time it was, he stated, "Sometimes it wasn't even light out. Sometimes it was still dark." And lastly, that he couldn't - should - he couldn't be sure of timing. "At this moment, I'm not sure what time the sun comes up." So, this is far from a retraction, and he's emphatic that he was repeatedly woken up early morning when it was still out - outside - still dark outside and evicted. And that's at A4903.

It's difficult for him to move his belongings so often. He loses the stability he experiences when he can stay in one location. His sleep is disrupted and he's exhausted from continuously moving. And again, he often loses his belongings in the process because he doesn't have time to move everything when the City is enforcing an eviction.

Moving on to Ammy Lewis. She's a 46 year-old indigenous woman in receipt of ODSP benefits. Her benefits - her disabilities include post-traumatic stress disorder, HIV, anxiety, depression, stimulant use and opioid use disorder, as well as borderline personality disorder. So, Ammy doesn't

have a strong chronological memory of her most recent homelessness, but she was released from jail in late 2020, briefly housed and then fled from her apartment in late 2021 after her landlord attempted to extort sex from her. Ammy obtained subsidized housing in February 2023 and remains housed. So, like many of the other applicants on becoming homeless, Ammy did seek shelter but was told that they would not accept her with her dog. So, her dog is a Jack Russell Terrier/Chihuahua mix, and is an important source of her emotional support, as well as she feels like her dog provided her a little bit of safety when she was homeless.

Eventually, Ammy's doctor's office was able to find a temporary foster home for her dog so she could access shelter.

Her psychiatrist attempted to get her into a shelter "dozens of times", asking if they can make an exception for a small dog or an emotional support dog, but was unable to get her into shelter. And this is at A9382.

It took Ms. Lewis' doctor and physician seven months to find a foster home for Ms. Lewis' pet so she could access shelter. We'd ask you to keep that startling example in mind if the respondent claims that pets are - pet foster programs are readily available.

So, when Ammy couldn't access shelter, she started sleeping outside unsheltered including in dumpsters, underground parking lots and in abandoned cars.

She received a tent after police found her sleeping in an underground parking lot. She stayed in a couple of locations and then moved to a green space at Cathedral Park. But once there, she was repeatedly told by By-law officers that she had to leave and was constantly worried about when she would be forced to move. She temporarily left and returned to an abusive relationship in order to be housed but had then left again.

Ammy was repeatedly assaulted while staying outside, and constantly worried, again, about when the City would evict her and where she would go next. She had to move several times, losing belongings in the process and also losing a sense of stability in connection to supports. She had suicidal ideation and exasperation of her post-traumatic stress and substance use disorders.

Julia Lauzon, our final applicant. She is a 27 year-old indigenous woman in receipt of ODSP benefits and has border-line personality disorder, OCD and substance abuse disorder. She became homeless in May 2021 after she lost custody of her child and ended up on the street. Thankfully Julia obtained subsidized housing in September 2024.

Julia repeatedly attempted to get into shelters but was usually told that they were full. In March 2022 she tried to stay out for nine days in a row. She was - sorry, she tried to enter shelter for nine days in a row. She would sometimes call the - told to call back every hour to see if a bed opened up, but didn't have a phone. Julia explains that there used to be a protocol amongst shelters where if all the shelters were full, one of their shelters called Mary's Place would do a referral to another shelter. But that didn't happen to - for Julia. She was able to stay in Mary's Place for a few days, but after that couldn't get back into shelter despite Outreach workers trying to find her a spot. She was occasionally able to get a spot at Carole-Anne's Place, however, like the other female applicants, she sometimes couldn't get there before it was full, particularly when she was working as a bartender until 11 p.m. And when Carole-Anne's Place was full, like Cassandra, Julia would sometimes sleep right outside of the building.

Julia has stayed in tents and encampments in several different locations during her homelessness. She never knew how long she would be able to stay. The City repeatedly evicted Julia and her friends from their tents and gave her what she counted as at least a dozen trespass notices.

She's slept outside on several occasions when she couldn't get into shelter, including on a night where she was sexually assaulted.

She was employed at the start of her homelessness, as a Bartender, but was unable to look for new work due to the stress of living on the streets and not knowing where she would sleep at night. She hardly sleeps when she is constantly on the move and it put her in a constant survival mode where she couldn't focus on anything like going to appointments. Again, she was sexually assaulted while sleeping outside without a tent. In the course of defending herself, she was charged with aggravated assault against her attacker. Her attacker was later charged and convicted.

I want to turn to some specific allegations levelled against some of our applicant's in the Respondent's Factum.

So, turning to paragraph 55, found at B1986. The respondent claims that four of the applicants declined housing when offered, and that's for applicants being Sherri, Mario, Linsley and Cory, and that Misty has not completed an Access to Housing Application.

So, I'd like to briefly contextualize those allegations.

With respect to Sherri, at page A947, the only mention of an offer of housing was from 2019, with no other details about the, about the offer. And

we would note that 2019 pre-dates the application and the damage period for this application.

The second is Mario, at A429. Now, again, Mario declined the possibility of a lodging home for, for a few reasons. He understood that it would take all of his ODSP cheque except for $150 a month, and he was unsure of how to get it to - how to get into a lodging home that would help with laundry and cooking, as not all do.

The possibility of a lodging home also came up some time between August 20 and April 2021, as Mario mentioned seeing a lodging home with a worker in his October 2021 cross-examination, where the worker explained that he would be left with $150 a month. So, those same worries and fears about how he would survive at $150 a month have persisted. And that cross-examination from 2021 is found at A4916.

The next is the allegation about Linsley Greaves, that again I've, I've, I've touched on. And again, Linsley did not think that a residential care facility for older adults would be stable or a long term fit for him. He stated that he wants to find stable secure housing and to him the residential care facility for older adults did not seem right. Linsley does want housing and has filled out housing applications in the hopes of finding his own apartment.

And lastly, Cory Monahan. So, Cory did express interest in a residential care facility, but they did not accept him for an unknown reason. And that's at A4889.

With respect to the offer of a room at Mission Services, he explained that the room was for people recovering from alcoholism and the program at large, and that they allowed for alcohol use in the building. Cory has fetal alcohol syndrome and prefers to stay away from people with alcohol addictions. He also lost another opportunity for an unknown type of housing through Salvation Army after being late for his appointment by a half hour.

Lastly, paragraph 59 of the Respondent's Factum alleges that some applicants declined accessing a shelter bed. And I don't want to repeat the evidence that we've already cited, but I will refer Your Honour back to the Applicant's Affidavits, as well as the physician affidavits on this point, because each name the applicant - each named applicant has a credible explanation for the occasional reluctance to access shelter spaces. So, just very quickly, Gord went into great detail in both his affidavit and his cross-examination, that he would not function well in a congregate shelter environment due to his mental health issues, including his border-line personality disorder, and fear that the tension would lead him to lose control.

Shawn, at paragraph nine of his Affidavit, again, stated that he's a recovering addict and worried about his sobriety being compromised by a shelter setting where drug use can be rampant.

I do want to highlight just quickly that drug use in shelters, even though there's a bit of a paradigm where it's not allowed, but still occurs, was confirmed by the City's witness, James Moulton, who is the executive director of the Salvation Army. During his cross-examination, and this is at Volume 17, Tab 141, of the Application Record, page A8943, questions 117 to 119, where he states that: "Drug use at the Salvation Army is daily and common." That, "Drug use immediately outside the Salvation Army is daily for sure, and drug dealing outside the Salvation Army is fairly common."

Linsley, as I mentioned, has accessed shelter in the past but has experienced racism, feeling targeted, unsafe and has had his belongings stolen or damaged.

Similar to Shawn, Cory expressed concerns about trying to stay away from shelters because of the harder street drugs, and he also finds the environment to be destabilizing, as well as the fact that he's been repeatedly service restricted.

The City claims that Ashley declined shelter for reasons unrelated to shelter capacity and cited

question 242 as its reference. So, this is at page A4799. And in reality, what Ashley said is that she "tried to get into shelter multiple times, and then I just gave up trying to get into shelter because some people are better at living outside then others." When asked if she was one of the people who was better living outside than others, she replied, "Yeah, I wouldn't say that I'm better at living outside, because it sucks living outside, but I'm more savvy to live outside than other women."

Sherri - with respect to Sherri, she has repeatedly tried to get into shelter, but again, has found that they are usually full. In fact, in 2022 she was using the phone at the former Wesley Day Centre to try to get in, but kept on being told that the shelters were full. She did not in fact cite a reason other than shelter capacity in the reference to the City's Factum. She only answers no to the question about whether she had tried to get into shelter more recently, and no to whether there was a specific reason. But we can infer from her previous attempts and her foundational knowledge at that point, that she had resigned herself to the understanding that women's shelters are typically full.

With respect to Kristen, the respondent cites Volume 2, Tab 27 of the Application Record, page A4726, to suggest that Kristen declined shelter for a reason that was not related to the shelter

capacity. This is misleading, and I'm sorry I've lost my page. One moment, Your Honour.

THE COURT: Okay. Well....

S. CHOUDHRY: Do you need a copy of the Factum?

S. CROWE: No. Sorry, one moment. Okay. Thank you for your patience, Your Honour.

THE COURT: Yeah, sure.

S. CROWE: Okay. So, I gave the citation - okay. So, the respondent suggests that Kristen declined shelters for a reason that was not related to capacity, and this is misleading because in fact what Kristen says is that after being told so many times when shelters are full, she sometimes gives up on calling or showing up at shelters. However, she still stays connected with City workers and other women experiencing homelessness, who share information about shelter bed availability.

And then with respect to Darrin, Volume 2, Tab 42 of the Application Record, page 4846. Again, the respondent's characterization of Darrin refusing shelter for a reason unrelated to shelter capacity is not true. Question 202 simply asked Darrin if he tried to get into shelter after an eviction, after an encampment eviction, to which he answers no. And if you'll recall, Your Honour, there are very substantial reasons why Darrin has reluctance, hesitancy and a discomfort with accessing shelter.

So, I am mindful of the time, it's at 12:50 right now. We do have some additional evidence with respect to City witnesses, but I think I will have

Mr. Choudhry address those potentially after the lunch break. I'm not sure what time you were thinking about breaking.

THE COURT: Oh, any time about now.

S. CROWE: Okay.

THE COURT: If it's a convenient time. We'll come back at 2:15. I have it - my - you can go 2:15 to four, or you can go 2:15 to 3:30, take a 15 minute break and then you can go at 4:15.

S. CHOUDHRY: Sure.

THE COURT: It's a long time to be talking, so I'll leave it up to you.

S. CHOUDHRY: Yeah. Sometimes a bit of caffeine can help I think. So, let's - why don't, why don't we plan on the 4:15 just so we can all have....

THE COURT: Sure. So, it's 2:15 to 4:15 with a 15 minute break at 3:30. Done.

MADAM REGISTRAR: Order, all rise. Court is recessed until 2:15.

R E C E S S

U P O N R E S U M I N G:

MADAM REGISTRAR: Superior Court of Justice is now resumed. Please be seated.

THE COURT: Yes?

S. CROWE: Your Honour, just one quick housekeeping matter. And that is that we realized that the incorrect affidavit, supplementary affidavit for Linsley Greaves, was included in our Application Record and our Compendium. So, we apologize for the confusion. I've let my friends know about this.

The correct affidavit was in fact served on the respondent and used as the basis for the cross-examination, so I don't believe that there's any issues there. And I just wanted to update you that the correct version is now updated on to Case Centre at document number 56.

THE COURT: Document number 56, okay.

S. CROWE: A10056.

THE COURT: Okay. And one housekeeping matter of my own. As we're going to be in 700 tomorrow, so there'll be a little more room.

THE COURT: And my screen seems to have frozen. All right. Well, just carry on and I'll, I'll fix it as we go along.

S. CHOUDHRY: Yeah, let's hope the Case Centre obliges. So, Your Honour, good afternoon. I thought it would be good to give you a bit of a roadmap for how we intend to use the remaining part of our time.

THE COURT: Yeah.

S. CHOUDHRY: So, as you, yourself said, we have one-and-a-half days in total. It is our intention to reserve a quarter of that time for reply, which will be at the end of the three days. So, we would go to the morning break tomorrow and then we would pass it off to my friends. Is that agreeable to the court?

THE COURT: Yeah. Yeah.

S. CHOUDHRY: Yes.

THE COURT: So here - you got - you, Ms. Shores, Mr....

B. SHORES: There's no issue with that.

THE COURT: Yeah. You're fine.

S. CHOUDHRY: Okay, good. And, and just to give you a sense, so my - so we would finish up our argument in-chief by tomorrow at the morning break and I'll be taking it from here, except Ms. Crowe will come in tomorrow on quantum.

THE COURT: Okay.

S. CHOUDHRY: Okay. Great. So, so the - I now would like to get into the, the - the issues and the legal argument in our, in our Factum. And so if there are - I'll be relying on, principally, on two volumes of the Applicant's Compendium, Volume's 4 and 5. And the - and so I'll begin by taking you to Tab 81, which is Master 9474, or A9474. And this is the *White Burgess* case. And so the question - you know the - I'm sure you know the case, and so the - and so we just provided the authority for you at Tab 81, for your convenience. And the question then is how to apply the *White Burgess* criteria to the different expert witnesses and the affidavits that they filed.

And so the - as you know, there are a number of applicant experts, eight in total. There are - there is one from the respondent, Dr. Koivu, and so I want to give you our submissions first on Dr. Koivu's Affidavit. And so, and so our position in our Factum is that the court should not admit the Affidavit of Dr. Koivu or should give it very little weight. And there are a few reasons for that position. The first, which is set out at paragraph 105 of our Factum, is that Dr. Koivu is

unqualified to address the general health outcomes for unhoused individuals because she is an in-patient, that is an in-hospital addiction physician specialist.

And so let me first take you to Tab 82 of our Compendium. And this reproduces some paragraphs of Dr. Koivu's Affidavit. So, if you can begin at A9479, in paragraph five it describes her work as an addiction physician. And then at paragraph six, it also describes her work as an addiction physician. And then there's paragraph 10, which I think is the point of disagreement with my friends and I want to read it out for the record and explain how we read that paragraph differently. She says:

> Many of the patients that I see are vulnerably housed or experiencing homelessness.

We don't disagree with that.

> I have seen patients who are living in homeless shelters and tent encampments and in both environments.

Now, I think where we do disagree is on that sentence. We say that what that sentence means, and I'll take you to cross-examination transcripts that show this, is that it certainly is the case that Dr. Koivu treats patients who live in tent encampments or in shelters, but she doesn't attend

to them in those environments and she doesn't treat their out-patient needs in those environments. And that's a very - that's a material difference. She sees them in hospital.

And so let me take you then to Tab 83, where we run through some of this evidence, and this is the cross-examination of Dr. Koivu. So, if you could go to paragraphs 44 and - questions 44 and 45, she describes how she - the nature of her practice. And if you look at paragraph - question 45, this is on A9483. Your Honour, has your computer caught up with you?

THE COURT: It just now did, so....

S. CHOUDHRY: Okay, good. So, I'll wait until you're there. It's A9483.

THE COURT: Ah, yes. Find. Yes?

S. CHOUDHRY: It's a bit hard to read, I'm sorry. It's - I'll read it for you, it's question 45, it says....

THE COURT: Sure. No pity on an old man....

S. CHOUDHRY: And, and I have reading issues as well, so, so we're both together in this. So, so it says, "Okay...."

THE COURT: Well, you're not 68 are you.

S. CHOUDHRY: We'll - don't tell my - don't - well, my kids might think I might as well be. So, so it says here:

> Q. Okay, we will come back to that as well. And then - so in your roll as an addiction medicine consultant at London Health Sciences,

is it fair to say that your practice was an in-patient practice?

And her answer is:

A. Exclusively.

That's exclusively in-patient.
THE COURT: Okay.
S. CHOUDHRY: Okay.
THE COURT: Yeah.
S. CHOUDHRY: So, now I'm going to take you to - scroll down then. If you could go to A9484, so it's a couple of pages down.
THE COURT: Yes.
S. CHOUDHRY: And this is - I'm going to begin with question 195. And this is again where I circled back to the nature of her clinical practice, because that's essential to her expertise. I said:

Q. And, and just so I understand the logistics of how this works, because you are an in-patient addiction consultant, is it correct to say that patients are admitted to hospital by a different service, so by general?

She says:

A. Yes.

And we had a bit of back and forth. And then at 197 I said:

Q. So, for example, they could be admitted by general surgery?
A. Yes.
Q. Or they could be admitted by psychiatry?
A. Yes.
Q. And then they are referred to the addiction consultant team?

And then the answer is, in substance, yes, and either she would see them or a member of her team would see them.
THE COURT: Yes.
S. CHOUDHRY: Then she would see them, and then she would treat them for those concerns. And then if you look on the next page at question 203, it's - this is A - it's the same page A49 - 9484, but the next panel I should say, bottom left panel.
THE COURT: Yeah.
S. CHOUDHRY: It says:

Q. Okay. But you don't treat them for their other medical issues?
A. Generally not.
Q. So you don't treat them - you're not a psychiatrist, are you?
A. No, I'm not.
Q. And because you see these patients on an in-patient basis, you don't follow-up with them in the community on an out-patient basis, do you?
A. No, I do not.

And then if you look at question 210, I say - I asked her:

Q. And when you see homeless patients, you see them in the hospital, correct?

She said:

A. That is correct.

211:

Q. So, you don't attend to them in shelters, correct?

A. I do not attend them medically in shelters, no.

212:

Q. No. And you don't attend on them medically in encampments, do you?

And then she says:

A. No, I don't.

So, I think the answer here is that, based on this cross-examination testimony, we know that Dr. Koivu is an in-patient hospital-based addiction physician who sees patients referred to her in hospital by other medical services. She treats them for their addiction issues. She does not see them on an out-patient basis, and nor does she treat them for their other medical issues. And so in that respect she's quiet different from, I want to say, Dr. Sereda or Dr. Hayman. And - who do see people and it's their un-contradicted evidence that they see people including in encampments, and Dr. Sereda perhaps more than others.

So, with respect, we don't dispute that Dr. Koivu might have been qualified to provide expert evidence if this were a case about, let's say, safe injection sites, or opioid treatment. And there is that litigation now, as you probably know, in the Superior Court in Toronto. But that's not what this case is. And so, she's really not qualified. And, and in her - and so her - her evidence isn't really relevant to this issue. And so then - and additionally, if you look at paragraph's - if you look at Tabs 84 and 85, this is - Tab 84, I've reproduced aspects, or we've produced aspects of her CV. You'll see in there, and I won't - you can look at it later but I'll give you the page point. It's A9491. There's a list of her publications. Pardon me, that's not the correct page. Your Honour, forgive me, but we've excerpted - we provided an incomplete excerpt of her, her CV there and we'll provide an undertaking. We'll, we'll make sure that we, we, we flag the correct page or you. But if you look at - if you do look at her CV, you'll see that she only - her publications - oh there you go, it's on A9495.

THE COURT: Okay.

S. CHOUDHRY: Her publications are - which are 11 there, are all on questions of addiction, not the unhoused, not the issues that are - not the medical issues that are germane to this case. And then if you continue on to Tab - to the next tab, so Tab 85, and if you look at A9501, this is a set of questions to Dr. Koivu about her expertise and her experience. And if you look particularly at the

bottom at question's 186 and 187. This is where I, I put to her, I wanted to characterize the nature of her research expertise. And it says here:

> Q. So, I'm trying to characterize the body of your research. I count here one, so Article 1, Article 4, 5, 6, 7, and then 8, 9, 10 and 11, as all being about the health effects of injecting drugs. Is that fair?

And she says:

> A. Yes, that would be more accurate than I think the first way..." I put it.

So, I put it to her a different way and then I reframed the question, and she said:

> A. Yes, that is what my research is about.

And then at 187, I asked her:

> Q. And so would you say that's the principle focus of your research?

And she said:

> A. Yes, that's the principle focus of our research.

So, her research - she's an in-patient hospital-based doctor treating addiction. Her research is about addiction. And again, for a different case she might have relevant evidence, but that's - but with respect, even though there are certainly - questions of addiction are at issue or present, in this case, this is not a case about addiction treatment. It's about the health effects of a ban

on encampments, and about the, the trade-offs that individuals make when choosing living in shelters, encampments or in - living rough. And, and nothing in her qualifications suggest she's qualified to give that evidence, again, with respect.

I also would like to point out, that - and this is at Tab 86, Dr. Koivu doesn't have any Hamilton practice experience. And this is at page A9503. Now, quite frankly, that's not relevant. It's not clear to us why it would matter that she hasn't practiced in Hamilton. We only raise that because our friend seemed to place great emphasis on the fact that many of our expert witnesses don't have Hamilton specific experience or expertise. And what we'd say is, what's good for the goose is good for the gander. If that is meant to be some hype of....

THE COURT: What sauce for the goose is good for the gander...

S. CHOUDHRY: Pardon me. Yes.

THE COURT: ...sauce for the gander, yes.

S. CHOUDHRY: Forgive me. I'll - so, so, but what's - but the point being that we should be even-handed about this. That is, if the lack of Hamilton experience is somehow a demerit against or a mark against the, the admissibility or weight of an expert, should count equally in relation to the respondent's expert. We don't think it makes a difference, but there you have it.

THE COURT: Okay.

S. CHOUDHRY: Okay. So, now, furthermore, not only is Dr. Koivu kind of - not only is her expertise not germane, her evidence isn't relevant. And so her mandate was confined to comparing the health outcomes of unhoused persons overnighting in shelters to those living in encampments. So, that's certainly one set of issues. But the other issue, which is in a way the core of a case is, comparing the health outcomes or access to medical care for encampment residents or those living rough. And so there's two sets of comparisons. There's sort of shelter versus people living outside of shelter, and there she only looked at, at encampments. But then the second comparison, which is really at the core of our case, is living in encampment versus living rough. And her mandate did not include addressing that second issue. And, and for your reference, Tab 87 provides a clarification on her mandate. I won't take you through the questions, but it's clear her mandate was confined to comparing life in shelters versus life in encampments. It does not include living rough. And the relevant paragraph in her affidavit that again restates her mandate is paragraph 15.

THE COURT: Yeah.

S. CHOUDHRY: Further more, if you do admit the affidavit, there are - I think there are, again with respect, some concerns about the nature of the evidence she gave. And so, Dr. Koivu, she gave evidence that's straight from her expertise and mandate. And here, I'd like to take you to Tab 88. And this is where Dr. Koivu gave evidence about

frostbite and whether individuals were more or less at risk from frostbite if they slept in a tent versus sleeping in the rough. That, of course, is not within her express stated expertise. And when probed on that she said, "Well, I camp."

THE COURT: Well, she's a doctor.

S. CHOUDHRY: Yeah, but she's not....

THE COURT: She knows more about it than I do.

S. CHOUDHRY: She, she might, but she - but it's not a question of her - she admits it's not her - the basis - she didn't say I know about this because I'm a doctor, she said I know about this because I'm a camper.

THE COURT: Yeah.

S. CHOUDHRY: And she kind of - she kept on coming back to this. And so she doesn't cite any data to support this, and she couldn't cite a study. And she says, "Oh, I know about this as a camper." And then she says, "I'm not a tent expert." And so again, had this been - had these been a trench foot or frostbite, or other cold-related health issues been medical issues she treats, for which she was qualified as an expert, then we would be in a different place, but she's an in-patient addiction specialist.

THE COURT: Yes, but can't any doctor treat trench foot and frostbite?

S. CHOUDHRY: Well, she - she - but her practice is exclusively in-patient addiction medicine. She doesn't treat people for trench foot.

THE COURT: I know, but doctors, that's basic. I mean....

S. CHOUDHRY: So, just to put to the point, Justice - Your Honour, if that's true that any doctor could give - then a lot of doctors could give evidence in a lot of different things. And there - and we do have specializations within medicine and people are qualified as specialists, so - as you know from other personal injury matters. And so her speciality is, is in-patient addiction medicine, it's not this. And she says I know about this not as a doctor. She says I know about this as a camper. It's - that's the express basis on which she - she did it. Okay.

I then want to get into the, the work cited. And so if you look at paragraph 89, pardon me, Tab 89, and beginning at Master A9510, this is Exhibit C to the affidavit. And it lists the sources for her expert opinion. And of these 69 sources cited, 40 of them are news articles, which is - which are not research, but newspaper articles from newspapers and websites; TD websites; all over Canada. And she - in her affidavit she kind of cites these articles as the basis for her expert opinion upon the risks of living in encampments relative to the - to living in shelters. And again, newspaper articles are, per say, inadmissible hearsay unless they are - they are evidence of what you have seen yourself; or unless she had seen the patients who are described in those articles. And on cross-examination we put to her a number of them. We couldn't put all of them for the sake of time, but she admitted that, that her only information about

the incidents referenced in the newspaper articles or the news articles, were those articles. And that - and there's lengthy cross-examination on that at Tab 90. And so just to give you an example, so if you look at - I mean, I won't take you through it, Your Honour, but it's questions 299 to question 346. There's - we went through a number of the articles and for each of the articles she confirmed that she didn't have first-hand knowledge of the incident. Most of those incidents were, those incidents were drawn from all over Canada, Toronto, out east, out west, and even for the London specific article, she didn't treat the patient involved, she didn't have first-hand knowledge. So, that's a lot of sources cited that are just inadmissible hearsay. And it's, in an expert affidavit, it's quite something not one - it's not something one sees.

And so I now would like to turn to the issue of expert witnesses as advocates. And because this is kind of a central issue. And so our friends have said that you should either not admit or should give little weight to five expert witness affidavits tendered by the applicants, because their witnesses have engaged in advocacy. And I'll give you the names. Those are Farha, Gaetz, Hayman, Schwan and Sereda. And what we'd say to that is that if you are to consider advocacy, you should do so even-handily and fairly, not just in respect of the applicant's witnesses, but also in relation to Dr. Koivu herself.

So, let me first take you to Mr. Justice Schabas' decision in *Black*, where he discusses the issue of advocacy and experts. And this is in - at Master 9524, and it begins at paragraph 31, at the bottom of the page. Do you have it?

THE COURT: Yeah.

S. CHOUDHRY: So, he says - so this is Justice Schabas, and this was the - this was the first of Ontario encampment cases, or one of the first. He says:

> In public interest litigation of this kind, it would be surprising not to have experts who have expressed points of view and advocated for particular outcomes. Often, because of their commitment to their field and the conclusions they have reached, experts become involved in advocacy. However, this does not disqualify experts; if it did it would risk denying courts important perspectives on many issues. Courts are not naive and can, where necessary, discount or ignore testimony of experts if and when it becomes advocacy as opposed to evidence.

So, that's Mr. Justice Schabas, and we think that is a wise thoughtful, balanced view.

And then we would take you to Justice Carter in the *Kingston* case, where he applies that dictum, or that holding, we should say, and this is at Master 95 - A9527. Are you there, Your Honour?

THE COURT: No, sorry, not. A?
S. CHOUDHRY: 9527.
THE COURT: A9527.
S. CHOUDHRY: And this is from the *Kingston* case.
THE COURT: Case, yeah.
S. CHOUDHRY: And so if you look at paragraph 104, there's a couple of things that are of note-worthy. So, this is, again, about Dr. Sereda, whose, whose qualifications as an expert were challenged there in *Kingston* as well...
THE COURT: Yeah.
S. CHOUDHRY: ...and were accepted. And there's a couple of things:

> The fact that Dr. Sereda has not visited the encampment is of no moment. The central issue is whether a prohibition on camping in municipal parks would deprive a homeless person of their right to life, liberty or security of the person in a manner that is not in accordance with the principles of fundamental justice.

We think that's good law. That's a, that's a, again, a wise, thoughtful approach to expert evidence. And again, Dr. Koivu hasn't visited a shelter in Hamilton, or encampment in Hamilton, but somehow that seems to be fine. And then, and then, and then it says - then look at the last sentence, Justice Carter says:

> Nor does the fact that Dr. Sereda has been an

advocate against the clearing of encampments necessarily disqualify her from giving expert evidence.

And that's, again, the cite to *Black*. So, we think that the *Black*, that *Kingston* and *Black* are appropriately circumspect and have a balanced approach. And so the issue is advocacy, per say, is not presumptively disqualifying. It's the degree of advocacy and whether it taints or shades specific evidence in an affidavit. And, and also - or the affidavit as a whole. So, that's the approach that's been taken in the other cases in Ontario. We think that's a wise balanced approach here.

And so then the question is, how does - how does the expert evidence line up? And so here - so at Tab 93, we've kind of put into the record here, or we brought to your attention an extensive cross-examination of Dr. Koivu's advocacy, herself. And so I'm just going to list to you the instances of advocacy that we, we - what she calls "speaking out", that we put to her. And, and what we'd say to you is that if one is to make a relative comparison of how much advocacy has been engaged in by any of the experts in this case, we would say that Dr. Koivu was engaged in as much if not more than any applicant expert. And moreover, quite frankly, at least in one case, might have acted in a manner that is, with respect, intemperate. And so - so this begins on A9529. So, the first set of

questions or the first instance of advocacy - so just by way of background, the way we got into these questions is that Dr. Koivu's CV did not list on it her - an appearance that she had made in the House of Commons, testifying about the opioid crisis, nor did it list a piece that she had written in the National Post. And so we, we put those - and so we put to her, her testimony in the House of Commons and the piece she had written in the Post, and then we put to her other media articles where she commented on issues related to the opioid crisis or safe injections. And so with respect to the House of Commons Committee, I think that the takeaway point here is that she, herself approached the Committee to testify. She, she then testified. She then testified on - because she said "to speak out" on questions of addiction and addiction medicine. And again, as a citizen, that's perfectly her right, but it's indisputable that that is a form of advocacy, appearing before Parliamentarians and speaking - wanting that invitation to go and speak out to Parliamentarians.

So then there's a National Post article which she wrote, and the questions on that begin on page A9533, where I, I - we put to her that:

> Q. You haven't listed on your CV any publications that you have?

That's question 87. She said:

> A. No, I don't consider those publications.

And so we then put to her an article she wrote for the National Post. She refreshed her memory regarding the article and then, and then at - she stands she stands by the words in the article. And then if you look at page A9534, she says - this is - we put to her, at question 110, words that she stated in the article:

> I feel compelled to speak out about the harm safe supply is causing in my community.

She agreed she wrote those words. And then I said:

> Q. By speaking out, do you mean speaking out publicly?

And she said:

> A. Yes, it does.

And then we asked:

> Q. Was it your hope in writing these words or making a submission to the National Post, that your views would be read by members of the public?

And she said:

> A. Yes, it would.

Okay. And then she goes on to call for a policy change, which again apparently for Dr. Gaetz was disqualifying, but at question 113, we put to her a policy proposal she makes:

> Q. 'To prevent further harm, a moratorium on funding and expansion of "safe supply" programs

must be put in place.' Did you write those words?

And she answers:

A. Yes.

Q. Is it your understanding that the Provincial Government funds Safe Supply programs?

And she says:

A. Oh goodness no, it's federally funded.

And then we put to her:

Q. So, were you advocating that the Federal Government impose a moratorium on funding and expansion of safe supply programs?

She said:

A. Yes.

Okay. So that's - and so there's a Canadian Affairs article, which is again another interview that describes certain, again, her positions on these issues and which she's been outspoken.

And then there is a Toronto Sun article. And so this - these questions begin on - at page A9535. It's - and question 135. So, this is an article by Brian Lilley, who is kind of a well known Toronto Sun Journalist, about a - the SRCHC, and it's a, it's a South Riverdale Clinic, and that was engaged in safe supply. And essentially, Dr. Koivu offered a number of views about that clinic to Mr. Lilley, including views about its philosophy; views about its - basically, she's making statements, making

statements about the work that's being done there. She says:

> ...South Riverdale Community Health Centre is not working to improve lives...

And then, to be clear, then she, then she says:

> There has to be a complete change in leadership [there].

But she never visited that Centre; she'd never talked to the patients there; she'd never talked to the physicians there; she'd never made a study of that Centre, but nonetheless she felt qualified to offer very firm public views about what the work that Centre did and what should be done to - for the Centre to change course. And in our view, that is intemperate. It shouldn't be that a doctor, without having visited a place, without having assessed it, studied it, talked to anyone that's offered views about its leadership, how there needs to be a whole change, how it's not doing right - the right things. And certainly that's not what an expert would do.

And so, I'll stop there on those points. And there's also an article in the London Free Press. But again, the point being that if one looks at advocacy and how much has been engaged in, there is - Dr. Koivu was engaged in quite a bit of it. And if that's - and in some respects we feel that, in

the case of the Toronto Sun article, that she went a bit too far.

So then we take you to the - over the course of the next several tabs, we've just reproduced for your reference the CV's of the different expert witnesses whose CV's you're familiar with from last year's motion.

THE COURT: Yeah.

S. CHOUDHRY: And let me just first take you to Tab 94, and this is - reproduces paragraph 98 in our Factum. And if you look at the footnotes on that page, this is page A9540.

THE COURT: Yes.

S. CHOUDHRY: Okay. So, if you look at the footnotes at the bottom of that page, these are footnotes that collect all the different decisions of the Superior Court and courts across country that have qualified most of these experts as expert witnesses.

THE COURT: Mm-hmm.

S. CHOUDHRY: And so of course they don't bind you, but it is certainly not irrelevant. It's certainly not. And not just once, but for some of them multiple times, including very recently. And so it's - and including in the *Waterloo* and *Kingston* cases. And I would also point you to, in footnote 86, the *Church of Saint Stephen* case, that's a different type of encampment case. That was on private property that abutted public property. That was where Dr. Hwang was admitted as an expert. So, these folks have been accepted as being

credible expert witnesses in most cases by a number of courts in this province and also in some cases across Canada.

THE COURT: The *Church of Saint Stephen's* case? Where....

S. CHOUDHRY: That, that is footnote 86. It's - are you familiar with the case?

THE COURT: No.

S. CHOUDHRY: It was on - it was a church and it let some folks stay, build an encampment on its property, but it also - the encampment spilled over to adjoining piece of city land. It's an interesting case. It's worth a read.

THE COURT: The hyperlink doesn't work.

S. CHOUDHRY: Oh, I'm very sorry about that. We'll make sure....

THE COURT: No, I'm - I - it's okay, I can get it.

S. CHOUDHRY: Yeah, okay.

THE COURT: *Church of Saint Stephen*.

S. CHOUDHRY: Yeah.

THE COURT: 2023...

S. CHOUDHRY: 6566.

THE COURT: Okay.

S. CHOUDHRY: And so, so, to your - to - just to the - you know, Your Honour, you've seen these witness's CV's before. We don't want to take you through them all again. The point is, they're very qualified. They're very well known experts in their area. Those of whom have full-time academic appointments have very impressive credentials. Dr. Gaetz is a member of the Order of Canada. Dr. Hwang, if I can say so, is an academic superstar.

You know, I think there's 300 publications on his CV. These are very serious, credible people. And there should be no doubt about whether they are qualified to give expert evidence in this matter on the issues for which they've been asked to give expert evidence.

Just a couple of points about them, just quick points. If you look at paragraph 95 - actually, pardon me, if you look at Tab 96, and it's at A9559. There was a very helpful question and answer between counsel for the City and Dr. Gaetz about the relationship between research and policy advice.

THE COURT: Okay.

S. CHOUDHRY: Okay. And so - and so, so the - a video was played to Dr. Gaetz of a talk he had given - I think it might have been a tent talk or something like it, and, and so he was asked questions about it. And then if you look on page A9560, a question was put to him, question 67:

> Q. Okay. And you said, if I'm quoting, your research became a *[indiscernible]* to back bad decisions, do you agree?

And then Dr. Gaetz said - or Professor Gaetz:

> A. Well, that's hyperbole, but I think that research can and should influence policy and practice.

And so, you know, the point that Professor Gaetz is making, and I think this will be true of - of the University based academics who are experts here, is that the point of research is not to have it locked up in a ivory tower. The point of research is to put it into practice. If there's a cancer specialist at McMaster, who is doing research on finding a cure for cancer, the point is not to just publish it, it's to apply it. And so Dr. Gaetz has the same view about his research on the homeless. And so the fact of policy advocacy, per say, is not disqualifying if it's rooted in research.

So, I think in the interests of time, I just wanted to move ahead. I won't take you through all of the other experts, because I think you've seen their evidence and I think it's best to assess the relevance and weight to be given to their evidence in the course of the substantive legal argument...

THE COURT: Mm-hmm.

S. CHOUDHRY: ...where we marshal and mobilize it. And so unless you have any questions about them, I do want to take you to one issue with respect to Ms. Farha.

THE COURT: Yes.

S. CHOUDHRY: And so this - and so let me - I want to take you to A9655. Excuse me, Your Honour. And so, so Ms. Farha is a different type of expert witness than the others. So, the other witnesses are social scientists or physicians who treat and/or research on issues related to the unhoused. Ms. Farha is an international Human Rights lawyer.

And so she has provided an Affidavit on questions of international Human Rights Law, which the Supreme Court has said can be used to interpret the *Charter*. The only thing that I want to put to you on this is a recent decision of the Supreme Court of Canada on precisely the admissibility of this type of evidence, which is the *IATA* case. And the cite for this case is, 2024 SCC 30. And this was a case about the interpretation of an international treaty incorporated under Canadian law. And Justice Rowe, for the Supreme Court, wrote a unanimous decision. And one of the issues that Justice Rowe addressed was the admissibility of expert evidence on international law. And the - the simple way to summarize what he said - and it's worth having a look at, is that:

> Expert evidence on international law is admissible like any other expert evidence. Is it helpful to the Judge?

And the - and so, if you look at page 9657...

THE COURT: Yes?

S. CHOUDHRY: ...the - he - Justice Rowe says:

> The appellants and the Attorney General are, for the most part, *ad idem* that the *Mohan* framework be used to determine the admissibility of [the] expert evidence.

That is for evidence regarding international law. And then at paragraph 72, Justice Rowe says:

> The test from *Mohan* should be applied in the context of international law as it is in other circumstances...evidence is admissible when it is "necessary in the sense that it provides information 'which is likely to be outside the experience and knowledge of a judge...'"

And so - and then, at paragraph 73, He says:

> ...from time to time difficult and contentious questions of international law will arise where judges will be assisted in carrying out their functions by appropriate expert evidence.

And so the - so that, to simplify the point, Your Honour, the answer - the question regarding the admissibility of this expert evidence is whether it's helpful to you or not. And if you feel that the issues of international law are issues where you don't need the assistance of the affidavit, then you need not rely on it. But if you think that they would be, then you could. And then if you - and if you needn't rely on it, of course the international law arguments are before you as legal argument per say, and then you can rule on them or not. But the point is, that there's no blanket rule against the admissibility of these affidavits. On the contrary, *IATA* confirms that they are admissible if the judge thinks they're helpful. And if I could summarize there, I think what Justice Rowe was getting at is that there are some courts that are very familiar with international

law arguments. The Federal Court in particular, for example, because of the *Refugee Protection Act*, others who don't see international law that much. And then there are some international law issues that are pretty simple or un-complex, some which are more. And so it's really for the judge to decide if it would help them or not.

THE COURT: How would it help me?

S. CHOUDHRY: Well, so, so we had made - we've made arguments about the relevance of the international law under the minimal impairment branch of Section 1.

THE COURT: Oh.

S. CHOUDHRY: And so the, and so the issue - and so there's a paragraph about the international law there and so you - I'll take you to those submissions if not today then tomorrow and then it will be for you to assess whether the affidavit is helpful or not.

THE COURT: Okay.

S. CHOUDHRY: Okay.

THE COURT: So, it's relevant to Section 1.

S. CHOUDHRY: Absolutely.

THE COURT: Okay.

S. CHOUDHRY: Okay.

THE COURT: That - but that's it?

S. CHOUDHRY: That's it.

THE COURT: Okay.

S. CHOUDHRY: That's all we're giving you, yeah.

THE COURT: Otherwise I'm dealing with domestic law.

S. CHOUDHRY: Yeah, exactly.

THE COURT: Which I am allegedly an expert.
S. CHOUDHRY: So, so....
THE COURT: It's a conclusive presumption...
S. CHOUDHRY: Yes.
THE COURT: ...in the matter.
S. CHOUDHRY: Yeah.
THE COURT: Matter of what the actual facts are.
S. CHOUDHRY: So, so Your Honour, so, so that concludes our submissions on the, on the expert affidavit. So, I want to continue to the issue of the admissibility of various public documents, so the public documents hearsay exception.
THE COURT: Yeah.
S. CHOUDHRY: And so, and so perhaps the, the most kind of - the one place to start would be at Tab 106, and given that we're in the Sopinka Courthouse, it seemed appropriate to put into the Compendium an extract, Sopinka's, Law of Evidence on Statements and Public Documents.
THE COURT: Yes.
S. CHOUDHRY: And so the paragraphs 6331 and 6333 kind of outline the basis for this exception to the hearsay rule. And the - the - to kind of summarize - and the cases we put to you kind of confirm this position. So this, this kind of is to declaratory, is that why are these statements admissible, notwithstanding that they're hearsay; or why are these documents admissible? It's because it's the belief the public officers will perform their task properly, carefully and honestly. And when it's the function of a public officer to make a statement as to a fact coming within her knowledge,

it's assumed in all likelihood that it'll be true. The fact, the circumstance of publicity adds to an element of trustworthiness.

And so then if you look at A9670...

THE COURT: Mm-hmm.

S. CHOUDHRY: ...there's a summary of the test, the statements on a matter of a public nature; the statement must have been prepared with a view to being retained; being kept as a public record; must have been made for a public purpose and available for public inspection; must have been prepared by a public officer. Okay. And then 6333.

THE COURT: Yes?

S. CHOUDHRY: Okay. 6333 also explains - I'm sorry. Yes, Your Honour?

B. SHORES: Your Honour, I feel compelled to speak up. I may be misunderstanding the direction my friend is going, but it appears that he is intending to essentially make a collateral attack on...

S. CHOUDHRY: No.

B. SHORES: ...the court's Ruling...

S. CHOUDHRY: No, no.

B. SHORES: ...in the October 4th...

S. CHOUDHRY: No.

THE COURT: Now, are you talking about - are you talking about public documents that you put in in the first volumes?

S. CHOUDHRY: Yeah, yeah. These are - these are not - so the vol - we, we've removed Volumes 18 to 20 from the Application Record. These are other

public documents that are Exhibits or Cross-examinations...

THE COURT: Yeah.

S. CHOUDHRY: ...or that are Exhibits to Affidavits.

THE COURT: Go ahead.

S. CHOUDHRY: Okay. So, they're in - they're properly in the Application Record and no motion was brought to remove those, just to be clear. And in addition, the Missing and Murdered Indigenous Women and Girls' Report, they're - that also has - portions of it have gone in through an affidavit, so it's - we're also seeking that that be admitted, Your Honour. So, I hope there's no confusion about this. Okay.

And so, so Your Honour, it says here that:

> As with some of the other exceptions to the hearsay rule, necessity is a further justification, but it is necessity of a different kind. It has never been a pre-condition to admissibility that the maker of the public document be dead. The special necessity, therefore, for this type of hearsay evidence is not so much the unavailability of alternative modes of proof, rather it is based on expediency. For without such an exception, many public officials would have to be taken away from necessary governmental tasks.

THE COURT: Yeah, they'd be testifying all the time.

S. CHOUDHRY: Yeah. And, and again - and Your Honour, if I could, you know, I - so, for better for worse, I spend a lot of my time in court against Governments. And it's - documentary evidence of the kind, that is in the record here, is kind of - bread and - is the bread and butter of public law litigation. And it would just - it would grind that to a halt if we have to find that who had authored a document; issue a summons if they weren't produced as a witness; and then have them come and testify to it. It just wouldn't work.

And in many cases, if I can add, sometimes documents aren't authored these days. I'm sure you know that. There's just a document from the Government of Canada.

THE COURT: Right.

S. CHOUDHRY: Right? So how is one supposed to get that into evidence? It just doesn't - wouldn't work, you know. So, so the - so Tab's 104 and 105, I'm going backward, they give you a couple of authorities that you might find helpful about this exception. And I'll just - I'll just give you the, the case names and describe for you in summary what I think - why we think they're helpful to you.

So, the first is at Tab 104 we give you an extract from the Ontario Court of Appeal's decision in *J.N. and C.G.* And this is Justice George at the Court

of Appeal. And Justice George, in a sense, confirms that this statement of what the law is in, in Sopinka's Law of Evidence, is the Law of Ontario for public documents. And you can look at that.

The other cases, Mr. Justice Perell's decision in *Francis*.

THE COURT: Oh, could - have you got the citation of the....

S. CHOUDHRY: Of course, Your Honour. It's 2023 ONCA 77.

THE COURT: Thank you.

S. CHOUDHRY: Sorry, Your Honour. And then, Your Honour, the other case that we think would be good for you to have a peek at if - when you have - is *Francis*. And this is at Tab 105, and it's 2020 ONSC 1644, and this is Mr. Justice Perell.

THE COURT: That's pretty good authority.

S. CHOUDHRY: Yeah, and you know, he - and again, he's very wise about these things. He has a lot of experience and, and so he says something quite interesting. In fact, you know what, since you, since you expressed this interest, maybe I'll take you to it. It's A9667, Your Honour.

So, this is a case - as you know, there's been a lot of litigation about inmates and administer of segregation and so forth. And we'll be talking about that again in the context of the mootness arguments our friends make, but let me take you to paragraph 24 of what Mr. Justice Perell says. Although I fear we've just lost him to

supernumerary status, but nonetheless, I'll say what he says. He says:

> What should not be lost sight of in a discussion of the reports and the documentary evidence about the use of administrative segregation inside or outside of Ontario is that in the immediate case, I have the *viva voce* evidence of the lived experience of [both] the inmates...and [I have] the *viva voce* evidence of [Ontario's] civil servants.

And then at paragraph 25 he says:

> ...The documentary evidence confirms or corroborates the evidence of (the) witnesses.

And so that's a way - and as I hope you'll see, we propose to rely on certain documentary evidence, again, to confirm or corroborate. Another way of thinking about this, their use is as through a form of evidentiary triangulation.

Now, we have the Applicants' experiences that Ms. Crowe led you through; there's testimony; principle - evidence in-chief principally from Ms. Uppal for the Applicants; cross-examination of certain City witnesses, official and shelter officials; and then there's the documents themselves. And, and - your - what we're suggesting to Your Honour is that you take all this evidence together in it's totality

and then make findings that we would propose to you.

THE COURT: Okay.

S. CHOUDHRY: So, so that's Mr. Justice Perell, Justice George, and of course the late Mr. Justice Sopinka. So, I think that's what we have to say there about the rules governing the admissibility of this evidence.

So, now let's talk about Section 7.

So, Your Honour, there, there's first an issue here about horizontal *stare decisis*. And, and in the - in our Compendium we've put to the *Sullivan* case.

...BRIEF PAUSE

S. CHOUDHRY: And, Your Honour, I think we will take the afternoon break.

THE COURT: Yes.

S. CHOUDHRY: So, what's your preference?

THE COURT: My preference as to what?

S. CHOUDHRY: As to when to take it?

THE COURT: You can take it any time you want.

S. CHOUDHRY: Well, I'm, I'm in your - I also....

THE COURT: I don't mind because you're the one who's doing all the work.

S. CHOUDHRY: Okay. So, you know what, let me - how about we cover this horizontal *stare decisis* point...

THE COURT: Sure.

S. CHOUDHRY: ...first and then we'll take a break, I think is a good - okay. So, so the, so the *Sullivan* case - so the issue of horizontal *stare*

decisis is, it's, it's sort of - it's amazing it never got to the court, you know, quite, you know, until *Sullivan* was not dealt with in this way for a generation, but the essence of it is this. As you know in Ontario there is dozens and there's hundreds of judges sitting in the Superior Court.

THE COURT: Yeah.

S. CHOUDHRY: And, and the question is, how do you prevent - what happens when another judge has ruled on something that's substantially similar, issued a precedent, what do you do? You know, is it forum shopping where, well, if I don't like what happened with Mr. Justice Schabas in Toronto, I'll file in Brampton, or I'll go to Kingston or so forth. And, and the answer that the court said - and what *Sullivan* did was to confirm that there is a doctrine of horizontal *stare decisis*, and the criteria are the *Spruce Mills* criteria. And the basic rule is set out at - is - it starts at paragraph 73 of the decision. That's A9672. And it says here:

> Horizontal *stare decisis* applies to decisions of the same level of court.

And then there are the *Spruce Mills* criteria that Madam Justice Wilson set out about when you would not follow the decision of a peer court, and the answer are - is that there are three conditions. And those conditions are set out at paragraph 75 of the decision, which is at A9674. And so what that paragraph says is - and it describes the principle

of horizontal *decisis[sic]* as a principle of judicial comity, which is the right way to think about it.

> ...Judges treat fellow judges' decisions with courtesy and consideration.

And it says that:

> Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances.

And there's three circumstances:

> The rationale...has been undermined by... appellate decisions;

Which seems fair. The second is:

> The earlier decision was reached per incuriam ("through carelessness" or "by in advertence");

And that happens. And the third is:

> The earlier decision was not fully considered, e.g. taken in exigent circumstances.

So those are pretty limited circumstances. The reason we bring this up is that, as you know, although this Application originated before the other ones that were - have gone forward in

Kingston and *Waterloo*, those decisions, because of the procedural idiosyncrasies' of those cases have come down before. And those case have provided, put some flesh on the bones of what Section 7 means in Ontario in relation to encampment and encampment evictions. It doesn't answer all the questions at all - by any means, that we put to you in this case, but there are some - there are - there's a lot there. And in particular, the *Waterloo* case. And so we would say that the, presumptively, the *Waterloo* decision is, is governed by, by the principle of horizontal *stare decisis.*

THE COURT: But it dealt with a different law.

S. CHOUDHRY: It, it dealt with - and so the issue in *Waterloo* - so, so, Your Honour....

THE COURT: I mean, I'm bound by it with respect to that By-law, but this is a different By-law.

S. CHOUDHRY: So, so, Your Honour, yes, but - and so absolutely that in that case, that case was about a vacant lot in downtown Waterloo and this case is about the Park's By-law.

THE COURT: That too.

S. CHOUDHRY: But - and that, that's the key difference between the two. The, the nature of the prohibition that was under challenge. But the *Waterloo* case laid down the doctrine surrounding Section 7 and encampment, and encampment evictions that apply irrespective, in our respectful submission, of the nature of the piece of property at issue. And - or at least I will suggest that to you and, and I think this is a good moment to

break, because we'll begin with that after the break.

THE COURT: Okay. Fifteen minutes then to 3:30.

S. CHOUDHRY: Thank you.

MADAM REGISTRAR: Order, all rise. Court is recessed until 3:30.

R E C E S S

U P O N R E S U M I N G:

MADAM REGISTRAR: Order, all rise. The Superior Court of Justice has now resumed. Please be seated.

THE COURT: Yes. Go ahead, Mr. Choudhry.

S. CHOUDHRY: Thank you, Your Honour. So, so Your Honour, when we, when we, when we broke we were talking about the *Waterloo* case and what - what...

THE COURT: Yes.

S. CHOUDHRY: ...it was - what it does and doesn't stand for. So, maybe - I think it's good to get some clarity on that. Sir, I'm sorry to point out, but your tabs have slipped.

THE COURT: Oh, thank you. Thank you for pointing that out.

S. CHOUDHRY: No, your - yeah. So, so, Your Honour, at paragraph 110....

THE COURT: I've lost weight you know.

S. CHOUDHRY: I'm delighted to hear that. So - I wish I could say the same. So, at paragraph 110 of our Factum, which is at - at CaseLines A9128. So, it starts at the bottom of that page and goes on to the next page. This is a, kind of a swat up

summary of what we say *Waterloo* held in relation to Section 7 and encampments. Do you see it, Your Honour?

THE COURT: A9128?

S. CHOUDHRY: A9128. Maybe I've got the wrong page.

THE COURT: I think so. I, I'm....

S. CHOUDHRY: I'm sorry, Your Honour. Let me try this again.

THE COURT: That is in your Factum, but you're talking about at that point the various applicants.

S. CHOUDHRY: So, let's - give me another shot.

THE COURT: Yeah.

S. CHOUDHRY: So, I've got it at A9147, sorry. I must have printed this....

THE COURT: Okay.

S. CHOUDHRY: Forgive me, Your Honour.

THE COURT: No, no, no, that's fine.

S. CHOUDHRY: Yeah.

THE COURT: Yes.

S. CHOUDHRY: You've got there?

THE COURT: Yes.

S. CHOUDHRY: Okay. If you go to the bottom, paragraph 110.

THE COURT: Yeah.

S. CHOUDHRY: So, so this is...

THE COURT: That's....

S. CHOUDHRY: ...our attempt to pull together the threads.

THE COURT: Yeah.

S. CHOUDHRY: So, this is a summary that we hope is helpful.

THE COURT: Yeah.

S. CHOUDHRY: And so what I want to do is just set out the propositions and then give you - there's one pinpoint that's incorrect, and then I want to take you to a couple of - dig into a couple of the issues if I could with you.

THE COURT: Yeah.

S. CHOUDHRY: So, so the first - and so just - so I think it's now kind of a bit - it's not news anymore, but this case law began in B.C. It - the *Adams* decision in 2009 is the B.C. Court of Appeal. It's the leading case. And then since then, the B.C. Courts, including Chief Justice Hinkson, before his retirement, actually elaborated on this juris prudence quite a bit, and then it moved over to Ontario; *Black, Poff*, of course, which is the earlier case in this proceeding; *Kingston, Waterloo*, here, etcetera. Okay. And so, so the *Waterloo* case is a helpful summary of the basic, let's call it the skeleton and a bit of the flesh on the bones, of this juris prudence. And so I just want to set out those basic ideas for you in summary.

So, the first is that the cases thus far, to be clear, are about Section 7 and overnight encampment bans. And so this case, to be clear, is about going beyond those cases in relation to daytime bans in public parks...

THE COURT: Yeah.

S. CHOUDHRY: ...okay. So that - let there be no misunderstanding on that. Okay. So, so this - so,

so 110(a) says overnight encampment bans or evictions violate Section 7 if individuals cannot access shelter, where shelter beds are either insufficient - and so that's kind of a numbers thing, does demand exceed supply? And then they have no alternative but to sleep outside. Or, and this is the, the important development at point - it's on the top of the next page. Or that shelter beds are inaccessible. And the pinpoint here is not to paragraph 92, but to paragraph 93 in the *Waterloo* case. And what, and what Mr. Justice Valente said there is, shelter beds are:

> ...impractical for homeless individuals, either because the shelters do not accommodate couples, are unable to provide required services, impose rules that cannot be followed due to addictions, or cannot accommodate mental or physical disability, they are not low barrier and accessible to the individuals they are meant to serve.

And so I believe, you know, Ms. Crowe described from the perspective of the applicants, some of these barriers to accessing shelter. This has been taken up in the case law as being another dimension to inadequate shelter supply. And you'll see in the footnote there, footnote 98, Justice Valente was following two decisions of the British Columbia Supreme Court on that point. That's the *Shantz* decision and the *Stewart* decision. And this is important because as we'll see, these - this view

of shelter and barriers to access comes up in City documents. It also comes up through some of the cross-examinations of witnesses as well, that I'll provide to you. So, it's not just - so even if a bed is, in theory, available, it might be inaccessible.

And then the - and then the question is - then the next point is, in what way does - if those conditions hold, how is there a deprivation of - about one of the protected interests under Section 7? And those of course are life, security of the person and liberty. And so life is the first one that we have listed. It says, that if individuals can't erect an encampment in cases where they can't access shelter, it interferes with their ability to provide adequate shelter for themselves, which are a necessity of life, because exposure to the elements can result in serious harm, including*[sic]* death, during the late fall and winter months. And, and noticeably, courts are taking judicial notice of that. It's sort of common sense. And we might get to the point where it's no longer necessary to adduce expert evidence about the fact that sleeping in the open is bad for your health, at least in the fall and the winter.

And then security of the person, again, the - includes psychological and physical integrity. Again, the same point. And then - and then finally, Liberty, and this is also recognized in the *Waterloo* case, that interfering with preventing

individuals from erecting a tent can interfere with their sense of dignity and independence. And so one of our, our applicants, of course, talked about being able - not being able to change her clothes in, in private in some way - just to give you an example of what that might be.

And then there are principles of fundamental justice at play, overbreadth and gross disproportionality. Overbreadth is a principle fundamental justice that is violated or where the deprivation of a Section 7 interest bears no connection to the, the State's objective.

And then the other principle is gross disproportionality, which is that even if the deprivation or the interest furthers a government interest, the impact on the individual is grossly disproportionate to the, to the vindication of the State's interest. And, and again, to be fair, gross disproportionality has been the focus of the case law, although overbreadth has also - was at issue in *Waterloo* as well. And gross disproportionality said, listen, whatever might be the State's interest at stake, peoples' survival's at stake from the elements. So, it's grossly disproportion to prevent them from erecting basic shelter.

Sorry, you looked puzzled?

THE COURT: No, no, it's okay.

S. CHOUDHRY: Yeah.

THE COURT: It's okay. I'm just - yeah.
S. CHOUDHRY: Okay. And so then there's the issue of daytime. And this is, again, a point of - I think, a point of disagreement with our friends. And so - and so actually, let me go back to what I just said. So, those propositions regarding overnight encampment bans, that, in our respectful submission is, that's horizontal *stare decisis*.
THE COURT: Mm-hmm.
S. CHOUDHRY: Then there's a question of daytime encampment bans. And here, let, let's be - we want to be completely transparent with you. So, paragraph 111 talks about - in *Waterloo*, the daytime encampment ban was found to be also in violation of Section 7, but of course as we've discussed, that was a ban on a vacant lot, okay? Not a public park. So, then the question is, would it ever be possible for Section 7 to prohibit a daytime ban in a public park? And so the *Kingston* case addressed that. It said not on the facts that are before the court, but in principle it could be on the right record. And to recall, *Kingston* was decided on - it was an injunction case. So, the record was abbreviated, relative to this one. And what the Kingston Court says here - and so in *Kingston*, the claimants unsuccessfully argued for - that Section 7 prohibited a daytime ban. But the Kingston Court said, and this is at the bottom of paragraph 111*[sic]*[113]:

> That is not to say that a breach could not be established on the proper evidence.

And then also, and this is important:

> I disagree with the City that s.7 cannot be invoked to protect daytime sheltering in a public park as this would amount to the grant of a property right.

And so the idea that this is somehow creating a property right in individuals is something that the Kingston Court was quick to dismiss even though it rejected the argument in that case, that the daytime ban was unconstitutional.

THE COURT: But it was talking about short term bans.

S. CHOUDHRY: So, Your Honour....

THE COURT: It was talking about short term bans.

S. CHOUDHRY: In *Kingston*?

THE COURT: In *Kingston*.

S. CHOUDHRY: Yes.

THE COURT: I mean, if you have the right to build a tent and keep it there indefinitely...

S. CHOUDHRY: Right.

THE COURT: ...isn't that - to the exclusion of others, is that a property right?

S. CHOUDHRY: So, I - so, Your Honour, I think that's a difficult question of fact that we don't - we can't answer on the record before us. And I think the issue is, what would exclusion mean?

THE COURT: Well, if you're using it, nobody else can.

S. CHOUDHRY: Yeah. And so in a public park is that a property right? But do you own? Can you

dispose of it? Can you transfer it to an individual? Can you merge it with an adjacent? I mean, all the incidents of property don't really - it's a permission. And it's a right against eviction....

THE COURT: But you haven't got permission though.

S. CHOUDHRY: Yeah, but absent, again, the - the, the access condition to all this case law. Shelter spaces are inaccessible, either quantitatively or qualitatively. So, it's a - it's conditional.

THE COURT: Conditional.

S. CHOUDHRY: It's conditional.

THE COURT: Okay.

S. CHOUDHRY: Okay. And that's, kind of, that's what's been forgotten here. This whole case law is based on conditionality. And it's consistent with what my friend Mr. - my colleague Mr. Poziomka said at the beginning. This is not the preferred way that people - at least our clients, want to live. It's not that they want to be able to erect - create townships or communities that endure in perpetuity. This is about a claim against eviction in the context of a specific set of, of conditions that have to be met.

And so, and so we would say that, in this case, that the, the evidence was have adduced regarding the, the harm of the daytime ban would allow you to find, in this case, that a daytime ban would violate Section 7.

THE COURT: Okay.

S. CHOUDHRY: Okay. So, on to the issue then of insufficient shelter space in Hamilton. And so here, let's take you to - let me take you to the Compendium at Tab 110. And so, so, the issue here is an Exhibit - the document we rely on is an Exhibit to the cross-examination of Ms. Blake, a City witness. It's the Reducing Homelessness and Managing Encampments document. It was marked as an Exhibit 3 to her cross-examination. And at Tab 110, there's a couple of issues that are addressed here in this cross, just to be clear. The first is that the document that was put to the witness had underlines and highlights put on by counsel, that is, by counsel for the Applicants, for the purposes of directing the witness to certain paragraphs. And then on paragraph - on page - if you look then at question 104, I posed the question to the witness:

> Q. Ms. Blake, I see that - I've highlighted your name here so I take it that you prepared this document?
>
> A. Yes.
>
> Q. You're familiar with it?
>
> A. Yes, I am.
>
> Q. Ms. Blake, the document states that the date is June 19, 2023, is that accurate?
>
> A. It is not.
>
> Q. What is the actual date?
>
> A. June 19th, 2024.
>
> Q. That's a typo?
>
> A. Correct.

Okay. And so then the document is - appears at the next Tab, which is Tab 111. And, Your Honour, for your reference, there's also a clean copy in the record that we haven't put in the Compendium, but I want to give you the CaseLines reference if you don't want to see the underlines and the highlights. That's Application Record, Volume 14, Tab 116, and the CaseLines is MA - sorry, A8334. And so I want to take you to - so this document is - it's entitled, Reducing Homelessness and Managing Encampments. And there's a couple of things I want to take you to. So, if you look at page A9701. Are you there?

THE COURT: Yes.

S. CHOUDHRY: So, there's a passage in the middle of the page there that begins, "We know that the..."

> We know that the shelter system is consistently at 99% to 100% occupancy with many individuals and families being turned away each night. While we continue to provide 52 hotel rooms, or 208 beds as overflow, this paired with the current capacity of 345 and 20 temporary shelter beds does not come close to meeting the needs of the roughly 1592 people experiencing homelessness in the City.

Okay. And so, so this statement, this paragraph is important, right? Because it sets out - you know, *Adams* talks about demand and supply, right? And so this says that there are, according to this

document, as of June, 1592 people experiencing homelessness in Hamilton.

THE COURT: As of June what year?

S. CHOUDHRY: 2024.

THE COURT: Yeah.

S. CHOUDHRY: Okay. But I'll take you back in a minute. But this is how to interpret some other materials in this document. And then it kind of tallies up supply, right? So, there's 345 permanent and 20 temporary, so that's 365. And then if you add the 208 beds there from the hotel rooms, you're looking basically at 373 plus 200, 573. Okay. Okay. So, now the question is, how does - so this is kind of a cross-sectional snapshot from June of 2024. So, the question - our case, of course, is about August 2021 to August 2023. So, the question is, what can we make - what can we learn from this document what happened back then? And also from other evidence in the City's evidence. So, let me take you down to A9707. Okay. Are you with me?

THE COURT: Yes.

S. CHOUDHRY: So, this is a graph that says, it's entitled, "Figure 1 - Count of Individuals by Length of Homelessness at Month's End." And this graph runs back to January 2022, which of course is in, you know, in the first let's say five months in to the time period that's at issue, and it goes to January 2024. And there's this, this bar graph, we don't have the numbers, but the bar graph has a legend.

THE COURT: Mm-hmm.

S. CHOUDHRY: And so in January 2022 it seems that it's about 1500 and it fluctuates around that number, sometimes going as high as 2000. Okay.
THE COURT: Oh, I see, yes.
S. CHOUDHRY: Okay. Are you - do you see that?
THE COURT: Yeah, it's a total of the blue in the Table.
S. CHOUDHRY: Yeah, exactly.
THE COURT: Mm-hmm.
S. CHOUDHRY: And it's broken down in the - I think the point is that the dark one is meant to be folks who are longer, longer term.
THE COURT: Longer term. Yeah.
S. CHOUDHRY: Okay.
THE COURT: Yeah.
S. CHOUDHRY: Are you with me, Your Honour?
THE COURT: Yeah, yeah. Yeah. I just....
S. CHOUDHRY: Okay. So, now let me take you to the next page. So, if you go to the bottom of page A9708. Are you with me?
THE COURT: Mm-hmm.
S. CHOUDHRY: It says, "Figure 3 - Combined Monthly Shelter Bed or Room Occupancy Percent." So then the - but the graph is not until the next page.
THE COURT: Right.
S. CHOUDHRY: So, you'll see it there. So, youth beds, there's vacancies, okay?
THE COURT: Okay.
S. CHOUDHRY: Hotel overflows, it seems to vary, but the men's and women's beds are trending at or close to, often, between 90 and 100.
THE COURT: Mm-hmm.

S. CHOUDHRY: Okay. And this again is from the same time period and this is the City's data. Okay. Are you with me?

THE COURT: Yeah.

S. CHOUDHRY: So, now let's go to paragraph - let's go to Tab 112, and this is an Exhibit from the Affidavit of Mr. Mastroianni, who is a City Official. And this charts out supply. Now, I'm going to try to rotate this page, so wish me luck.

THE COURT: If you'd give me the page number?

S. CHOUDHRY: I'm sorry, Your Honour. It's A9715. Okay. I think I've rotated them. Okay. Did it rotate with you?

THE COURT: No.

S. CHOUDHRY: Okay. It's...

THE COURT: That's all right.

S. CHOUDHRY: ...it's all right? I have - I actually printed it off in case I couldn't do that.

THE COURT: There, I rotated it.

S. CHOUDHRY: You'll see it. Okay. Good. All right. So, so this is from Mr. Mastroianni's Affidavit and it's - and so the left hand column talks about supply, right? The maximum of City-funded shelter beds available month by month, by sector. Okay?

THE COURT: Yeah.

S. CHOUDHRY: And so there's the - there's - and so he's broken it down. I assume the City has by men's, women's, youth, family and hotel over-flow. I think those will probably track the graph that we saw.

THE COURT: Yeah.

S. CHOUDHRY: And then there's this bar graph on the right, do you see that?
THE COURT: Yeah.
S. CHOUDHRY: That tracks the - what's called the maximum number of City-funded shelter beds available. And we'll kind'a, kind'a qualify that in a minute. But do you see the maximum - it sort of goes - it's - this one starts - I'm just trying to - okay. This one starts in January 2020, actually. How about that? And so if you look at August 2021, it seems to be around five - between five and six-hundred.
THE COURT: Yeah.
S. CHOUDHRY: And then it goes - it shoots up, okay? And it seems to peak in March 2022. Do you see that?
THE COURT: Yeah.
S. CHOUDHRY: And then it comes back down. And then if you go to August 2023, it seems to be, again, around 600. And I'm - and, Sir, I'm approximating here. I'm just trying to read this graph. Okay. This is the...
THE COURT: Yeah.
S. CHOUDHRY: ...this is the only evidence we, we have, okay?
THE COURT: Mm-hmm.
S. CHOUDHRY: And so, I think the point I want to put to you is that - so, these numbers on maximum beds are lower than the homelessness counts throughout this entire period of time. And so on the quantitative kind'a condition for *Adams*, that first - you can tick that box.

THE COURT: Mm-hmm.

S. CHOUDHRY: Okay. Now, I also want to point out that these numbers regarding capacity are - they might overstate capacity. And so mystery - and so I'm not going to run you through the evidence, but at Tab's 114 and 115, Mr. Mastroianni, under cross-examination, agreed that shelter bed - that data, can overstate capacity because shelters do not provide empty beds in a room with a family to an unrelated person. And so you notice that some of those beds are so-called hotel rooms. They have four beds. According to Mr. Mastroianni, they won't provide, they won't mix families in a room, which seems to be - make sense. And Ms. Uppal also confirmed that point. And so Mr. Mastroianni's evidence is at Tab 114, and Ms. Uppal's evidence, which is in her Supplemental Affidavit, is at Tab 115. Okay. And then quickly in - so we have - so, so, do you see the picture emerging? So, we have the applicants' evidence that they weren't able to get in, or consistently so. Then you have these numbers, which seem to suggest that the quantitative criterion in *Adams*, of demand exceeding supply, seems to have been met. And then you have evidence - and this is at Tab's 117, 118, 120, 121, 122, 123, of witnesses, the City's witnesses, that confirm this. And I'm just going to summarize that evidence for you. I don't want to take you through it, but it's - this is all from Affidavits and cross-examinations. So, Mr. Mastroianni's said in October 2021, his evidence was that there had been occasions when no space was

available. In cross-examination he agreed, in 2024, that twice the system was on the verge of collapse. And again, this is a senior City Official. Mr. Buckle agreed in cross that City-funded shelters are consistently at or over capacity. And then the City's kind of witnesses from the shelter system, MacKeigan, Moulton and McFadzean - a lot of Scottish names - have all, have all kind of agreed that there was a lack of capacity, and in particular for men's shelters, for women's shelters. And that the lack of space could place individuals who are indigenous women, et cetera, and people with disability at risk of physical harm. And so I won't - that's at those tabs, Your Honour. I won't - because we're - I'm conscious of time, I'm just referring you to that evidence. But that's the - so that's the - our case to you on Section 7 and the quantitative limb of *Adams*.

Then there's the other limb, the inaccessible shelter space limb that's in *Shantz* and *Stewart*, from Chief Justice Hinkson in the B.C. Courts, that has now been taken up by Justice Valente in *Waterloo*. And the evidence that we would point you to, again, is a document that was also put as an Exhibit to Ms. Blake in her cross-examination. This is at Tab 124 and 125. Excuse me, Your Honour.

THE COURT: Yeah.

S. CHOUDHRY: Ah, if I can find it. Okay. So, this is a May 2024 Report. And just to be clear,

when this was put to Ms. Blake, she said that she was involved. She reviewed drafts, and so she was involved in - she said, when asked if she's ever seen this report she said she was familiar with it; she was involved in preparing it; and she explained that she had oversight for the report and that she reviewed drafts. So, we took that as her having identified the document. And then if you look at the document itself, there is - there are a couple of points that we want to draw your attention to. And so, I'm sorry, the first page of the document repeats itself, but if you look at A9758. Are you there?

THE COURT: Yeah.

S. CHOUDHRY: It's at the bottom, there's a - it begins, "Barriers to Housing and Emergency Shelter."

THE COURT: Just a minute. Yes.

S. CHOUDHRY: Okay. So it says:

> Without identified outflow from encampments in the indoor spaces, such as emergency shelter, temporary or transitional housing, or permanent housing, encampments are likely to maintain or increase in total. Individuals living unsheltered reported several barriers to emergency shelter, including a lack of pet friendly and couple spaces, harm reduction, friendly policies, privacy concerns, requirements to leave and return to secure a bed every day, that precluded them from wanting to access this service. When asked if

they...

And this is crucial, Your Honour:

> When asked if they would consider accessing spaces in the emergency shelter system, more suitable to their needs, 71 percent said they were interested.

So, this goes to the point about the, the claim, the false claim that people generally want to remain in encampments. Seventy-one percent said they'd be interested in different options. And so then - and then the Housing Services Division says, yeah, we're going to explore options. Okay. And then later, this report says housing also - if you look, scroll further down that page, on 9759, it says:

> Housing also continues to be difficult to acquire for individuals living in encampments, especially those who may require supports and assist in their transition.

This is something that Mr. Poziomka spoke about at the beginning. How do we make sure people succeed and can remain in the housing we provide them. It's not easy, Sir.

While many of the individuals living outside had connected with housing workers and they were on

access to housing wait lists, many felt unsupported.

Now, the question is, is this - there's a question that came up in the cross-examinations, is whether this was real or not. Are these report - is this a survey that reports people's self-perceptions and views, or are these problems real? And that's a way in which a lot of the, the data, so - or, or evidence is sought to be diminished in its significance. And so I want to take you to Tab 127 and 120 - so, 127, which is at A9779.

THE COURT: Yes, and this is?

S. CHOUDHRY: Mr. Buckle's Affidavit. Mr. Buckle is an Outreach Worker with the City of Hamilton. I think he holds a position of responsibility, and he was a witness in both these proceedings and the earlier ones in 2021. And so this is his Affidavit evidence. He says, at paragraph 16:

> The people experiencing homelessness who I've interacted with have cited different reasons, assumed or real, for not sheltering indoors.

And then there's a list of these reasons, some of which track the reasons in the document I just showed you. And the key thing is "assumed or real." And so it continues on to the next page.

THE COURT: Yes.

S. CHOUDHRY: Okay. And so then at Tab 128, we reproduce elements of the cross-examination of Mr. Buckle on these propositions and we put to him, are

these assumed or are they real? And for the most part, I think - you'll have to read this yourself, we would say he thinks these statements are real, or these statements are true. That is, what people are telling him is the truth, not just their subjective perception.

If I could, Your Honour, take you back to Tab 126, at page A9773.

THE COURT: Yes.

S. CHOUDHRY: Are you with me? So, there's a passage there that's kind of side-barred.

THE COURT: Mm-hmm.

S. CHOUDHRY: Further - so this is the, again, the June 2024 Report. That was the Exhibit to, to Ms. Blake's cross.

THE COURT: Mm-hmm.

S. CHOUDHRY: And so it says here:

> Further, Housing Focus Outreach staff...(that's Mr. Buckle's team)...maintain an informal count of individuals living in encampments. There are currently over 90 sites with 200 individuals.

In fact, Mr. Buckle's evidence is that it's 271 at the time he swore the Affidavit. And then the - what I want to draw your attention to is the next portion of that paragraph. It states:

> While there will always be individuals who prefer to live outside, there are individuals

> who would shelter within City-funded programs if there were appropriate spaces. However, City-funded shelters are consistently at or over capacity. In addition to these capacity pressures, there are gaps in service for individuals with pets and couples without children. Because there is no space for those who are and willing to access shelter separately from their partners, these individuals often chose to live in encampments. And without additional resources, encampments are likely to persist and then they actually project growth.

Okay. So, this is the City's own document.

My colleague, Ms. Crowe, talked about acuity and high acuity individuals. And that's - and so now we're off the quantitative limb of *Adams* and we're on to the - let's call it the inaccessible shelter limb. And so issues of high acuity seem to be a particular pressure point for access to shelter. And so we have evidence on that issue at - in our Compendium at Tab's 129, 130, 131. And I want to summarize that for you. And so the summary is that, as of 2024, it appears that 65 percent of encampment residents, according to Mr. Buckle's Affidavit, had high acuity or very high acuity. Okay. And Mr. Buckle also - Mr. Buckle's 2021 Affidavit is also in our record, and the CaseLines reference for that is, A8291. And in his 2021 Affidavit, Mr. Buckle's evidence was that seven

percent of encampment residents had high or very high acuity. And so you can see there's a connection between the experiences of some of our applicants, the City's data regarding high acuity, and the legal doctrine regarding treating high - being in a state of high acuity, or very high acuity, as possible constituting a barrier to access shelter, okay? How - would it be a barrier to access a shelter? Well, Mr. Mastroianni testified both in 2021 and 2024, and those cross-examinations are at Tab's 129 and 130.

> The behaviours associated with high acuity can lead to exclusion from shelter.

You know, for the lack of a better term, Sir, if people behave in a certain way, because of their high acuity or very high acuity condition, they might not be permitted to stay in shelter.

And then at Tab 131 of our, of our Compendium, Mr. MacKeigan, who is the City's witness from the shelter system, said that shelters aren't equipped to support people with complex mental health needs. So, you have that evidence about what the shelter system can and can't do; why people might be excluded because of their high acuity or very high acuity; and the fact that an overwhelming majority of the shelter - of the encampment residence that Mr. Buckle identified, have high or very high acuity. So, they all add up - they all point in the same direction. Those folks, at least - even

if there were a bed, in theory, available for them, aren't able to access it.

Your Honour, we're at 4:10, and I'm wondering - I, I don't want to push my luck, and so - and I think it's been a long day...

THE COURT: Yeah.

S. CHOUDHRY: ...so should - do you think maybe we should give - I don't....

THE COURT: Call it a day?

S. CHOUDHRY: Yeah.

THE COURT: And come back in the morning.

S. CHOUDHRY: All right.

THE COURT: There's the endorsement sheet. Thank you.

MADAM REGISTRAR: Order, all rise. Court 700 tomorrow, Your Honour?

THE COURT: Yes.

MADAM REGISTRAR: This matter is adjourned to court 700 tomorrow at 10 a.m. Oyez, oyez, oyez, the sittings of this court are concluded for the day, long live the King.

Form 3

Electronic Certificate of Transcript *(Subsection 5(2))*

Evidence Act

I, Barbara Thompson, certify that this document is a true and accurate transcript of the recording of, Kristen Heegsma et al - and - City of Hamilton, in the Superior Court of Justice, 45 Main Street East, Hamilton, Ontario, taken from Recording No: 4799 702 20241216 091759 10 RAMSAYJ.dcr, which has been certified in Form 1.

February 20, 2025 B. Thompson, A.C.T.

(Date) **Electronic Signature of Authorized Person**

A.C.T. #6014683207, Ontario, Canada.

TAB 18

COA-25-CV-0166
Court File No: CV-21-00077187

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KRISTEN HEEGSMA et al.
Applicants

- and -

CITY OF HAMILTON
Respondent

P R O C E E D I N G S A T A P P L I C A T I O N H E A R I N G

BEFORE THE HONOURABLE, JUSTICE J. RAMSAY
on December 17, 2024, at the CITY OF HAMILTON, Ontario

APPEARANCES:

S. Crowe	Counsel for the Applicants
W. Poziomka	Counsel for the Applicants
S. Choudhry	Counsel for the Applicants
C. Sell	Counsel for the Applicants
M. Sutherland	Counsel for the Applicants
J. Diacur	Counsel for the Respondent
B. Shores	Counsel for the Respondent

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

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LEGEND

[sic] Indicates preceding word has been reproduced verbatim and is not a transcription error

(ph) Indicates preceding word has been spelled phonetically

TRANSCRIPT ORDERED: February 6, 2025 (confirmed to go ahead)

TRANSCRIPTS COMPLETED: February 28, 2025

ORDERING PARTY NOTIFIED: March 8, 2025

TUESDAY, DECEMBER 17, 2024

THE COURT: Good morning all.

S. CHOUDHRY: Good morning, Your Honour.

THE COURT: Mr. Choudhry, you're up I believe.

S. CHOUDHRY: Yeah. So, just to give you a bit of a roadmap of how we're planning to - so we're planning to wind-up our argument in-chief by the morning break.

THE COURT: Yeah.

S. CHOUDHRY: And so I'll need to be a little bit brisker and a bit less conversational at times, Sir, as - than we were yesterday, but I'll, I'll focus in on what I - we think is important. At, at the end of our - of my argument in-chief, my colleague, Ms. Crowe, will take the stand to - or, or take the podium, I should say, to address the issue of quantum, and then we'll be wrapping up.

THE COURT: Okay.

S. CHOUDHRY: So, just, just a couple of points to kind of - by way of recap from yesterday that are kind of quite important. The first is this idea that the right under Section 7 against eviction from an encampment in a public park or a piece of public property is a conditional right. There's this conditionality, and, and that comes out of *Adams* and the subsequent case law. And there's two types of conditions. There's this quantitative condition; does - if - does demand exceeds supply or not? And, and then there's this inaccessibility condition that the, that the B.C. Supreme Courts recognized in *Stuart* and *Shantz* and then the Waterloo Court added as well. And, and so this

speaks to your concern about whether an encampment resident would be a - recognizing a right against eviction from an encampment would be tantamount to a property right was, was something that Your Honour raised, and I think the answer to that is this conditionality, this conditionality criterion. And it's not a, it's not a right *per se* to erect a tent on a piece of, of, of public property. It's a conditional right if certain conditions are met. And, and in some cases, as you know, and there's lots of these cases, those conditions aren't met according to the evidence in the record. And so, that's the first point.

I think the - so, so let me just continue where I left off, yesterday. And today we're going to try to use the technology here on the big screen. We seem to have hooked it up. If it will start? Good. Okay. And so....

THE COURT: And I've got it right here.

S. CHOUDHRY: Good. And so, we, we will all - this should hopefully be even smoother than yesterday.

THE COURT: Yeah.

S. CHOUDHRY: And, and so, so, essentially, yesterday, we wrapped up some submissions on inaccessibility of shelter beds to individuals with high acuity. And we provided you with some evidence about that from, from the City's witnesses, from, from Mr. Blake, from Mr. Mastroianni, from Mr. MacKeigan. There's also some Applicant expert evidence on this, and I'm not - I'm just going to refer you to where it is in the

Compendium as opposed to taking you through it in detail. But there's Dr. - there's Dr. Gaetz's evidence, which is at T 132 of the, of the Compendium. Then there's Professor Schwan's evidence at T 133. There's Dr. Hayman's evidence at Tab 134. There's Dr. Sereda's evidence at Tab 135. And there's Dr. Orkin's evidence at 136. And, and when you review these extracts, Your Honour, these track the submissions in our Factum at paragraphs 121 and 122. They describe the different reasons that individuals might not enter shelter, might not be allowed to enter shelter. And, and so it's, it's a - and it's a - and it kind of goes to this point that when, when people are trying to make - when unhoused individuals are making difficult decisions in very imperfect circumstances that you and I are fortunately not faced with about where to reside temporarily between a shelter or an encampment, they are making choices under very - they're making rational choices. They make trade-offs that are different from the trade-offs you and I make. You and I might decide whether to live in a certain neighbourhood, or close to family, or we might make a decision based on affordability, or proximity to work, or what have you, right? There's all sorts of things that go into our assessments. For, for the unhoused, they also think rationally about choices that are different than the choices you and I have, about, 'Well, does the shelter system work for me? Am I allowed in the shelter? Can I stay with my partner? Will I have to give up my

belongings? Did I have a bad experience in the shelter? Was I assaulted? Was I robbed? And, and if not, then maybe I'm better off.' And it's not that, that - that's a wrong choice for someone to decide that, 'You know what? All things considered, I'm better off.'

THE COURT: Well, it's not irrational. They're all....

MR. CHOUDHRY: Yeah.

THE COURT: They're all - it's not irrational. They're all...

MR. CHOUDHRY: Yeah, they're all...

THE COURT: ...rational choices.

MR. CHOUDHRY: ...rational choices. And, and that's the thing. It's not rooted. It's, it's based in experience and perspective.

So, so, then - and then finally at Tabs 137, 138 and 139, we have *[indiscernible]* witness evidence that speaks to some of the challenges that individuals have faced in shelter. And we - I don't think it's disputed that people have faced threats of violence, thefts, property damage. That, that happens, and, and we're not trying to romanticize any of these living environments. And, and that evidence for Your Honour's reference is at Tab 137 from Ms. Mancini, Tab 138 at - from Mr. Mr. Moulton's cross-examination and 139 from Ms. McFadzean's - I hope I'm pronouncing it right - cross-examination. And, and again, Mr. Moulton and McFadzean were the City's witnesses.

So, so, the next point I'd like to move on to briefly, Your Honour, is that - is the issue about housing affordability. It's sort of the premise of all this litigation that people are unable to afford housing, that's why they aren't housed. And, and, and you, you saw from our client's evidence that there's a common set of stories, right? People flee domestic abuse. People lose their housing because of renovictions. They - they're priced out of housing. That's kind of the common thread to all this. At paragraph 123 of the Factum, you'll see that there is some information about ODSP rates, about Ontario Work *[sic]* rates and about average housing costs in Hamilton. And I think, Your Honour, one way to think about this is that I think it's now fair to say that we're all aware that housing has become more expensive for everybody in the last ten years. And there's kind of a chain reaction that happens, sir, that, you know, people can't afford what they used to, and so people get priced out of that, and they have to move further down the chain of housing. And at some point, people can't afford a rooming house, or they're - they - or they, or they, they can't afford - or they, they were for women. And there's evidence from this from, from Professor Schwan; women are very dependent on their domestic partner for housing, and if there is a relationship breakdown, often characterized by violence, they have nowhere to go, and so they become unhoused, okay? And so - and that evidence about, about housing prices and, and these rates of public

assistance that individuals receive, that's for your reference. We collected those at some tabs as well. I'll give you the tab numbers. It's Tab 140T 141, Tab 142, Tab 143, and Tan 144. Okay. So, so, that's all that material.

So, so, now I'd like to spend a little bit more time talking about the health risks of encampment bans and evictions. And, and here we rely on the evidence of, of Dr. Hwang, who has given evidence - who gave the evidence in *Adams* actually, and also Dr. Hayman. And so let me just summarize that evidence. It's, it's, it's - for your reference, it's, it's at paragraph 124 of our Factum, and the tabs in the Compendium are Tabs 145 and 146. And, Your Honour, I hope this is - proceeding in a summary way is of assistance to you. Is it, is it good enough?

THE COURT: Yes.

MR. CHOUDHRY: Yes. Okay.

THE COURT: Yes, indeed. I'm mapping it all out here.

MR. CHOUDHRY: Okay. And, so, so, let me just summarize Dr. Hwang's evidence for you, if I may? And so, he kind of - he enumerates - we set out four different health risks that - and so what he basically says, and I'll quote him, is that, "If homeless people who sleep outside are prohibited from erecting any form of shelter such as a tent, tarpaulin, or cardboard box, it is absolutely clear that this would have a substantial and potentially severe adverse effect on their health and would

likely increase their risk of death." And so, the point there is about relative risk, right? So, none of these - we, we know that being unhoused is bad for your health. We, we know - and, and, and the point - but the question is, what is the relative risk of being - of sleeping rough or living rough to living in an encampment? That's the core empirical point that the evidence - that our witnesses gave evidence to. And, and again, Dr. Koivu wasn't asked to give evidence of that specific comparison. And what Dr. Hwang said is that, "A lack of protection from wind and rain would increase the wind chill effect, which would greatly increase the risk of hypothermia." He said, "Prolonged exposure to cold and dampness increases the risk of skin breakdown and skin infections, particularly in the feet." So, that's trench foot that we've talked about. You know, that's from World War I, that term. And then, "Exposure to the cold increases the risk of developing respiratory tract infections...", not surprising, "...like pneumonia." And then, "A lack of shelter from the sun would greatly increase homeless people's risk of sunburn."

THE COURT: I, I - okay. I, I don't think it's controversial.

MR. CHOUDHRY: Okay.

THE COURT: Sleeping in the open is worse than sleeping...

MR. CHOUDHRY: Yeah.

THE COURT: ...under shelter of any kind.

MR. CHOUDHRY: I think so. And, and so, so, maybe

I'll just summarize and make two points then there. Thank you for that.

THE COURT: Oh, make, make - I just hope that helps you, but...

MR. CHOUDHRY: Yeah.

THE COURT: ...make any points you want.

MR. CHOUDHRY: So, there's also disturbed and fragmented sleep, which is something that, you know - I think Ms. Crowe has talked about how some of our clients have stayed awake all night...

THE COURT: Yeah.

MR. CHOUDHRY: ...where they sleep for an hour or two and they fall down from exhaustion.

THE COURT: Yeah.

MR. CHOUDHRY: That's something that's often not thought of in this context...

THE COURT: Well....

MR. CHOUDHRY: ...you know? And then there's also the - these comorbidities, right? So, the idea is that because of disturbed and fragmented sleep, you have increased risk of diabetes, cardiovascular disease, obesity, depression, and injuries. So, that piece again is something that Dr. Hwang provides evidence in, the comorbidities, which aren't surprising. And the point here is this, that, you know, the, the existing cases have taken judicial notice of these risks. The, the judicial notice they have taken, to be candid, has been in relation to fall and winter months. But the point of Dr. Hwang's evidence, and this is important, is that some of these risks are risks all year round, okay, and in particular, sunburn, heat stroke,

sleep deprivation. That's a, that's a, that's a 12-month...

THE COURT: Yeah.

MR. CHOUDHRY: ...risk, right? And, and Dr. Hayman kind of provides corroborative expert evidence, and, and she focuses - what's distinct about her evidence is that it focuses on women's experiences. And, and again, she, she is - focuses on the risk of, of interpersonal violence. And, and so - and again, our, our clients have experienced various forms of interpersonal violence when sleeping rough, including sexual assault.

So, the - I now want to shift gears to the, to the to the, to the novel set of issues in this case, and that's on the daytime ban. So, I, I - we've - I've completed our arguments on the overnight ban. And so, the - as you know, there, there has not yet been a court in Canada, to be candid, that has recognized that a daytime ban on encampments or, or evictions, is - violates Section 7. And so, we - we're hoping to persuade you in this case to, to recognize that. And the, the evidence that we rely on for that is principally from Dr. Sereda and Dr. Hayman. And that's at Tabs 147 and 148 of the Compendium; we've collected the relevant extracts. And, and I want to summarize that evidence for you to for them to, to, to understand it, okay - for you to understand it.

So, one of the things that daytime - that allowing individuals to stay in an encampment during the

day, the same encampment - so, having to - what we're trying to compare is having to pack up every night and move on and come back - is that it helps them get access to services, because service providers work normally during the day, right? So, they can get - they can see doctors who might attend on them. They can see nurses, social workers, and those folks are system navigators. They can help them, the encampment residents, get onto ODSP, get Ontario Works, get on the housing list, get ID, get OHIP cards, sir, get out of encampments. It's perverse. It's perverse to cut people off from the very supports that would allow them to get out of encampments. Medication delivery, donations of food and blankets.

And then there's, of course, health benefits. So, we talked about the health risks of sleeping in the open. Those health risks don't dissipate during the day in the cold. Without a tent, there's still the risk of hypothermia, of heat stroke, of dehydration. And then there's also the benefits of community. We all live in communities. We're supported by people around us, who care for us, have love for us, and that's true for our clients and residents of encampments as well. They make their communities in those places. They don't live alone. There is as well, individuals - our clients have reported that the - that daytime, that daytime encampments give them - or 24/7 encampments give them, give them an increased sense of safety. They can remain with their partners, with their food and

blankets. They can - and it mitigates the risk of sexual assault, assault, and theft, because they can choose who to sleep with, who to be in close proximity to. Couples can stay together, or what we call survival partners, people who, in adversity, bond together and, and take care of each other.

And then, of course, there's the issue of privacy. And you've heard the evidence of one of our Applicants who said she can't change in private. She can't change her clothes. She's exposed to the public gaze to engage in activities that you and I again take for granted as been able to take place in private. So, there's all these things that come from being able to have a tent or encampment 24/7 that are lost.

And, and, and so, the - what's interesting is that the City's evidence supports some of these concerns. And so, I want to take you here, and I will now take, take you to Tab 149. And so, this is at - let me find the page.

THE COURT: No, I've got it.

MR. CHOUDHRY: Okay. And let me try to get there on the screen, sir. And so, if you'll give me a second?

THE COURT: Oh, okay. Right.

MR. CHOUDHRY: Got it?

THE COURT: Got it, yeah.

MR. CHOUDHRY: Yeah. So, look - so, this is a report that came out in 2023 in January. It was,

it was an - it's an exhibit to Ms. Blake's Affidavit, and it's, it's, it's a, it's a - basically, it's an - it's, it's a - it's an evaluation. It - this was offered - this evidence or this, this report was released during the period - time period in question between August 2021 and August 2023, and it describes from the City's perspective the impact of people living in encampments. And so, I want to take you to the bottom of this page here. It says, "Others living in encampments..." - and this is a city report, "Others living in encampments moved to less conspicuous areas where they would not be found and therefore would not leave to move as frequently." So, ravines, for example, and there's lots of that here in the escarpment.

This impacted the ability of HFSO staff... - that's the, that's the outreach staff - ...to aid as it became more difficult for staff to find them to make necessary referrals and provide harm reduction and other basic supplies. And due to gaps between making contact with people living in encampments, it became more difficult for HFSO staff to maintain continuity in providing a housing plan as this requires ongoing interaction with staff and coordination.

So, again, there's a there's a perversity or counterproductive aspect to this that undermines both public policy goals and also the Section 7 interests of the encampment residents themselves,

because they have to keep on moving around. You know, it's sort of common sense once you see it spelled out this way. You can't help people unless you can find them.

And so, the - and so, and so, that's the, the - that's - the last point I just want to make is about the scale of what we're talking about here in terms of encampments and, and, and how much of the city they affect.

So, so, as you know, there are, according to the latest evidence we have from the City and Mr. Buckle's Affidavit, there are about 271 encampment residents that the city has logged in its database. And then, as you know, under the, under the protocol in 2023, each tent is allowed to be nine metres squared. And so, if you assume everyone - every tent complies with that, you're looking at about .6 acres. And we, we put to Mr. Buckle, and this is a Tab 150, a, a figure from the City's own website, which says that there's about 3,480 acres of municipally-owned parkland. So, it's, it's about - it's really - it's less than - it's, it's not that much of that parkland, to - that is - basically would be taken up by these, by these, by these encampments. So, I know....

THE COURT: Could you give me that page again?

MR. CHOUDHRY: Yeah. Sure. Of course. It's, it's - if you look at - it's A9893, and I'll take you to it as well.

THE COURT: Okay. No, I've got it. I - oh, no.

No, this, this this page. The last page.
MR. CHOUDHRY: Oh, I - I'm sorry, sir?
THE COURT: The last page.
MR. CHOUDHRY: On the last page? Yeah. I'll just - I'll take you back there. That's - that page is A9890. You got it, sir?
THE COURT: Yes. Thank you.
MR. CHOUDHRY: And then it continues over onto the next page.
THE COURT: Yes. And who, who wrote this?
MR. CHOUDHRY: This is a City - this is a, this is a City of Hamilton Housing Department report and it's - could you pull it up, please?
S. CROWE: Yes.
THE COURT: Yeah. It's - I will get it for you. It's Exhibit 'C' to Ms. Blake's Affidavit. It's called the "Encampment Pilot Evaluation." And we only put the extract here, but...
THE COURT: Yeah.
MR. CHOUDHRY: ...if you'll give me - would you like us to give you the full site?
THE COURT: Yeah, please.
MR. CHOUDHRY: Okay. So, if you just give me one second, Your Honour?
....BRIEF PAUSE - COUNSEL LOCATING DOCUMENTS.
THE COURT: Okay. Well, take your time. I, I don't need to know right now.
MR. CHOUDHRY: Okay.
THE COURT: I don't have to interrupt you.
MR. CHOUDHRY: We'll, we'll, we'll get it to you.
THE COURT: Sure.
MR. CHOUDHRY: Okay. I apologize I don't have it

right at the finger - at our fingertips. Actually, you know what, Your Honour?

THE COURT: Well, I don't know how you're supposed to have everything at your fingertips.

MR. CHOUDHRY: No. No. No. It's - we're here to help. Just give me a second, now that you've got us going. So, this is - it's in the Application Record, Volume 13...

THE COURT: Okay.

MR. CHOUDHRY: ...Tab 114.

THE COURT: Okay.

MR. CHOUDHRY: And, and you'll see in the index at each - at the beginning of the Compendium, I wish I'd remembered this, we put in the full site for you.

THE COURT: Yeah.

MR. CHOUDHRY: So, you can go back and look at the full document.

THE COURT: Yeah.

MR. CHOUDHRY: Is that all right?

THE COURT: Yes.

MR. CHOUDHRY: Okay.

THE COURT: That's great.

MR. CHOUDHRY: All right. Good. All right. So, so, now - so, that is - so I've given you the evidence on daytime encampment bans, and the harm they cause, and about the scale of encampments relative to the amount of parkland in the city.

So, so, then there's, of course, how to tie all this up and how this violates Section 7, and there, I want to principally refer you to our Factum,

because we've, we've covered these - the framework in some depth already, but it is at paragraphs 129 through 132 of our Factum.

THE COURT: Factum. Yes.

MR. CHOUDHRY: And, and, so it sort of sums it all up for you. And essentially, that the - the over - you know, the overnight bans deprive individuals of their life, liberty, and security of the person for the reasons that other courts have accepted, and the daytime ban should as well for the - on the basis of the evidence we provided. Our argument is that - is on the principles of fundamental justice is that there's gross disproportionality, that whatever the public interest or benefit, there is, in a ban, that it is outweighed by the risks to very profoundly important *Charter* interests in life, liberty, and security of the person. And, and, and the issue, as we'll get to Section 1, is one of minimal impairment. And, you know, there are - sir, you're looking like you have a question for me.

THE COURT: No. No. I'm just scrolling down to that part of your Factum.

MR. CHOUDHRY: Okay. So, it's - yeah. Are you there?

THE COURT: Just about. Yes. Oh, yeah.

MR. CHOUDHRY: Are you there?

THE COURT: Yeah. Yeah. Yeah.

MR. CHOUDHRY: Okay. Good. And so, the only thing I want to - so, that - that's kind of where we've tied all together for you. And, and so, the only thing I - and given that we discussed this

framework - this legal framework in some depth, what we've done is we plugged in the evidence into the doctrine here.

THE COURT: Yeah. What - you've got a lot of evidence about how the encampment for some people is preferable to a shelter.

MR. CHOUDHRY: Correct.

THE COURT: So, why does - why is it conditional on there being enough shelters? That seems to be a little bit of a *non sequitur*.

MR. CHOUDHRY: So, let's talk about that. So, the first is that, in many cases....

THE COURT: The shelters aren't really a solution.

MR. CHOUDHRY: No.

THE COURT: They're just a stop gap.

MR. CHOUDHRY: But....

THE COURT: I mean, an urgency provision, like an encampment.

MR. CHOUDHRY: I understand. I understand the question. So, the first thing is that many of our clients did try to access shelter, but couldn't.

THE COURT: Yes. Some....

MR. CHOUDHRY: Right. And....

THE COURT: But some don't want to for...

MR. CHOUDHRY: Some, some, some....

THE COURT: ...for rational reasons.

MR. CHOUDHRY: For rational reasons. And so, what we'd say is, is that for - but for - for those clients who wanted to, but couldn't get in...

THE COURT: Yeah.

MR. CHOUDHRY: ...Then the - that - the inadequacy of supply relative to demand is enough to find a

Section 7 breach.

THE COURT: Yeah.

MR. CHOUDHRY: And, and we went through with you the numbers yesterday that show that there's a lot, you know....

THE COURT: Yeah.

MR. CHOUDHRY: Right? There's a delta, a significant one, right? And then for those who can't, it's, it's - so, it's the conditionality. You're right. It's - but it's still a condition, because the, the - in this sense, that is - it's - it doesn't suggest that people can remain in perpetuity if there is an affordable accessible housing option that has provided them with supports, and, and that again is in the City's evidence. Remember 71 percent...

THE COURT: Yeah.

MR. CHOUDHRY: ...of folks - and it's, and it's not that people want to make - I mean, this is their temporary home...

THE COURT: Yeah.

MR. CHOUDHRY: ...until they get some - people didn't start out living this way.

THE COURT: Right.

MR. CHOUDHRY: Right? This is not where they were born and raised, and it's not where they wanted to be. They ended up choosing this, because they had no other options, but if they - but if they had some other place to go, they would. And, and you saw some of our clients tried...

THE COURT: But that wouldn't be a shelter.

MR. CHOUDHRY: It wouldn't be a shelter...

THE COURT: No.

MR. CHOUDHRY: ...if they could, for those folks, right? Some of our folks would have tried to act - as you know, some of our clients tried to access shelter night-after-night and couldn't get in. At some point, they just gave up.

THE COURT: Yes.

MR. CHOUDHRY: Right? But for those - but for other folks, yeah, it wouldn't work. But they, but they would - but to be clear, sir, they would take accessible housing. And this goes back to Mr. Poziomka's opening. We, we don't expect the City - we understand that this is a multi-jurisdictional...

THE COURT: Yeah.

MR. CHOUDHRY: ...puzzle, right? But that doesn't...

THE COURT: Yeah.

MR. CHOUDHRY: ...solve this - the proximate problem here, right, about these evictions. That is something that's on the City.

THE COURT: Okay.

MR. CHOUDHRY: Okay. So, so, the only other point I want to take you to, and it's a bit of a - it's a, it's a, it's - it's, it's a, it's a clarifying, but, important point. So, I put up here on the on the screen paragraph 56 from the Supreme Court's recent decision in the Canadian Council for Refugees case. So, this is at A9896, and...

THE COURT: Yes.

MR. CHOUDHRY: ...it's, and it's about how to establish Section 7 breaches. And so, it's - and

it's, it's quite important. It says,

To establish a violation of Section 7, challengers must first show that the impugned legislation deprives them of life, liberty and security of the person." The analysis asks whether the legislation engages those interests, and, and then look at what it said - in the sense that it causes a limitation or negative impact or - on - in - or an infringement of or an interference with them. And then it - and here's the key thing, "...a risk of such a deprivation suffices," right? So, in all the Section 7 cases on refugee removal and the border, it's not the fact that someone has actually been tortured...

THE COURT: Yeah.

MR. CHOUDHRY: ...right? It's the fact that they face that risk.

THE COURT: Yeah.

MR. CHOUDHRY: Right? And so, that's kind of important here too, right? And so, in many - our clients - the, the risks have materialized. There's lots of evidence before you about the health harms and the, the sexual assault, and the thefts, and the robberies and all that. But the point is, placing people at increased risk in a way that's supported by evidence is enough to meet the Section 7 breach. The reason I - I'm focusing in on this is that it goes to my friend's question about, about - for causation and damages claims. It seems that the causation test for a damages claim has to be - under the *Charter*, has to be

harmonious with the test for a - the breach of the right. And so, this, this sounds - I, I know that you've done a lot of personal injury matters. This sounds in the language of material contribution. Does that - do you see what I'm getting at?

THE COURT: Yeah.

MR. CHOUDHRY: Okay. So, I now want to move on to Section 15, if I could? And so here I want to clarify what it - we're arguing, what we're not arguing. And so, if you look at our Notice of Application, we did not argue that homelessness is an analogous ground of discrimination.

THE COURT: Right.

MR. CHOUDHRY: Right? Because it's....

THE COURT: It's not.

MR. CHOUDHRY: It's not. And it - and, and the, and the, and the Waterloo case rejected that proposition. And we - what we're arguing is what's called disproportionate impact discrimination, which is - and you know what this is, Your Honour. It's, it's, it's, it's a concept of discrimination pioneered in disability law. It's when you have a law that's - or a policy that's neutral on its space, but it has an unequal impact upon members of protected groups. And the *Eldridge* case is the classic case, right? Healthcare provided to everyone on an equal basis, but the sign - the hearing impaired didn't have publicly funded sign language interpretation, they couldn't enjoy the services equally, and so that was discrimination. And that idea has been extended to other areas of law, for example, gender discrimination. That's

the *Fraser* case that we cited to you. Okay. These kind of pension contribution rules in - for the RCMP, they basically have the - they were facially neutral, but they disproportionately had a negative impact on working moms who took time out from RCMP service to help raise their kids when they were young. And Justice Abella found for the majority that, that law, that rule, although neutral on its face, discriminated on the basis of sex. And, and we provided you with the site to the *Fraser* case at Tab 155. It's the - kind of the classic modern example of this of disproportionate impact discrimination. Okay.

The, the other case that we provide for you for your reference is a *Sherma* case, and, and there's a lot we can talk about, about *Sherma*, and we probably will save that for reply. There's one thing I want to, to kind of bring your attention to in *Sherma* though, because it's quite important, and it's about - it's at paragraph 49. So, are you - this is at A9911...

THE COURT: Yeah.

MR. CHOUDHRY: ...and I'm taking you to paragraph 49. Are you here?

THE COURT: Yeah.

MR. CHOUDHRY: So, it says here,

> In confirming the claimant's causation burden at step one, we are mindful of the evidentiary hurdles and asymmetry of knowledge relative to the state that many claimants face.

And so, that is a profoundly important sentence. It basically says that sometimes the, the State has the information about whether its laws and policies have a disproportionate impact on certain groups. And so - and the claimants don't have that or they can't easily get it, because it's the State that collects that information. Okay. So, so, just to give you an example, I recently had a case at the Court of Appeal about the CERB program, and it was about whether disabled workers could benefit equally from the CERB program, because they tend to make less than non-disabled workers. All that data was in the hands of the CRA. There was no way we could generate that data by hiring a, a fancy economist. It's based on government databases. So, we - the government had to disclose it to us. And so - and the reason I raise that is that a lot of the data about shelter capacity, shelter demand, the demographic makeup, that's all in the city's - the City has that information. We've done our best to try to get it before you through putting in various City documents, and I'll take you to another one shortly. But in, in, in - the point that the court is arguing for here is that in assessing whether claimants have discharged their evidentiary burden, they have to keep in mind that often the State that is the defendant has the, the very data that would impugn the constitutionality of their own their own actions, and that's certainly the case here.

So, I, I, I, I now want to take you to the Application Record, and I want to take you to - so, Ms. Uppal filed a Supplemental Affidavit in 2023, and this is Exhibit 'D' to her Affidavit, and it begins on page A5297. And this is a document called "The Point in Time Connection Results", and as you can see, it's produced by the Housing Services Division of the City of Hamilton. It's a City of Hamilton document. And I want to take you to - so, what the point in time survey is, it's kind of a - it's a national - it - it's something that the Waterloo case described as well, and you'll see at paragraph 18 of Mr. Valencia's judgment. You can look at it there. It's kind of a cross-sectional study of the state of homelessness, and it's, it's conducted across Canada in participating municipalities. So, Hamilton does it, other cities do it. And so, this - it says here this was conducted in November 2021, so after the, the, the repeal of the 2020 protocol and while the 2021 process was in place. And, and here's some highlights from this, and I'll take you to another page that summarizes this. So, it says, first bullet, "The over representation of Indigenous people has 23 percent of all respondents identified as Indigenous." Okay. So, so, that's - so, that - so, what this says is that 23 percent of the unhoused individuals who participated in the survey that night were identified as Indigenous. And what I'm going to show you is that those numbers are consistent with Mr. Buckle's evidence. Okay. And maybe I'll just give you those

references now to be efficient.

THE COURT: Yeah.

MR. CHOUDHRY: So, Mr. Buckle, in his Affidavit evidence, provides data on the number of unhoused individuals in - on HFSOT's radar who are Indigenous. And I'll give you the, the references. At A9460, Mr. Buckle's 2021 Affidavit, he says that - at paragraph 27, he says, "Of the 99 people living in encampments as of September 2021, 19 were Indigenous." So, that's 19 per cent. And then in his 2024 Affidavit, and this is - the relevant paragraph is ten, and the case in our cite is A8291. He says that, "Of the 276 people in the HFSOT client list...", that is people living in encampments, "...53 are identified as Indigenous." Again, that's 19 percent. So, all these percentages are roughly the same, right? And the, and the City characterizes 23 percent as over-representation.

THE COURT: Well, it's more than five percent.

MR. CHOUDHRY: Yeah. Yeah. And so, it's - and so, there's a - and the other thing that's actually quite striking about this, and this is why Ms. Uppal attached this document as - to her Affidavit, it says, "There's a shift in the demographic profile of those experiencing homelessness throughout the COVID pandemic, including an increase in the percentage of respondents who identify as a woman, 53 percent." Okay. And that is a significant increase from the previous point in time counts. Okay. And, and for your reference, if you go down to page - this, this is a

very - this is - this report is data rich. It's, it's worth your time, Your Honour, but the - there's lots of evidence here about shelter stays, and inflows, and outflows, and homelessness counts. So, here we have, again - you know, just to go - actually, if we could just go here? So, page A5305, we have - remember that homelessness count data we saw yesterday? So, this takes us back. So, that began in January 2022. This takes us back to August 2021.

THE COURT: Mm-hmm.

MR. CHOUDHRY: So, we see 1200, and then it jumps up to just under 14, and then in November just over 14. So, we have - I think we can fill out the picture a bit from what we had yesterday.

THE COURT: And this is in Hamilton.

MR. CHOUDHRY: I'm sorry, sir?

THE COURT: This is in Hamilton?

MR. CHOUDHRY: This is Hamilton, sir.

THE COURT: Okay.

MR. CHOUDHRY: Okay. This is all from Hamilton.

THE COURT: Okay.

MR. CHOUDHRY: Not to - I'm not trying to try this case on Waterloo data.

THE COURT: No. They have more, but - yeah. The, the numbers are higher than, than their, their client lists.

MR. CHOUDHRY: Yes.

THE COURT: Yeah.

MR. CHOUDHRY: Yeah. And, and so - so, then there's - also this chart here, this - which is at A5307, this is kind of a nice graphic summary of

everything for you.
THE COURT: Yeah.
MR. CHOUDHRY: It kind of captures a lot of these - a lot of points, and it's, it's worth a bit of time. It kind of gives the gender breakdown, gives Indigenous breakdown, age, you know, just a lot of information. Okay. And now you remember yesterday, I took you to Mr. Mastroianni's affidavit from 2024 and we looked at the bed counts. Do you remember that?
THE COURT: Yes.
MR. CHOUDHRY: And, and do you remember how there's two columns, one for men's beds and one is - one for women's beds?
THE COURT: Mm-hmm.
MR. CHOUDHRY: I want to take you back to that, if I could? I've - hopefully, I've done it right and it's here. Just give me a second. Actually, sorry. Okay. And let me try to rotate this again. All right.
THE COURT: Yeah.
MR. CHOUDHRY: Thank goodness. Okay. So, it's - and I can even zoom.
THE COURT: Good.
MR. CHOUDHRY: Okay. How's that?
THE COURT: That's good.
MR. CHOUDHRY: All right. Good. All right. It's still hard to read for me, but let's do our best. So, I think if you look at - down the column of men's beds and then you look at down the down the column of women's beds...
THE COURT: Yeah.

MR. CHOUDHRY: ...you're going to see that consistently men's beds outnumbered women's beds, right, and sometimes by a ratio of up to eight to one. All right. But, you know, from the, from the from the data I just showed you that women are about half of the homeless or the unhoused in Hamilton, which is - sort of makes sense, because they're about half the population of Hamilton. So, so, in terms of the sex discrimination argument, this is the crux of it, right? That is, if women are equally likely to be unhoused, but if women's shelter beds are - there's a shortage of women's shelter, shelter beds relative to their share of the population, that's kind of a *prima facie* case of statistical - of sex discrimination. There should be equal numbers offered, even if both are inadequate, still to be clear, right?

THE COURT: Mm-hmm.

MR. CHOUDHRY: Women are worse off. Everyone's badly off, because there aren't enough beds for the unhoused, but women are even worse off. Can I - does that - is that clear, Your Honour?

THE COURT: Yeah. Yeah.

MR. CHOUDHRY: Okay. And so, and so, Ms. Uppal - and then there's a lot of evidence, and you'll hear, "Well, there's other places people can go. There's transitional housing." Well, that's not emergency shelter. There's Carole-Anne's Place. Well, that's why we put in the evidence from Ms. Uppal, right, who said, 'We're full. We're full every night, and so don't count on us.' And then Ms. Uppal also said, 'Don't - if you are going to

count the violence against women's shelter system, you, you, you can't just count those beds without counting the demand for those beds.' And so, what the City does in its Factum is it sometimes lists - the only numbers it gives are of all these other beds that aren't city funded, aren't emergency shelters, but they never give the demand or occupancy rates for those beds. So, you, you can't, you can't count capacity without counting demand. And this, this, this point about data is at Tabs 159 and 160 Applicants' Compendium. It's Ms. Uppal's Affidavit, and her Supplementary Affidavit talks about this data collection issue. Okay.

So, then the question is, how is - what is the - at the step - second step of the Section 15 test, the first step is, is there a disproportionate impact based on sex? Yes. Then the second step is, is there just - is there a sex-based harm? Well, the answer is yes. And so, here, I, I want to take you to, to Ms. Uppal's Affidavit, and so this is her supplemental - this is her Affidavit where she describes violence against women, and in particular, the violence that she observed, or her staff observed and reported to her, that she then reported to police in and around Carole-Anne's place. And it's, it's kind of - it's really harrowing stuff. It's assaults, and sexual assaults, many - with many specific examples. Men attempting to break into Carole-Anne's place, street-level harassment, men loitering around

Carole-Anne's Place, bear mace attacks, all against women. So, this is the consequence of women trying to get inside for the night, but who can't, and so that is sex discrimination.

THE COURT: Could you move that page up to the top so I can get the number of it?

MR. CHOUDHRY: Yeah. Sure. Of course, sir.

THE COURT: Yeah.

MR. CHOUDHRY: It's - let me just reduce the....

THE COURT: Got it.

MR. CHOUDHRY: Give me a second here. I'm....

THE COURT: I got it, A9936.

MR. CHOUDHRY: I'm going to try to zoom out again. And so, it goes on for several paragraphs, 22 to 30. Okay.

THE COURT: Yes.

MR. CHOUDHRY: Including reference to police reports. All right.

THE COURT: Yeah.

MR. CHOUDHRY: Right. So, this is - and, and, and Ms. Uppal is a very senior official in this sector. She's a CEO. She - this, this is very credible. This is very serious. And it's in her capacity as a manager that this this all came to her.

THE COURT: Yes.

MR. CHOUDHRY: Okay. So, then - and then, of course, our clients have described some of those experiences. So, you know, we've talked about triangulating evidence. So, there's our client's evidence, there's this evidence, and then there's Professor Schwan, you'll remember Exhibit 'B' to her Affidavit is the Pan-Canadian Women's Housing

and Homelessness Survey?

THE COURT: Mm-hmm.

MR. CHOUDHRY: I'll, I'll just refer you to Tab 162. There's a section in that survey about, about unhoused women, and it says - and their relate - their experiences of sexual violence. And it says that 75 percent of women who are unhoused identify as survivors of trauma or abuse, and the - and that the primary reason that they lost their most recent housing was a relationship breakdown. Okay.

So, let me talk now about race, if I could? So, when we talk about race discrimination, in this case, we're talking about discrimination against Indigenous peoples.

THE COURT: Oh, yeah.

MR. CHOUDHRY: Right? And it's the - and it's - and that's why I spent time going through the data with you about overrepresentation. Okay. The City can maybe tell us what percentage of Hamilton's operation is Indigenous. It's not 23 percent.

THE COURT: Well, yeah. Canada is about five percent.

MR. CHOUDHRY: Yeah. And so, it's - and so, the point is, is that, that the, that the unavailability of housing has a disproportionate impact upon groups that are overrepresented among the unhoused. Pardon me. The unavailability of shelter beds has a disproportionate impact among groups that are unhoused disproportionately, and that includes Indigenous peoples. And it's quite a striking statistic. And as you know, Your Honour,

of our 14 applicants, 8 are Indigenous.

And, and, and, and with - to give you some context, that is what makes this case different from the other cases that have been adjudicated on this issue. The, the fact of, of, of that - of kind of putting to - bringing - to the core of our case the experience of Indigenous Canadians and their overrepresentation among the unhoused is something that is different about this case. It's not that they weren't - it wasn't present in the other cases, but it - it's part of the theory of our case. And it's, it's, it's reflected in the makeup of our client group and our applicant group, and, and we think that's important.

And, and, and then there's something that we call intersectional discrimination. And so, let, let me just kind of try to explain this in, in layman's terms.

THE COURT: I think I know. It means...

MR. CHOUDHRY: Okay.

THE COURT: ...some of your applicants are both female and Indigenous.

MR. CHOUDHRY: That - that's exactly it. Well, I'm so relieved to hear you say that, because I've had such difficulty in the past trying to explain the concept. And so - but the, but the case that we cite is called *Bjorkquist*. It's a justice - it's a case that I argued before Madam Justice Akabarali in the Superior Court in, in 2023. And she recognized that there was discrimination on the

basis of both national origin and sex against certain Canadian women...

THE COURT: Yeah.

MR. CHOUDHRY: ...who are born abroad. And so here you have discrimination against women who are both, both - you know, who are Indigenous, so they are - they're doubly disadvantaged. And, and there we put you for - again to, to support a finding of discrimination against them, the Missing and Murdered Indigenous Women and Girls Report, right, which talks about the, the cycles that are a national shame of, of Indigenous women leaving overcrowded communities and then ending up in urban centres and ending up in kind of cycles of, of, of being unhoused, poverty, coerced sex work, and so forth. And some of that - some of our clients have had that experience, Misty Marshall in, in particular, you know. And - but that, that, that type - that report, which is - you, you - if you put it into CanLII, you're going to see it cited in all sorts of cases now, mostly in a sentencing context, you probably know, but it's cited all over. It's, it's - this - you can take judicial notice of that, of that broader social phenomenon. It's, it's been - that was a very serious Royal Commission.

THE COURT: Yes. It's - yeah.

MR. CHOUDHRY: Yeah.

THE COURT: Yeah. Yeah. Okay. So - and then finally on, on disability, I don't want to spend - I just want to specify the different forms of disability discrimination. I heard Your Honour

about substance abuse yesterday, and, and so I'm not going to press that any further than I have.
THE COURT: Was this illegal?
MR. CHOUDHRY: Yeah. Okay. But then there's also physical disability, so getting in and out of encampment every day, and I, and I referred you to the *Matsqui* decision of the B.C. Supreme Court, which is a Tab 167 of our Compendium, and it's at page A9984, where the B.C. Supreme Court recognized for the first time that asking someone who's physically disabled to pack up their belongings every day and then to - it - and - or, or to enter shelter every day and leave shelter every day, this might not be practical or viable. You know, we have clients in wheelchairs.

In addition, there's the high - issue of high acuity which we've been discussing quite a bit. That's a form of disability. And, and there's - and the evidence about all that, you'll find it at Tabs 168 through Tabs 170 of our Compendium where we describe - there's, there's fact witness evidence from crosses or from Affidavits about this. I don't think I need to take you to it. Okay.

So, let's talk about Section 1 and remedy, and then I'm going to pass it off to my, to my co-counsel Ms. Crowe.

So, on Section 1, I think the simple point that - you know, to kind of cut through all of this, is to

say that, 'Listen. In Canada, since *Oakes*, when governments do anything in a blanket fashion, that tends to fail the minimum impairment test. A blanket ban on speech, not minimally impairing. A blanket denial of benefit, not minimally impairing. And so, we say a blanket ban on encampments as opposed to a regulation governing the size and placement of encampments relative to schools, relative to paths, relative to playgrounds, the number of tents, the number of tents that can be clustered, how the tents can be spaced together or not, that type of option would be minimally impairing, and those types of options are set out in our notice. And quite frankly, they're also in the 2020 protocol and some elements of the 2023 protocol. They are - but a blanket ban, that's not minimally apparent. And, and for the two years that are at issue here between August 2021 and August 2023, there was a blanket ban. No exceptions. And, and the parks By-law was clear. Ms. Crowe took you to that. And the six step process that, that was implemented under the, the 2021 process didn't have - there's nothing in there about exemptions. It's categorical. There's voluntary compliance. There's notice - trespass notices, but there's nothing in there about exemptions. And we're saying that what the City did before and after should give you pause to wonder why they didn't choose a minimally offering - impairing alternative for those 24 months in between. And, and that's often what courts do in Section 1; they look to what governments themselves

did before or after, and in this case, you have those bookends. And, and, and, and again, our, our notice did not say at large tenting as a right anywhere you want, anytime. There's some very - there are restrictions. But the numbers of tents, the size, the, the clustering, the setbacks, that's all there. And there's a reason for that, that we understand that there are competing users of public parks. And, and those terms, in our submission, would be minimally impairing, but if not those terms, perhaps some other terms, but some terms, not a blanket ban. Okay.

Now, on the issue of relief, okay - so, my friends are going to argue about mootness. And so let me just say that this case is not moot, because we're seeking damages for 2021 to 2023. This case is no more moot than the residential school's litigation was moot, because we had long abolished residential schools before we compensated victims of residential schools. This case is no, is no more moot than the administrative segregation class action that Mr. Perell - Justice Perell presided over and the Court of Appeal upheld in *Brazeau*, even though those policies were long abolished before individuals were compensated for the harm they suffered on them. So, just - the fact that - the 2023 protocol doesn't render this case moot, because we're talking about that 24 months before then. And so, then the, the, the double-barreled approach we're taking to, to remedies is that - is a declaration - a set of declarations that what

happened during those two years was, was - violated Section 7 and 15 and couldn't be justified under Section 1. and then damages in the amounts that my, my colleague Ms. Crowe will explain for you.

Declarations of unconstitutionality are a precondition for issuing the damages relief. You have to find that governments acted unconstitutionally before you can then say as, as a remedy they - you should get - you should award these damages, right?

THE COURT: Well, you need more than that, don't you?

MR. CHOUDHRY: Yeah. Well - for damages?

THE COURT: Yeah.

MR. CHOUDHRY: Oh, yeah. I'm getting to that part.

THE COURT: Okay.

MR. CHOUDHRY: Yeah. So, on the damage - but the declaration, you kind of - it's a, it's a precondition for issuing a damages relief. But even if not, and we put two authorities, courts have a discretion to issue declaratory relief, and if - and there are conditions to be met. I, I won't go over those except to say - to reiterate what Mr. Poziomka said at the opening; councils come and go. There was a protocol in 2020. It was re-appealed in 2021. We have a new one in 2023. It's not, it's not a secret, sir, that this is a politicized issue, you know, and who knows what the future holds. And so, the - one of the points of declaratory relief is to kind of give governments and the public guidance as to what constitutional

baselines are. It's not a bad thing, and it - and it's also more efficient than having to come back and to get that declaration later.

Now, on damages - so let me cut right to the essence of it. So, I think you know that there's the *Ward* test. There's a four-part test for whether you should get damages. I think the key part where we are going to have a principled disagreement with our friends is about step three, and, and steps - step, step one is; has a *Charter* right been breached? Step two is; would you - would the damages fulfill one of the purposes of compensation, vindication, or deterrence? Step three is; are there countervailing factors that defeat the reasons to get damages? And step four is the quantum. And, and this is set out at Tab 174. It's in the *Power* case at paragraph 42. Yeah. And so, this is the test, okay?

And so, just so you have the reference, it's, it's, it's A10000.

THE COURT: A10000.

MR. CHOUDHRY: Yeah. I, I - sir, don't, don't remind me. So, it's - and so, there's....

THE COURT: I just have to read it. You had, you had to put it all together.

MR. CHOUDHRY: Yeah. Okay. So, so, this is the - so, this is the test. So, I, I think where we're going to be - I think where we're going to have a, a disagreement with our friends most acutely, I mean, I think we disagree on all these points, but

it's on point three. And, and, and so, I - and so, the - they kind of simplify the case law. So, the, the - you know, the *Power* case is a bit, is a - it thoroughly renovates, and revises, and restates the jurisprudence on damages. And what it basically says is that this factor three, the countervailing factor, depends in part on the nature of the government institution whose decisions are being - for whom you're seeking to attach damages liability. Okay. And the, the highest threshold is the, is the *Mackin* threshold, right, of clearly wrong and bad faith, or abuse of power, right? And we say that, that threshold only applies to provincial legislatures and to Parliament. And, and, and what *Power* does, but *Mackin* does not, is to explain why. It says that that threshold is high because it is rooted in fundamental constitutional principles, parliamentary sovereignty, parliamentary privilege, respect for the legislative process, and the separation of powers. Okay. And, and those are the reasons why when Parliament or a province enacts a law that is found to be unconstitutional, it's going to be pretty hard to, to kind of award damages against them. But that - those arguments don't apply to municipalities and their By-law making authority. Okay.

And, and so here, I want to take you to the City of - to the City of Toronto case. And so, this is a binding authority from the Supreme Court of Canada on the, on the legal nature of municipalities. And

you might recall there was a, a constitutional challenge - excuse me, Your Honour. I think I've got the page wrong. So, this was a constitutional challenge to the province, a provincial law in Ontario that, that basically cut in half the size of City of Toronto's municipal council during election and the City of Toronto challenged it. And one of the arguments that came up, one of the issues, 'Well, you just - you know, one order of government can't do this to another,' right? That was, that was one of the arguments.

THE COURT: Yeah.

MR. CHOUDHRY: And here's what the court said, not much, right? It said, "Section 92(8) of the..." what, what I call *BNA* Act...

THE COURT: Yeah.

MR. CHOUDHRY: ...okay, "...assigns to provinces exclusive legislative authority regarding municipal institutions in the province. Municipalities incorporated under this authority are - therefore hold delegated provincial powers. Like school boards or other creatures of provincial statute, they do not have independent constitutional status." Okay? That's - that is - so, a municipality - it might be politically hard to imagine a province abolishing a municipality, but they can at will.

THE COURT: Yeah, they can. They have.

MR. CHOUDHRY: And they have.

THE COURT: Yeah.

MR. CHOUDHRY: Well, you remember the amalgamation in Toronto?

THE COURT: Yes. They abolished - wanted to replace it with another.

MR. CHOUDHRY: Yeah. Peel amalgamation, you know? And so, so, so, *Power* and the - that, that very high limited immunity threshold doesn't apply to municipalities. The question is; what should? And that's a novel question of law. Yet another one. And so, the - and, and, and we say that the standard is the Brazeau....

THE COURT: I'm the unlikely person to be....

MR. CHOUDHRY: I beg your pardon, sir?

THE COURT: I said I'm the most unlikely person. I'm not exactly the Lord Denning of the Superior Court.

MR. CHOUDHRY: Well, Your Honour, kind of, kind of - fate chooses us.

THE COURT: Yeah.

MR. CHOUDHRY: And so, and so, you and I are here now.

THE COURT: Yes.

MR. CHOUDHRY: And, and so, so, Your Honour, if we can look at 113, this is the *Brazeau* decision. This is - I think this is Mr. Justice Sharpe before he, he, he, he went supernumerary. He sets out a - what's called the 'clear disregard standard'...

THE COURT: Yeah.

MR. CHOUDHRY: ...you know? And you'll know this from *Sansregret*. You'll know that case. *[Indiscernible]* recklessness or wilful blindness. And so - and, and what we say quite simply is that if this should be the standard for a municipal By-law, it gives municipalities some degree of

deference, more than let's say the executive, but not as much deference as a provincial legislature. And that the - on this standard based on this - the data that I showed you from the point in time count, and from the shelter bed counts, and from the, the homeless counts, the City knew or ought to have known as early as October 2021 that demand exceeded supply, that there was sex discrimination, that there was over-representation of Indigenous unhoused, and they nonetheless kept in place this ban for two years, and that fails to meet this standard.

So, on that topic - and I'm going to hand it over to my co-counsel for a wrap up. Your Honour, do you have any questions about this?

THE COURT: No.

MR. CHOUDHRY: Okay. We'll, we'll get you to reply as well...

THE COURT: Yeah.

MR. CHOUDHRY: ...if you have any. Thank you, sir.

THE COURT: Thank you.

S. CROWE: Good morning, Your Honour.

THE COURT: Good morning.

S. CROWE: I just want to do a quick scan of the gallery, because I believe Kristen Heegsma was planning on attending. Kristen, are you here? She's not. Sorry.

THE COURT: Okay.

S. CROWE: Okay. So, as you know, we are seeking *Charter* damages for encampment evictions, and we understand that that's a novel argument. So, there

are no parallel cases to draw reference, but we can distinguish the nature of the *Charter* breach and the appropriate relief based on the authorities cited by my friends. So, with respect to the, the cases cited in paragraph 146 of the Respondent's Factum, we would submit that these cases involve *Charter* breaches where the court found that either there was no personal loss suffered despite the *Charter* breach, and/or the nature, and the duration, and the severity of the *Charter* breach paled in comparison to the experience of our Applicants. The Respondent has not cited any analogous cases with, with respect to the types of breaches we are alleging.

So, the damages sought by the applicants are contained in paragraph 172 of the Applicants' Factum. I do need to clarify unfortunately one type of graphical error that we, we discovered, and that is that the, the individual damages sought for Sherri Ogden, Cory Monahan, Jammy Pierre, and Julia Lauzon were unintentionally omitted. Now, the total quantum remains the same of $445,000, but we had sought an additional $10,000 per Applicant that unfortunately wasn't listed off in that paragraph.

THE COURT: Paragraph - what paragraph?

S. CROWE: One-seventy-two of our Factum.

THE COURT: One-seventy-two.

S. CROWE: And so, we did upload onto a Case Centre a PDF, just including those applicants just to make it clear what was, what was omitted. But again, the total relief claimed remains at 4.45.

THE COURT: So, that's 5000 per Applicant for the common experience of sleep deprivation, loss of belonging, and exposure to the elements.

S. CROWE: And then individualized amounts based on the unique experiences of each Applicant.

THE COURT: Oh, okay.

S. CROWE: Yep.

THE COURT: And then - to which you are - is to be added.?

S. CROWE: Yes. Sherri Ogden, Cory Monahan, Jammy Pierre, and Julia Lauzon of $10,000 each.

THE COURT: Okay. Slow down.

S. CROWE: Sorry.

THE COURT: Sheri Ogden.

S. CROWE: Mm-hmm.

THE COURT: Jammy Pierre.

S. CROWE: Yep. Cory Monahan.

THE COURT: Cory Monahan.

S. CROWE: Julia Lauzon.

THE COURT: Julia Lauzon. $10,000 each.

S. CROWE: That's right.

THE COURT: And that total was the same. Okay.

S. CROWE: Yes. Thank you. Okay. So, I'll just quickly refer to the cases cited by my friend in paragraph 146 of their Factum. The first being *Carr and Ottawa Police Services Board*, where seven - $7,500 was awarded based on the, the Section 7 breach of the Plaintiff's right - sorry, of the Section 7 right triggered by her being left naked in a holding cell for several hours. In awarding $7,500, at paragraph 254 of that decision, the court wrote that they might have considered an

additional award, but by virtue of additional damage awards that were given to her, the court was satisfied that she was put in the same position she would have been had her *Charter* rights not been infringed. The next case, *Russell and B.C.*, $1000 for the accused's right to counsel, and the court found at paragraph 69 that there was no personal loss despite this breach. The next one, *McGowan v. Montreal*, with $3000 for an arbitrary detention that lasted for one hour. *Stewart v. Toronto Police Services* is $500 for arbitrary detention. And again, the court found that there was no evidence of a personal loss. And at *Thibodeau v. GTAA*, this was an award of $3500 where there was airport signage missing, French language versions. And again - and then lastly with *Ward v. Canada*, so this was $5000 awarded for an illegal strip search, but again, there was no finding of personal loss, and the court did note that the search was relatively brief, brief and not extremely disrespectful.

So, I think the best way to contrast the range of damages in, in the cases cited by the Respondent is to briefly summarize the nature of the *Charter* breach for which damages are claimed in this Application.

So, as you just noted, each of the Applicants have claimed amounts for the common experience of sleep deprivation, loss of belongings, and exposure to the elements as a result of encampment evictions,

and then additional amounts based on the distinct injuries suffered.

So, beginning with Kristen Heegsma, within three weeks of being evicted from her encampment, Kristen was assaulted, robbed, and raped while sleeping on a park bench outside City Hall. She's also slept outside the overflow shelter at Carole-Anne's Place. Because shelters are full and she can't put up a tent, she sometimes resorts to couch-surfing which leads - which led her to being held hostage and beaten for two weeks. Her physician, Dr. O'Shea, and her psychiatrist, Dr. Lamont, describe how her mental health deteriorated significantly and her opioid use disorder dramatically worsened following the assault, including an exacerbation of her post-traumatic stress disorder symptoms, as well as severe suicidal ideation, and feeling the most desperate she had in her entire life.

So, I'll just give you some page references for, for those facts and those are A9216, A9222, A9226 and A9229. And for Kristen, we are seeking $75,000.

For Misty Marshall, she was largely unable to get into shelters, or even the overflow shelter, and she was repeatedly sexually assaulted by men that she had - when she had resorted to couch-surfing. She been threatened with sexual assault many more times. During the winter months, she, she becomes increasingly desperate to get inside, which leads

her to couch-surf and face ongoing risk of assault. Without a tent, she's been resolved - she's been robbed several times. Following an encampment eviction, she lost touch with her doctor for a year, and by then Dr. Richard found that she had "drastically decompensated both physically and mentally." And those references are A9238 eight. I'm sorry. I will move on from the references if I's not needed.

THE COURT: No, it's okay. You don't - I'm, I'm not copying them down. I - because I'm pretty familiar with this part of the record.

S. CROWE: Okay. Fair enough. And for Misty, we are seeking $75,000.

For Cassandra, again she slept outside the overflow shelter when she couldn't get into shelter. She was evicted from an encampment while suffering from third degree burns on her legs. And while she had been receiving daily wound care from her doctor prior to the eviction, after the eviction, she did not receive this proper wound care, and having to continuously move around was both physically and emotionally exhausting and aggravates her pain. And for Cassandra, we are seeking $5,000.

Julia was also sexually assaulted while staying on the streets and sheltered outside of the Salvation Army. She's had to sleep outside the overflow shelter, and without a stable place to stay, she has felt as though she's constantly in survival mode and can't focus on anything else, including,

including looking for work and attending appointments. And we are seeking $10,000 for Julia.

Sherri experienced overnight eviction. She moves around proactively trying to avoid enforcement and has a heightened stress and constantly being on the lookout. And we're seeking $10,000 for Sherri.

Jammy has wandered the streets at night, unaware of where she could stay. She's felt unsafe. Her mental health and substance use have been negatively impacted. Encampment evictions have been traumatic to her and caused her to give up putting up a tent. Her sleep deprivation has worsened her mental health and substance use.

Encampment evictions were particularly damaging for Darren, because he was so often *[indiscernible]* restricted from shelters. He was all - also reluctant to go into shelter after witnessing the aftermath of a violent hatchet attack from one shelter resident to another. So, he couldn't stay in a tent, and he couldn't stay in shelter. And on December 21st, 2021, while homeless and with nowhere to plant his feet, he was hanging outside the church, on church stairs, when he was shot in the shoulder by a complete stranger. And we're seeking $50,000 for Darren.

Despite being told that she was too high acuity to enter into shelters, Ashley was repeatedly evicted

from her encampments. Ashley has been repeatedly assaulted, often when she's separated from her, her friends and her partner who support her. And we're seeking $5,000 for Ashley.

Like Ashley, Sean has also been told that he is high acuity, and the City should have known that evicting Sean would be particularly impactful. He's wandered around the streets for days after being evicted. He struggled to maintain connections and support, including losing connections with a housing worker following an encampment eviction, almost losing a housing offer in the meantime, and we're seeking 5,000 for him.

Gord uses a mobility scooter and struggled to move from encampment to encampment. He lived in constant worry of when he would be forced to move and lost approximately 50 pounds. We are seeking $5,000 for Gord.

Cory has experienced worsening back pain and repeatedly injured his shoulder while trying to move his belongings following an eviction. He's had infections from bug bites after sleeping outside without a tent. His substance use is, is worsened and there's been a negative impact on his mental health. He stopped taking care of himself and lost 15 pounds. We're seeking $10,000 for Cory.

Ammy was forced to return to an abusive living

situation after being evicted from her tent in November 2021. She then had to flee from this abusive environment and return to living in a tent. She experienced an intense fear of having her tent taken down and wondering how long she would be able to stay. Her mental health and substance use worsened, and we're seeking $25,000 for Amy.

As an amputee, Mario has particular difficulty moving through the city with his belongings. He becomes so exhausted that, that - from wandering around that he collapses. He's improperly - he's unable to properly break his fall due to his, due to his amputations. He struggled to maintain connections with medical and social supports, meaning that he's been unable to be fitted for prosthetics and is at risk of his HIV developing into AIDS. And we're seeking $15,000 for Mario.

Linsley Greaves. In June 2022, we served the Respondent with an affidavit from Linsley stating that he had frostbite from sleeping outside in the winter with only a blanket after being repeatedly evicted from his encampments and would lose a toe as a result. The City continued to evict Linsley during cold, wet weather, and as a result, he couldn't keep his belongings dry. Both feet were injured and he developed an infection in his leg, which led to his amputation below the knee in December 2022. Dr. Bodkin was clear during her cross-examination that the December 2022 injury was a new distinct injury caused by repeated encampment

evictions in the weeks that preceded. He now requires the use of a wheelchair and is permanently disabled. He struggled to maintain family connections due to his profound shame over his condition.

So, I just feel compelled to, to briefly mention that there are seven Indigenous women on this Application. And when we consider the findings of the Missing and Murdered Indigenous Women and Girls Report regarding the increased risks of violence to Indigenous women, and the Affidavit that Mr. Choudhry just cited of Medora Uppal talking about the violence that happens to women when they are on the streets, the City ought to have been aware that Indigenous women, particularly in the context of a women's shelter being consistently over capacity, face an increased risk of violence from encampment evictions.

So, lastly, before handing the podium over to the City, we'd like to address one final point, and that is that we anticipate based on the City's Factum that it will spend at least some time drawing your attention to the various types of homeless - homelessness funding and investments made by the City of Hamilton. And while these investments are welcome, and in general the right thing to do, if there isn't any evidence to show that those particular types of investments or funding resulted in real housing or shelter options for our Applicants, then we would respectfully say

that they are largely outside of these proceedings.

THE COURT: Thank you.

S. CROWE: Thank you.

THE COURT: So, Ms. Shores?

B. SHORES: Your Honour, for the record...

THE COURT: Oh....

B. SHORES: ...it's S-H-O-R-E-S, first initial 'B'.

THE COURT: Yes.

B. SHORES: I think it's probably appropriate to take the morning break.

THE COURT: Yes.

B. SHORES: But before we do, if I may, my friends have a couple of times in their submissions referenced, something that they'll get to and reply, and I'd just like to urge them to make sure that they put in their entire submissions now because, of course, reply is for new matters raised in responding submissions.

THE COURT: Oh, no worry. I'm pretty, I'm pretty strict about that.

B. SHORES: Thank you, Your Honour.

THE COURT: Okay. Yes. Let's take 20 minutes now. Thank you.

MADAM REGISTRAR: Order, all rise. Court is recessed for 20 minutes. I will ask that the court be cleared.

R E C E S S

U P O N R E S U M I N G:

MADAM REGISTRAR: The Superior Court of Justice is now in session. Please, be seated.

MR. CHOUDHRY: Ms. Shores, kindly let me take ten seconds.
THE COURT: Sure.
MR. CHOUDHRY: You asked for a document cite?
THE COURT: Oh, yes.
MR. CHOUDHRY: And so, we have it for you. It's - the document is - it begins in full at page A76 - pardon me - A7961, and it's a planning - it's a report from the health - it's from a couple of departments you'll see, and it's to the mayor and members of the General Issues Committee, and it's from a number of City officials. I won't give you the names, but I think you can look at them there.
THE COURT: Yep.
MR. CHOUDHRY: Is that good enough for you?
THE COURT: Yes. That's - yes, that's great. Thanks. Yes. Ms. Shores?
B. SHORES: Yes. Good morning, Your Honour.
THE COURT: Good morning.
B. SHORES: I'm just getting set up here. As I previously stated, my name is Bevin Shores. Last name, S-H-O-R-E-S, first initial 'B', for the record. I'm here with my co-counsel, Mr. Jordan Diacur. For the record, D-A-I-C-U-R, first initial 'J'. And we're also joined in the courtroom with - by our articulating student, Liz Marr, who is assisting with note-taking. We'll be making submissions on behalf of the City of Hamilton.

In this proceeding, it's fair to say, it's a matter of great significance to all parties. In light of that, it's important to acknowledge at the outset

what this case is not about. It is not a referendum on homelessness. The court is not being asked to solve homelessness or to answer the question of how to address homelessness. It's also important to acknowledge that the Applicants, 14 people who have lived with homelessness, have shown great courage and conviction in coming forward to share their stories. What they have shared about the circumstances that led them to experience homelessness is heartbreaking. The resilience they have each described is remarkable. It's not in dispute that the City did not cause homelessness. While the City strongly disagrees that it caused anyone's *Charter* rights to be breached, that doesn't disregard the human element in this proceeding. That human element includes the Applicants who have lived with the hardship and struggle of homelessness. It also includes the people of the City of Hamilton, elected officials, City staff, taxpayers, members of the community, all trying to make the best use of finite resources in the face of a growing crisis.

This case is a retroactive claim by the Applicants alleging that their *Charter* rights were breached in the past. That claim is what the court is asked to consider in this proceeding.

The key issue for this court to decide is whether there was an actual breach of the Applicants' *Charter* rights at the time in question, being between August of 2021 and August of 2023. The

City will submit that the answer is no. Not only have the Applicants failed to meet their burden of proof to establish *Charter* breaches, the court will hear about the City's substantial investment in its homeless-serving system and resources, the City funded shelter system in Hamilton, the reality of encampments in Hamilton, the protocols and processes that have governed enforcement of By-laws, and the City's person-centered, support-focused, rights-based approach that has informed its actions throughout.

In our submissions, Mr. Diacur and I will begin with an overview of the facts, and we propose to do so in the order they're presented in the City's Factum. I want to be clear that we'll go over these facts in some detail.

The court has heard, in the applicants' submissions, repeated references to evictions. Certainly, eviction connotes something rapid and sudden, someone being kicked out of a place they otherwise have a right to be. But the Applicants have largely left this concept up to the imagination. They have not gone deeply into the evidence as to what actually happened, let alone what occurred in the timeframe being claimed for between August '21 and August 2023, which is the timeframe at issue. This is particularly important, because the Applicants have the burden of proof in this proceeding. It is the Applicants who sued the City, and so they are the ones who

must back up their claims with evidence. What the evidence shows is that when By-laws were enforced, any enforcement was done in a multistage process taking place over a minimum of several days that afforded multiple opportunities to make arrangements, to pack up, to move, and to connect with supports. By using the term eviction, but skipping over the detail of what actually took place, the Applicants implied that this was a summary process without forewarning and the evidence will show that this is simply not the case.

Similarly, the applicants' counsel, in their submissions, describe many events that took place outside the timeframe in question. We will take the court to the details of what the evidence actually shows for the time period within which the applicants claim their rights were breached.

In our review of the evidence, in terms of the By-laws and enforcement, I will address the protocols and processes for enforcement of bylaws and how they operated.

First, the formal protocol in place from October 2020 to August 2021, which allowed people to camp for up to 14 days and provided that some people with complex needs were not subject to the 14-day limit. Second, the six-step process in place from August 2021 to August 2023, which replaced the 14-day limit with a multi-step process that focused on

connecting people with supports and provided people in encampments with multiple days to engage with supports and make arrangements. Third, the current protocol in place since August of 2023, which allows people to remain encamped indefinitely if they're not in a prohibited area.

I will address how enforcement was conducted, and particularly the City's evidence, which is unequivocal that enforcement was not done overnight. This court will hear that municipal law enforcement officers don't even work overnight. In policy and in practice, people have been able to take shelter overnight in City parks.

I will next address how encampment cleanup has been conducted and in particular the many steps taken by City workers to ensure that only items that have been left behind are cleared. I will also address the applicants' own evidence which corroborates that the items that they claim were lost were actually either left behind, or lost to theft or some other means not related to any actions by the City.

Mr. Diacur will next address the City's role in addressing homelessness, which includes numerous programs, emergency indoor shelters, licenced residential care facilities, the housing-focused street outreach team, access to housing Applications, housing stability benefits, eviction prevention programs, rapid rehousing programs, and

intensive case management for homeless individuals. He will explain the substantial investment of funding for these programs, as well as additional outlay for making washrooms and showers available to people in encampments, increased security around encampments, clean up costs of garbage and hazardous materials, such as drug paraphernalia and human waste, and repairs for damage to parks from encampments.

Mr. Diacur will describe the City's emergency shelter system. He will describe how they're designed to be a low barrier, accessible to all regardless of culture, ethnicity, Indigenous status, religion, disability, gender or sexual orientation or expression. He will take the court through the evidence regarding how - the reasonable and limited rules that exist in shelters and explain how these rules are necessary to keep the people working in and using shelter safe. Mr. Diacur will also address capacity within the City-funded shelter system.

Next, Mr. Diacur will address the evidence about housing for the Applicants. The court will hear that seven of the Applicants have obtained housing, and all but one of that group remain housed. The court will also hear that four of the Applicants have declined housing, and several of the Applicants have declined shelter.

Last, Mr. Diacur will discuss the evidence of the

reality of encampments and whether they are, as alleged, safer than other forms of shelter. The court will hear about threats to health and safety that are posed by encampments, both for people living in them and the people in the surrounding community. Threats that include fires, violence, theft, drug dealing and drug use, poor sanitation, and spread of disease. He will address the data from the city's first responders, police, paramedics, and fire department showing the impact on these services of encampment-related dispatches.

We will next address the legal issues, again proposing to follow the order of the City's Factum.

The first issue; how much weight should be given to the expert evidence of the city's witness Dr. Koivu? The City will submit that Dr. Koivu's evidence should be accepted by this court as she provides necessary context about the health risks of encampments versus shelter. Mr. Diacur will explain that her evidence is well within the subject matter of her expertise and that her public statements about safe supply do not overlap with her evidence in this case.

With respect to the second issue, admissibility and weight of the applicants' expert witness's evidence, the City will submit that two of these witnesses, Ms. Leilani Farha and Professor Ameil Joseph, do not meet the threshold criterion of necessity. The City will also submit that the

remaining witnesses - the remaining expert witnesses of the applicants should be given little weight as their evidence lacks impartiality.

With respect to the third issue, Section 7 of the *Charter*, Mr. Diacur will review the well-established law that provides that Section 7 protects the ability to shelter temporarily overnight in parks when there is insufficient indoor shelter space. He will explain that there is no evidence that the Applicants have been prevented from sheltering overnight in parks at any of the times in issue and that there has been no violation of Section 7 of the *Charter* since the By-laws have not been enforced so as to prevent sheltering overnight in parks at any of the times in question. He will explain that there is no basis to expand the law, not in a retroactive claim such as this one, and not based on the evidence or the existing law.

With respect to the fourth issue, Section 15 of the *Charter*, the City will submit that there has been no breach of Section 15. There is no evidence that there has been a disproportionate impact to any protected group under the two-step test set out by the Supreme Court in *R. v. Sharma*. I will explain that the law is clear that a protected group being affected by a law, even if that group is overrepresented among the class of people affected by a law, that does not constitute a breach of Section 15 under the *Charter*.

I will next address Section 1 of the *Charter* and the *Oakes* test explaining that if there is any breach of the *Charter*, which is, to be clear, the City's position that there has not been, the By-laws and their accompanying protocols and processes constitute a reasonable limit such that they are justified under the *Charter*.

I will next address the sixth question which is mootness. And I, I want to be clear here, because in my - in the applicants' submissions, they suggested that the City's argument is that the claim is moot, and that's not what the City's position is. The City's position is that the declaration of invalidity and inapplicably - inapplicability sought by the Applicants is moot, because their claim is retroactive.

The case law is clear that when there is no live controversy and a question has been rendered hypothetical, the claim is moot and should not be decided, particularly when it involves a constitutional question. The City will submit that, that is precisely the case here; that there is no basis for issuing a declaration for a claim in the past. There is no need for the Applicants to seek a declaration in order to pursue their claim for *Charter* damages. In fact, the Supreme Court has clarified in the recent *Power* case that there is a presumption against awards of both declarations and *Charter* damages. So, to clarify, the Applicants must prove as a fact that their

Charter rights have been breached in order to prove *Charter* - to pursue *Charter* damages. That's absolutely clear from the Supreme Court's decision in *Ward*. However, proving as a fact is different from a declaration, which is a grant of relief; relief that we'll argue is moot.

I will also briefly address that a declaration sought - that the declaration sought by the Applicants, specifically declarations regarding a ban on encampments under the City of Hamilton's parks By-law between August 30, 2021 and August 18, 2023 is not an order capable of being implemented. The By-law in question doesn't provide anywhere for "ban on encampments" and that is not consistent with how declaratory relief is to be granted under the *Charter*.

Finally, I will address the seventh issue, which is the applicants' claim for *Charter* damages. The City will submit that there is no entitlement to damages because there has been no breach of the applicants' *Charter* rights, and in any event, good governance immunity does apply. The law clearly requires that when the harm alleged is due to the mere enactment or Application of a law that is subsequently declared to be unconstitutional, *Charter* damages are only available if the City acted in a manner that is clearly wrong, in bad faith, or an abuse of power, which is not the case here. The City, through its implement and - implementation of protocols and processes which govern the enforcement of By-laws, through its

outreach efforts, through its engagement with the public, through its significant investment in homeless supports, has acted in good faith, in a measured fashion, and in accordance with the established law. As well, the Applicants have not met their burden of proving damages are justified. The harms they describe are the harms of living with homelessness. The things that the Applicants claim compensation for are not related to any *Charter* breach by the City. And so, on that basis as well, we will submit that *Charter* damages are not recoverable.

At the conclusion of our argument, we will submit that the Applicants have not proven that their *Charter* rights were breached, and we will submit that on that basis, the Application should be dismissed.

And if the court is content, I will now begin with our overview of the facts.

THE COURT: Yes.

B. SHORES: I'll begin my discussion of the facts with the By-laws that are being challenged.

Now, the City's By-laws generally, and the ones in question, are enactments that under the *Municipal Act* are enacted with specific purposes. These purposes include fostering and protecting the economical and - the economic and social well-being of the City, the health, safety and well-being of

people and property in the city, and the public assets of the municipality. And this is all from Section 10(2) of the *Municipal Act*, which is cited in the City's Factum.

The By-laws in question have at all times been governed - or at all times in, in question have been governed by official policies referred to as either protocols or processes that were in place at the times in question, and so I'll address what these protocols and processes were.

They're particularly important to understand, because, again, the Applicants, throughout their submissions, have referred to bans or evictions that connote something sudden in summary. But if we look at the actual protocols and processes in place, it's clear that that is not what was provided for.

First, beginning with what we were - what is referred to in the materials as the former protocol, this is the protocol that was in effect from October 2020 to August 30 of 2021. So, it's before the time period in question. The overview of the former protocol is set out in Monica Ciriello's October 5, 2021 and October 9, 2021 Affidavits. Ms. Ciriello is the Director of Licencing and By-law Services for the City of Hamilton.

The key takeaway for the former protocol is that

encampments were permitted for up to 14 days, and some people with particularly complex needs were permitted to stay longer than 14 days.

Now, I'll begin - through this part of my submissions, I'll be dealing with - or I'll be referring to certain parts of the Record. And so, I'll largely be in the Applicants' - or I'm sorry, in the Respondent's Compendium, and I'll use the 'direct others to page' function, although it doesn't appear to be working right now, unfortunately. So, let's see if this, this is going to cooperate. Okay. Here we go. So, master page B1--1067. This is Monica Ciriello's October 5, 20 - or October 9, 2021 Affidavit, just providing an overview of the former protocol.

The former protocol was complaint-based. Upon receipt of a complaint about an encampment, City employees on the housing-focused street outreach team would be directed to engage with people at the encampment. Housing-focused street outreach, as the name implies, is a team of City workers who regularly engage with people experiencing homelessness to offer outreach and support. Housing-focused street outreach team would administer a questionnaire called the 'Vulnerability Index Service Prioritization Decision Assistance Tool', also referred to by the acronym VI-SPDAT, and they would administer that questionnaire to - in order to aid in providing assistance.

For individuals with a low to moderate acuity score on the VI-SPDAT, they would be given notice that after 14 days their encampment could be removed, but they would also be provided with housing supports. Those housing supports would include assistance moving to shelter or housing, such as transportation, financial assistance, or storage of possessions, and, and those services were also made available to people. For individuals with high acuity under the VI-SPDAT, the 14-day timeline would not apply. However, outreach efforts would still be continue - would still continue, and supports would still be offered.

Ms. Ciriello also confirmed that - and this is at the bottom of page B1--1067 going on to the following page, that municipal law enforcement officers could use discretion to allow people to stay longer than the 14 days, such as if someone had arranged for housing, or if the weather was poor, then the people would be allowed to stay for more, more than 14 days, and those are just examples. That was the former protocol, October 2020 through August 30, 2021.

The next time period is the so called six-step encampment process, which was in effect from August 30, 2021 to August 18, 2023, so that's that 24-month timeframe in question. The overview of the encampment process is set out in Ms. Ciriello's Affidavit of October 5, 2021. And the material

portion is at page B1--1071, if you're following along using the Master Page numbering starting at paragraph seven. The, the, heart of it begins at paragraph nine. And the key takeaway here is that the 14-day period was no longer in effect, but the six-step encampment process provided for a series of supports to be offered and for people to be given the opportunity to comply with the By-law. Also noteworthy is that the encampment process specifically provided that it was intended to use person-centered strategies and approaches. And for this I'll refer to - this is an information report dated September 9, 2021. It's Exhibit 'A' to Ms. Ciriello's Affidavit. This is at Master pagination B1--440.

Beginning at the bottom of page B1--440, continuing on to the following page, it's detailed there that person-centered strategies and approaches are required to address urgent issues associated with supporting residents experiencing homelessness and living in encampments while supporting long-term adequate housing solutions and broader community needs.

So, the six-step encampment process was also complaint-based as opposed to, for example, municipal, municipal law enforcement going out and seeking people out. At the first step, a complaint would initiate the enforcement process. At the second step, after receiving a complaint, municipal law enforcement would then attend the encampment to

determine if there was a violation of the impugned By-laws - or I'm sorry, if there was a violation of the By-laws and provide education and seek voluntary compliance. If there was no voluntary compliance, housing-focused street outreach would attend the encampment and provide various types of support, and these are set out again - or summarized in Ms. Ciriello's Affidavit. So, they include, again, starting at the bottom of B1-071 and continuing on to the following page, providing connection to shelter, shelter and housing, assisting with obtaining necessary documents needed to obtain housing, including subsidized - supportive and subsidized housing Applications, coordinating services with community and health agencies, crisis intervention, and providing a summary of those actions to municipal law enforcement if requested. If, at that stage, a violation of the By-law continued, municipal law enforcement would re-attend, issue a trespass notice, and notify Hamilton Police. That's step four. At step five, police would respond under the *Trespass to Property Act*, and the City would continue to collaborate with Hamilton Police Service and the social navigator, which is another outreach role that helps connect people with supports. The final step, which is step six, was cleanup of the site, which is performed by the Parks and Waste Divisions.

Now, in terms of implementation, Lee Rynar, who is a supervisor, who was at the time Supervisor of

Operations and Enforcement with the City of Hamilton, confirmed in his October 10, 2021 Affidavit - and this is at page B1-520 using the Master pagination - he confirmed at paragraphs three continuing on to paragraph four of his Affidavit that the six-step encampment process in practice takes at least a few days and would not be completed in less than one day. He confirmed that he was not aware of the encampment process ever taking less than a few days. This is echoed in the evidence of Ms. Ciriello in her October 9 Affidavit - October 9, 2021 Affidavit again, paragraph three. She explains that the time to implement the six-step process varies. But she went on to explain that as of the date of her Affidavit in October, there had been existing encampments that were present since the previous August - or I'm sorry, since the - August, so for about two months. She described that in that case, step five was not taken due to a desire that the occupants of the encampment find housing. These details about timing are key, because, again, it underscores, it underscores the multi-day enforcement process and the fact that the enforcement of the By-laws at the time in question did not provide for people being removed overnight or as night was approaching. I'll briefly....

THE COURT: What page is that?

B. SHORES: So, this is that - I've referred to the excerpt in the Compendium, but it looks like it may be cut off. If you - oh, no. Sorry. Paragraph four. Paragraph four, "These existing encampments

were referred to Hamilton Police for step five. However, it was not taken at the time due to a desire that the encampment's occupants...."

THE COURT: What is the page number? I can't see the page number. Yeah, that's it. Thank you.

B. SHORES: B1-1068. This is in the Respondent's Compendium.

THE COURT: Thank you.

B. SHORES: Now, I will briefly address next the current protocol, which is the one that was implemented on August 18, 2023, and that's a protocol that remains in force. The current protocol was based on extensive public consultations, which are detailed in the Affidavit of Danielle Blake. And this is set out in the excerpt in the Applicants' - or I'm sorry, the Respondent's Compendium starting a, page B1-1079, if you're using the Master pagination.

THE COURT: Yep.

B. SHORES: Ms. Blake is the manager of the housing-focused street outreach team within the Housing Services Division, and at the time of her Affidavit in July of 2024, she was the Acting Director of Housing Services. Ms. Blake describes consultations in July 2022 that were brought back before council in February 2023. She describes consultations in March 2023 that were brought back before council in May 2023; a public comment period in June 2023 that was brought back before council in August of 2023, and of course, the current protocol was implemented in August of 2023.

An overview of the current protocol is also set out in Ms. Blake's Affidavit, and the excerpt in the Compendium is starting at B1-1086 in Case Centre. Oh, and I skipped ahead in my notes a little bit. What - what's actually on the screen here is at the August 14, 2023 meeting, so what, what - that B1-1086 is some additional supports that were ratified in August of 2023, and that includes washroom and shower access with security, a full-time outreach worker in partnership with the Hamilton Regional Indian Center, as well as two peer support outreach workers, additional By-laws - or I'm sorry, additional By-law officers to ensure compliance with the protocol and meet the response times that were directed in the protocol, and to increase the park's budget for security and cleanup costs.

In terms of what the current protocol provides, and this is in, in very general terms, it permits people to erect tents or temporary shelters in public parks in the city, provided that they are not in a spatially prohibited area, for example, not within a hundred metres of a school, daycare, playground, pool, etcetera, within ten metres of a private property line, they're in groups of up to no more than five tents or temporary shelters, and that there's spaced from other groups by at least 50 metres.

t's notable in the encampment protocol, the current protocol, which, if you're following the pagination is at B1-1094 in the Respondent's Compendium, at

the outset, there is a lengthy statement of shared principles. And in part, it states, and this is the very first part of the protocol, that in all interactions with people who are living unsheltered, staff will engage in utilizing a human-centered, housing first, health-focused, rights-based approach. All actions will be guided by a commitment to upholding the human rights and human dignity of all individuals living in encampments, temporary shelters or tents.

In terms of enforcement under the current protocol, in the event a tent or temporary shelter is in a prohibited area, and this is found in subsection (b) of subsection (g), which begins on page B1-096 continuing on to the subsequent pages, the current protocol provides an eight-step process for enforcement. That process begins with notification and attempts by housing-focused street outreach to gain voluntary compliance and offer supports prior to involving municipal law enforcement or police. If municipal law enforcement are involved, their timing is to respond within four business days, and they can further determine compliance timelines up to another four total days from issuing a notice. Only then, if the person still has not moved, are the police to respond. The current protocol also provides for addressing health and safety concerns while allowing people to stay encamped provided that the health or safety concern is remediated. Under the current protocol, there is no time limit on how long a person may remain encamped in a tent

or temporary shelter so long as there is otherwise compliance with the current protocol.

As I've indicated previously, some of the key components of each of these protocols and processes is that they are staged processes that give people in encampments advanced notice and multiple opportunities to engage with supports. Overall, the evidence shows that this approach has been effected - effective.

And I'll turn to evidence from the Hamilton Police Service particularly. What's on the screen here is an excerpt from the exhibit to Inspector Frank Miscione's Affidavit from July of 2024. This is beginning at page B1-1108 in the Respondent's Compendium. Inspector Miscione details that if you take, for example, the time period from September 1, 2023 to June 30, 2024, Hamilton Police Service Encampment Engagement Team assisted, assisted City municipal law enforcement officers in issuing 651 Notices of Noncompliance or Trespass at locations that were not in compliant - compliance with the current protocol. They spent 327 hours enforcing those notices, but enforcement - and this is at - what was at the bottom of the screen there, enforcement in the circumstances is defined as gaining compliance with the current protocol. Inspector Miscione confirms that no force was used with respect to any person by the Encampment Engagement Team during those hours, and no person was arrested or charged for refusing to leave an

encampment. The Encampment Engagement Team's role was to maintain safety, keep the peace, and mitigate any situation that might arise. Even more significantly, the City's evidence shows that enforcement of the bylaws has never happened overnight or as night is approaching. The City's evidence is unequivocal on this point.

I'll begin with the Affidavit of Monica Ciriello dated July 29, 2024. What's on the screen is an excerpt in the Respondent's Compendium, page B1-1111 in the Master pagination. The material part is paragraph ten of Ms. Ciriello's Affidavit. She states that,

Whether under the former protocol, the encampment process, or the current protocol, the only enforcement action taken by City municipal law enforcement officers with respect to encampments in public parks in the city has been issuing trespass notices. City municipal law enforcement officers do not enforce trespass notices, or remove people from tents or temporary shelters, or dismantle or remove tents or temporary shelters if the tents are occupied. City municipal law enforcement officers have never issued trespass notices to encamped individuals in City parks overnight or as night is approaching.

Ms. Ciriello goes on to describe that,

Municipal law enforcement officers are empowered to

use discretion in enforcing By-laws, exercising - such as exercising leniency in poor weather or other extenuating circumstances.

Ms. Ciriello confirms that municipal law enforcement officers do not work overnight. This makes it functionally impossible for the City's By-law enforcement to prevent people from sheltering overnight. This is also corroborated by Lee Rynar, who, in his October 10, 2021 Affidavit, and if you're at the Master pagination, it's B1-1118, again confirmed that municipal law enforcement officers endeavour to leave encampments before sundown. The latest they would be present at an encampment site is roughly eight to 9 p.m., but these later attendances do not result in the removal of encampments after they leave. Encampments are not taken down as night is approaching. This evidence is corroborated by the applicants' evidence. All 14 of the Applicants have given evidence that they and others have encamped in public parks in the city, including temporarily overnight and for longer periods of time.

And for this next portion, I'll be referring to the chart in the City's, the City's Factum, which begins on page B1-975, if you're using the Master pagination. So, this chart sets out which, which Applicant - which applicant's evidence is being referred to in the evidence in the record. And I'll briefly take the court through this just

explaining what the evidence is to contextualize the, the references to the record and focus specifically on the timeframe in question, which is August 2021 to August 2023. But I'll note that the evidence supports that the Applicants have stayed overnight or longer in other timeframes as well.

Taking first Kristen Heegsma, in her Affidavit of June 7, 2022 cited here, she describes, among other things, that she stayed in Woolverton Park in fall of 2021 for a few months. In her transcript at question 270, she agreed that she could put up a tent after having been told to move, although she did describe that she found it easier to stay in one place. Similarly, at question 302 on her cross-examination, she confirmed she stayed in Kenora Park in the summer - from the summer of 2022 to the spring of 2023.

Darrin Marchand. Now, there are some references here that are in addition to the ones in the chart. And so, this is to his June 2/2022 Affidavit at page A542, but that's the bundle pagination. It is A4826 using the Master pagination. Now, in his Affidavit, he doesn't describe the timeframe, but he describes that he's moved from Dundurn Castle to Catherine Park and Charlton Park where various outreaches - outreach workers brought him food, tents, and tried to advocate for him to get into shelter. And in the same Affidavit at paragraph 18, he describes that the last time he was in a tent was in 2021 in the fall, but he can't remember

what happened to his tent.

If we go back to the chart, the reference to his transcript at questions 204 through 211 - oops, I hit a wrong button there - at that point in his cross-examination, he described that he was staying outside and not in a tent, because in a tent, he "feels like I'm trapped in there." He also described that his tent had been stolen.

Going down to Mr. Smyth, in his Affidavit - so, again, this is, this is another reference that's in addition to the chart, and that can be found at page A5011, paragraph 20 of his Affidavit. Mr. Smith describes that he remained in his tent throughout his duration of homelessness. And at paragraph 21, at the time of this Affidavit, I'm sorry, he describes having stayed at Central Park for several weeks. If we go back to the chart, the reference to the transcript of his October 13, 2021 cross-examination, he confirms that at that time he was still in Central Park. And in terms of timing, Mr. Smyth confirms that he became housed in November of 2021, so only a couple of months into the time frame in question.

Mr. Muscato, the next of the Applicants on the chart, in his Affidavit dated May 11, 2022, among other time periods, he describes that he stayed in various locations throughout 2021 from three to four days at a time until up to two weeks at a time, and that throughout 2022, he was able to stay

in various locations for a couple of days at a time. And in his cross-examination, he confirmed, he confirmed this timeline and that he stayed in his tent throughout that time.

Mr. Arnold, the next of the Applicants on the chart, now in his Affidavit from September 29 of 2021, which is page A4663 using the Master pagination at paragraph 16 - oops, I'm sorry, paragraph six, he has been - or the, the paragraph that says paragraph 16 is just out of order. He says he's been staying in J.C. Beemer Park since the fall of 2020 when the protocol was enacted, and this is his Affidavit dated September 29, 2021. So, at that point, nearly a year. And then returning to the chart, Mr. Arnold confirmed in his cross-examination at questions 121 through 122, again, describing that he was able to stay at J.C. Beemer Park after leaving the Ferguson encampment in October of 2020.

The next of the Applicants we address is Ms. Jordan. And in her transcript on August 14, 2024, she described the places that she stayed, what she called Jimmy Beemer Park, Carole-Anne's Place, random sidewalks on the rail trail and the rail yard before she was told to move. Of course, a rail yard would be private property. On her cross-examination, she described that in 2021, she stayed on - in a tent on Ferguson and went there - and that she had gone there from her apartment on Victoria when she was kicked out of that apartment.

The next of these applicants summarized on the chart, Ms. Lauzon. In her cross-examination at questions 59 through 60, she described that she stayed with other people in tents for a couple of days at a time, although the timeframe was unclear. And in particular, it's not clear from her evidence whether this was even within the timeframe in question. And she described the same thing later in her cross-examination at questions 119 through 123. Ms. Lauzon, it's important to note, does not, in her evidence, give any clear indication of any By-law enforcement that can be tied to the timeframe in question, which is August 2021 through August 2023.

Ms. Lewis, the next of the applicants summarized on the chart, in her cross-examination transcript, she describes staying at a place she called "the underground" in a tent. She described in her cross-examinations that she was there for months, although she was uncertain on the timeframe. She next described that she was staying in a park off Barnsdale and that she eventually left when neighbourhood kids for the tent down. Again, here, she was uncertain on when this happened. She also described staying behind a No Frills for months in her tent, again being uncertain on the timeframe. After which, she described staying behind the cathedral in a park, and she stayed there until an outreach worker got her into a shelter, her dog into a foster program, and she described that as some time in 2022, which is, based on her evidence,

that it was about two years prior to her examination. Ms. Lewis' only evidence that can be tied to the timeframe in question suggests that she was allowed to stay in a park, being the park by the cathedral, until an outreach worker got her into shelter.

Ms. MacDonald describes in her Affidavit that she has not had a home aside from her tent since 2020. She describes that she was able to stay at Wesley for months, although she was unclear on when. She describes that she has stayed in a tent until every couple of weeks she's told to move and then she "just put up another tent." She also described that she was at City Hall for a month - almost a year I think, although she couldn't remember precisely when, and she also described staying at Gore Park for a week. So, although Ms. MacDonald's evidence does support that she's been able to stay in parks for, at times, lengthy stretches of time, up to a year according to her, she doesn't give any clear evidence of any By-law enforcement that can be tied to the timeframe in question. She wasn't able to say when any of this happened.

Mr. Monahan, in his Affidavit, described staying at Carter Park for three days in 2021, Gage Park for three months in 2021, and in the parking lot at Gage Park for three months from early 2022 until mid-March 2022. He also described staying at Ferguson for days or weeks at a time in 2021 and 2022, and in various other parks from days to a

week at a time. He also described in his cross-examination staying in Beasley Park overnight in April of 2022.

Misty Marshall, in her Affidavit, she has a chart setting out where she stayed. And focusing on the timeframe in issue, she described that in the fall of 2021, she stayed at John Rebecca Park for about a week, and in October of 2021, she stayed in City Hall nightly for a couple of months. And in her transcript of cross-examination, she confirmed that the list in her Affidavit is a complete list.

Ms. Ogden, in her Affidavit, she also provided a chart of places that she had stayed. And focusing on the timeframe in question, she described staying at Beasley Park for a night, Durand Park in winter of 2021 for three nights, Beasley Park in early 2022 for two months, and she confirmed as well in her cross-examination that she stayed in Beasley for two months. She also confirmed in her transcript - and this citation is not on the chart, so I'll briefly take the court there. So, this is page A4955, and the question is question 239. It's important to note that when she left Durand Park, she left because someone in the community told her that there were kids in the park where she was using drugs, and so that's why she left.

If we return to the chart? Turning next to the evidence of Ms. Pierre. In her Affidavit, she did describe places that she saved - stayed, but her

timeframes were unknown. She wasn't able even able to pin them down to a year. She did describe in her Affidavit one alleged eviction, but that occurred in 2019, well before the time frame in question. Ms. Pierre did not give any clear evidence of any By-law enforcement that can be tied to the timeframe in question. She did confirm that when the By-law had been enforced, and again this is prior to the timeframe in question, she was given an opportunity to take her things and go.

Last, Mr. Greaves. In his Affidavit dated June 2, 2022, he described that he stayed in Woodlands Park for almost two years. This was corroborated by him again in his transcript at questions 183 through 184. He confirmed that at that time he was back in Woodlands Park and had stayed there and in various locations in a tent from December 2022 up to the date of his Affidavit in July of 2023. And he also confirmed that he had been various tents in various parks since his Affidavit in July of 2023.

To summarize, this chart sets out that each of the Applicants have given evidence that they've been permitted to stay in parks overnight, in many cases, nearly all of them, much longer than overnight. And as well, several of the Applicants, Ms. Lauzon, Ms. Lewis, Ms. MacDonald, and Ms. Pierre, have not given evidence that ties any By-law enforcement that they report to the timeframe in question.

Additionally, several of the Applicants have specifically confirmed that when they were given notices from City municipal law enforcement officers, this occurred during the daytime. And for this I'm going to stay, stay on the same page. So, we are still at page - the, the chart in the Applicants' Factum, this is just the one that follows paragraph 20, so page B1-975. And again, I'll just give a brief summary of what, what the evidence is that's referred to at each of those citations, and a couple more that I'd like to bring the court to.

Ms. Pierre in her transcript describes that when she was - or when, when she was questioned on her cross-examination about being told to move by police, she agreed that they came by during the day.

Mr. Smyth, when he was questioned, when he was questioned, he said that By-law came by at 7 a.m. in the morning.

Ms. Jordan, she described when police and By-law attended J.C. Beemer Park. After the fire at the park, she described that they came in early morning, but she also described in her evidence that they were telling them it was not safe to be there because of the fire. She later described in her evidence that she thought it was four or five in the morning, because it became light quickly.

Ms. Ogden, in her cross-examination, she claimed that she was approached at 5:30 in the morning, but as I'll detail shortly, she later described that the person who approached her wasn't in a uniform and didn't issue her a ticket. She just claimed that she recognized that person was a By-law officer. It's also notable that she could not remember when this happened, not even the year.

Mr. Monahan describes again being contacted in the morning. He described it as first thing in the morning, but couldn't be more precise than that.

Ms. MacDonald, she described being a - being given a ticket at 6 p.m. and that it was not dusk at the time. Although, as I'll explain briefly, she later clarified that this was actually in the morning that this incident occurred.

A few more areas that I'll take the court through just to underscore this point. Mr. Muscato, again, this is, this is in addition to what's on the chart. So, referring to his transcript of cross-examination dated August 14/2024, beginning at page A4935, question 188, he confirms in his answer they would mainly approach him during morning hours, and if it wasn't in morning hours, they would come by later - late afternoon or early evening. He also confirmed earlier in this line of questioning at questions 184 to 185 that he was told how much time he had to move, and that when he was, he packed up and he moved.

We look at Ms. Heegsma's evidence on cross-examination. So, this is her transcript from August 23rd, 2024, beginning on page A4721, questions 191 through 192, she describes that she got a day of notice and that notice was given to her in the daytime. And she goes on to, she goes on to explain that when law enforcement returned, she had already packed up everything that she needed.

Last on this point, the evidence of Mr. Marchand from his cross-examination August 29th, 2024, beginning at A4841, questions 132 through 135, beginning on the upper right, again this is, this is describing being asked to leave Dundurn Castle. He described that someone came up to him during the day and asked him to leave and, and he did.

Now, some of the applicants have suggested that the City did undertake enforcement activity overnight, but as I'll explain, these claims do not hold up on cross-examination.

Ms. MacDonald, as I indicated previously, she had initially claimed that she was told to meet - to leave at 6 p.m. and that it wasn't dark out at the time. But in her cross-examination, in the line of questioning beginning at question 343, so this is in the Respondent's Compendium B1-1122, she explains that it was actually in the morning. So, question 343,

Q. On the time where you told me about where they gave you the tickets at 6 p.m., when was the last - the next time they came back? Was it a couple of days later?

A. I can't remember the time, but they were quite frequent.

Q. And when you say - you said 6 p.m., but how did you know? Did you have a watch or a phone?

A. It was morning.

Q. I'm sorry?

A. It was morning.

Q. It was in the morning?

A. Yeah. It was not overnight.

Mr. Monahan claimed that he was repeatedly woken first thing in the morning by City municipal law enforcement officers. But on re-examination - on cross by his own lawyer - and this excerpt is found in the Compendium. Unfortunately, the type is rather small, but it's B1-1129. He was not sure of the time when this occurred. He also did not describe being told to move. In this exchange, he just said that he was woken up and that he hurt himself moving around quickly. And this is at B1-1125, question 411. Here too he did not indicate when this happened, and in particular whether it's within the timeframe in question.

Mr. Greaves has given evidence that an officer required him to move from an encampment during the evening, although he didn't think it was a City municipal law enforcement officer. And on cross-

examination - so, question - this is at page B1-1133 of the Master pagination, but going down to the key point of questioning at question at 108, he acknowledged that he was not actually sure that this had occurred at night. He felt as if it was, because he was asleep. He said it was later than usual. But note as well that Mr. Greaves has described elsewhere in his evidence that he often sleeps during the daytime.

Ms. Marshall claimed that a couple of weeks prior to the date on which she swore her May 12, 2022 Affidavit, she and some friends were told by a police officer that they would have to leave John Rebecca Park at 11 p.m., which is the closing time for that park while they were sitting on a park bench with blankets and a tarp. On cross-examination, she was much less clear on the details of that incident, including when it happened. So, if we go to the excerpt at page A4870, beginning with question 198, on the right she describes, "Oh, I remember that day." In fairness to her, she says day. She goes on to describe police were coming around, they were asking names, everybody in the vicinity. She says, "We weren't doing anything wrong, but either way, there were these little benches," and she described there was a tarp fitting over it, and she was saying she wasn't allowed to put up tents at the time, but they were just hanging around. It's notable from this evidence that what she describes is being approached by a police officer while sitting on a

park bench. It's very difficult to tell from Ms. Marshall's evidence whether what was being enforced at that time was sheltering in park overnight or something else.

To summarize the evidence on enforcement of the By-laws, at no time during the former protocol, the current protocol, or the six-step encampment process, did enforcement take less than a few days, giving people opportunities to pack up, connect, connect with supports, and find somewhere to go. The Applicants have also claimed that they have had no choice but to sleep outside, again implying that they had no opportunity to do anything other than sleep outside without any sort of shelter. The evidence shows that this is not the case. The By-laws provided and the Applicants had opportunities, days at a minimum, to plan where to go and take their belongings with them. The City's evidence is unequivocal that no enforcement was done overnight. And the very few incidents relied on by the Applicants to allege that enforcement did take place overnight became much more equivocal on cross-examination. And we suggest that this evidence just isn't as reliable, particularly when weighed against the clear evidence of the City that no enforcement took place overnight or when night was approaching. The City's evidence should be preferred. The simple conclusion is that the Applicants were merely mistaken about the time.

Now, I'll next be changing gears to address the

City's approach to encampment clean-up. And in light of the time, I wonder whether this might....
THE COURT: Yeah. Sure. Let's come back at 2:15.
B. SHORES: Thank you, Your Honour.

R E C E S S

U P O N R E S U M I N G:

MADAM REGISTRAR: Superior Court of Justice is now resumed. Please be seated.
THE COURT: Yes, Ms. Shores?
B. SHORES: Thank you, Your Honour. Prior to the break, I indicated that I would next address the topic of encampment clean-up. And that's where I'll take the court now.
THE COURT: Yes.
B. SHORES: The applicants, in their evidence and in their counsel's submissions, have repeatedly referred to bulldozers or some even claim to have been bulldozed from encampments or their sites where they were camping. This strongly implies that someone was forcibly removed from an occupied tent by heavy machinery, and I need to be absolutely clear. There is no evidence at all that that has happened. While there has at times been machinery involved in cleaning sites, as I will explain, this is only after the site has been vacated. Similarly, as I will explain, people were given opportunities to take their belongings with them. Though some of the applicants also admit to having left items behind. The City has had policies at place - in place at all relevant times

to ensure that an encampment site is not cleaned up or removed if an occupant is present. Prior to the current protocol, so at the time that the six step encampment process was in effect, so that is the time in question, between August 2021 and August 2023, Kara Bunn, the Manager of Parks and Cemeteries for the City, at the time, describes in her October 8, 2021 Affidavit, and this is what's up on the screen. This is at page - this is in the Compendium of the Respondent's. So, beginning at page B1-1144, using the master pagination. At paragraph six of her affidavit she describes that under the six step process, Parks and Cemeteries is involved at the sixth step of the process, which is clean-up of former encampment sites. And then on the next page at paragraph 16 she goes on to explain that Parks and Cemeteries workers verify that residents are no longer present prior to performing clean up. For active sites, they request that residents pile up their garbage separately from the encampment site so as not to remove people's possessions. This is similarly confirmed in the Affidavit of Monica Ciriello, and I'll just give the cite. It is B1-731, B1-1150, if you're using the master pagination. This is again in the Respondent's Compendium. And Ms. Ciriello again confirms at paragraph 12(e), that clean-up was done in accordance with step six after the occupants of the site had departed.

Now, I'll briefly touch on the current protocol, which again is outside the timeline in question.

But under the current protocol there is also a multi-factor approach to determining when a site has been abandoned. And it emphasizes the importance of ensuring that property is truly abandoned before disposing of it. And so this is largely detailed in Ms. Ciriello's 2024 Affidavit. And that's excerpted beginning at page B1-1154. Ms. Ciriello describes that generally the process for designating a site as abandoned is initiated by Housing Focus Street Outreach. Municipal Law Enforcement may be consulted to provide input on whether anyone has been at the site or whether inhabitants at the site have moved elsewhere. If it's believed that the site may have been abandoned, Housing Focus Street Outreach will put a notice at the site in a conspicuous area informing potential residents that the site is due to be cleaned up in three days. Municipal Law Enforcement is generally not involved in that step. Following placement of the notice, Municipal Law Enforcement may be involved to assist efforts to inform people who are staying at the site, that their former site will be deemed abandoned and cleaned. Municipal Law Enforcement is typically not involved in the remaining steps of the process for clean-up, which is namely notifying the Parks and Cemeteries section to clean the site and to perform the clean-up. Ms. Ciriello also confirms that Municipal Law Enforcement officers will exercise caution and use their judgment if they are consulted in the process of determining whether a site is abandoned, so that someone's possessions

are not inadvertently disposed of. This is also echoed in the 2024 Affidavit of Kara Bunn of the Parks and Cemeteries section, which is excerpted in the Respondent's Compendium beginning at B1-1157 using the master pagination. And again, Ms. Bunn summarizes under the, the process under the protocol, which emphasizes that Parks and Cemeteries staff are cognizant of the fact, or sorry, of the importance of maintaining one's possessions while experiencing homelessness, and are cautious when they are consulted about deeming a site to be abandoned. Staff make best efforts to ensure that items are disposed of - that items that are disposed of during clean-up have actually been abandoned or discarded. She states at paragraph eight of her 2024 Affidavit, unequivocally, that Parks and Cemeteries staff do not remove or dispose of tents or shelters that are occupied.

This evidence shows that the City has recognized that an individual's belonging are important to them, and that it has measures in place to prevent someone's belongings from being discarded if they have not been abandoned. The reality is, people move and leave things behind. Also, waste management is a feature of encampments.

The applicants imply that discarding any item under any circumstance is depriving a person of a critical survival need, but that misses quite a lot of nuance. If we look at the evidence, it shows that many of the applicants took their belongings

with them, voluntarily left things behind or lost their belongings through other means such as theft. And here I'll again return to the City's Factum where there's another chart summarizing the evidence, which I'll take the court to. So, this chart begins at page B1-977, using the master pagination. And beginning with the evidence of Ms. Ogden, this is again summarized at the chart with the citations to the record. Ms. Ogden has claimed in her evidence that her tent was bulldozed, but she admitted on cross-examination that she had actually been given a couple days notice, and that she did not take her tent with her, because, "I guess I gained too much stuff and so I didn't feel like taking it all with me, because I know I can get another tent somewhere."

Mr. Muscato, in his cross-examination, admitted that when the police or Municipal Law Enforcement officers told him to move, they did not take his tent, and he described, "We were always pretty civil about it."

Mr. Arnold, in his cross-examination, described that despite being impromptued by his counsel to give this evidence, he explained that on, on an occasion when he believes the City came with a Bobcat and removed his belongings, he actually did not witness this occur, and he had actually been away for a couple of days when this had happened. And one of his friends had said that he didn't think Mr. Arnold was coming back. For all intents

and purposes, as far as the City was aware, that site would have been abandoned.

Similarly, Mr. Arnold described - and this is a site in addition to what's on the chart, so I'm going to take the court there - this is in Mr. Arnold's Affidavit at page A4663. At paragraph nine he describes that his tent was wrecked and so he couldn't re-erect it after people stole it - "Stole from me while I was away from it." What he's describing is theft, not an action of the City.

Returning to the chart summarizing the evidence.

With respect to Mr. Monahan. Mr. Monahan is another of the applicants who claim's that he was bulldozed out of a parking lot at Gage Park. He admitted on cross-examination that he was not present when this alleged bulldozing happened, that he was aware that notice had been given and that he had left his tent over the weekend and went to stay at the Budget Inn with his girlfriend. He also, he also recounted another event where he claimed his encampment was cleared within 12 hours of setting it up, but admitted he was not present when this occurred either.

Ms. Marshall claimed in her affidavit that the City showed up with Bobcats to remove belongings with only 20 minutes notice. But in the, in the portion of her transcript that's referenced in the chart,

she admitted on cross-examination that people had been required to depart the park because it was a crime scene and it had been caution taped for, "the whole night and early morning." She also described and this is something that's in addition to what's in the chart. In her May 12th....

THE COURT: Did, did Ms. Ciriello say that the police didn't actually execute any trespass notices?

B. SHORES: That would have been - yes, I believe in the - yes, that is in Ms. Ciriello's, I believe, 2024 Affidavit. I'll have to get the cite, Your Honour, because I don't want to be unclear, but it would be the police that enforces trespass notice and the evidence of the police has been unequivocal, that they have not had to use any force.

THE COURT: So, they left voluntarily.

S. CHOUDHRY: Excuse me.

THE COURT: Yeah?

S. CHOUDHRY: Your Honour.

THE COURT: Can you help me on that? Yeah?

S. CHOUDHRY: I just would like a pin point for that proposition, Your Honour. Because I don't....

THE COURT: Well, we looked at it today.

B. SHORES: Yes. If I can perhaps just have the court's brief indulgence while I locate that.

THE COURT: Yeah.

B. SHORES: I think, I think I've located in the record, let me just find where it actually is in Case Center. So, perhaps what Your Honour is referring to is at page A8385, using the master

pagination, paragraph nine of Ms. Ciriello's 2024 Affidavit.

THE COURT: Yeah.

B. SHORES: Which reads:

> "Since the start of the 2023 Encampment Protocol, MLE is not aware of any circumstances under which a person has been removed from an encampment in enforcement of the 2023 Encampment Protocol."

She attests to understanding that:

> There have been occurrences where Hamilton Police Services have removed people from encampments in the course of acting on warrants for those people's arrest, but that was not in accordance with the protocol.

I believe there was also reference earlier, and let me just grab the citation from my notes.

THE COURT: Yeah.

B. SHORES: Sorry, that's the same one. There was, there was a portion in Ms. Ciriello's 2021 Affidavit, that is what I'm actually trying to locate.

S. CHOUDHRY: That's from October 2021, correct?

B. SHORES: Yes.

THE COURT: Yeah.

S. CHOUDHRY: Yeah. I have that cite for you. Sorry.

B. SHORES: No. Thank you. What is it?

THE COURT: No, no, I'll take it.

S. CHOUDHRY: It's - what I had was B1-1068. So, maybe we can call - because I, I just was taking my notes from you, Ms. Shores. So, I'm not sure I got that down right. Maybe we can take it up. It was paragraph four.

THE COURT: Yeah. That's what - that was at 2021.

B. SHORES: Yes.

THE COURT: But your other reference was....

B. SHORES: To the current protocol in 2023.

THE COURT: Oh, okay. Yeah, all right. There was one fella who refused and was allowed to stay, I think. That was - was that Darrin Monahan?

J. DIACUR: Darrin Marchand.

B. SHORES: Mr. Marchand.

THE COURT: Was it Mr. Marchand? Yeah.

B. SHORES: If you'll again bear with me a moment...

THE COURT: Yeah.

B. SHORES: ...Your Honour, I'm trying to locate the reference. There, there have been several, several - several occasions in the evidence on which people have been permitted to stay.

THE COURT: Yeah. Well no, I'm thinking of one time when they told him to leave and he said no, and then they relented.

B. SHORES: Is that possibly Mr. Smyth? I think in that case it would have been....

THE COURT: No.

B. SHORES: No.

THE COURT: Well, look I'll just leave that with you.

B. SHORES: Okay. Yes, we'll...
THE COURT: There's no need to interrupt you right now any further.
B. SHORES: ...we'll come back to it.
THE COURT: Yeah.
B. SHORES: So, I'll return again back to the chart. Sorry, we - so, again this is on the topic of the allegations of a loss of possessions and tents. Continuing on Ms. Jordan. In the transcript of her cross-examination, she stated that when the Ferguson Encampment was dismantled in 2020, so again, this is before the timeframe in question, but she did confirm that she was offered a hotel and was permitted the opportunity to make arrangements for her other possessions to be stored. And in her June 3rd, 2022 Affidavit, she also described receiving donated tents, although the timing of this is uncertain.

Ms. Lewis, in the transcript of her cross-examination, admitted on cross-examination that when her doctor, Dr. O'Shea, had reported she lost all of her belongings on multiple occasions, that this was due to theft. And similarly, in the transcript of her cross-examination, which this is, this is again in addition to the chart, in the exchange beginning on page A4271, and this is something I had taken the court to previously, Ms. Lewis described that - and this is sorry, pages 1 - or question's 117 through 118, the exchange there. Ms. Lewis describes that kids in the neighborhood had ripped hers and other tents apart, other's

tents apart, at the location where she was encamped. And so, while as unfortunate as that incident may be, this is again not due to actions by the City.

Continuing on. Mr. Greaves. In his cross-examination, he admitted that he was given three days notice to move and he didn't take any steps to move because he wanted to stay. Nevertheless, he did accept the City's offer to store his belongings temporarily.

Ms. Pierre, in her cross-examination, now again this is describing an incident that occurred in 2019 before the time period in question, but Ms. Pierre had claimed that her tent was bulldozed. But on cross-examination, she admitted that she was not present when this allegedly occurred. And her evidence, when she asked whether she had been given notice in advance, we submit was evasive. There are few other points on this topic that I'll just take the court to that are not in the chart.

Mr. Marchand, in his Affidavit - so this is at page A4827 of the master pagination. At paragraph's 17 and 18, he describes that he had tents. On one occasion someone took his tent, on another he gave his tent away, and he forgot what happened to the third one. At paragraph 18 he goes on to describe that he had a tent - sorry, the last time he had a tent was in 2021 in the fall, but he couldn't remember what happened to it. Again, this is not

as a result of any actions by the City. He also, Mr. Marchand in - Marchand, in his cross-examination - I'll take the court there. In the exchange beginning on page A4841, questions 126 to 127. Mr. Marchand had previously claimed that he was not given advance notice of By-law enforcement, but he also admitted on cross-examination that he was given advance notice, what he described as a note from the police, and that upon receiving this note he packed up his tent and moved. Mr. Marchand also described later in the same cross-examination, this is questions 200 through 202 at page A4845. He described that after being told to move, "If I don't move and I just leave my tent there, I'll come back and it's not there. Someone takes it." He explained he does not know who takes his tent. Again, this is not something that can be tied to actions of the City.

Ms. Lauzon, in her cross-examination, at question 55, described that she had a tent and it got stolen. And again, for the record this is A4756. Again, not an action of the City.

Ms. MacDonald, in her cross-examination, at question's 121 through 122, which appear at the top of page A4794. She described staying in a tent until - for, for every couple of weeks. And then she says, "Then I just put up another tent."

Similarly, in the same cross-examination at questions 207 through 210, she describes that

although she lost - she claims that she lost her tent and belongings, she just replaced it all. And she admits that she wasn't there when it was allegedly thrown out.

Later in her cross-examination, at question 287, she again described or alleged that, "They just started throwing my stuff out." But as this exchange shows, and again this is on page A4801, as this exchange shows, when she was pressed for details she couldn't provide any:

> Q. When did that happen?
> A. Just like over the last two years.
> Q. But no, when did that, specifically, did that happen?
> A. I already told you I can't recall dates, but over the last two years after City Hall, the women's "Y", it's all mumbled, like, together.

This falls far - this falls short of meeting the burden of proof, that the City has thrown away Ms. MacDonald's belongings.

Finally, Ms. Heegsma. She claimed that she lost her possessions when she left Woolverton Park, which is previously described she was given advance notice of. On cross-examination she acknowledged that she took what she needed with her. And so this exchange is at - in her cross-examination,

questions 193 through 195 at page A4722, in the upper left hand corner:

> Q. Did they return the following day?
> A. Yes they did.
> Q. What steps were taken when they returned?
> A. I had already packed up everything that I needed, needed, not what I wanted, needed, and then I was leaving.

In summary, the suggestion by the applicants that people are being forcibly removed and their possessions discarded, is not supported by the evidence.

I will next ask my colleague, Mr. Diacur, to the podium to speak about the remaining factual issues and the first three legal issues.

THE COURT: Okay.

J. DIACUR: A moment's indulgence, Your Honour, while we switch over our computers.

THE COURT: Yeah.

J. DIACUR: All right. I am connected and ready to, ready to proceed.

THE COURT: Go ahead.

J. DIACUR: Thank you, Your Honour. And for the record it's Diacur, D-I-A-C-U-R, initial J, co-counsel for the Respondent.

I'd like to begin with the subject of the City's role in addressing homelessness. And much of the evidence on this subject is straight forward data

that's drawn from the City's Affidavits, but I do propose to spend some time reviewing it.

It supports several different parts of the City's submissions and response in this case, including alternatives to encampments, the impacts of homelessness on those experiencing it, the impact of encampments on the surrounding community and also on the City's good governance immunity.

You heard in my friend's opening statement as well, that the applicant's are not casting blame on the City, so it would be appropriate to review why that is. And it's my submission that the evidence is clear that the City works to address homelessness in many different ways.

As Monica Ciriello has put it, and again, she was noted to be the City's Director of Licensing and By-law Services, the City's primary goal is to have housing options available for encamped individuals. That's found at Tab 23 of the Respondent's Compendium. I don't propose to go to it, but that's where it is located and extracted.

In addition to using its own tax base to fund the programs that address homelessness, the City also administers funds from both of the provincial and federal governments. It is, as Rob Mastroianni the City's Manager of Homelessness and Housing Support has put it, the system service manager. So, we have property taxes, we also have provincial and

federal funds that are supporting the City in that role. And in our Factum, at paragraph 28, in particular, we listed some of the most important of the City-funded or administered programs in the homelessness serving system. And it is a system. These parts are intended to work together. We have the City-funded emergency indoor shelters. Then we have City licensed and subsidized residential care facilities, I'll return to those. And we have the Housing Focus Street Outreach Team and they directly engage with homeless individuals.

There's also supportive housing that can be accessed by Application, an access to housing Application can access those.

There are also monetary benefits, housing stability benefits, eviction prevention programs, which involve stepping in to pay rent, rapid re-housing programs if housing is lost, and intensive case management for homeless individuals. And these are all itemized in Mr. Mastroianni's evidence. As is the fact that in many respects the City is working with partner organizations in the City. And those include, Good Shepherd, Mission Services, the Salvation Army and St. Joseph's Womankind. And that's extracted at Tab 25 of the Respondent's Compendium.

All of these City-funded and administered services are based around two best practices. And the first principle of best practice is called coordinated

access. There is a standardized process in the City of Hamilton for the intake and the assessment and the referral of homeless individuals to housing and other services in the community. And the idea it to house individuals by matching them with the right level of support based on their needs and the available resources. Again, that's from Mr. Mastroianni's evidence extracted at Tab 26 of the Respondent's Compendium.

The second best practice is known as housing first. And this is a philosophy that's based on the idea that getting homeless individuals into housing as quickly as possible allows for the issues that contribute to their homelessness to be addressed and to start to be addressed as soon as possible. And that is addressed in the evidence of Shawn Mackeigan, the Associate Executive Director of Programs at Mission Services, extracted at Tab 27 of the Respondent's Compendium.

Housing first is, as opposed to an older philosophy known as housing readiness, that concluded that homeless individuals lack the skills needed to remain housed, and so focused on, on teaching and on the learning of those skills first before housing was provided. That in Mr. MacKeigan's evidence has been discredited. Get into housing as quickly as possible is the current thinking.

Mr. Mastroianni's evidence also established that as part of coordinated access, the City ensures that

its shelter partners have common access to a database of information, it's called HIAFIS, the Homeless Individuals and Families Information System. HIAFIS is what allows the City to track individuals' interactions with its homelessness serving system. It also allows the partner organizations to do so. And in our Factum at paragraph 31, we provide City budget allocation totals. And these are totals based on the evidence of Mr. Mastroianni, who itemizes them. We've done the math in our Factum based on his testimony. And so, what we have is at two different points in time collected what the City has allocated towards the homelessness serving system. It's not just from its own resources, it is also inclusive of the money that's provided by the other levels of government. But in 2021, the evidence from Mr. Mastroianni was that a little over 61.5 million dollars was spent by the City in the 2021/2022 fiscal years with respect to homelessness and emergency indoor shelter. We get that by adding up the various allotments in his Factum. And we can see in Mr. Mastroianni's updated evidence for the 2024/2025 budget allotment, that there's about 67 million dollars allocated for this year and next for the homelessness serving system, so there has been a significant increase since 2021.

Now, at paragraph 32 of the City's Factum, we have the evidence of Danielle Blake, who is the City's Manager of Housing Focus and Street Outreach. And that also allows us to do some math, which

demonstrates what the City's budget figure, 67 million dollars in this year and next is - what, what it's used for. And Danielle Blake has testified to, for example, over 3.1 million dollars in new funding for emergency indoor shelters this year and next. And we get that by adding up the numbers in her Affidavit. If we do the same adding of the 2024/2025 funds together in her evidence, we can see that there is over 600,000 dollars earmarked for the Hamilton Regional Indian Center's Indigenous Drop-in Program. Over 700,000 dollars for that rapid rehousing and the intensive care management supports that I mentioned. And also approximately 350,000 dollars which is available to compensate landlords in the private market for unit damage, or what's called exceptional unit damage, caused by any individual in rental housing arranged through City-funded case management. These are all part of the housing first model. And the existence of drop-in programs is of particular note, I'll return to that and comment upon it again shortly. But the evidence is that those programs provide an additional option for temporary shelter in the City, both in the daytime and temporarily overnight.

Ms. Blake's evidence also speaks to significant City investment in new personnel, including on the Housing Focus Street Outreach Team itself in terms of Municipal Law Enforcement officers and in the parks department. The key point here is that over 1.5 million dollars in new money has been invested

for permanent, year-round washroom and shower facilities in publics parks. And that evidence from Ms. Blake is extracted at Tab 31 of the Respondent's Compendium.

The evidence of Mr. Buckle, David Buckle, a Supervisor with the Housing Focus Street Outreach Team, is that between August of 2021 and May of 2024, the City also spent a total of over 2.1 million dollars on additional security near encampments, to protect them from theft and vandalism. We do that math - we can do that math based on the numbers at Tab 32 in the Respondent's Compendium.

The, the fact is, and this is testified to by Kara Bunn, the City's Manager of Parks and Cemeteries, the unfortunate reality is that since 2021 there has been an increase in vigilantism against encampment occupants, including actions such as setting tents on fire. That is extracted at Tab 33 of the Respondent's Compendium. But in sum, the City works to protect encamped individuals from such attacks and has spent a significant amount of money to do so.

Returning very briefly to the topic of parks clean-up, which Ms. Shores has already addressed. Ms. Bunn also testifies, and this is extracted at Tab 34 of our Compendium, to the budget resources that have been allocated to the parks department. That has been necessary to address the impact of

encampments since 2021. There are a number of line items set out in Tab 34 of the Compendium. I don't think it's necessary to review each of them. But City counsel did, just last year in 2023, approve an increase of 200,000 dollars annually for the Public Works Department's operating budget that's used ad hoc to clean-up encampments when necessary. And this is aside from the cost of staffing increases and capital costs of vehicles.

And I do want to briefly call attention to the fact that City park's staff must use hazardous materials protocols during clean-up, when addressing human waste for example or discarded drug paraphernalia in encampments, and that they have also been confronted with aggressive and threatening behaviors from encampment residents. And that they have had to repair direct damage to parks in and around encampments that this relates to fires, trees that have been cut down, unauthorized accessing of electricity, and damage to those public washroom facilities and water fountains. All of these things, Your Honour, have a cost associated with them and that is covered in the evidence of Kara Bunn and also Steve Hassleman, who is the City's Superintendent of parks - or Parks District North. Parks District North comprises the downtown and much of the lower City. And that is found between Tabs 34 and 37 in the Respondent's Compendium.

And Mr. Hassleman notably gives some examples of threatening behaviour from encampment residents, inclusive of an encamped individual warning City staff to "stay away from my area." I note that Parks District North Superintendent, Cory Manning, described doing regular clean-up to assist with keeping existing encampments clean, specifically taking only items that encampments residents have indicated are garbage. And he describes having a good relationship with encampment residents, but also that in his observation, some encampment residents see their encampment site as their possession. And that is at Tab 38 in the Respondent's Compendium, and also - and I will take you to that just briefly, Your Honour - is also found at page A8680 in the master pagination, and it's at paragraph 12.

And this is Mr. Manning stating:

> I have observed that encampments are becoming more entrenched or permanent because they are permitted by the 2023 Encampment Protocol to remain in place longer. People living in encampments are adding to their spaces as they live there longer and become established. Many of them express that they see their encampment site as their possession.

Mr. Hassleman has also noted that there's more territorial behavior from encampment occupants in his, in his observation, such as referring to the

encampment site as theirs. And I'll take you briefly to that. It's at page B1-1929 on the master pagination, and it's the highlighted paragraph 13 on that page. This is from Mr. Hassleman's 2024 Affidavit. And this evidence is ultimately relevant to the Section 7 *Charter* analysis that I'll be taking Your Honour through either this afternoon or tomorrow. But in the previous case of *City of Kingston and Doe*, at paragraph 113, Justice Carter did not make any finding about whether allowing indefinite encampments, daytime and night time, would amount to a grant of a property right. But he did mention that this would require encamped individuals to start to assert a right to things like exclusive use. There was a lack, a lack of evidence in other words in that case to indicate that encamped individuals in the City of Kingston were claiming that they could exclude anyone from the City's property or determine the use of that property or seek to have public property allocated to their own exclusive use. In this case, in my submission, to the contrary, there is evidence that those things are happening. And I'm obliged to note that my friend answered a direct question from Your Honour, noting that on this evidentiary record, in this case, it's not possible to answer whether daytime shelter would amount to a property right. Not only is that an acknowledgment that the evidentiary record the applicants have put before Your Honour, that on that record it's not possible to make a finding of one of the only novel things that they

are asking Your Honour to do, which is expand Section 7 to include a protection for daytime encampments in public parks. It's actually in my submission, incorrect. It is possible to find, in this case, that encamped individuals are beginning to assert property rights over public land and that indefinite encampments would amount to a property right.

And so turning now to the next topic, which is the City-funded Indoor Emergency Shelter System. As I mentioned, the City partners with allocates funding for that emergency indoor shelter system to providers in the community. And Good Shepherd, Mission Services, Salvation Army and St. Joseph's Womankind are divided into several sectors. There's a men sector, a woman's sector, a couples family sector, and the youth sector. The City also, at present, retains the ability to place homeless families in hotel spaces on an ad hoc basis. When necessary, it's available. And this is set out in the evidence of Mr. Mastroianni. That's at Tab 49 of the Respondent's Compendium. But again, it's straight forward data I don't intend to take Your Honour to it.

There are also, in the City of Hamilton, other shelter options, and these are several. There are four Violence Against Women shelters in the City, which are separately funded by the Province, though the City does pay for some overflow beds at those facilities and does use them.

There are also charities and service providers who offer temporary shelter of various sizes that are not funded by the City or tracked by the City, such as the YMCA, which offers 174 beds for men at its St. James, or at its James Street facility, I should say. And that's true despite there having been a fire this past summer.
The YWCA operates a transitional living program including temporary housing for women on McNabb Street.

There's also the Hamilton Regional Indian Centre, which as I noted, operates a drop-in program specifically serving individuals who identify as indigenous. They do that with some City funding. And those individuals who identify as indigenous can choose to seek service from a specifically indigenous agency.

There are also over 750 spaces in 90 City licensed and City subsidized residential care facilities and that's something I mentioned earlier. Each of these residential care facilities or RCF's provide safe and affordable supportive housing in a communal setting for people who require assistance with the activities of daily life. That's their mandate. RCF's serve both men and women, some specialize in serving those who suffer from mental illness or addiction, or disability. Some specialize in serving youth or seniors. And Mr. Mastroianni testifies to all of these points, so I don't propose to review each of them in detail.

But the, the evidence is that in the City of Hamilton the shelter options are not limited to those that are funded or administered by the City. There are a significant number operating in the City beyond the scope of the City's view. And I will return to that briefly while discussing the fluctuating capacity in the City-funded system. But it's simply not possible, in my submission, to determine the total number of emergency indoor shelter beds available at any given time, based only on those that receive City-funding or that are tracked by the City, because that's what HIAFIS is plugged into, is the beds that the City's paying for. Despite that, City-funded spaces have been the sole focus of the applicants' argument. And in my submission, this is a key oversight in the applicants' case, or a key problem with the evidence that’s been advanced. The applicants bear the burden of proving - and I'll come back to this argument, but I want to deal with it at this point as well- they bear the burden of proving that there is an insufficient number of shelter spaces in the City. They have not done that. And they can't do that, in my submission, because they only focus on those that are City-funded and City-tracked. And we know from the evidence of Mr. Mastroianni, that there are others. It would be incumbent upon the applicants if they want to argue that their Section 7 rights are triggered, or that the protections offered by Section 7 are triggered, to demonstrate on the record that all of these options are

exhausted and they haven't done that.

Now, turning to the next point, as Ms. Shores said, we have some submissions on the, the fact that City-funded indoor emergency shelters are accessible to all, regardless of culture or ethnicity or indigenous status or religion, disability, gender, sexual orientation or expression. The services that are provided by the City-funded system, the emergency indoor shelter providers that partner with the City, they're free at point of use. And they accept admissions 24 hours a day, seven days a week. They're not closed and there's no fee. And they are in other words available in the daytime and the night time. And if one shelter is full, the evidence is that HIAFIS allows the City's partners to see what capacity is present at other facilities. There are also, importantly, no restrictions on indoor shelter access in the City based only on an individual's acuity. And the City offers intensive case management specifically for individuals of high acuity. So, in indoor emergency shelters, individuals have access to supports and that includes things like harm reduction supplies, housing planning, medical services, food, facilities for personal hygiene and products for personal hygiene, and safety, fundamentally. And these points are testified to again by Mr. Mastroianni at Tabs 50 and 51 of the Respondent's Compendium.

But I do think it's important to take a look at two aspects of Mr. Mastroianni's evidence on this subject. And I'll take you first to page A8742 in the master pagination to the Affidavit of Mr. Mastroianni. And paragraph 33 talks about intensive case management. He indicates here that intensive case management, or what he calls ICM:

> ...provides longer term case management and housing support to higher acuity participants facing long term homelessness or chronic homelessness, addictions and mental health issues. ICM programs support clients through regular in-home visits providing financial support to stabilize income and maintain housing. They also facilitate connection to health resources and to a broader reconnection with support networks, generally.

And he goes on at paragraph 35, which I'll scroll down to, to talk about individuals at the highest level of acuity, 13 plus. And what he says is that individuals with the highest acuity are able to access City programs. Such individuals typically require assistance that is beyond the funding purview of the City, including physicians, mental health practitioners and what he calls the assertive community treatment team which goes to mental health services combined with a permanent supportive housing program. But notwithstanding the fact that the City doesn't have control over funding physicians or mental health care, City-

funded programs remain dedicated to supporting high acuity individuals who experience homelessness. And although intensive case management programs are contracted out and they're designed to support the individuals with acuity up to 12, those contracts allow for higher acuity or higher needs individuals to be taken on when requested by the City. And ICM programs have done so at the City's request, and they've done so throughout the encampment response. And it is also the case that both Tessa McFadzean and Shawn MacKeigan, who are referenced in the submissions of the applicants, Tessa McFadzean of Good Shepherd and Shawn Mackeigan of Mission Services, have confirmed that the City's partners, so that includes Good Shepherd and Mission Services but also Salvation Army, et cetera, that the City's partners in providing indoor emergency shelter welcome everyone: cisgender or transgender, two-spirit, non-binary and gender diverse individuals are welcome. Individuals of all races and ethnicities, sexual orientations, cultural backgrounds and religious affiliations and those of no religion. Cultural practices, religious practices, medical and dietary needs are respected and accommodated. Private and quiet space is made available for religious and cultural practices, including indigenous cultural practices such as smudging. That's specifically noted. And staff support residents in accessing culturally safe and responsive services through referral and advocacy and translators are also available. And we can see

that at Tabs 55 and 56 in the evidence of Ms. McFadzean and Mr. Mackeigan.

So, it is certainly the case that there is no accessibility concern based around these issues.

Turning now to the other accessibility concerns that have been raised by the applicants. Things like, emergency shelters' rules, including as against drug use on site, pets on site and division by gender at some sites. It will be my submission ultimately that these do not preclude access to shelter either. And the real issue is not shelter accessibility because it's clear from the applicants' evidence that there are perceived barriers, but these do not preclude access or become actual ones. Ultimately, it will be my submission that there is a preference among the applicants for the absence of rules that prevails in encampments, and an unwillingness to follow even the, the minimal rules that are necessary for emergency indoor shelters to continue to operate safely. And those shelter policies that are complained of are things like conducting bed checks, rules against drug use and pets or against violent conduct. As well, as I mentioned division by gender, that can result in couples not being able to stay together. But again, none of these perceived issues are actual barriers and nor do they indicate that indoor sheltering is not available, they're choices.

As Danielle Blake specifically stated on cross-examination, and I'll take you to this, it's at Tab 57 of the Respondent's Compendium, page B1-1482. A moment's indulgence, Your Honour. In the highlighted portion in the top right-hand corner, Ms. Blake states, it is not the case that there are no options for those individuals, and people that have pets, that are part of couples, that are drug users, have the option to go to shelters. It just would not be their preference to go to a shelter that restricts pets or drug use, or them being with their partner. And you were taken to some extracts from Ms. Blake's cross-examination by the applicants, but in my submission, her comments do not speak to accessibility. What my friends are trying to do is conflate a City report that Danielle Blake had a hand in writing, about how they can improve shelters, how the City can improve shelters, to try to suggest that there's a concession that shelters are not accessible at the present time. And the evidence simply does not say that. And this was echoed in the cross-examination of Kristen Heegsma, for example, who admitted that she could access shelter without the person she was in a relationship with. It's clearly not a barrier, it's a choice.

Now, Dr. Gaetz described in his Affidavit, and agreed on cross-examination, that people may choose not to go to an emergency indoor shelter. And among the reasons that he stated are those that are more properly thought of as preferences and not

barriers. Separation from a partner, from a family member or a pet, inconvenient entry and exit times in his, in his words, concerns about storing or moving personal belongings, and perceptions about shelters. And those comments are extracted at Tab 59 and 60 of the Respondent's Compendium. Dr. Gaetz confirms that in some communities there are shelter beds that are available but go unused because of regulations or conditions that are incompatible with potential client's expectations or needs. And a key point here is that a number of the applicants witnesses made, what in my submission is a common sense acknowledgement, that not all needs or preferences are of an equal priority.

Dr. Sereda, in particular, agreed on cross-examination that the need for shelter takes precedence over other needs and wants, such as a desire for community or autonomy, and that those are not as of high priority. And Dr. Sereda in fact specifically relied upon Maslow's Hierarchy of Needs, in her opinion, which places shelter as the base of the pyramid. Other needs and wants are obviously not as high priority. And that was one of the basis of her comments generally.

Dr. Orkin also agreed, on cross-examination, that not every choice that's made by an individual will be a healthy one for them, and that there are circumstances where coercion is in the interests of a persons health. And we can find that at Tab's 64

and 65 of the Respondent's Compendium. But those are just straight forward acknowledgements by Dr. Orkin. And again, in my submission, are common sense.

Now, emergency indoor shelter providers obviously have to work to ensure that their beds and their spaces are actually being used. And that is so that those beds and resources are not wasted. Bed checks are conducted nightly to ensure that an individual who checks in is actually using the shelter facilities. This is sometimes framed or referred to as a curfew, but it is not. It is simply a bed check. If an individual leaves a shelter facility without advising that they are returning, then that bed may be reassigned. It doesn't happen immediately, it only happens after two bed checks indicate there is an empty room. And any belongings that are left behind are made available for pick-up. This is testified to by James Moulton, the Executive Director of the local Salvation Army Booth Centre. And Booth there is not a reference to the services provided, it's a reference to the founder of the Salvation Army. And that is at Tab 67 of the Respondent's Compendium, and it is highlighted there.

Threatening violence as well as actual violence and other crimes are of course strictly prohibited in shelters. They're also prohibited by the *Criminal Code*. The possession of weapons is also prohibited. If an individual does become violent

or commits a theft or is found with a weapon, they may be what's called service restricted from a shelter for a period of time. The length of the service restriction is proportional to the gravity of the incident. And service restrictions of this kind only apply to the shelter location where the incident occurred. So, the only time that a person would be service restricted system wide, is if they'd been involved at - been involved in separate incidents at all shelters across the system. And this is also testified to by Mr. Moulton of the Salvation Army, who mentions that this is considered necessary, service restrictions to keep shelter, shelter staff safe. And that is found in his evidence extracted at Tab 68 of the Respondent's Compendium. And it is unfortunate, but it is clear, that some of the applicants can and sometimes have threatened violence or have become violent or have carried weapons. For just one example, Julia Lauzon was incarcerated for an assault that occurred outside of the Salvation Army Booth Centre. And that's extracted at Tab 69 of the Respondent's Compendium. There are others who have indicated that they have been violent in the past, Gord Smyth, Tab 70 and 71 of the Compendium. And Mr. Monahan, Cory Monahan indicated that he was service restricted from a shelter for carrying a jack knife that was as long as his hand. He denied the staff's allegation that he then responded to being confronted about the weapon with racial slurs. That's extracted at Tab 72 of the Respondent's Compendium.

Concerningly, during the cross-examination by Ms. Shores, Darrin Marchand threatened that he was going to go and get a gun and start shooting people. That is at Tab 73 of the Respondent's Compendium. And Mr. Marchand in that same examination purported that he had been service restricted from a temporary shelter, even though he had only argued with another resident and had been falsely accused of fighting. That's at Tab 74. The credibility of such evidence in my submission, Your Honour, is open to serious question.

It's also important to note that drug users are welcome to access City-funded indoor emergency shelters, but the drug use on site and drug dealing on site is prohibited and I'm not going to go into any greater depth on that subject. As Your Honour has noted, it is also prohibited by the *Criminal Code*.

Pets are not allowed in indoor emergency shelters, though there is an exception for service animals. And this, Mr. Moulton has testified, is necessary because of the issues posed by allergies, by loud noises and by aggressive animals. And that's at Tab 76 of the Respondent's Compendium. None of the applicants have offered any evidence, including those who say that they have a pet, that their pet is a certified service animal. That's not necessary to review that point in detail either. But I will note that both Amy Lewis and Ms. Pierre have indicated that when their pets were fostered,

they were able to enter shelter and obtain shelter that - through that route. And in my submission that was a healthful choice for both of them and also for the pets. All were able to obtain safe, indoor shelter. Mr. Smyth has noted that he would not ever consider boarding or fostering his pet because she is a service dog. I simply note that there is no evidence in the record that there is any such licensing. He noted that he had a doctor's note indicating same. We asked for it, its not been produced.

Now, Mr. MacKeigan of Mission Services, and this is extracted at Tab 80 of the Respondent's Compendium, has testified that the organization of some sites within the indoor emergency shelter system are gender specific. Male and male identifying in some in the men's sector, female and female identifying in others, the women's sector. And that this could mean that couples are not allowed to stay together. That's not always the case. He does highlight the fact that same sex couples have stayed together in gender specific sites before. But that this is necessary in shelter facilities that are designed around congregate living, that include communal washroom and shelter facilities. There are City-funded shelters however in the family sector that accept couples, as does the hotel overflow. And that is testified to by Mr. Mastroianni, Tab 81 of the Respondent's Compendium. And as we say in paragraph 51 of our Factum, the applicants' experts take some pains to try to paint every relationship

between homeless individuals as a survival partnership and every separation of a couple as traumatic. And in my submission, the evidence actually shows the contrary of that. Two of the applicants reported being subjected to violence at the hands of their partners. That is Ms. Heegsma and Ms. Jordan. And that citations for that are extracted at paragraph's 82 and 83 of our Compendium. And it was also conceded by Dr. Sereda on cross-examination, that an abusive relationship is not a survival partnership. Being separated from those violent partners would in fact be better for those individuals. All right.

So, turning now to the next subject, the City-funded indoor emergency shelters and their capacity. It is fluctuating. And the City acknowledges and do so at paragraph 52 of its Factum, that the City-funded indoor emergency shelter system is often times at capacity. And in my submission, it would be strange if that wasn't true. If there were slack in the system, if there were beds that were never being used, that would simply be a waste of resources better allocated elsewhere. However, there is evidence and it's from Mr. Mastroianni again, that shelter bed availability is extremely fluid, it changes all the time, often hourly, rapidly. And that is at Tab 87 of the Respondent's Compendium. And it's an important point. The fact of this - the facts in this case were collected at two different points in time. We have evidence from 2021 aligning with the

injunction motion that was brought and we have evidence that was collected in 2024. And I think that looking at that evidence at least briefly will be of assistance. And so, I'm going to take you first to the September and October 2021 data on shelter capacity. And this is again just the City-funded system. It does not look at anything outside of what the City tracks. So, what we have on the screen now is page B1-1588 in the master pagination, and it is from the 2021 Affidavit of Mr. Mastroianni. And what he lays out is from October 2021, so he says for the month of September to present, the occupancy level of the City's emergency shelter system. He lays out the main emergency shelter sectors, by-sector. The women's emergency shelters we can see here were at 108 percent, so over capacity. We have the family emergency shelter at 99 percent, so near capacity. The youth emergency shelter at 61 percent, there is slack in the system there. And we have the men's emergency shelter at 97 percent capacity, so near capacity. And then we have the overflow locations provided again. Cathedral, the men's overflow, was at 38 percent or a little, little less than - or, I should say, a little more than a third, a little less than half of 60 beds. Then we have couples and women, 95 percent in the hotel, so there is slack there. We have hotel family is equivalent to 100 percent, but placement as needed. As I mentioned earlier, for families there is ad hoc hotel space available. And then we have the women's sector overflow at 89 percent, so there

were rooms available. So, in some there was capacity, in the men's, youth and family indoor emergency shelter sectors. And there was overflow capacity in the hotel spaces available for women and couples. This evidence was in fact relied on by Justice Goodman in dismissing the applicants' interlocutory injunction motion. The applicants failed to show that there was insufficient capacity at that time and so there was no *Charter* issue. In my submission, that hasn't changed. If we take a look at the data for - or June and July 2024. This is at Tab 87 in our Compendium, and I'll take you to the page citation. It's at master B1-1591. And this is again from July 2024, and so Mr. Mastroianni says:

> For the month of June to present, the occupancy levels of the City-funded emergency shelter system were summarized below.

We have the emergency shelters laid out, the men's, women's and family sector are at or above 100 percent. The youth shelter, again, has, has slack in that system. But Mr. Mastroianni goes on to say that:

> The City-funded women's, men's and family emergency shelter sectors have overflow capacity available.

And so, this is in June/July 2024. And this is also where he testifies to the fact the bed

availability is extremely fluid, it changes all the time, often on an hourly basis. And if a person calls for space at one in a day, it's possible capacity may change later in the day or the following day. And just below that, just below the highlighted section in paragraph 30, Mr. Mastroianni states:

> When City-funded shelter is not available, there are often other options available which staff are able to help people pursue, particularly for women such as overnight drop-n spaces.

So, the evidence from the City is that at the two points in time that evidence was collected in this matter, there was some available capacity. And again, the City does not dispute that there are times that there is not. But it's incumbent upon the applicants to demonstrate that on any particular night that they are trying to assert that their Section 7 rights were violated, that there was an insufficient number of shelter spaces. And in my submission they've not done so.

Now, the names of the overnight drop-in centers for women in the City of Hamilton are Carole-Anne's Place and Willows' Place. You've heard some reference to Carole-Anne's Place. The City also has provided funding to ensure there is a specifically indigenous or - a specifically indigenous oriented drop-in shelter program

available at the Hamilton Regional Indian Center, for those who choose to engage with an Indigenous run organization.

And, Your Honour, I notice that it is 3:30. I wonder if, as we did yesterday, we might take an afternoon break...

THE COURT: Sure.

J. DIACUR: ...and then go until 4:15.

THE COURT: Yeah.

J. DIACUR: Thank you.

MADAM REGISTRAR: Order, all rise. Court is recessed for 15 minutes.

R E C E S S

U P O N R E S U M I N G:

MADAM REGISTRAR: Order, all rise. The Superior Court of Justice is now resumed. Please be seated.

B. SHORES: Your Honour, if I may, briefly, before Mr. Diacur resumes?

THE COURT: Yes.

B. SHORES: Your Honour had asked a couple of questions about some references to the record, which I believe we've now located and I can take the court to if...

THE COURT: Thank you.

B. SHORES: ...you'd like. So, the first one was with respect to enforcement and particularly Ms. Ciriello's evidence. And I had pointed the court to the references in the Affidavit, but there's also one in the transcript of Ms. Ciriello. So,

this is on the screen. It's page B1-1115 in the master record, question's...

THE COURT: Right.

B. SHORES: ...78 through 79, referencing the enforcement by Municipal Law Enforcement...

THE COURT: Yeah.

B. SHORES: ...and specifically the enforcement action that they do.

THE COURT: Okay.

B. SHORES: The other reference was, I believe to - with respect to one of the - one of the applicants who, who didn't move, and I think that may be a reference to Mr. Greaves and so I'll take the court there.

THE COURT: Was it, was - yeah.

B. SHORES: So, this is Mr. Greaves cross-examination transcript. It's an exchange that begins on page A4695.

THE COURT: Yes.

B. SHORES: And the - the exchange in question begins at question 112 on the right there...

THE COURT: Yeah.

B. SHORES: ...and continues to 120. Mr. Greaves described being given three days notice, deciding not to, not to leave because he thought he might be permitted to stay. And then he goes on to describe having been offered and ultimately accepting an offer by the City to store his belongings and offered a spot in a hotel.

THE COURT: Okay. Thank you.

B. SHORES: Thank you. I'll now turn it back over to Mr. Diacur.

THE COURT: Yes. Yes, Mr. Diacur?

J. DIACUR: Thank you, Your Honour. Before the break I was just about to turn to a new area, and that is as Ms. Shores mentioned in her opening, the fact that the applicants have obtained housing or declined offers of housing. And in our submission, there are seven of the applicants who have obtained housing with City supports. And the evidence of this starts at Tab 89 of our Responding Compendium, with the evidence, of Ammy Lewis on that subject. Ashley MacDonald gave evidence with respect to the fact that she's obtained housing at Tab 90; Ms. Pierre, at Tab 91; Mr. Arnold, at Tab 92; Mr. Smyth at Tab 93; and Cory Monahan, at Tab 94; and Julia Lauzon at Tab 95. Those are all straight-forward comments. I don't think it's necessary to go through each of them. But I do note that all but one of that group, Mr. Monahan, remains housed to present.

Now, in terms of the applicants who have declined housing when offered, there are four. The first is, Sherri Ogden, and this is found at Tab 96 of the Responding Compendium. And I think it is worth while to take a look at these. We have that at page B1-1621 in the master pagination. And we can see that in the highlighted portion starting at question number 23 on the right hand side. This is an extract from her cross-examination. Ms. Ogden says:

> A. They tried offered me housing but I didn't

take it.

Q. Okay. When did they offer you housing?

A. Around 2019 they tried to offer me housing.

Q. Why didn't you take the housing?

A. Because I figured people needed it more than I did.

Q. Were there any other reasons that you didn't take the housing?

The answer was:

A. No.

Second, we have Mr. Muscato at Tab 97. And that is to be found at page B1-1624. I'll scroll down to it. And the highlighted portion starts at question 54. Mr. Muscato says here, the housing offered was not good enough.

Next we have Lesley Greaves at Tab 98 of the Respondent's Compendium. That's at page B1-1627. I'll scroll down to that. The highlighted portion begins at question 175. And Mr. Greaves was offered a residential care facility space. And this is the supportive housing I was referencing earlier, and he turned it down saying that first he was hesitant, but also that he doesn't know much about those places, or "these places."

And then we have Cory Monahan, who has at times obtained housing with City supports, but he has also declined housing. And that is at Tab 99 of the Respondent's Compendium at page B1-1631. And I'll scroll to that. That's starting at question

158. He was offered a private room at Mission Services and he says that he turned it down because it didn't seem right to him.

Beyond that, the Applicant, Ms. Marshall, admitted on cross-examination that she has not made an access to housing Application at all. And as I mentioned earlier, that is a necessary step to accessing supportive housing.

Another notable circumstance is that of Ashley MacDonald, who has obtained housing with City supports, but who still prefers to encamp in public parks in the City at least some of the time. On her cross-examination she was asked about that and she admitted that procuring drugs is part of the reason she prefers to encamp in a tent and that she is neither in nor intending to get treatment for her substance use disorder. That is to be found at Tab 101 of the Respondent's Compendium at page B1-1631, which I will take Your Honour to briefly.

THE COURT: That was Ashley MacDonald?

J. DIACUR: That was Ashley MacDonald, that's correct. And I'll scroll down to it. But this is an important circumstance in our submission, that sometimes people choose encampments over their shelter, specifically because of drug access. And that is what she says here on screen.

Now, several of the applicants acknowledge that they have other options beyond encamping....

THE COURT: Just, just a minute.

J. DIACUR: I'm sorry. Yes, of course?

THE COURT: I read this - I read this before. Where does it say about drugs?

J. DIACUR: Right. I'll take you to that, Your Honour. And that is on the next page at question 180 and following. So, the question at 180 is:

> Q. Is that part of the reason you're still out on the street procuring substances?

The answer is:

> A. Yes.

181:

> Q. Are you in treatment for your substance use?

The answer is:

> A. No.
>
> Q. And do you intend to get treat....
>
> A. I'm in the harm reduction and I'm not in treatment.
>
> Q. What do you mean by harm reduction?
>
> A. I just safe use.
>
> Q. But that doesn't involve actually using less?
>
> A. Yeah, correct, depends on the day. It goes up and down.

And then she mentions...

THE COURT: Well...

J. DIACUR: ...fentanyl and methamphetamine use.

THE COURT: "Is that part of the reason you're still out on the street?" Does that mean that's why she stays - that's why she camps now and again?

J. DIACUR: Yes. I mean, the - she, she gives the answer initially that it's a comfort thing that she chooses to go out into encampments...

THE COURT: Yeah.

J. DIACUR: ...as a comfort thing. When we asked, is that part of the reason that you're still out on the street procuring substances, as she referenced them, her answer was yes.

THE COURT: Okay.

J. DIACUR: There are also a number of applicants who have acknowledged that they have other options in terms of shelter; staying with family at least temporarily. Mario Muscato has indicated that he has an option of staying with a cousin. That's at Tab 102 of he Respondent's Compendium.

Cassandra Jordan has indicated that she has the option of staying with her mother, at Tab 103. Tab 104 of the Respondent's Compendium, Darrin Marchand indicates that he can occasionally stay with his brother at his parent's home. His parents are deceased. His brother lives in their former house.

THE COURT: Just a minute. But when it says, "I just safe use", that involves using at a supervised place, isn't it?

J. DIACUR: That's correct. So, the safe use that she references would involve actually using safe injection site...

THE COURT: Yeah.

J. DIACUR: ...which exists in Hamilton. But the substances still must be procured.

THE COURT: Okay. But he can't safe use in his - in a tent? That's not safe use?

J. DIACUR: No. And I wouldn't - I would agree that absolutely.

THE COURT: Okay. Okay. I got it. I got it.

J. DIACUR: Yeah. There's no quarrel with you on that, Your Honour.

THE COURT: Yeah.

J. DIACUR: I do note that Darrin Marchand has mentioned that he can only stay temporarily with his brother because they have a history of violence. That is at Tab 104.

THE COURT: Yeah.

J. DIACUR: And Tab 105, Ms. Heegsma has indicated that she has the option, at least occasionally, three or four days at a time, of staying with her mother in London, Ontario. The limitation three to four days at a time is because they do not get along, in Ms. Heegsma's evidence. And that is found at Tab 105 of the Respondent's Compendium.

THE COURT: Yeah.

J. DIACUR: Some of the applicants have admitted to declining to enter shelters when spaces were available. And again, I think it's helpful to go to these citations just briefly. We have Gord Smyth at Tab 106 of the Respondent's Compendium. That's page B1-1656. The extract - and Mr. Smyth, here, answered that he did not think it was in his best interest to enter shelter. And at Tab 107, which I'll scroll down to, there's a further extract from his evidence. Mr. Smyth says, here, that there was an offer of shelter and also

supportive care for his dog until housing was found for him, which he turned down. Question 37, the question was:

> Q. I thought you said something about housing and they were going to shelter your dog somewhere else. Is that not what I heard?
> A. No, it was for me to go to a shelter and to put the dog - at first it was to go to a shelter and then it was because that wasn't possible. And then they offered for me to go to a shelter and put my dog into some sort of supportive care until such time as housing was found. That was before I was offered any housing.
> Q. And you declined that, correct?
> A. Absolutely, yes, I did.

Now, Shawn Arnold indicated that shelter was available but he didn't think it was appropriate. He later accepted shelter in the winter, and I'll take you to that citation. It's extracted at Tab 108 of the Respondent's Compendium, page B1-1667. Question 128:

> Q. To be clear, you were offered a shelter space but you declined it because you didn't think it was appropriate for you?
> A. Yeah, due to my addictions.

And if we scroll down a bit further, we see at Question 131, that Mr. Marchand - or I should say,

Mr. Arnold, did ultimately accept shelter at winter.

Linsley Greaves, Tab 109, which I'll scroll through to, was offered a hotel space but did not go, though his possessions were put in storage by the City. And that's beginning at question 120, he responds that he was offered a shelter room at Four Points Hotel. And it was indicated that his property could not be brought with him, but that it could be put into storage. And that's at question 124 to 125.

And then we have Cory Monahan, who has come up several times in this portion of the evidence. At Tab 110, and I'll take you to that, page B1-1675, he says he declined to go because he does not do well in institutional settings. That's at question 273. He references having been in jail as an example of an institutional setting where he did not do well.

Separate and apart from these applicants who declined to enter shelters when space was available, some of the applicants noted that they declined to seek shelter at all, and that was for reasons other than shelter capacity. Some of these have been referenced previously, but I think that it will be helpful to take a look at them in this context.

So, Tab 111, we have Ashley MacDonald. She indicates when asked, "Did you try to get into shelter?" And she says that she tried multiple times and then gave up trying to get into shelter, "because some people are better at living outside than others. Though it was previously noted she has obtained stable housing and sometimes prefers to live in encampments.

The next tab, Tab 112, Sherri Ogden, she indicates that she has made no attempts to access shelter since 2022, and that there is no reason for that. Question 269, and I will give the page reference. That's B1-1681. Ms. Ogden was asked:

> Q. During that time, did you make any attempts to get into shelter?
> A. No.

And 296, 297:

> Q. When was the last time you tried to get into a shelter?
> A. Before 2022 - early - before 2022 ended.
> Q. Before 2022 ended, okay. And is there any reason that you haven't tried to get into shelter since then?
> A. No.

Kristen Heegsma and Darrin Marchand have given similar evidence. Ms. Heegsma is extracted at Tab 113. She indicated that she felt discouraged and

stopped trying. And Darrin Marchand at Tab 114 also gave evidence that he did not try to enter shelter.

And I would note that considered alongside Mr. Mastroianni's evidence about the way in which shelter capacity fluctuates, simply trying several times to get into a shelter and then stopping, in my submission, does not constitute a barrier. Shelter capacity changes hourly is the evidence from the City. And so trying one day and then the next, and then the next may result in success, trying one day and stopping would not. But that is not an actual barrier, it's a perceived one, in my submission.

Now, it's also set out at paragraph 60 of our Factum that there is evidence, and this is from Mr. Buckle, David Buckle, who is supervisor of the Housing Focus Street Outreach Team, that encampment residents are being encouraged by organized groups to resist housing supports and instead to insist on remaining in encampments. That's extracted at Tab 115. And I will take you to that, B1-1691. And that's at paragraph 31 of Mr. Buckle's Affidavit extracted there. Mr. Buckle has also testified to observing a prevailing view among people living in encampments. They're not necessarily shared by all, certainly we acknowledge that, that living in an encampment is the first resort when living unhoused. It's the first place you go. And that it's preferable to staying in an indoor shelter,

whereas previously living in an encampment was viewed as a temporary measure of last resort. This is a change that he's noticed in his Outreach efforts. And that is actually testified to at the next tab, Tab 117 of the Respondent's Compendium, B1-1697. And this is Mr. Buckle in 2024 saying that since his 2021 Affidavit was sworn there's been this change. The prevailing view has changed. One potential reason for this, in my submission, is provided by Mr. MacKeigan of Mission Services. And he notes that encampment residents have been told that they will be given priority for future housing by staying in encampments. This, in my submission, obviously poses difficulties for the City when seeking to engage encamped individuals with housing supports. And I'll take you to Mr. MacKeigan's comments. That is at page B1-794, at paragraph 14 of his Affidavit here. And he says in paragraph 14 that:

> Organizations that work with encampment occupants without any oversight, standards or regulations, can thereby actually undermine the available housing options, and the long-term health and well-being of encampment occupants by telling them that they are not yet ready to be housed (that's the housing philosophy that I mentioned earlier) that they need to learn life skills first, or that they will be given priority for future housing by staying in encampments.

And, Your Honour, that brings me to the end of that section of the, of the facts. I notice that we're at 10 minutes past four. I'm more than happy to make use of any additional time that we have, but I would be starting a new area.

THE COURT: No, there'll be lots - there'll be lots of time in the morning.

J. DIACUR: Okay.

THE COURT: Thank you.

J. DIACUR: Thank you, Your Honour.

MADAM REGISTRAR: Order, all rise. This matter is adjourned until tomorrow in this court at ten o'clock and the sittings of this court are now concluded. Long live the King.

Form 3

Electronic Certificate of Transcript *(Subsection 5(2))*

Evidence Act

I, Barbara Thompson, certify that this document is a true and accurate transcript of the recording of, Kristen Heegsma et al - and - City of Hamilton, in the Superior Court of Justice, 45 Main Street East, Hamilton, Ontario, taken from Recording No: 4799 700 20241217 081925 10 RAMSAYJ.dcr, which has been certified in Form 1.

February 28, 2025
(Date)

B. Thompson, A.C.T.
Electronic Signature of Authorized Person
A.C.T. #6014683207, Ontario, Canada.

TAB 19

COA-25-CV-0166
Court File No: CV-21-00077187

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KRISTEN HEEGSMA et al.
Applicants

- and -

CITY OF HAMILTON
Respondent

P R O C E E D I N G S A T A P P L I C A T I O N H E A R I N G

BEFORE THE HONOURABLE, JUSTICE J. RAMSAY
on December 18, 2024, at the CITY OF HAMILTON, Ontario

APPEARANCES:

S. Crowe	Counsel for the Applicants
W. Poziomka	Counsel for the Applicants
S. Choudhry	Counsel for the Applicants
C. Sell	Counsel for the Applicants
M. Sutherland	Counsel for the Applicants
J. Diacur	Counsel for the Respondent
B. Shores	Counsel for the Respondent

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

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LEGEND

[sic] Indicates preceding word has been reproduced verbatim and is not a transcription error

(ph) Indicates preceding word has been spelled phonetically

TRANSCRIPT ORDERED: February 6, 2025 (confirmed to go ahead)

TRANSCRIPTS COMPLETED: March 8, 2025

ORDERING PARTY NOTIFIED: March 8, 2025 (Email)

WEDNESDAY, DECEMBER 18, 2024

MADAM REGISTRAR: Good morning, Your Honour.

THE COURT: Good morning.

B. SHORE: Good morning, Your Honour.

J. DIACUR: Good morning, Your Honour.

S. CHOUDHRY: Good morning, Your Honour.

THE COURT: Who's up? Yes?

J. DIACUR: Thank you, Your Honour. I propose to begin where we left off yesterday.

THE COURT: Yes.

J. DIACUR: Which was starting at paragraph 61 of our Factum, and the subject of encampments, and the fact that they are not safer than other forms of shelter.

Now, numerous witnesses gave evidence on this subject, specifically the health and safety risks that are posed by encampments both to the residents of encampments and the surrounding community. A number of the applicants themselves have spoken to these issues. And that is beginning at Tab 118 of the Respondent's Compendium. We have evidence from Shawn Arnold, one of the applicants, regarding drug use and drug dealing in encampments. And I would propose to take you briefly to that page, it's B1-1700, questions 134 and 135. Mr. Arnold was asked:

> Q. Sir, there are drug users and drugs in encampments, is that not accurate?
>
> A. Yes there is.
>
> Q. There are people who sell drugs and who in

fact target the occupants of encampments for the sale of drugs, is that not accurate?
A. That's accurate, to my knowledge.

THE COURT: And he, he tries to avoid that, right? He's taking methadone because he wants to get off drugs?
J. DIACUR: That is true. And that - Mr. Arnold is one of the individuals among the encampments who is in treatment. As I had...
THE COURT: Yeah.
J. DIACUR: ...mentioned yesterday, there are others who do no intend to seek treatment or have indicated that they do not intend to seek treatment.

The applicant, Mr. Greaves, who is a black man, recognized that he has encountered racial slurs in encampments. That's extracted at Tab 121 of the Respondent's Compendium. And as we heard from Ms. Shores, people experience theft in encampments. There are a number of examples in the Respondent's Compendium but in - that includes Mr. Greaves at Tab 122, which we've seen. People are also at risk of assault in encampments, and there are again several examples of that in the Respondent's Compendium. For example, Ms. Pierre at Tab 127 of the compendium speaks to that. I also note that Ashley MacDonald reported having been assaulted but refused to give any details, stating there's punishments for people talking to people. Bad things is how she put it.

THE COURT: Yeah.

J. DIACUR: And that's extracted at Tab 129 of the Respondent's Compendium. So, those details were not able to be obtained on cross-examination.

Among the expert witnesses, Dr. Hayman agreed that there may be safety risks while sleeping in a tent. That's extracted at Tab 130 of the Respondent's Compendium.

And one of the over-arching submissions that, that we make, that the respondent makes in its Factum is that there's a consensus among the medical expert witnesses, that homelessness itself is associated with negative health outcomes. That's a common sense position and it is supported by the medical witnesses. Dr. Koivu says so very clearly. Dr. Hwang agreed to that, and so did Dr. Orkin, Tabs 132 and 133 of the Respondent's Compendium. Given that this is not really in dispute, I don't intend to spend much time on this point. But the negative health outcomes that are associated with homelessness itself include a lowered life expectancy; higher rates of chronic disease and mental health conditions; higher rates of substance abuse and substance abuse conditions; inadequate sleep or sleep deprivation; exposure to the elements; and becoming a target of physical violence and threats. Including, a higher risk of violence than in shelter, and more severe violence too. That is testified to by Dr. Koivu, and I will take you briefly to that citation, Your Honour.

It's in Tab 139 of the Respondent's Compendium, B1-772. And it's paragraph 47 of Dr. Koivu's expert Affidavit where she makes those statements:

> While violence can happen in shelters (the second sentence) in my experience, people living in encampments have a higher risk of violence and the violence is more severe.

And she cites to a number of authorities on which she bases that evidence. And Dr. Koivu's evidence speaks in detail as well about the health risks of encampments specifically. So, not simply the state of homelessness, but living encamped. And her evidence on this point is extracted from her expert's Affidavit at Tabs 141 through 151 of the Respondent's Compendium. But I would propose to proceed in a summary way, given that much of her Affidavit speaks to this issue. The health risks in encampments are many. They include the fact that people with substance use disorders are attracted to encampments because of the absence of rules. Dr. Koivu testifies that this results in increased drug use, less safe use, and harming recovery. Dr. Koivu testifies that the presence of vulnerable individuals and diverted drugs in encampments, creates unsafe situations and opportunities for violence and exploitation that are aimed at the people living in the encampments. Yet she says, encampments give people a false sense of security. And I'll repeat that because it's important. The security that some of the

encampment occupants report, the feeling in encampments, is a false one. Dr. Koivu also testifies to disease transmission due to a lack of sanitation and rodents, including injection drug use and unsanitary conditions. As well as a lack of mitigating practices such as mask use, distancing and cleanliness. Dr. Koivu testifies to the fact that in encampments there is still exposure to temperature extremes that cause heat stroke, dehydration, breakdown of skeletal muscle tissue due to heat exposure, hypothermia, frost bite, which is associated with gangrene due to exposure to cold, and also trench foot due to prolonged exposure to damp and cold.

And so, it's clear in my submission, that while tents and tarps and encampments may help in the short term, they obviously do not resolve these issues in the longer term or they would not continue to be seen in individuals who are in encamped. There's also a risk of direct injury, burns, explosions, carbon monoxide poisoning due to fires and propane tanks and Dr. Koivu testifies to that. She talks about dog bites from dogs in encampments. And she also reported that from her experience, and this is a direct quotation, and I'll take to it, it's at Tab 151:

> I observed deterioration in physical and mental health in people who moved into encampments. For many people this led to bad health outcomes and even death.

That's at Tab B1-1825, paragraph 57 of her Affidavit which is highlighted on the screen.

And so, I want to pause just briefly at this point to emphasize that all of the medical evidence, all of the expert doctors in this case, confirmed that the harms that the applicants are suggesting would flow from a dismantling of an encampment or a prohibition on encampments at any time, day time or night time, those very same harms that they base their claim for monetary *Charter* damages on, they're consistent with the harms that are caused by homelessness. And encampments clearly do not mitigate the risk of these harms and in some cases even cause or at least not prevent deterioration of the individuals health or even death. City workers also gave their own evidence regarding dangers that they have observed in encampments. And that includes, fire hazards, exposed wires or unauthorized access to electricity, encampments attracting drug dealing activity and drug use, discarded drug paraphernalia and risks stemming from that. People at encampments with weapons or brandishing weapons, assaults or other violent crime, theft, poor sanitation, though noting that sanitation has improved via the City, making 24/7 access to washrooms and showers available. And the people in encampments become a target for abuse and violence, exploitation or that they may themselves, people in encampments, threaten others, becoming verbally abusive. And in one case there is also reference to an individual exposing themselves to

visitors to a park. This evidence is extracted at Tabs 152 to 170 in the Respondent's Compendium. I don't think that it would be helpful to review each of these individually as there's a lot of overlap and repetition, and ultimately they're not really disputed. And some have been touched on in our submissions already. Many of these individual items are summarized in the evidence of Mr. Hasselman at Tab 170 in the Respondent's Compendium. He gives a good overview of these issues.

Now, the applicants own witnesses, and that includes several of the medical experts, Doctor's Lamont, Orkin, Schwan, Hayman, Gaetz and Sereda, as well as Medora Uppal, have also acknowledged in their Affidavit's or on cross-examination, that violence, assault and other safety concerns are present in encampments as are theft, drug use and overdose, risk of fire, burns, et cetera. Again, I don't think it's necessary to review each of those in detail, but they are extracted in our Compendium at Tabs 171 to 180.

Encampments also pose risks for the surrounding community, that is clear on the evidence. And the evidence to support that is excerpted at Tabs 181 to 192 of the Respondent's Compendium. And again, I don't think it's necessary to review each individually as these risks are again not really in dispute. They include an inability to use park areas where encampments are located. That's

testified to by Michelle Simonovich(ph), a street outreach coordinator on the Housing Focus Street Outreach Team. And I'll take you briefly to that point, which is at B1-607. It is outside of our compendium. But it's at paragraph 18 of her Affidavit. She testifies quite simply:

> It has also been my observation that the presence of encampments in parks makes the parks less accessible to other members of the public who are not living in the encampments.

And she gives some examples of that. But that statement is in evidence.

There are also concerns as we heard Ms. Shores note, among the encamped individuals, that they may be exposing children to drug use or overdosed individuals, aggressive behaviour or even sexual acts. Sherri Ogden conceded on cross-examination that she was concerned about that and in fact left a park because she did not want to expose a child or children to drug use.

In one case, Mr. Hasselman testifies that there were booby traps laid by an encampment resident, a series of trip lines is the phrase that he uses. That's extracted at Tab 190. And that again goes to this issue of individuals treating this property as their own and in fact trying to defend it in that way. There are also reports in those tabs of our Compendium, of property damage, vandalism,

thefts and breaks-ins, in areas where encampments are located. As well as noting the risk of infection due to fecal contact and contamination. So, the impact of encampments upon encamped individuals such as the applicants and others, and on the surrounding community, is also captured in data that has been provided by the first responders in the City. And so, in the evidence that the City has marshalled, there is evidence from the Hamilton Police Service, the Paramedic Service, and Hamilton Fire Department. And this is again data that is collected and summarized, so I will again proceed in a summary way. But at Tab's 193 to 200 of the Respondent's Compendium, we have excerpted data provided by Wesley Loy, a Data and Records Coordinator for the Hamilton Paramedic Service. His data shows that where encampments have been located, and how they have related to paramedic calls, that there has been a fluctuating number of paramedic calls over time, but that in 2024, for example, there were a higher number than in 2023.

Like, Mr. Mastroianni, his evidence was collected at two different points in time. So, we have his evidence from October 2020 to August 2021, which showed that there was an increase in dispatches to encampment areas as of May 2021. And then updated again for the data and the evidence collected for this hearing between January 2023 and June 2024. And again, there has been an upswing in the number of calls. The primary problems reported in that initial time period, October 2020 to August 2021,

the top three primary problems in the encampment areas were collectively, opioid overdose suspected, drug or alcohol overdose, trauma or injury. Collectively, those three problems as they're defined by Mr. Loy, accounted for almost half of all of the paramedic visits to encampment areas.

Turning to the police data, we've already from Ms. Shores regarding the assistance that the police have provided and the lack of force employed by police regarding encampments. At Tab's 201 to 203 of the Respondent's Compendium, we've excerpted the data that was provided by Inspector Frank Miscione of the Hamilton Police Service. His data shows us where encampments have been located and how they have related to police calls. And again, this was at two points in time in the 2020/21 and in 2023 to 2024. The police data shows that they used a system of computer aided dispatch, or CAD, in order to record the reasons for police being dispatched. The top five CAD events by volume, between October 2020 and September of 2021, were mischief, medical, property or violent. The activity was clustered in the downtown core and near the Four Points Sheraton Hotel in the east end where a hotel shelter was available.

In total, there were 1,103 such CAD events recorded between October 2020 and September 2021. There has been a significant increase in the number of CAD events recorded by the police when we turn to the July 2023 to June 2024 time period. In the CAD

records where an encampment or a tent is recorded in the notes Section, there were 2,659 such events. And the reasons for those events were again, mischief, medical, property or person in crisis.

So, we went from roughly three CAD events relating to encampments per day in 2020 to 2021, to roughly seven per day in 2023 to 2024, more than doubled. And the activity again in 2023 to 2024 was clustered in the downtown core. Those are the parks where encampments are occurring.

Then finally at Tab's 204 to 205, we've excerpted data provided by Trevor Haalstra of the Hamilton Fire Department. His data assists in showing how encampments relate to fire calls. And they also use the computer aided dispatch records system. Those records show that there were 384 fire department dispatches relating to an encampment between July of 2023 and July of 2024. That is roughly one fire call everyday, all year, relating to encampments. And so, in some, the first responder data is consistent with the risks of harm in encampments as I noted previously, as the medical experts have testified to.

So, that concludes our review of the relevant facts in this case, Your Honour. I'd propose to turn to the first two of the issues that are addressed in the Factum. And they both have an evidentiary aspect, given that they deal with the admissibility

or the weight that we would ask Your Honour to give to some of the expert evidence.

Now, issue number one as defined in our Factum is, what weight should be given to the expert evidence of Dr. Koivu. I'll address that first.

The overarching submission is that the evidence of Dr. Koivu is proper expert evidence and it should be given full weight. The applicants seek to rely upon opinion evidence in support of their position that encampments are a better option for unhoused individuals than indoor shelters or other options. And to rebut that evidence the City retained an expert witness, Dr. Sharon Koivu, to provide her evidence and her opinion.

Dr. Koivu is a physician and she has been for 39 years. And she does hold a certificate of added competency in addiction medicine. But through her practice, which is almost four decades now, she has gained, in my submission, extensive experience treating patients who are vulnerably housed or experiencing homelessness. And contrary to the submission that is made by the applicants, Dr. Koivu does treat homeless individuals, homeless patients who are living in indoor shelters and homeless individuals who are encamped in tents. She has experience with both communities. And I do think it's necessary to take a look at that evidence specifically, it is extracted at Tab 206 in our Compendium, but that's Tab - or I should

say, page B1-2053 in the master pagination, paragraph 10 of her Affidavit she states that:

> Many (and I believe she means of) many of the patients that I see are vulnerably housed or experiencing homelessness. I have seen patients who are living in homeless shelters, in tent encampments and in both environments.

And in my submission, Your Honour, it frankly makes no difference whatsoever, that Dr. Koivu treats these individuals in hospital or in clinic rather than in situ, in encampments. She is a doctor and has experience treating this specific population coming both from a shelter environment and from an encampment environment. As such, her evidence carries the weight of her expertise. And in my submission, Dr. Koivu's evidence speaks to her expertise specifically on the question of health outcomes for people experiencing homelessness who live in encampments as compared to indoor shelters. She treats both and she is in the prime position to testify and assist the Court by explaining what she has noted as the differences between indoor shelters and encampments in terms of health outcomes. Her evidence also directly responds to the evidence of several of the applicants' expert witnesses, who purport that encampments are in some how - or in some way preferable to indoor shelters, or that tents are a healthy or healthier choice for people experiencing homelessness. And as I noted in my previous submissions about the content of her

evidence, Dr. Koivu in her opinion, in her expert opinion, disagrees that encampments are a safe alternative to indoor shelters. They're not. So, in some - Dr. Koivu's expert evidence fulfils every aspect of the experts duty under the *White Burgess* Test, and under the *Mohan* four-part analysis. Her evidence is fair, objective and non-partisan. It's impartial, independent and unbiased. It's also relevant in that it provides a necessary counter point to the advocacy that I will come to, that's in the applicant expert evidence. And there is no exclusionary rule that applies to her evidence. And finally, I would suggest that Dr. Koivu is clearly a properly qualified expert, having been a physician for nearly 40 years. She has decades of experience underpinning what she has to say.

The applicants have attempted to discredit her evidence by referencing comments that she has made on the subject of safe supply, that is the prescription of drugs that would otherwise fall under the controlled drugs and substances act. But that is not an issue in this case, and it's not the subject of her evidence. I would suggest that it does fall within the purview of a physician who is an expert in addiction medicine to give commentary on that subject, but it is not the subject of this case. And in my submission, trying to discredit an expert witness on the basis of things that they have said on other subjects, would be akin to trying to discredit an engineer who's testifying about engineering by raising his or her public

comments on architecture, or some other unrelated subject. It's wholly irrelevant to point to those comments. And the applicants, in my submission, are not even close to discrediting Dr. Koivu and their submissions entirely miss the point.

Now, turning to some of the applicants' expert evidence. In my submission, two of the eight experts that have been proffered by the applicants are simply inadmissible. They do not meet the, the necessary standard to be considered. And the other six, in my submission, and I will review them individually, briefly, but the rest should be given no or minimal weight.

So, of course the *White Burgess* case established the experts duty to be fair, objective and non-partisan, and that is a threshold requirement for admissibility. And that that is informed, the duty is informed by three related concepts, impartiality, independence and an absence of bias.

In my submission, two of the experts put forward by the applicants simply don't meet the *White Burgess* threshold, and that is Ms. Leilani Farha and Professor Ameil Joseph. The other six experts, as I mentioned, they, they may meet the basic admissibility criteria, they may get over the threshold in other words, but they're either not relied upon at all by the applicants, that is the case of Dr. Aaron Orkin, who is not cited in the applicants Factum. He was not mentioned at all in

their submissions. He may have no relevance whatsoever, other than in the limited circumstances where his evidence was cited by the respondent and in fact supports the respondent's position. And we have cited him two or three times, including on the subject of coercion sometimes being necessary in order to make individuals healthy again.

The others, the other five in that class, other than Ms. Leilani Farha, Ameil Joseph and Dr. Orkin, have revealed themselves to be partisan and advocates for certain government policy outcomes on the very matter in issue in this case, encampments and municipal response to encampments. So, we're not talking about completely irrelevant public comments that have been made by these individuals, like the applicants are trying to rely upon with respect to Dr. Koivu. They're talking about relevant, directly relevant advocacy on the very subject of encampments and municipal response. And that that indicates that they are something other than independent and impartial experts. And so, in my submission, that if the Court accepts the evidence of these other witnesses, the six proffered expert witnesses other than Ms. Leilani Farha and Ameil Joseph on the side of the applicants, that their evidence should be weighed in light of the ways that their advocacy is tainted by their - or that their evidence is tainted by their advocacy.

THE COURT: Okay. Or - but you don't disagree with a lot of what they have to say?

J. DIACUR: That's true. And I mean, a number of them are medical experts and they're part of this consensus that homelessness is bad for you. And to that extent, yes. I mean, there's, there's no issue with what they're saying. But when it comes to this point of encampments and municipal response, they have advocated for certain outcomes, sometimes quite strenuously. And so, I would not impugn their medical expertise, they are physicians in the same way that Dr. Koivu is and they can testify to health harms. But when it comes to the subject of encampments and municipal response, they are advocates and their evidence in my submission needs to be considered in light of that. So, if they're going to be given any weight it should be minimal. And it was stated in the *White Burgess* case itself, and this is at Tab 231 in the Respondent's Compendium. I'll take you to the page.

THE COURT: Sorry about that.

J. DIACUR: My computer spoke to me the other day by accident and it scared me half to death. Hit the wrong button and AI starts reading what you're typing. Now, so the page that I've taken, taken you to, Your Honour, is here master B1-2149, paragraph 49, which I'll scroll down to, the top of page 208. This case, or I should say, it goes over from 207 to 208. This is Justice Cromwell speaking:

> Similarly, an expert who in his or her proposed evidence or otherwise assumes the role of an

advocate for a party is clearly unwilling and or unable to carry out the primary duty to the Court.

And I would propose to briefly make submissions with respect to each of the applicants' experts, in turn. Starting with Leilani Farha, and I have a preliminary point on the subject of Ms. Farha. The, the remedy, in my submission, if Affidavit evidence, any Affidavit evidence, including an expert's Affidavit, is deemed inadmissible, the remedy is to strike the Affidavit. My friend suggested that Your Honour could rely upon Ms. Farha's Affidavit as legal argument if Your Honour does not find it helpful as expert evidence. In my submission, that is simply incorrect. The applicants cannot get what amounts to dozens of extra pages added on to their Factum by putting legal argument in the mouth of an expert witness. Legal argument, in any event, has no place in an Affidavit in the first place. And that is the problem with Ms. Farha. Ms. Farha's purported evidence is merely legal argument cloaked as opinion. Ms. Farha acknowledged on cross-examination that she is an international human rights lawyer and "I use international human rights law to dispute forced evictions." That's excerpted at Tab 209 of the Respondent's Compendium. And Ms. Farha is indeed an international human rights lawyer. In my submission, she should continue advocating for her clients rather than trying to give purported expert evidence about the law. And

I note that Ms. Farha also plainly confirmed that she is an advocate for what she calls "implementation of the human right to housing for people living in encampments." That is the subject matter of her opinion and it's a question of law. It's also something that's at issue in this case. That's excerpted at Tab 210 of the Respondent's Compendium at question 79. This is, in my submission, the essence of something that's subjective and partisan.

My friend noted that the Supreme Court recently clarified the framework governing the admissibility of expert evidence in the context of international law in the *IATA*, International Air Transport Association...

THE COURT: Yeah.

J. DIACUR: ...in Canada. And some comments about that case are necessary, because it's ultimate holding, in my submission, suggests that Ms. Farha's evidence should be excluded. Justice Rowe, for the Court, noted that there is a distinction between foreign law which is treated as a question of fact that has to pleaded and proved generally by way of expert evidence, and international law, which is to be treated as a question of law, and that may be considered by Courts without expert evidence. And that's noted at paragraph 65 of the case. Now, in *Mohan* of course, the Court had held that there are four factors to be considered when it comes to admissibility of an expert witness or their evidence; relevance, necessity to the Court

or the trier of fact; absence of an exclusionary rule and a properly qualified expert.

In the *IATA* case, the Supreme Court held that questions of international law may require judges to have regard to questions of fact that are susceptible to expert evidence in some cases. That includes things like authenticating the text of a treaty that's in a foreign language, you may need a translator. Or in the context of customary international law, what those alleged customs are, that may require expert evidence. But the Supreme Court held that where expert evidence on international law satisfies the *Mohan* criteria, it may be considered. But otherwise, judges should proceed as they would for any other question of law. And that is, on the basis of the submissions of the parties before the Court and the authorities on which they rely. It's in the usual course. And so, it's my submission that Ms. Farha's evidence does not meet the *Mohan* criteria. She does not provide any assistance with questions of fact at all, and certainly none in the nature of the examples provided by the Supreme Court in the *IATA* case. She's not translating a treaty for the Court; she's not giving evidence about international custom. And it is the case that Ms. Farha's opinion evidence addresses issues of pure international law. Ms. Farha would usurp the role of the Court and opining on the consistency of the impugned By-laws in this case, and the various protocols of processes that have been in place over

time with international human rights law. And that is effectively an opinion on the question that this Court is being asked to adjudicate. And so, in my submission, Ms. Farha's opinion evidence should be disregarded on that basis, and the Court should proceed as they would for any other question of law on the basis of the submissions of the parties and the authorities, without recourse to expert evidence. And that is ultimately the holding in *IATA*. It's important to note that is to the contrary of the applicant's submissions.

Going a bit further, in the content of her opinion, Ms. Farha appeared to be unaware of the legal principle in Canada, that the exact same commentaries, commentaries now, from international bodies on an international covenant, which the applicants seek to rely in order to urge this Court to a certain interpretation of the UN International covenant on economic, social and cultural rights are simply not binding. Those commentaries from a committee at the United Nations, are not binding on this Court. And Ms. Farha appeared to be unaware of that. The commentaries are cited at footnote 154 in the Applicants' Amended Factum, and that's extracted at Tab 211 of the Respondent's Compendium. "Canadian Courts have said that those comments are simply not binding." That's extracted at Tab 233 of the Respondent's Compendium, it's a decision of the Federal Court called, *Toussaint*. And so, in my submission, even if Ms. Farha's legal opinion where otherwise admissible, her conclusions

are unreliable given her misapprehension of the applicability of international law in Canada. And further, that international covenant itself clarifies in its own text, at article 25, that it does not create any positive obligation on any ratifying government, and we would acknowledge that Canada ratified that international covenant. It hasn't brought it into domestic law but it ratified it. But that covenant itself at article 25....

THE COURT: Well, it says that people have a right to...

J. DIACUR: Yes. Well, I'll put it on the screen.

THE COURT: ...among, among other things, shelter and that the states parties will work to realize these rights.

J. DIACUR: That's right. And then we have article 25....

THE COURT: It doesn't provide for specifics.

J. DIACUR: That's right. But what article 25 says, on the screen now is:

> Nothing in the present covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

In my submission, that is a provision clearly indicating that even at the time that the international covenant was being written, before it was ratified by anyone, the governments that were involved in negotiating it, wanted to ensure that there was no positive obligation being placed on

them. They are able to marshal their natural wealth and resources as they choose, and that the international covenant is not to be interpreted otherwise.

And so, ultimately, the Supreme Court has also been clear that while there's a role for international and comparative law in interpreting *Charter* rights, that role is limited. It is only there to support or confirm an interpretation arrived at through the usual purposive interpretation where they, the Big M Drug Mart approach, it's sometimes called, based on the early *Charter* law. And that was reconfirmed most recently in 2020 in a case involving the Quebec Attorney General and a numbered company. That's extracted at Tab 235 of the Respondent's Compendium. But given that there was no change to the law at that time, and that this was a long standing principle, I don't believe it's necessary to go through that one.

In my submission, the applicants point to no purposive interpretation of Section 7 or Section 15, or Section 1 of the *Charter* that differs from the existing case law at all. The existing case law - well, the respondent ultimately submits that there is no purposive interpretation that differs from the existing case law. And so, in the end, the Court should not admit Ms. Farha's Affidavit or her cross-examination transcript into evidence at all. And, Your Honour, if the decision is otherwise, alternatively, our submission is that

her evidence should be given no weight. The other expert witnesses can be dealt with more briefly.

Professor Joseph, Ameil Joseph, in our submission, the applicants have not established that any of his purported evidence is relevant at all, or that it is of any assistance to the trier of fact. What his evidence is, is various social science comments about past federal immigration laws and racism in Canada. That is simply not at issue and it is unnecessary to the Court. The applicants' only cite Professor Joseph's evidence, in one footnote, in their amended Factum, that's footnote 112. But they do not actually reference any of his evidence in the corresponding paragraph and they have not mentioned him at all at this hearing. The Court should not admit Professor Joseph's Affidavit or his cross-examination in - cross-examination transcript into evidence at all. And if it is admitted, alternately, his evidence should be given no weight. It doesn't bear on the issues.

Now, I mentioned Dr. Orkin already, but the applicants do not cite or rely upon any of Dr. Orkin's evidence in their amended Factum and they haven't done so at this hearing. They appear to consider it irrelevant. And in my submission, his evidence is of very limited use, in that a few parts of it are in support of the City's position in this application. And I noted those previously, as did Ms. Shores, in reviewing the facts. It should be given little weight. But we don't argue

that it's completely inadmissible. He is a medical expert.

Dr. Gaetz's evidence is also of limited relevance. He purports to opine on homeless shelters, how they operate and what they're benefits and drawbacks are. He also purports to speak about the reasons that an unhoused person may prefer an encampment to an indoor shelter, but he acknowledged under cross-examination that he had no or very limited knowledge of Hamilton shelters. And his evidence about shelters was that, "Some shelters limit the number of nights an individual can stay." He admitted he didn't know if any in Hamilton do that. And the evidence is that in Hamilton shelters are open 24 hours a day, seven days a week.

THE COURT: But they can't stay all day.

S. CHOUDHRY: Your Honour, I, I would ask my friend to please point to where the evidence that is there. That is not in the evidence. These are overnight shelters.

J. DIACUR: Well, that is not the case. They are open 24 hours a day, seven days a week.

S. CHOUDHRY: Sir, that is not correct.

THE COURT: Hold on. Just - don't interrupt.

J. DIACUR: I will take you to the Affidavit of Mr. Moulton, where he testifies to this. I don't have that citation off the top....

THE COURT: Well, anyway so they, they still have to leave in the morning.

J. DIACUR: And can return.

THE COURT: And can return. Okay.

J. DIACUR: That's correct. But I will get that citation for you.
THE COURT: They're not, they're not limited to a certain number of nights...
J. DIACUR: Yes, there's no evidence to support that...
THE COURT: ...you can stay as many nights as you want if you can get in.
J. DIACUR: ...is the case. That's right.
THE COURT: But you, you, you can't stay all day, you have to get out and then come back?
J. DIACUR: That's right.
THE COURT: Yeah.
J. DIACUR: Yeah.
THE COURT: And your spot's not saved, it's everyday you present yourself to see if there's, if there's room?
J. DIACUR: That's correct.
THE COURT: Okay. Well, that's fine. A little excitement there.
J. DIACUR: He also stated that there is typically a curfew after which people will not be admitted.
THE COURT: Yes.
J. DIACUR: And he said he didn't have an example of that in Hamilton, but had what he called, "A high degree of certainty that that is the case." That is not the case.
THE COURT: No, it's not curfew but you have to be there - you have to be...
J. DIACUR: You have to be using the service.
THE COURT: ...there at a certain time because they, they want to make sure that the bed doesn't

go unused. And if you're not there, they give it away.

J. DIACUR: That's right.

THE COURT: Okay.

J. DIACUR: There are bed checks but...

THE COURT: Yeah.

J. DIACUR: ...no cut off time for entering a shelter.

THE COURT: Right.

J. DIACUR: If they have a bed for you, you can enter. In other words, Dr. Gaetz, what he calls a high degree of certainty, was based on extrapolation from other municipalities, and it's that kind of extrapolation that's troubling to see in an expert witness. And so, in my submission, what he's doing is saying, well in other places shelters operate this way, I'm assuming in Hamilton they do the same. And that is an important distinction in this case. Experts who, in their evidence, are talking about indoor shelters, can only do so on the basis of particular shelters and their particular rules and policies, in particular municipalities, because they're not the same across the board. If they know nothing of the particular city or the shelters at issue in a given case, including in this case, their evidence on the subject will necessarily be a lower utility. Experts who give evidence about risks of encampments however, they don't face that issue. An encampment without rules in one place does not materially differ from an encampment with rules in another place in my submission. And this is one

reason that Dr. Koivu's evidence should be preferred in my submission.

Now, further, Dr. Gaetz simply lacks independence and impartiality and there is a bias present in his evidence. At several points he just recites in his Affidavit what can only be described as actually policy recommendations that he thinks should be implemented regarding encampments and municipal response and I'll take you to them, page B1-2089. And this starts at paragraph 58 of his evidence. But he starts out by talking about the U.S. Interagency Council on Homelessness, and a document produced by them, and a checklist for communities addressing homeless encampments. And he says that the guidance first sets forth certain underlying principles and he recites those. He provides a checklist based around the elements set out in that document. And then he goes on to cite Ms. Farha and also Kaitlin Schwan, and their National Protocol for Homelessness Encampments in Canada from 2020, and more principles that he thinks should be implemented. And on cross-examination when he was asked about these things he said, well these are some things that we should consider. He refused to acknowledge that they were actual policy recommendations. And in my submission, it's well beyond the role of an expert witness. And so, to the extent that Dr. Gaetz's evidence is admissible, it should be given no or limited weight.

Dr. Hayman, turning to Dr. Hayman. She agreed on cross-examination that she is an advocate for people experiencing homelessness and that her involvement in this case is part of that work, advocating for people experiencing homelessness. So, in my submission, her evidence lacks independence and impartiality. Her evidence was also largely focused on her Toronto based practice, such as Dr. Hayman's experience in trying to find patients shelter in Toronto. She admitted that she can't give any evidence about the state of shelters in Hamilton or the availability or adequacy, I should say, about shelters in Hamilton. That's extracted at Tabs 217 and 218 in the Respondent's Compendium. So, there is advocacy and there is a lack of ability to speak to the issues in this case.

So, to the extent that Dr. Hayman's evidence as a physician is admissible, it should be given no or minimal weight as well.

Turning to Dr. Hwang, Dr. Hwang's evidence is of limited relevance in my submission. Counsel for the applicants objected during his cross-examination to any questions about the prohibitions on raising temporary shelter in Hamilton or indeed any opinion about anything that's occurring in the City of Hamilton at all, and that's a direct quote extracted at Tab 219, with the Respondent's Compendium. In any event, as it was apparent in the review of the evidence to Dr. - to the extent

that Dr. Hwang's evidence is relevant, it's merely part of the consensus about homelessness harms, the negative health outcomes that are applicable. And so, if Dr. Hwang's evidence is admissible it should be given minimal weight at least on that subject.

Turning to Dr. Kaitlin Schwan. Dr. Schwan sought to describe herself as, "a publicly engaged scholar rather than an advocate," but she conceded that others would describe her as an advocate for a right to housing, and that's extracted at Tab 220, page B1-2110. Under cross-examination Dr. Schwan stated:

> We're very, very far away from actually realizing the right to housing in Canada. We have so far to go."

That's at Tab 221 of the Respondent's Compendium. On that same page, Dr. Schwan agreed that she saw the previous Waterloo case, in which she was also a witness, as a step along the path to realizing a right to housing in Canada. So, she certainly has a direction in which she would like the law to go.

Like Ms. Farha, Dr. Schwan is an advocate for policy change and as we've just seen her work with Ms. Farha includes co-authoring a proposed Encampments National Protocol which aims to guide policy changes and make policy recommendations regarding homeless encampments in Canada. We have at Tab 223 of the Respondent's Compendium an

extract from Ms. Farha's Affidavit citing the joint authorship but it's not in dispute. So, to the extent that Dr. Schwan's evidence is admissible, it should also be given minimal weight.

And then we have Dr. Andrea Sereda. So, Dr. Sereda agreed on cross-examination that she is an advocate, and that she is an advocate for people experiencing homelessness in particular. She acknowledged that she was on the organizing committee of an advocacy group in London, Ontario, which was known as the Forgotten 519, which published a press release in July of 2022 claiming that there is a war on the impoverished and that impoverished persons are suffering like combatants in a war. That's extracted at Tab 224 of the Respondent's Compendium. And Dr. Sereda acknowledged that one goal of that group, the Forgotten 519, was to pressure the City of London to cease any removal of encampments and to allocate more resources to addressing homelessness. Notably, Dr. Sereda omitted her work with this group from her CV, but once it was raised with her, acknowledged that it should have been included. That exchange is extracted at Tab 225 of the Respondent's Compendium. Dr. Sereda later tried to deny that her involvement in this case is part of her continuing advocacy work, but she admitted in her - that her expert evidence in this case would look to improve the lives of people who are living unhoused. And so, again, in my submission, Your Honour, Dr. Sereda's evidence to the extent it's

admissible, to the extent that she is considered a medical expert and able to speak to negative health outcomes, she is an advocate and her evidence should be weighed in that light and given minimal weight.

So, as a whole, in my submission, the expert evidence proffered by the applicants, suggests that there's an ecosystem of doctors and academics who give opinions in this type of case and that they specifically advocate for certain policy objectives. Their purpose of not to assist the Court in an objective and non-partisan manner, it's the opposite. The tests in *White Burgess* and *Mohan* are designed to eliminate this kind of evidence from consideration or at least make sure that it is considered and given the weight that it is appropriate to give it. Its use is constrained in other words. And in my submission, that - when those tests are applied here to this group of eight expert witnesses proposed, it's clear that the Court should either exclude it entirely in the case of Ms. Farha and Professor Joseph, or carefully weigh it in light of the motives for which it's being given, some of which only became clear in cross-examination.

So, those are our submissions on expert evidence.

And the last issue on which I'm going to be giving submissions in this matter is Section 7 of the *Charter*, whether there has been a breach. And it

is one of the overarching submissions of the City that there has been no breach of Section 7 of the *Charter* in this case.

Now, under the former protocol, so that's prior to August 2021, we know encampments were permitted in areas to allow up to 14 days in place. There were permitted areas, there were non-permitted areas but in permitted areas, 14 days was the practice. We have Mr. Mastroianni, Rob Mastroianni, who testifies that they did sometimes remain in place longer than 14 days, even under the former protocol. Under the encampment process, so the period of time that's at issue in this case, time period number two as we call it, between August 2021 and August 2023, there were no set time lines for enforcement as you heard from Ms. Shores, but in practice, it took at least a few days to begin to implement the encampment process and some encampments have been in place for months. And again, this is not evidence of any overnight removals. The evidence is quite to the contrary, and that evidence is drawn from the evidence - that is drawn from the evidence of Lee Rynar, as Ms. Shores' review. And in any event, after the encampment process was put in place, no encampment sites were dismantled by the City. We have Monica Ciriello's evidence that to the extent requests were made of individuals, they complied with requests to move. And these requests were suggested by the applicants in their submissions to be in some sense coercive, but in my submission

there is no credible evidence of that. Voluntary compliance is not coercion, it's not force. And these protocols and processes matter in this case because the impugned By-laws and the City's protocols and processes, are to be considered together, not in isolation from each other. That is the approach used in the *Adams* case by the British Columbia Court of Appeal. They reference a Supreme Court of Canada decision at paragraph's 150 and 151. And I can put a copy of that decision on the screen, this is just directly from CanLII. But what the Court says here at paragraph 151 is:

> ...the combination of the By-laws and the operational policy, as they apply where there is insufficient shelter in the City for homeless people, is properly characterized as "law"...

That's at paragraph 151, in the middle of the page right there. And that is for the purpose of a Section 52 declaration, which is also being sought in this case.

So, it's not possible to consider the By-laws and protocols and processes separately. And I'll return to *Adams* shortly, but this is a key point. They must not just be considered as By-laws and policies together, but their impact needs to be considered together. They are, together, the law.

And so, to establish a breach of Section 7 of the *Charter* the applicants must satisfy this Court with two things. There's a - an analytical framework. First, that there is a deprivation of life, liberty or security of the person caused by state action. And I emphasize that a causal relationship is necessary, because there is no credible evidence of a deprivation of life, liberty or security of the person caused by state action in this case. And second, the applicants must also show that the deprivation is contrary to the principles of fundamental justice. If such a deprivation is established, the City would have the opportunity to demonstrate that it is a reasonable limit as set forth in Section 1 of the *Charter*, which my colleague, Ms. Shores, will address in due course. But this formulation of the analytical framework for Section 7 was relied upon in the *Shantz* case, that is extracted at Tab 241 of the Respondent's Compendium. And in that case the British Columbia Court cited to the Supreme Court of Canada's 2015 *Carter and Canada* decision. And we know that the right to life is engaged when the law or state action imposes death or an increased risk of death on a person. That's also from *Carter and Canada*, extracted at Tab 236 in our Compendium. But the City acknowledges that the state of being homeless can indeed cause harm to those experiencing it. And there appears to be a medical consensus about what those harms are, and how a lack of indoor shelter produces them. But it is one of the City's fundamental submissions in this case, that none of

the evidence adduced indicates that the City has caused anyone to be homeless or has caused those harms, much less death or an increased risk of it. Dr. Koivu's evidence instead demonstrates that encampments are ultimately not able to prevent the harms of living without indoor shelter. As she says, the physical and psychological deterioration associated with homelessness still happens in encamped individuals. And Dr. Koivu's evidence also indicates that the City's many programs and policies that seek to address homelessness are *Charter* compliant, that the City's first focused upon providing indoor shelter to homeless individuals. That was Ms. Ciriello's evidence. And because that does not - because that does prevent the harms associated with homelessness. Indoor shelter does prevent these harms. And at the same time, the City has never stopped homeless individuals who encamp in public parks, despite the risks from raising temporary overnight shelter over their heads, which is all the applicable case law suggests that Section 7 of the *Charter* protects. And that's due to its short term benefits. The City has also not prevented anyone from accessing services in the community. So, nothing the City has done has caused homelessness or caused the risks of homelessness to exist and that includes death. The City has fully complied with the existing case law stemming from *Adams*, and that was in place through each of the three time periods at issue in this case, including time period number two where the applicants make all of their

arguments. There has been no infringement of the applicants' right to life caused by the City. And the applicants have also not shown that the impugned By-laws or their manner of enforcement lead to a serious risk of harm or interference with any liberty interest or the security of the person of the applicants. Underlying both of those rights is a concern for the protection of individual autonomy and dignity. In *Carter and Canada* the Supreme Court indicated,

> Liberty protects, "the right to make fundamental personal choices, free from state interference" while security of the person encompasses, "a notion of personal autonomy involving control over one's bodily integrity, free from state interference."

And that extract is from paragraph 64 of the *Carter and Canada* case. It's extracted at Tab 236 of the Respondent's Compendium.

The evidence in this case, in my submission, does not demonstrate any state action interfering with liberty or security of the person at all. The enforcement of the impugned By-laws whether under the former protocol or under the encampment process, or indeed under the current protocol, has always taken place in a manner that complies with the *Charter*. No encampment removals have ever taken place such that homeless individuals could not shelter in public parks temporarily and

overnight. And that's a critical point because to date where public parks are concerned, Section 7 of the *Charter* has only been interpreted to protect a person's ability to erect such temporary overnight shelter. And this is the, the quantitative aspect as my, my friend put it, only on nights when the number of people experiencing homelessness in a municipality, out-number the available and accessible indoor shelter spaces. That is the *Victoria and Adams* holding. And I'll turn to that case shortly but that holding has been applied in many other B.C. cases and its remained essentially unchanged.

So, even if the applicants had established that there were insufficient accessible indoor shelter spaces in Hamilton on any given night, and in my submission they haven't and cannot, because they only look at the City-funded system; and even if they were able to connect that to any harm that they have suffered on such a night, which they cannot, because as we've reviewed, there's very limited evidence about the dates on which anything happened to the applicants. The evidence in this case would remain clear that no one, including the applicants, has been prevented from raising temporary overnight shelter in a public park, because encampment enforcement simply does not occur overnight or as night is approaching. And as such, there has been, demonstrably, no breach of the Applicants' Section 7 rights to liberty or security of the person. And so, the conditionality

of this ability to shelter in public parks is an issue for the applicants. The applicants have not shown that the trigger that would allow them to shelter overnight has ever been pulled. And so, in my submission, the Applicants' Section 7 arguments never really get off the ground. They don't get beyond the, the threshold, so to speak, of showing that the ability even existed. That's not to say that the City hasn't gone well above and beyond what the *Charter* requires, but in terms of the analytical framework, the applicants failed to meet that test. And so, turning to the main body of the encampment case law, it establishes a limited ability, as I've said, to raise temporary overnight shelter in public parks which may be protected by Section 7 on some nights subject to the evidence and the facts of a particular case. The leading cases as we've heard are *Adams* and *Shantz* from British Columbia. Strictly speaking, those are not binding in Ontario, but they have been considered, including in Justice Goodman's Reasons in the Injunction Motion in this matter. And so, in my submission, they do provide very helpful guidance regarding the extent of the Section 7 protection.

When triggered, the ability to encamp that is protected is specific and narrow. It's time limited and encampments of indefinite duration are very clearly not protected by that line of cases. And it is important I think to turn to the specific statement on that subject in the *Adams* decision. It's at, it's at paragraph 160 and it's extracted

at Tab 240 in our Respondent's Compendium, but I'll simply put it on the screen now. Paragraph 160, the British Columbia Court of Appeal says:

> There are some other difficulties with the order. We are told that the phrase "temporary shelter" has been a source of dispute. There has been disagreement as to whether "temporary" refers to the nature of the shelter's construction, or to the length of time that it is able to remain in place. The evidence in this case was directed at the need for homeless persons to erect temporary overnight shelter, in order to be able to sleep outside. The declaration granted should, therefore, refer to "temporary overnight shelter" rather than simply to "temporary shelter". This should clarify the intention that the City is required to allow shelters to remain in place only for the overnight period.

And that is the highest authority that we have on this subject.

The Court further explained in *Adams,* describing the trial judge's decision, that the decision did not grant the homeless a free standing constitutional right to erect shelter in public parks, and that's at paragraph 74 of the decision. As it says in that, in that paragraph which I'll scroll up to since I'm at the case now. As it says here:

> A finding of unconstitutionality must first be linked to a factual finding that the number of homeless people in the Municipality exceeded the number of available shelters beds in that Municipality on a given night.

So, the analysis of whether there are sufficient indoor sheltering spaces also considers the accessibility of those spaces, we acknowledge. And that's a consideration noted in the *Bamberger and Vancouver* decision from 2022. That's extracted in our compendium at Tab 242. I don't think it's necessary to turn to it. Accessibility is something that the Courts have looked at. The question is whether we are talking about actual or perceived accessibility. And in my submission, it is only actual accessibility that matters as Section 7 cannot be subject to or invite a subjective test, personal preferences would suddenly attract *Charter* protection if that were the case. And so, as we've noted in our review of the facts, the City-funded indoor emergency shelter system is free to access and has no actual barriers to use, only perceived ones. While the applicants claim that they are justified in declining indoor shelter or must encamp in public parks for numerous reasons, including not wanting to be separated from a partner or a pet, finding shelter rules restrictive or disagreeing with the policies at some shelters that do not permit drug use on site. The applicants have offered nothing to indicate that there, there has ever been a threat to their

life, liberty or security of the person as a result. And that's because the applicants have offered nothing suggestive of true inaccessibility. We've reviewed success stories in the evidence from several applicants who, when they put a pet in foster, indoor shelter was accessible to them. Similarly, illegal substances may well be easier to obtain in encampments, and shelters do have rules against theft and violence, but complying with the criminal law is not an actual barrier to shelter accessibility. And to this I would add that, in the City's submission, an actual barrier for it to qualify as rendering an indoor shelter space inaccessible to a person, that would need to present an equal or greater risk to their life, liberty or security of the person than remaining unsheltered would. That is what an actual barrier is, in my submission. And viewed in that sense, in that way, it becomes clear it's not a threat to a person's life, liberty or security of the person to accept shelter without a pet or partner, or to not be able to use drugs on site, or to have to refrain from violence or other criminal acts, or to follow other shelter rules that are in place for the safety of all. And in, in my submission, it's also clear the property rights are, by conscious choice, of the framers of the *Charter,* not included in it and not protected by it. In the *Shantz* case, the Court concluded that property and related economic rights are not included within *Charter* protections. That's extracted at Tab 241 and it's not disputed. There has been no recognition by any Court in

Canada that the *Charter* creates any positive obligations on a government in relation to social and economic interests. The Court has found - the Courts have found that the right to obtain the basic, what they call the basic necessaries of life, was not a foundational principle underlying the *Charter,* or the guarantees of Section 7, life, liberty and security of the person in particular. That's also at Tab 241 from the *Shantz* case.

In the *City of Kingston and Doe* decision of Justice Carter, the Court has held that:

> Encampment case law does not create or indicate that there exists any Section 7 protected right to shelter generally.

And the Court of Appeal for Ontario in the *Tanudjaja* case, concluded that:

> It's doubtful that Section 7 of the *Charter* confers a free-standing or general right to adequate housing.

And that's extracted at Tab 246 of the Respondent's Compendium.

So, in my submission it's clear that broad claims to a positive right to adequate housing, or housing in general, have been repeatedly considered by the Courts of Canada and been repeatedly rejected. The

Charter simply was not intended, consciously, to provide such rights.

Now, it's also the case that there are no authorities in any province in Canada, to date, that have recognized a *Charter* right to erect temporary shelter in public parks for a period longer than overnight. The applicants do try to suggest otherwise, and they rely on the *Region of Waterloo and Persons Unknown* decision of Justice Valente, but that case only recognized a right to erect temporary shelter beyond overnight - beyond overnight hours, where the encampment in question was located not in a public park but in an unused municipally owned vacant lot. And Justice Valente's words on this subject are helpful. I would propose to take you to them briefly. They are at Tab 24 of the Respondent's Compendium, page B1-2350. Oh, I may have that Tab number wrong. Just let me confirm that. That may just be a typo. Yes, it's Tab 247. I thought that sounded wrong. Tab 247. There's an extract from the *Region of Waterloo* decision at paragraph 30 - oh, I'm sorry, I should say at paragraph 105. And he states in this paragraph starting at I think the second sentence:

> Like Chief Justice Hinkson found in *Shantz*, at para. 276, I find on the evidence that, "there is a legitimate need for people to rest and shelter during the day" but, unlike the British Columbia's Supreme Court's Chief

> Justice, I find that there is no need in the case of the Encampment to balance their needs with the rights of the Region's other residents. Unlike in *Adams* and *Shantz,* the Property is not a park or other space designed with the purpose of being enjoyed by the public at large. Instead, the Property is a vacant lot to be used by the Region as a temporary parking lot and lay down construction area at some undefined future date. Therefore, based on these facts, there is no need to consider how the impact of the Encampment residents sheltering overnight may impair the interests and rights of other residents in the Region.

So, Justice Valente's finding in *Waterloo,* that the particular By-law in that case, which is not at issue in this case, that it was unconstitutional, is clearly not binding on this Court. Whether via horizontal *stare decisis*, as the applicants have suggested, or otherwise. Because, not only are we dealing with different By-laws, and that was a basis on which Justice Carter in the *City of Kingston* has already distinguished the *Waterloo* decision from the By-laws that were before him. That's extracted at Tab 244 in our Respondent's Compendium where Justice Carter makes that finding. But *Waterloo* is also clearly distinguishable on its facts. Fundamentally, this case concerns public parks, not a single, disused vacant lot. And so, accordingly in this case as in *Adams* and in *Shantz*, that line of cases, there is a need to balance the

needs and rights of other City of Hamilton residents to use their public parks. So, I'd like to emphasize it's a fact-based analysis entirely. And the competing need of the public to use public land, public parks, simply didn't exist in *Waterloo*. That is the key difference between the *City of Waterloo* decision and the other line of cases or the main line of cases. That difference alone is enough to explain the different outcome in *Waterloo* and to dispose of the applicants' arguments on the subject. And so further, even if there were otherwise an infringement upon any interest protected by Section 7, the impugned By-laws and the City's, the City's enforcement actions, which have not included dismantling an encampment overnight at anytime, they're in accord with the principles of fundamental justice. And as Justice Carter put it in the *City of Kingston* decision, when discussing this analytical framework for Section 7, he said that the three primary principles of fundamental justice have emerged from the juris prudence. They are arbitrariness, overbreadth and gross disproportionality. That’s at paragraph 46 of the *City of Kingston* decision.

And so, in my submission, the impugned By-laws, alongside the former protocol encampment process and current protocol, which it has to be considered together, are neither overbroad nor are they arbitrary, and they are not certainly grossly disproportionate either. And these questions have in fact already been answered in the existing case

law. I note that the applicants are not relying upon arbitrariness, but overbreadth and arbitrariness have been considered together in a number of cases. And so, I propose to do so as well.

Turning to overbreadth, we have an extract from the Supreme Court's *Heywood* decision at Tab 248 of our Respondent's Compendium. But the, the majority of the Supreme Court in that case described overbreadth and its analysis this way:

> Over breath analysis looks at the means chosen by the state in relation to its purpose. A Court must consider whether those means are necessary to achieve the state objective. If the state, in pursuing a legitimate objective, uses means which are broader than necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

And that's the connection between overbreadth and arbitrariness that leads to them often being discussed together.

The Court of - the British Columbia Court of Appeal in *Adams* noted on arbitrariness, that a law is arbitrary where it bears no relation to or is

inconsistent with the objective that lies behind it. I don't propose to spend much more time on arbitrariness than that given that it's not being argued but that is the principle. And so, as in the *Adams* case itself there is an objective and a real connection in this case between the By-laws, the impugned By-laws and the protocols and processes that have been used to implement them and that have limited their enforcement. And that - between that and the City's goal of maintenance of the environmental, recreational and social benefits of urban parks, that is specifically a finding in the *Adams* case that that is a - an objective and real connection. I'll take you briefly to that, Your Honour. It's at page B1-2306, paragraph 119 of *Adams*. But there is an indication that that is a real and objective connection. And as *Adams* - the Court in *Adams* also put it at paragraph four and I'll jump up to that, page B1-2306, no 2301. I'm sorry. I'll just scroll up to it. It was noted by the B.C. Court of Appeal in that, in that paragraph, that:

> The City, on the other hand, bears the responsibility to the public to preserve public places for the use of all, and of necessity focuses on the wide public impact of any use of public places for living accommodation.

The City of Hamilton also must balance the needs of all. The City has carefully considered and calibrated the law in this case, the impugned By-

laws and enforcement remaining subject to the former protocol of the encampment process and the current protocol. It's only done what's necessary to pursue its legitimate objective which is maintenance of the environmental, recreational and social benefits of urban parks. This has included the fact that there have never been any encampments removed overnight or as night is approaching because the City has acted consistently with the existing case law. And in fact the City goes well beyond, at the current time, what Section 7 has ever required. *Adams* would say temporary overnight shelter must be respected on certain nights. As we've seen, there are times in the City of Hamilton where there is shelter available for all. But those times there wouldn't be any ability under Section 7 to shelter temporarily overnight. But on nights when that isn't the case, when there is no shelter available, the City has always respected that right, and in fact its gone well beyond it, allowing longer term encampments than simply temporary overnight.

Now, gross disproportionality asks a different question from arbitrariness and overbreadth. The question is, are the laws' affects on life, liberty or security of the person so grossly disproportionate to its purposes that they cannot rationally be supported? And it was noted in the *City of Kingston* decision, Justice Carter notes at paragraph 54, that the rule against gross disproportionality only applies in extreme cases

where the seriousness of the deprivation is totally out of sync with the objective of the measure. And so, in my submission this is not an extreme case. And this case is distinguishable from a case like the *City of Kingston*. In that case, Justice Carter noted that:

> A law that prevents the homeless from avoiding a serious risk of injury or death by erecting shelter overnight when there is nowhere else to go, is a law that has lost sight of its purpose and that it may grossly disproportionate.

That's at paragraph 86. And it troubles me not at all to say I agree with that. But it surely does not apply in this case. Like, *Waterloo*, *Kingston* was a case where the municipality was going to Court to seek authorization for clearing an encampment. The City of Hamilton is not doing that. Additionally, in both *Kingston* and *Waterloo,* it was demonstrated that there was insufficient indoor shelter space, at least at night. Indeed the municipality in *Kingston* admitted that its By-laws were in breach of Section 7. The applicants in this case cannot show that on any particular night there was no place for them to go. They also cannot show that they were ever prevented from erecting shelter overnight, due to the impugned By-laws. Whether under the former protocol, the current protocol or the encampment process in that two year window. That has simply never happened. And that is why the City of Hamilton certainly does

not admit that it is in breach of anyone's rights. There's also significant evidence in this case, that encampments are not safer than indoor shelter. The City-funded emergency indoor shelters operate, or how they operate, what rules they have in place and that encamped individuals are beginning to assert proprietary - proprietary rights over their encamped areas in some cases. Evidence of those things was lacking in the prior case law and noted to be lacking in *City of Kingston,* for example. And so the impugned By-laws, together with the protocols and processes, have at no time prevented anyone from avoiding a serious risk of injury or death by erecting temporary overnight shelter when there is nowhere else to go. The City, its By-laws and their enforcement - their enforcement policies have, have not lost sight of their purpose. Purpose has been kept in mind. And they are not grossly disproportionate to the City's goal, which is an important goal and recognized in the existing line of cases of maintaining the public parks for all. And so, in my submission, there - the By-laws and the protocols and processes are not disproportionate at all, let alone grossly so. The City's response has been proportional. And so, in my submission, the applicants have simply failed to demonstrate that the impugned By-laws are overbroad or arbitrary, or grossly disproportionate or otherwise contrary to the principles of fundamental justice. And there has been no deprivation of life, liberty or security of the person or the applicants, caused by the City in any manner let

alone contrary to the principles of fundamental justice. That concludes my portion of the submissions, Your Honour. And I note that it is at 11:30. Ms. Shores would be carrying on from this point. And I wonder if this is appropriate for the morning break?

THE COURT: Yes. 20 to - ten, ten minutes before noon. 20 minutes.

COURT SERVICES OFFICER: All rise.

MADAM REGISTRAR: Court will recess for 20 minutes.

R E C E S S

U P O N R E S U M I N G:

MADAM REGISTRAR: Court is back in session. You may be seated. Good morning again, Your Honour.

THE COURT: Thank you. Ms. Shores.

B. SHORES: Good morning, Your Honour. So, as Mr. Diacur indicated, I'll be continuing the City's submissions, beginning first with addressing the, the law and the City's position on Section 15 of the *Charter*.

So, in order to establish a breach of Section 15 under the *Charter*, the applicants must satisfy a two-part legal test, this is well established. It's summarized in the decision *R. v Sharma* and also set out in the Supreme Court decision *R. v Kapp*. Both of these are cited in the City's Factum. And I'll be referring primarily to *R. v Sharma*, which is again the Supreme Court decision.

The two part test requests, first, does the law create a distinction based on an enumerated or analogous ground? And second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping? A person claiming a Section 15 breach has to satisfy both parts of that test. And this is again from *Sharma* at paragraph 38. Turning first, I will - or I'm sorry, I will discuss first, the first step, and why the applicants' claim does not pass at the first step. And next I will discuss the second step and why the applicants' claim does not pass at the second step either.

So, at the first step of the Section 15 analysis the question is whether the law or state action creates or contributes to a disproportionate impact on the claimant group based on a protected ground in comparison to other groups. And this is all again from the *Sharma* decision at paragraph 40.

I'll discuss protected ground first. The applicants have acknowledged that homelessness is not a protected ground under Section 15 of the *Charter*. The leading case on that point is the Ontario Superior Court decision in *Tanudjaja,* which is - again, is cited in the City's Factum, and that decision was upheld on appeal to the Court of Appeal.

Now, the Court's analysis in that decision is still noteworthy here for two reasons. First, we submit that the applicants' argument is essentially still

that people who experience homelessness includes greater representation of enumerated groups such as women, indigenous people and people who live with disability, and thus the applicants being composed of greater numbers of these groups are being discriminated against as a whole. And if you look at the relief sought in this application, the applications don't - the applicants don't distinguish between which applicants are purporting to have sustained a Section 15 *Charter* breach versus those that don't. The group of applicants is not composed solely of people from these groups. What is the common uniting factor among the group of applicants is that they all experience or have experienced homelessness. So, despite how the applicants have framed their argument, being that as a group they are collectively alleging a Section 15 breach, that is really the only logical way to interpret their argument. But second and more importantly what's key about the *Tanudjaja* case is the reasoning that informs the analysis on the Section 15 issues. And for this I'm going to take the Court to a quote from the *Tanudjaja* case and this is in the Respondent's Compendium at page B1-2343. It starts at paragraph 135 and I'll start in the middle of the page there. In this passage, Justice Lederer, in describing the expansive group that would be captured if homelessness were to be considered an analogous ground he comments, starting towards the end of that paragraph:

> What discrimination can there be when all of

> the groups identified as being subject to this discrimination, taken together, include virtually all of us? This serves to confirm that the issues raised by the application are not breaches of the *Charter,* but a general concern for those who live in poverty and without appropriate housing. This is an issue that should disturb us all. This does not mean that it is an issue that belongs in this Court.

Justice Lederer's comments are completely on point here. While it's only natural to have concern for those who live in poverty and the vulnerable groups who face poverty, that on its own does not make it a *Charter* issue to be dealt with in the Courts. Bearing in mind this reasoning, I will address the rest of the two step Section 15 test and explain why considering the protected groups, referenced by the applicants, women, indigenous people, people who live with disability and people who belong to more than one of these groups, why the Section 15 claim still cannot succeed.

So, I'll return again to the first step of the test and this time dealing with disproportionate impact. And again, if we look at paragraph 40 of *Sharma*, this requires disproportionate impact in comparison to other groups. And I'll be referring to *Sharma* a few times and so rather than dealing with the various tabs of the Compendium, I've just got a copy of the case on CanLII here that I've placed up on the screen. Paragraph 40 of *Sharma* makes it

clear that it is not sufficient merely to show that a law has an effect on a protected group. And this is echoed in *Sharma* again at paragraph 71 where the Court states:

> While the situation of the claimant group is relevant at step one, it is not sufficient on its own to establish disproportionate impact.

There's also a helpful summary of the factors to consider at this stage in the *Metro Taxi* case and that's cited in the Applicants' - or I'm sorry in the Respondent's Factum. The particular paragraph in question is paragraph 282. *Metro Taxi* is a Superior Court decision, but the portion that we're relying on is just where the Court provides a helpful summary of the principles enunciated in *Sharma* at paragraphs 40, 41 and 71 in *Sharma.* So, in *Metro Taxi* the Court summarizes first:

> The focus at this step..." the first step of the test "...must be on 'disproportionate impact', not the historic or systemic disadvantage..." They also explain "...We must consider the difference between 'impact' and 'disproportionate impact'." Further, "It is insufficient to only show that a law impacts a protected group."

Also, and this is again something summarized in the *Metro Taxi* case, which I've got a cite here again

just using CanLII for some expediency. We go down to paragraph 299:

> Disproportionate impact cannot be assumed from the fact that the law affects a protected group.

So, as Justice Smith is explaining here:

> It is incorrect to say that anything that has an adverse impact on the class will have a disproportionately negative impact.

In that same paragraph, His Honour goes on to describe:

> The s. 15(1) analysis is not limited to showing that there is merely an adverse impact; there must be a disproportionate impact.

And again, this is echoing *Sharma* at paragraph 40, which again says:

> It's not sufficient merely to show that a law has an affect on a protected group. More over, the inquiry requires a comparison of the actual impact of the law on members of the claimant class, to the actual impact of the law on others in the social and political setting in which the question arises.

And again, this is a summary from *Metro Taxi* at paragraph 284, which I'll just scroll to here. Further, and, and this is again helping the - providing the Court with guidance as to how to approach the analysis on Section 15. Causation is a central issue. This is from *Sharma*, specifically at paragraph 42. And so the Supreme Court in *Sharma* explains that:

> To prove discrimination, the claiming party must present sufficient evidence to prove the impugned law, on its impact, creates or contributes to a disproportionate impact on the basis of a protected ground.

The Court goes on to describe:

> Causation is thus a central issue.

And the Court elaborates further, in *Sharma* at paragraph 44, agreeing with the Supreme Court's earlier decision in *Symes v. Canada* in which:

> ...the Court stressed the importance of distinguishing between adverse impacts "caused" or "contributed to" by the impugned law and those which "exist independently of" the impugned provision or [the] state action."

Again, causation, it's a critical component under the step of the test.

This is also echoed again in the *Metro Taxi* decision at paragraph 286 where Justice Smith explains:

> If a differential impact is found, then it must be determined if the difference is based on an enumerated or analogous ground. Evidence of broad and statistical trends of historic disadvantage is not sufficient for this case.

Now in this case, there's no evidence that the By-laws have resulted in a disproportionate impact to a protected group. At best, the applicants' evidence is that there is impact to a protected group, and that there are more people in these groups represented in the population of people living with homelessness.

Taking first the applicants' argument that comparatively fewer shelter spaces mean there is disproportionate impact on women. First of all, if we're considering disproportionate impact compared to others in the affected group, on the evidence we would submit that it's far from clear that there is even a difference for women. First of all, the evidence shows that there are capacity pressures in all sectors of the City-funded shelter system. And for this I'll refer to Mr. Mastroianni's Affidavit, which can be found at page A8801 in Case Centre, specifically paragraph 28, where Mr. Mastroianni with the City of Hamilton, describes that as of the date of his Affidavit from June 24 to that time,

the men's emergency shelter, the women's emergency shelter and the family emergency shelter at that point in time, all of those sectors were at or over 100 percent.

Similarly, if we look at the demographics of people who are unsheltered based on the Housing Focus Street Outreach client list, and this is set up - set out in the Affidavit of David Buckle, at page A8291, going down to paragraph 11 of Mr. Buckle's Affidavit. He describes, of the 276 people on the Housing Focus Street Outreach Team client list from July 1 to December 31, 2023 - and again, this is a snap shot in time - but of 276 people, 111 identified as female. And doing some quick math, that's roughly 40 percent, which suggests that proportionately fewer women are represented in the homeless population that housing focus street outreach interacts with. However, even if we accept the premise that the shelter capacity pressures mean that more women proportionately are living unsheltered and again this would be an assumption, this is essentially just an argument that women are over represented in the group of people who are affected by the By-laws, which the Supreme Court has clearly enunciated in *Sharma* is not sufficient to satisfy the first step of the test. And again, that's *Sharma* at paragraph's 40 and 71. In other words, the applicants are inviting the Court to infer that because there are comparatively fewer indoor shelter spaces for the women's sector, women must be over-represented in

the population of people affected by the By-law. Otherwise the applicants' submissions on that point simply amount to criticism of the shelter system in Hamilton, which is not an issue for the Court to decide in this case.

The same goes for the applicants' arguments regarding the other protected groups. For example, with respect to disability, the applicants suggest that people who use substances are justified in choosing not to go to shelter because they cannot use substances while on premises and are thus over represented in the group of people who may be affected by the By-laws. Similarly, the applicants argue that indigenous people are demographically over represented in the homeless population and thus also over represented in the group of people who may be affected by the By-laws. That is not what the first step of the Section 15 test requires. That is not showing disproportionate impact in comparison to other groups. And again, Section 15 requires more than showing a group is over-represented among the people affected by the law. Put another way, demographics cannot on its own establish a *Charter* violation.

Now, the *Sharma* decision also speaks to the evidence that is required, and this can be found at paragraph 49 or beginning at paragraph 49 of *Sharma*. And so, the Court describes that the evidence is required speaks to the outcome that the impugned law or policy has produced in practice.

And at paragraph 50, the Court goes on to describe, that while the evidentiary burden at the first step should not be undue, it must be fulfilled.

The applicants' evidence does not speak to any particular outcomes, specifically for protected groups and in practice from enforcement of the By-laws. The applicants' evidence speaks to historical or systemic disadvantage and demographic over-representation. But that is not showing the outcomes that the impugned law or policy has produced in practice.

Now, I'll address a few of the points raised specifically by the applicants in their submissions on this point.

Regarding indigenous people. The applicants reference the evidence of Audrey Davis about housing discrimination against indigenous people. But housing discrimination against indigenous people does not relate to acts of the City's - the City or the City's By-laws or processes.

Similarly, the applicants reference with respect to the circumstances of Ashley MacDonald, the, the woman who had housing but nevertheless chose to spend some of her time in a tent. Ms. MacDonald is an indigenous woman, and the applicants' referenced Audrey Davis' evidence about the concept of becoming street-entrenched. However, there's no indication that the, the phenomenon of becoming

street-entrenched is particular to indigenous people. And certainly there's no evidence suggesting that this is related to or an outcome of the By-law.

Now, there's a related point with respect to gender expression, and that's with respect to one of the applicants, Ms. Pierre, who is a transgender woman. Ms. Pierre gave evidence in her June 7, 2022 Affidavit, which I'll briefly take the Court to. So, this is at page A4960 and at paragraph 17 of Ms. Pierre's Affidavit she describes that she has been able to stay in both men's and women's shelters. Although she does understandably explain that this is difficult for her. She had described an occasion on which she suggests that she was turned away from a men's shelter and claims that this was due to her gender expression. But if we look to where this was addressed in cross-examination, so this is at page A4968, question 58 begins or continues on the - the material part rather, sorry, is the answer that starts at the top of page 17. Ms. Pierre explains:

> Those words weren't used exactly but the suggestion was heavily implied and I could tell he wasn't going to be of assistance.

Referring to the person who allegedly turned her away for her gender expression.

THE COURT: Turned her away from what?

B. SHORES: The Salvation Army Booth Centre, one of the shelters.

THE COURT: From a men's shelter?

B. SHORES: From a men's shelter. Correct.

THE COURT: Okay. And what does all this show?

B. SHORES: Well, all of this goes to the, frankly, the concept that the applicants haven't met their evidentiary burden. These arguments raised by the applicants, all funnel towards the point that people in protected groups are demographically over-represented in the group of people affected by the By-laws. But none of that amounts to showing a disproportionate impact of the By-law on a protected ground.

Now, I'll address another point from the applicants, because the applicants in their submissions have suggested that this is a case where the, the state, referring to, I believe, the City, has information that the applicants haven't been able to put before the Court. And this argument should be rejected for three reasons. First, it appears from the context of that statement made in the applicants' submissions, that the applicants were - what they were referring to was demographic data. And as I've explained its not sufficient to merely show that a group is over represented among the people who are affected by the law, so that wouldn't have assisted the applicants in proving their Section 15 breach on the first step of the test. Second, there's no indication whatsoever that the City somehow has

evidence that would support the applicants' Section 15 claim. This is speculation. It's completely unfounded and it should be disregarded. Third, the applicants have had over three years, since 2021, to marshal their evidence and to present their case as they see fit. They have eight expert witnesses including researchers and many more fact witnesses, in addition to the evidence of the applicants themselves. Its completely without base to suggest that the applicants evidence does not meet the burden of proof and that this would be - or sorry, that if the applicants' evidence doesn't meet their burden of proof, that that's the City's fault.

Now, I also want to suggest or to address the suggestion that women are subject to increased rates of violence and that this suggests a disproportionate impact. It does not and the reason is because it is not a disproportionate impact of the By-law. The evidence is clear that the increased risk of violence as a result of living with homelessness and for this I'll take the Court to the cross-examination of Dr. Hayman. Dr. Hayman suggested that homeless women are subject to increased rates of violence. However, on cross-examination, the source that she cited was somewhat more nuanced. And so the passage in question begins at page A6221 using the master pagination. Question five, the exchange in question begins at question 75 at the top of page 29. So, we'll start with the question:

Q. Paragraph 10 of your Affidavit I'll next refer you to. The last sentence you state, 'overall houseless women are also at higher risk for sexual and physical assault than houseless men.'

I then took her to the source she cited for this and the material point of the line in questioning picks up at question 78, which continues on to page 32.

Q. So the authors have qualified the statement but you'll agree with me that they're identifying that their descriptive analysis in the study did not support previous findings that homeless women experience higher rates of victimization than the harmless men, other than sexual violence, right?

A. I would have to go back and read the paper in more detail to definitively confirm that, but from what you've shown that, that seems to be an accurate understanding of the text that you've shown.

Now, again....

THE COURT: Well, that's just what it says. It says they, they may not have a higher rate of violence, but they have a high rate of sexual violence.

B. SHORES: Right. Which I'll....

THE COURT: Which is what you would expect.

B. SHORES: And I'll turn to that in a minute. That is actually - or not a minute, that is the next point that I'll raise. And so, that's at question 80, so continuing on the same page. So, question 80:

> Q. Well, to tie it back to the statement in paragraph 10 of your Affidavit, you certainly weren't relying on the study to make a proposition that sexual or physical assault risk for women changes based on whether they're in an encampment or not?
> A. I was not relying on that paper to make a statement about whether they are in an encampment or not, that is correct.

This is a risk of living with homelessness, not caused by the City of Hamilton's By-laws.

This also contextualizes Ms. Uppal's evidence, referred to by the applicants, regarding her observations of harassment and violence directed at women outside Carol-Anne's Place. This evidence does not establish that these incidents are due to enforcement of the By-laws as opposed to the unfortunate but recognized risk that is associated with experiencing homelessness.

Now, beyond the points that I've just described and taken the Court through, the applicants have not identified what they say the impact is of enforcing the By-laws on people in the protected groups, let

alone that it is disproportionate in the way required under the first step of the test. Or how it compares to other affected groups. Similarly, the applicants' evidence does not show that the By-laws have effected the protected groups differently than anyone else affected by the By-laws. There's no evidence that the By-laws were enforced differently whether on paper or in practical effect against women, indigenous people, people with disabilities or people with more than one of these traits. There's no evidence that when the By-laws were enforced, the effect was different for people in these protected groups. And for these reasons, the applicants' claim fails on the first step of the *Sharma* test. Because both steps must be satisfied the applicants' claim under Section 15 fails in its entirety. But as I will explain, the applicant's claim also does not pass based on the second step of the test. So, the second step of the test is disadvantage. In particular, the Court is to consider whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

And again, I'll return to *Sharma*. As with other components of a Section 15 test there are specific factors to consider. And the Supreme Court in *Sharma* at paragraph 51 states at the very outset of its discussion of the second step of the test:

> It has never been the view of this Court, that every distinction is discriminatory. Here, the

> claimant must establish not just a distinction but that the impugned law imposes burdens or denies benefits in a matter that has the effect of reinforcing, perpetuating or exacerbating the groups disadvantage.

And at paragraph 53 of the *Sharma* decision, the Court goes on to describe that the Courts may, in conducting this analysis, consider whether the factors of stereotyping or prejudice, or arbitrariness - or it may consider the factors of stereotyping or prejudice or arbitrariness. So, with respect to stereotyping or prejudice, this invites the question of whether the effect furthered stereotypes and prejudicial notions, and in so doing, perpetuating - perpetuated the disadvantage that the group experienced.

With respect to arbitrariness, the Court cited the *Taypotat* case and described arbitrariness as:

> ..."arbitrary - or discriminatory - disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a matter that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.

And so, if we go down to *Sharma* in paragraph 55. It's correct that *Sharma* provides that evidence

under the second step may include judicial notice, and that a:

> Court[s] may infer that the[a] law has the effect of reinforcing, perpetuating, or exacerbating disadvantage...

But that inference must still be "supported by the available evidence." And in here, there's no evidence from which to make any such inference.

When we consider the evidence proffered by the applicants, there simply isn't any about what the groups disadvantages are in these circumstances, or how the By-laws are alleged to have reinforced, perpetuated or exacerbated those specific disadvantages particular to those groups.

So, to summarize, the applicants have not lead any much less sufficient evidence that creates any distinction that the By-laws may have made. Or sorry, that any distinction that the By-laws may have made on these groups creates a disadvantage by perpetuating prejudice or stereotyping.

Now, *Sharma* also directs Courts to consider, and this is at paragraph 56, the legislative context. And here the relevant considerations include and this is set out at paragraph 59:

> ...the objects of the (legislative) scheme, whether a policy is designed to benefit a

> number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors.

It's also important to note, and this is at paragraph 63 of *Sharma,* that:

> ...s. 15[1] does not impose a general, positive obligation on the state to remedy social inequalities or to enact remedial legislation.

That's not the legislative context that the Court is referring to. The Court goes on to explain in the middle of that paragraph:

> Were it otherwise, Courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers.

Now this reinforces Justice Lederer's statement in *Tanudjaja,* that I took the Court to at the beginning of my discussion. To paraphrase, just because one has a sincere and understandable concern for those who live in poverty and without appropriate housing, it does not mean that it's on the Courts to provide the appropriate remedy. Now here, the legislative context necessarily includes the protocols and processes and place at the time as well as the By-law itself. The object of the

parks By-law and I'll just briefly take the Court there. So, this is found in the text of the By-law, page A4400 at the very bottom of that page. The object of the parks By-law according to the By-law itself is to provide for the maintenance, operation, management and regulation of municipal parks. And as well, with reference to the *Municipal Act*, as I cited at the beginning of my submissions yesterday, this includes the economic and social well-being of the City, the health, safety and well-being of the people and property in the City and the public assets of the municipality. And again that's Section 10(2) of the *Municipal Act*. So, here the policy is designed to benefit a number of different groups, namely, the general public in the City of Hamilton, housed and unhoused. It also involves the allocation of resources, namely, the public lands and the funding to maintain them. In light of this legislative context, the By-laws as enforced in conjunction with the applicable process, was not discriminatory. And to use the language of *Sharma*, the lines that were drawn were mindful of those factors. Beyond this, the applicants' evidence does not at all show that the By-laws reinforced, perpetuated or exacerbated a disadvantage felt by women, indigenous people, people living with disability or people at the intersection of more than one of those groups. For these reasons, the applicants' Section 15 claim fails on the second step of the test as well.

Now, I'll next turn to the fifth question for the Court to consider, which is Section 1 of the *Charter* in the *Oakes* test.

The City's position, and this was touched on a little bit by Mr. Diacur earlier in his discussion of Section 7. But the City's position is that if there has been any breach of Section 7 or Section 15, it is justified under Section 1 of the *Charter*.

So, this is an alternative argument, as I've indicated. It is the City's position that neither Section - nor Section 7 nor Section 15 have been breached. So, Section 1 of the *Charter,* and I'll just take the, the Court to the excerpt in the Factum, although it's a little bit superfluous as it's very well established. Section 1 of the *Charter* provides that the rights and freedoms set out in the *Charter,* are subject only to such reasonable limits prescribed by law, as can be demonstrably justified in a free and democratic society. And if an infringement is found, the burden is on the infringing party to justify the infringement under Section 1, and that's by way of the three park *Oakes* test. And that's beginning in the excerpt on the screen here, which is in the Respondent's Compendium at B1-2187.

Now, the *Oakes* test, as I said, is well established and I don't propose to spend much time reiterating it. And this is also detailed in the City's Factum. The first two factors on the *Oakes* test

are easily dealt with here, we submit. First, prescribed by law. There's no issue that the provisions of the impugned By-laws are prescribed by law. With respect to pressing and substantial purpose, we can look to the B.C. cases, *Victoria v. Adams* and *Abbotsford v. Shantz*, both of which have accepted that preservation of parks or managing public lands are a pressing and substantial purpose. And we submit there's no reason to depart from that reasoning, and that park of the *Oakes* test is satisfied here too. *Oakes* next invites a consideration of the proportionality factors, rational connection, minimal impairment and proportionate effect. With respect to rational connection hereto the *Adams* and *Shantz* cases are instructive. They accepted that limits on camping were rationally connected to the purpose of the parks By-law. And we submit that the same reasoning can be applied here.

And so, again, the *Victoria v. Adams*, these, these are excerpted in the Respondent's Compendium. Just take the - take the Court there briefly. But not to that page. So, this is page B12296 in *Victoria v. Adams* starting on paragraph 203, continuing onto paragraph 204. And the Court describes that what sort of shelter homeless people will be permitted to erect is encompassed in the issue of urban encampments. And in that sense, the provision has a rational connection to the purpose identified by the City. And then similarly in the *Shantz* decision, so this is excerpted again in the

Respondent's Compendium, page B1-2318, starting at paragraph 241. The Court in *Shantz* agreed with *Adams*, and notes:

> I have come to the same conclusion in these proceedings. There is a rational connection between the prohibitions and the impugned By-laws and the objectives in the impugned - sorry the objectives the impugned By-laws purport to me.

The key factors under the Oakes test, in this case are the last two of the proportionality factors, minimally impairing and proportionate effect. And so, hereto we can look to the case law to determine what minimally impairing is. In other words, how the By-laws in *Adams* and *Shantz* were read down, because they were read down to the extent that they prohibit temporary overnight shelter when there were insufficient shelter beds available. So, if we look at *Adams* - and for this I'll just go to the CanLII, which I've got up on the screen here, it's a little bit easier. So, the read down is at paragraph 166(a) in the *Adams* appeal decision. The By-law was read down to be declared inoperative and so far - and only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the City of Victoria. And the similar finding is in the *Shantz* decision at paragraphs 278 and 279. So, there's clear guidance from the cases that are

authoritative on this point, that that is where the line for minimally impairing is drawn. And if we look at the City of Hamilton, whether under the 2020 protocol, the current protocol or the timeframe with the 2021 process, that six step process in issue, people have been permitted to take shelter overnight, which is what *Adams* and *Shantz* concluded the minimally impairing response would be. And I think it's important also to point out that in the City of Hamilton the permission for people to take shelter overnight or the, or the practice to allow people to take shelter overnight wasn't contingent upon shelter capacity hitting any particular number becoming over capacity. It was allow at all times in this time frame. So, it's actually slightly more than what the minimally impairing threshold as enunciated in *Adams* and *Shantz* would have required. I'll also briefly address the applicants' arguments that the former 2020 Protocol and the current protocol, should be considered to set the bar for what would be minimally impairing. Because as I've just explained, those processes go further than what the law requires. They permitted encamping for much longer than overnight and again we're not contingent upon any sort of shelter capacity. And so, the submission there is that just because the City, in its legislative function, has seen fit to provide a regime that is more permissive than what the minimally impairing amount has been articulated to be, that doesn't mean that it moves the bar for what minimally impairing is, it just means that the

City went above and beyond what would be required. And so, for the same reason we submit that with respect to the last of the Oak factors that the By-laws in question were, along with the protocols and processes, proportional to any deleterious effects. Again, they permitted temporary shelter overnight and provided for multiple days notice and supports to be offered as part of the enforcement process.

And so, for all of these reasons we submit that, again this is an alternative argument, but we submit that if a Section 7 or Section 15 breach were to be found they would be justified under Section 1 of the *Charter*.

Now, I'll next address the remedies sought by the applicants, starting with the claim for declaratory relief. Most of my argument in this Section is going to focus on the issue of mootness that is set out in the Respondent's Factum. And with respect to mootness, the position here is fairly straight forward. As the applicants claims are in their own description retroactive, the applicants' request for a declaration of invalidity or inapplicability is rendered moot. Further, the authorities are clear that particularly in *Charter* cases, pronouncement should not be made when the foundation upon which the proceedings were launched, has ceased to exist. So, I'll start with the test for mootness. And this is in the case *Borowski v. Canada*. This is a 1990 - 1989 case of the Supreme Court, which I only mention because

that was before paragraph numbering became a thing. And so, for ease of reference, I'm just - I've got a .pdf with numbered paragraphs that I pulled from Lexis Nexus. I'll give the, the page number citations to the official reporter as well. But just for purposes of orienting my argument it will be easier to refer to the paragraph numbers in this decision.

So, the reason, or sorry, the, the, the test for mootness and, and the reason for it is they're both clearly enunciated in the *Borowski* decision. So, if we go to page 353 of the *Borowski* decision. Which I think is actually not highlighted here so I'll use the version that's in the - in case lines in the Respondents excerpt, just, just for this one portion. So, this is page B12422 where the Court begins its discussion of mootness. *Borowski* sets out a two step test for the mootness analysis. First, a Court will consider whether the tangible and concrete dispute has disappeared and the issue has become academic. And if so, whether the Court should nonetheless exercise its discretion to hear the fact specific case. To be clear, and I reference this in my opening but I want to make it actually clear what the City's position is. The factual infringement as to whether there was a past *Charter* infringement for purposes of assessing the applicants' claim for *Charter* damages, we're, we're not saying that's moot. It's the City's position that there was no past *Charter* infringement, but the City does not take the position that the

question itself is moot, because of course the issue of *Charter* damages is in dispute. The mootness argument pertains to the applicants' claim for a declaration of invalidity or inapplicability as relief, which is something different.

So, turning first to the first step of the *Borowski* test, whether the tangible and concrete dispute has disappeared and the issue has become academic. To that question the applicants are seeking declaratory relief for something entirely in the past. There is simply no live controversy. And so, in the *Borowski* decision, again going to the bottom of the same page. So, the bottom of B1-2422. Or, I'm sorry, I got ahead of myself here and I'm directing to the wrong paragraph:

> If subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present, live controversy exists, which affects the rights of the parties, the case is said to be moot.

And that's exactly the case here. With respect to the By-laws and the process that govern their enforcement in 2021 and up to 2023, there's no live controversy to be resolved.

Now, there's particular significance, as I indicated earlier, to mootness in the context of *Charter* claims. The applicants have repeatedly

invited this Court to make law on points that are not necessary to the resolution of this case. And as we've explained in our discussion of Section 7 and Section 15, this case can be determined on the base of the existing law. That's relevant to the mootness question, because the authorities are clear that not only is it not necessary to decide constitutional issues gratuitously, Courts should not do so. And for this we look to the Supreme Court of Canada case *Phillips v. Nova Scotia*, (Commission of Inquiry into the Westray Mine Tragedy). Now, this case is not in our Factum. We provided a copy to the applicants' counsel, I believe on Monday, and indicated that we may be referring to it. And so I'm going to take the Court to it now. For the record, the citation is [1995] 2 S.C.R. 97. And again, the case is *Phillips v. Nova Scotia*, (Commission of Inquiry into the Westray Mine Tragedy).

The material discussion here is at paragraph 6, which I've put up on the screen.

> This Court has said on numerous occasions that it should not decide issues of law that are not necessary to the[a] resolution of an appeal. This is particularly true with respect to constitutional issues and the principle applies with even greater emphasis in circumstances in which the foundation upon which the proceedings were launched has ceased to exist.

The basis for that reasoning in the *Phillips* case is explained in paragraph 9, which I placed up on the screen here.

> The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen.

And the Court goes on at paragraph 12 to rely on *Borowski* and its consideration of mootness.

Now, with respect to how this has been applied in encampment cases, we can look to the *Kingston* decision at paragraph 118. And again, just for convenience sake I've got it here up on CanLII. So, paragraph 118. Now, in that case, Justice Carter, in declining to make a finding on Section 15 of the *Charter* cited the lack of evidence in that case, and reasoned echoing the rationale in *Phillips*, that:

> A constitutional pronouncement in such circumstances would be unnecessary and may prejudice future cases.

Now, I'll, I'll just mention that the authority Justice Carter cites is the *Canadian Council for Refugees* case, but the *Canadian Council for Refugees* case in turn cites *Phillips*. The problem presented by unnecessary constitutional

pronouncements, is illustrated by the applicants' submissions that the Court should expand the law on Section 7 and Section 15. In the context of this retroactive claim, essentially what the applicants are asking is for the Court to change the law and then retroactively declare that the City breached rights that hadn't been established at the time. There's no reason to depart from the Supreme Court's established authority and rationale on why this should not be done. The same risk of future prejudice is present in this case. That is, creating law without the foundation of a live controversy to fully consider the implications.

Now, I'll turn back to *Borowski* and deal next with the second part of the *Borowski* test. And so, this is, this is where I'll get to the, the .pdf with the paragraph references. So, beginning at the discussion at paragraph 31, page 359 of the official reporter, *Borowski* identified three factors to consider in determining whether a Court should nevertheless exercise discretion to hear an issue. So, the first of these at paragraph 31 is:

> If the necessary adversarial relationships will nevertheless prevail.

We submit that's not the case here, where the claim is solely retroactive.

The second of these begins at paragraph 34 and that's at page 360 of the official reporter. And

that's concern for judicial economy. And the Court in *Borowski* goes on to describe a little bit more about what is meant by that in paragraph's 35 and 36, on the same page in the official reporter. So, that this can apply - paragraph 35:

> Where the Court's decision will have some practical effect on the rights of the parties notwithstanding that it will not the effect of determining the controversy which gave rise to the action.

Or at paragraph 36:

> In cases which, although moot, are of a recurring nature but brief duration.

So again, we submit that this is not applicable in the context of a retroactive claim for declaratory relief. Certainly there may be some rights of the parties with respect to the claim for *Charter* damages, but as I've explained, that is separate. The factual finding that the Court may be invited to make in the claim for *Charter* damages is separate from the claim for declaratory relief.

The key factor for this case and whether the Court ought to nevertheless exercise its discretion, is the third one. And so, the discussion there starts at paragraph 40. And that is awareness of the Court's function. And really what the Court is getting here is, is to a separation of powers

concern. So, at paragraph 40 here the Court says and I quote:

> Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

And on this point, the Supreme Court goes on to explain at paragraph 41, quoting from the law review article, "Re Skapinker and the Mootness Doctrine".

> The mootness doctrine permits the Court not to hear a case on the ground that there no longer existed a dispute between the parties, notwithstanding the fact that it is of the opinion that it is a matter of public importance. Though related to the factor of judicial economy insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian Constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

The Court - so that ends the quote from the law review article but quoting still from the case, paragraph 41 goes on:

> I prefer however, not to use the term

> "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

We submit that this factor combined with the clear directive explained in *Phillips*, that Courts ought not to make unnecessary constitutional pronouncements, weighs strongly against deciding to consider the relief sought, that is a declaration of invalidity or inapplicability.

Now, to the applicants' argument that the current protocol or By-laws may change, the answer to this is found in the fundamental considerations underlying mootness. That question is purely hypothetical. There's no evidence that if the City were to amend the By-laws or protocol, that it would be done in a way that does not comply with the *Charter*. The evidence before this Court shows that the City has been cognizant of rights in its policy decisions. And in any event, the separation of powers concern highlighted in *Borowski,* and *Phillips*, also answers for why the Court should not issue a declaration in the absence of a live controversy. To issue a declaration for no other reason than to prospectively constrain Hamilton City Counsel in exercising its law making function, would be to overstep the role of the Courts. In summary, the applicants' request for a declaration

of invalidity or inapplicability, should be declined because it is moot.

Now, as I'm addressing the declaratory relief sought, I'm going to briefly address the actual declaration sought by the applicants.

At the outset of this hearing, Your Honour asked the applicants to provide a draft judgment which would clarify precisely what the applicants are seeking in this application, and yesterday morning we received a draft order from the applicants. I don't believe its been uploaded to CaseLine, so I'll place it up on the screen here. And the second and third paragraphs are what I'll refer to. So, they're, they're two similar paragraphs. This and the proposed relief is:

> This Court orders a declaration that the ban on Encampments under the City of Hamilton's Parks By-law between August 30, 2021 and August 18, 2023, and or Encampment evictions during the same time period, violated Section 7 of the *Charter*.

And then the same language is mirrored in the next paragraph just with respect to Section 15 of the *Charter*.

Now, the relief sought by the applicants have changed over the course of this proceeding. The Notice of Application has been amended multiple

times and it appears now, based on this draft judgment, the Applicants' Factum and their submissions, that they applicants are now limiting their relief sought to the Parks By-law. Furthermore, the applicants only narrowed their Application to a claim related to the 24 month period in their Factum delivered on November 22nd of this year. So, during cross-examinations this summer the claim had not been narrowed. It's unusual for the remedy being sought by an applicant to be modified so late in the proceeding. But here, the relief sought still remains unclear from this draft judgment. I'll just mention here that we would ask for an opportunity to respond to the applicants' submissions on remedy if they raise new arguments on reply, but leaving that for now.

What I want to take the Court to in terms of the declaratory relief sought, the reference to a ban on encampments under the City of Hamilton's Parks By-law, is not an order capable of being implemented. The By-law in question does not provide anywhere for a ban on encampments. It doesn't appear anywhere in the language of the Sections that are being challenged. Nowhere do those provisions say that encampments are banned. And so, broad declarations of this sort are not consistent with how declaratory relief is granted under the *Charter*.

So, if we look briefly to the *Adams* and *Shantz* cases, and I propose just to deal with this briefly

and then perhaps it would be a good time to break for lunch or if Your Honour prefers we can...

THE COURT: That's fine.

B. SHORES: ...do that now.

THE COURT: No, that's fine. How much longer are you going to be?

B. SHORES: I've got about half an hour after this, this Section, which should take us to the afternoon break. Well, a little bit before the afternoon break.

THE COURT: Half an hour, okay. How long are you going to be Mr. Choudhry?

S. CHOUDHRY: Your Honour, we're - I think that the handoff that Ms. Shores has suggested is what we had hoped would happen.

THE COURT: Okay.

S. CHOUDHRY: And so, if Ms. Shores goes to the afternoon break, we would then take the break and we anticipate that reply would be an hour or so.

THE COURT: Okay.

S. CHOUDHRY: Is that, is that - if that's - subject to your questions and so forth, Your Honour.

THE COURT: Yeah. All right. Fine. Let's do lunch now then.

B. SHORES: Okay.

COURT SERVICES OFFICER: Order, all rise.

MADAM REGISTRAR: Court will recess for lunch until 2:15.

R E C E S S

U P O N R E S U M I N G:

COURT SERVICES OFFICER: Order, all rise.

MADAM REGISTRAR: Court is back in session. You may be seated. Good afternoon, Your Honour.

THE COURT: Madam Registrar, can I have an Endorsement Sheet.

MADAM REGISTRAR: I certainly can*[sic]*.

THE COURT: Yes, go ahead, Ms. Shores. Thank you.

MADAM REGISTRAR: You're welcome, Your Honour.

B. SHORES: Thank you, Your Honour. So, before the break, I was addressing the declarations sought by the applicants. And in keeping with that, I'll just next deal with the respondent's position, that the broad declarations that are sought by the applicants, are not consistent with how declaratory relief is granted under the *Charter*.

And so for that I'll be referring again to the *Adams* and *Shantz* cases, beginning with *Adams* at paragraph 158. And again, this is the *Adams* appeal. And again, just for convenience, I've got the CanLII version up on the screen. So, when the *Adams* decision dealt with the declaratory relief sought in that case, the Court relied on the Supreme Court of Canada's decision in, *Schachter v. Canada,* and quoted - and this is the part that's underlined in *Adams* here:

> Where the offending portion of a statute can be defined in a limited manner, it is consistent

> with legal principles to declare inoperative only that limited portion.

And this is echoed a little bit further down in the same decision, at paragraph 163, where the Court in *Adams* that:

> "...when it finds a law to be 'of no force or effect'" ...courts ought "...to craft a remedy that covers the 'extent of the inconsistency.'"

And similar authority weight against broad, or overly broad, in our submission, declarations as found in the *Shantz* decision. And so if we look at paragraph's 269 and 270, which are up on the screen here. In that case, the court relied on the Supreme Court's authority in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* also to decline an overly broad declaration there. So, at paragraph 269, quoting from *Doucet-Boudreau*, the Court states:

> ...in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance...

Again, another separation of powers concern. Continuing on at paragraph 270, no longer quoting from *Doucet-Boudreau*, the Court in *Shantz* states:

> In my view, the broad declaration sought by DWS with respect to the right to the "basic necessities of life" would be to effectively read in substantive rights under the *Charter* and thus usurp the role of the legislative branch.

We submit that the same reasoning applies here. There's no need to, this Court, to usurp the legislative function of the Municipality, and make a declaration that is broader than the wording of the By-law that is being challenged.

We submit, that any declaration, if made - which again, it is our position that it should not be for the reasons previously outlined - such a declaration should follow those made in similar cases and the authorities informing them, which is *Adams* and *Shantz*.

As I'm dealing with the draft judgment, I'd also just briefly mention the relief dealing with the monetary *Charter* damages sought, which is in the last paragraph of the draft, draft judgment, draft order I think it's termed. The relief regarding declaring - sorry. It's not declaratory relief. That the relief regarding the monetary damages is also premised on "violations" for their *Charter* rights, referring to the applicants. But again, here, this is - this does not delineate which *Charter* rights are supposed to have been breached,

which is also a concern for the reliability and implementation of the order.

This also reinforces my earlier comment about the framing of the Section 15 argument, that it is in fact an argument that the applicants, as a group of people experiencing homelessness, as opposed to discreet groups, constitute analogous ground. It certainly appears that the applicants, as a group, are alleging that their *Charter* rights as a whole, have been breached.

For the reasons that I have outlined, it is our position that the relief sought is unduly broad.

Now, I will now address the final question for the Court, which is the applicants' claim for *Charter* damages.

First and foremost, it is the City's position that there is no entitlement to *Charter* damages, for the simple reason that the City did not breach the applicants' *Charter* rights. As we previously explained, the City did not breach Section 7 or Section 15. And that, on its own, is sufficient to dispose of the claim for *Charter* damages. However, I will also address why, even if this court were to find that there had been a *Charter* breach, *Charter* damages under Section 24(1), would not be the appropriate remedy. And for this we look to the *Ward* Test. The leading authority is of course the Supreme Court of Canada's case, *Ward v. Vancouver*,

which sets out the four-step test for *Charter* damages. And this is in the Respondent's Factum and in the Compendium. First, the plaintiff must establish a *Charter* breach. At the second step, *Ward* provides that the plaintiff must establish a functional justification for damages. And that means that damages must serve a useful function or purpose in relation to the remedial purpose of Section 24(1). And that's paragraph 25 of *Ward*. That remedial purpose includes compensation for the individual harmed; vindication and deterrence.

At the third step, the responding party may establish countervailing factors, which include, or can include there being another adequate alternative remedy, or that there is interference with good governance.

And then at the fourth step, if the Court is satisfied that damages are warranted, the Court will then set the quantum of damages that is appropriate and just, if any, based on the need to put the plaintiff in the position he or she would have been, had the breach not been committed. As well as proportionality, considering the seriousness of the violation and fairness to all parties.

So, having reviewed those four steps, I will now explain how, in the City's submission, they ought to be applied in this case.

The first step with respect to establishing a *Charter* breach, as I've indicated, it is the City's position that the claim fails on this first test as there has been no *Charter* breach. Again, that is sufficient to answer the question of *Charter* damages.

We turn next though to the second step, which is whether there is a functional justification for damages. And here it is important to note that this inquiry necessarily requires considering causation. And that's clear from the Court's description of the purposes of damages. And this was enunciated in the Federal Court case, *Boily v. Canada*, and again, this is cited in the Respondent's Factum. And *Boily* explains that this imports the private law concept of causation. And again, that's on the basis that the Court's concern in *Charter* damages is similarly, like, similarly to private law, to restore the claimant to the position that he or she would have been had the breach not been committed. And so to quote from *Boily* at paragraph 196:

> In order for a claimant to be compensated for an injury they have suffered, the injury must have been caused by the infringement of a *Charter* right.

And that it's "proven on a balance of probabilities."

Now, the applicants had made an argument about causation and particularly had suggested that it is the material contribution test that applies in this case. It is of course the City's position that it is about four tests that applies here. And I'll refer to the Supreme Court of Canada's decision in *Clements v. Clements*, which is of course the case that sets out the distinction between the two. What I've put on the screen here - and the *Clements v. Clements* case, I should state, is not in our Factum. The applicants had indicated that they may be relying on it and provided it to us.

THE COURT: I'm - I know it.

B. SHORES: Okay. Thank you, Your Honour. Well then, the point here is merely that *Clements* provides that it is only in exceptional cases that the material contribution test is applicable, and that includes when there are two or more tortfeasors, and that, that may be the possible cause of the injury. And that is only to be applied in those circumstances where the claiming party, through no fault of their own, cannot differentiate between the two, but those multiple potential tortfeasors would have been potential causes on the "but for" test.

It's the City's position of course, that on either the "but for" or the material contribution test for causation, the applicants have not shown that the harms they allege are due to any breach of a *Charter* right by the City. Rather, the harms

alleged by the applicants are consistent with the harms and effects of living with homelessness.

Now, I want to emphasize this because these are *Charter* damages being sought and they must be proven to be caused by a breach of a *Charter* right. Put another way, the unfortunate reality, as made clear by the consensus among the experts, is that the harms and risk factors that the applicants rely on in support of their claims, are the harms and risks of living with homelessness that they would have sustained in any event.

THE COURT: Yeah, but that's part of the argument for, well, there was no *Charter* breach, right?

B. SHORES: Correct, Your Honour.

THE COURT: It's the same argument which you have made.

B. SHORES: Yes, but it's also the argument on causation.

THE COURT: Yeah. Okay. I've got it.

B. SHORES: If I may briefly take the, the Court through the factual allegations that we rely on in support of the - our submissions on causation. And these are detailed in the City's Factum at paragraph 62. There, there's two points of evidence from the, from the expert witnesses, and it's actually the applicants' experts, just on the causes - or, I'm sorry, the health sequelae of living with homelessness. And so this is Professor Hwang's Affidavit. This is page A6303. Professor Hwang sets out a summary at paragraph five, continuing on to paragraph six, about the health

consequences of homelessness. And if you look at the articles that he's referring to and cites in this paragraph and appends as Exhibits, it's clear that he's referring to homelessness overall, not distinguishing between sheltered and unsheltered homelessness. And in this article, or I'm sorry, in this paragraph, citing these articles, Professor Hwang lists that people who become homeless, often has physical and mental health problems which worsen over the period of their homelessness. He highlights the near impossibility of maintaining health-promoting behaviours and barriers to accessing appropriate health care as a risk of living with homelessness. He highlights increased risk of violence and victimization while living with shelter - living in shelters and on the street. At paragraph six he goes on, or I'm sorry, the end of paragraph five on to paragraph six, he describes frostbite and hypothermia as major problems for people who experience homelessness. And at paragraph six, he details....

THE COURT: I've heard all this.

B. SHORES: I'll move on, Your Honour. The, the point here is....

THE COURT: I mean, if I agree with you on this, you've got no problems, and if I don't, you do.

B. SHORES: Well, on the second step of the test, and I can deal with the third and fourth steps. Your Honour, I do - the point to make here, and I don't want to belabour this or waste the Court's time, but the point....

THE COURT: Or take a hint.

B. SHORES: Fair enough, Your Honour. I'll move next to the third step...

THE COURT: Right.

B. SHORES: ...of the test, which is countervailing factors. Regarding - so, so there's, there's two main considerations at the third step. First one is adequate alternative remedy, and that's the *Power* case. So, at paragraph 45 of *Power*, the Supreme Court gives a general presumption against combining remedies under Section 24 and Section 52. So, that's *Charter* damages and declarations. I've explained that previously.

THE COURT: Where's the *Power* case?

B. SHORES: So, *Power*, I think I've got it up here. The next window here. So, this is *Canada (Attorney General) v. Power*, and the cite is 2024 SCC 26.

THE COURT: Okay.

B. SHORES: So, paragraph 45 is the paragraph, and that's on the screen here, which deals with the presumption against combining remedies.

THE COURT: Yes.

B. SHORES: And so, in essence, *Charter* damages, according to the Court here, are only available:

> "...where a declaration would fail to satisfy the functional need for compensation, vindication or..." meaningful deterrence.

And the City's position on this particular point, adequate alternative remedy, is an alternative argument. As I've outlined previously, we submit that, among other things, a declaration would be

moot. However, if the Court were to find a breach and did not consider a declaration to be moot, then a declaration, and not monetary damages, would be sufficient to serve the aims of 24(1).

Under the third step of the test though, the main thing, the more important factor is good governance immunity. And this is explained in the leading case of *Mackin v. New Brunswick*, and that case was of course relied on and cited in *Power* - or I'm sorry, in *Ward*, and it was undisturbed in *Power*. And the key thing from *Mackin* is, and this is at paragraph 78. This is in our Factum and in our - sorry, in the City's Factum and in the Compendium, but I've placed it up on the screen here.

> ...absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional.

The Court goes on, after the citations, to describe:

> "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action."

In other words, good governance immunity is only pierced where it can be shown that a law was

clearly unconstitutional or that it's enactment was in bad faith or an abuse of power. And again, this was, that was confirmed in the *Power* decision, which confirmed that the government's immunity is not absolute, but does set a high bar. And so at paragraph 7 of *Power*, the Court stated:

> The state will continue to benefit from immunity unless the high threshold is satisfied. This exacting threshold functions to limit the scope of causes of action for damages.

And so the reason for this is set out in *Ward*, and again, this is cited in our Factum, it's paragraph 39, but it's important. As the Court explains in *Ward*, and they're citing *Mackin*:

> The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s.24(1) of the *Charter* cannot be combined with an action for invalidity based on s.52...

And again, this particular case, which is a retroactive case, this particular reasoning is, is very important.

Continuing on with *Ward* at paragraph 40, the Court

explains:

> The immunity is justified because the law does not wish to chill the exercise of policy-making discretion.

And so in this case, we submit that the applicants' claims do not pass that high bar to pierce good governance immunity.

The impugned By-laws in the Encampment process are not clearly wrong. As we've explained previously, they exceed the requirements to comply with the Section 7 protections as established in the Encampment cases. And so far from bad faith or an abuse of power, these enactments are part of the City's over-arching response to homelessness, which includes administering massive investment and sheltering initiatives in mitigation of harms, both to the homeless and others in the community. The City has acted in good faith, exercising power cautiously and reasonably. And so there's no basis to pierce good governance immunity.

Now, I'll briefly address the applicants' argument that the immunity threshold for Municipal By-laws is lower than that for Provincial or Federal statutes. And they suggest that a clear disregard standard rather than the good governance standard should apply. And this is dealt with in our Factum. But in brief - first of all, the applicants, respectfully, do not cite authority for

this suggestion. What the established authorities support, is that good governance immunity does apply to municipal By-laws. And for this we return to the *Mackin* case. The *Mackin* case, which is the case that enunciated good governance immunity, relied on *Welbridge Holdings[Ltd.] v. Greater Winnipeg*, and this is still in paragraph 78, which is up on the screen, *Welbridge Holdings* was a Supreme Court decision involving alleged harm arising from a By-law that was subsequently declared to be ultra vires. So, this principle has its origin in Municipal By-Laws. It clearly applies. Additionally, it's well established that the separation of powers applied to Municipal Governments, no less than it would a Provincial Legislature or the Federal Parliament. So again, that separation of powers concern *[indiscernible]* in *Ward*, applies equally to Municipal Governments. And for that, again, the citation is in our Factum, but it's the *Nelson (City) v. Marchi* case at paragraph 43.

And again, more recently in the *Power* decision, at paragraph's 70 and 71, the Supreme Court gave what we would describe as an expansive interpretation to conduct that may attract immunity. And so at paragraph's 70 and 71, the Court in *Power* goes on, and I'll focus on 71, for example, to agree with Justice's Brown and Rowe's observation in *Conseil scolaire...*, that "a key holding" in *Mackin*, was its broad formulation of the immunity threshold and that it "plainly encompasses acts of both legislatures and other public officials". So, taken together, its clear that a Municipality in making By-Laws and policies such as the protocol in process, that

governed enforcement of By-laws, the Municipality enjoys good governance immunity, the same as any other government body exercising a similar function. Even if the clear disregard standard were to apply, for the same reasons I've identified, as the reason that the City did not breach the good governance immunity standard, the City also did not act with clear disregard for the applicants' rights. The By-law and the protocol were consistent with the established *Charter* law.

I'll next address the fourth *Ward* factor, which is quantum of damages.

Ward provides, at paragraph 57, that the quantum of *Charter* damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches. The quantum must have regard to the impact of the breach on the claimant. It must reflect the seriousness of the state conduct and it must be appropriate and just from the perspective of the claimant and the state. And we submit that the applicants have not, in their submissions or in their evidence, provided justification for why these amounts that they claim would be appropriate. The applicants claim $5000 per applicant for the common experience of sleep deprivation, loss of belongings and exposure to the elements, and $375,000 additionally for individual claims for each of the applicants for violation of their *Charter* rights. But they do not offer any explanation for how these sums serve the aims identified in *Ward*. And again, it's relevant here too, to observe that the applicants' evidence, in our submission, does not show any harm other than what is attributable to harms of living with homelessness or harms from other causes not

tied to this - any Acts, or certainly breaches, on the part of the City. As well, the total quantum of *Charter* damages sought by the applicants is excessive, given the established range. Generally, if awarded at all, damage rewards under the *Charter* are not nearly as high as what the applicants are claiming. The cases where more substantial awards of damages have been made, where cases where there was evidence of serious state misconduct that needed to be deterred, such as the solitary confinement cases. In those cases, the Court was convinced that the conduct was intentional, malicious, high-handed or oppressive. And that's both the *Elmardy* and the *Brazeau* cases that are referenced in the City's Factum.

So, taking the *Brazeau* case just as an example, at paragraph 92, in that case the Court found that:

> For over 30 years, Canada's Correctional authorities have steadfastly refused to heed warnings about the harm caused by administrative segregation and the need for independent review.

That's far from the circumstance here. And it's also notable that in the *Brazeau* decision, the compensatory portion of the award was $500 per inmate. There was nine-million dollars in the aggregate, but for each inmate it was $500 for each inmate that had been placed in administrative segregation for more than 15 days.

As is set out in the Respondent's Factum, and this is the, the chart, and I'll just briefly place it up on the screen, the cases that are more in line with the established range of *Charter* damages, and so this is B1-

1013, are much lower than what the applicants are claiming here.

Now, it's set out in our Factum what each of these cases, the award of damages were and how that's broken down and what they were for. The applicants have suggested that their case is different from these, but we submit that they have not satisfactorily established how. As these cases made clear, the amount of damages sought by the applicants is excessive in light of the established range of damages, and are, in any event, not justified under the *Ward* factors.

So, to conclude our argument regarding *Charter* damages under the *Ward* factors, first, there's no *Charter* breach. Second, there is no functional purpose for damages, because the damages are not caused by a *Charter* breach and there is no need for vindication or deterrence in a retroactive claim. Third, good governance immunity applies, because the City did not act in a way that was clearly wrong, in bad faith or an abuse of power, while alternatively did not act in clear disregard for the applicants' rights. And fourth, the amount of damages sought is well in excess of the range of *Charter* damages in other comparable cases.

Having now addressed each of the legal issues for this Court to decide, I will next make my concluding submissions.

And I'm prepared to take the Court through a recap of the City's position on the questions for the Court to decide if that would assist the Court, otherwise, I'm content to rest on our earlier submissions, unless Your Honour has any questions.

THE COURT: No, I don't need you - to hear it again.
B. SHORES: Thank you, Your Honour.
THE COURT: Yeah. I got them.
B. SHORES: We began these submissions by acknowledging the homelessness crisis. What everyone thinks about the causes of or solutions to homelessness, that is not what the Court must decide in this proceeding, nor is this application about picking sides. The undercurrent of the applications' submissions implies that a finding in favour of the applicants is a vote of support for those who experience homelessness, and that a dismissal would be tantamount to saying the Court does not care about people without homes, and that is simply not true. The evidence shows, that concern for people without homes and respect for their rights, has guided the City's actions throughout.

The City of Hamilton has been faced with the impossible problem of navigating pressures on the capacity of the shelter system. The harms of encampments, both to people who live in them and the people in the community surrounding them. The reality that even a person's express preference to stay in an encampment may not be in that person's best interests. The competing reality that people need somewhere to go. And all of this in the context of finite resources and funding.

The City's elected officials representing constituents who want to be able to access their community without navigating threats to their health or safety, as well as representing constituents living with homelessness, has shown remarkable cooperation and have, at times, expended great political capital to respect and balance the rights and interests of all people who live in Hamilton. This is shown in the evolving processes and

protocols; the investment of resources; the dedication of the City staff members who spend their days engaging with people who experience homelessness; and doing the hard and frankly unglamorous work of trying to make workable policies and realistic funding allocations.

All of this is undeniably in the background, but this application is not about solving homelessness or making a value statement about people who live with homelessness. The issues in this proceeding are discreet, and they all funnel toward the one key question: Were the 14 Applicants *Charter* rights infringed? As we have explained, and as the evidence has shown, they were not.

This Court, and the public, who rightly wants reassurance that Society's most vulnerable are being protected, should be confident in knowing that dismissing this Application will uphold the law and reinforce the *Charter* protections that have been clearly enunciated in the law. Protections that have been respected and not infringed by the City of Hamilton.

The City, therefore, respectfully submits that the Application should be dismissed.

THE COURT: Okay.

B. SHORES: Subject to any questions from the Court and reserving any submissions on costs if necessary, those are our submissions.

THE COURT: Thank you.

B. SHORES: Thank you.

THE COURT: Mr. Choudhry?

S. CHOUDHRY: Your Honour, could we have just a couple of minutes to...

THE COURT: Sure.

S. CHOUDHRY: ...collect ourselves.
THE COURT: Yes. You can have as much time as you want. You're going to have until 4:15, so.
S. CHOUDHRY: Yes, so why don't we take ten minutes just...
THE COURT: Sure.
S. CHOUDHRY: ...to get ourselves organized. Is that alright, Sir?
THE COURT: Yeah, sure.
S. CHOUDHRY: Okay. Thank you, so much.
COURT SERVICES OFFICER: Order, all rise.
MADAM REGISTRAR: Court will stand down for 10 minutes.

R E C E S S

U P O N R E S U M I N G:

COURT SERVICES OFFICER: Order, all rise.
MADAM REGISTRAR: Court is back in session. You may be seated.
S. CROWE: Okay. I know it's been a long three days. Everybody's tired. I'm going to be brief and I will reply to some of the specific allegations against the applicants, issue by issue, and please let me know if you have any questions.
THE COURT: Don't you worry.
S. CROWE: So, beginning with the subject of overnight enforcement. So, the core of my friend's Section 7 case is that notwithstanding the terms of the 2021 process, the City nonetheless permitted overnight encampments. And in reply I can say this is false. And as Your Honour will remember, I addressed the specific Applicant evidence, which I would submit is un-contradicted with respect to Misty, Linsley, Sherri and Cory in my chief, and I won't reiterate those specifics.

I would simply refer you to the fact that the City has not pointed to anything in the 2021 encampment process, or the Parks By-law that expressly states that there should be no removal of overnight encampments, nor have they pointed to any other policy that says so, and yet they allege that such policy existed. And even if there was periodic reprieve from overnight enforcement on seemingly an *ad hoc* basis, that is certainly not the same thing as permission to erect shelter overnights. And there is no evidence from the applicants that they understood that they had permission to encamp overnight.

And lastly, on this point, I would remind the Court of how the City characterized the 2021 process. In the September 9th, 2021 Report, as a return to "pre-protocol enforcement" of its By-laws.

The second issue I wish to reply to is encampment evictions that happened during August 21st - between August 2021 and August 2023. And my friend suggested that the applicants had failed to establish that they experienced encampment evictions during this time period. And I would submit that the un-contradicted evidence of the applicants is in fact that they were repeatedly evicted from encampments during that time period. We have 14 applicants and limited time so I'll only highlight a selection of the applicant evidence on this point.

So, with respect to Kristen, she was evicted from Woolverton Park in November 2021, shortly after the injunction in *Poff* was denied. And as Your Honour will recall, it was three weeks after this eviction that she was assaulted, robbed and raped. And after Woolverton, she stopped staying in a tent for a period of time

because By-law had told her that they were shutting down all encampments; that they were no longer allowed and that she had to figure something else out. She got a tent sometime after June 2022 and continued to keep being told that she had to move her tent, sometimes every day under the 2021 process.

With Cassandra, she was evicted from J.C. Beemer in November 2021. In fact, she was evicted after being notice - given notice that the City had "changed its protocols." Dr. Wiwcharuk was present for the eviction and recalled how destressed she was while trying to figure out what she would do with her belongings. She started sleeping rough and was repeatedly told - after being told that the shelters were again full, she got another tent, but her evidence is that she could only stay for a day or two before being evicted, and came to feel that the City was pushing her into increasingly isolated unsafe places where she would be out of public sight.

Mario's September 2021 Affidavit references the end of the 2020 Protocol, and then describes By-law evicting him and taking his tent, even if he told them that he didn't - he couldn't get into shelter. And his June 2022 Affidavit describes being evicted from various encampments throughout 2021, and then moving proactively several times in 2022 to avoid run-ins with police.

My friend suggested that Misty's interaction with police when they came and told her, at 11 o'clock p.m. that the park was closing, may not have been an attempt to, to overnight shelter. But it is clear from her evidence that she was staying under a tent and in fact attempting to shelter overnight. Misty also described constant

evictions every one or two weeks in 2022, where she says no one was allowed in a tent for, like, longer than a week or two.

THE COURT: Well, that's compliant with the case law as I understood, no? They could be made to move everyday according to *Waterloo* and *Adams*.

S. CROWE: Well, I would submit that it has to be considered in the context of simultaneously that the applicants didn't have the understanding that they could stay somewhere overnight.

THE COURT: Right.

S. CROWE: And I would just quickly reference the fact that there were also times during these two years where our applicants either gave up putting up tents because of their past experience with encampment evictions and because they knew they just have to move, and wanted to avoid enforcement from MLE or the police.

So, next, voluntary compliance. So, my friend stated that voluntary compliance is not a coercion, and I did address this, this term in my opening remarks. So, I would just briefly draw your attention to how the applicants describe these interactions that my friend is attempting to classify as voluntary compliance. So, for example, Kristen stated that she felt like she had no choice but to leave, that it was intimidating. Ashley stated that she complied to avoid confrontation with By-law and police, again, because they're intimidating and the need to avoid the risk of criminal charges. And Cassandra finds interactions with By-law to be traumatizing.

So, with respect, voluntary compliance is nothing but a sanitized term for what is really an encampment eviction.

Next, the respondent alleged that the - or mentioned that some of the applicants have refused housing. Now, this again was addressed in-chief so I'll only reply that what was presented by my friends was cherry-picked evidence about the broader context. And so their version for the applicants' decisions was misleading.

Moving on to the allegation that several applicants declined to accept shelter and suggested that the decisions were not justified. Each applicant submitted specific reasons why they may have been reluctant to access shelter at different times in their affidavits and their cross-examinations. The one specific reply I wish to make is with respect to Shawn Arnold, because my friend suggested that he made an arbitrary decision not to access shelter because of drug use, but then turned around and accepted shelter at the YMCA. And the really important clarifying point here is that the YMCA is not an emergency shelter. It is not part of the emergency shelter system, and this was confirmed by Mr. Mastroianni on cross-examination. You pay rent, you get a room, and there's no evidence before the Court about drug use at the YMCA.

Next, whether or not the applicants made reasonable attempts to access shelter. My friend said - referenced that capacity in the shelter system can fluctuate by the hour. But, Your Honour, you should not have to call a shelter every hour in order to access a bed.

My friends also mentioned a notice period. And they emphasize that notice to move was sometimes provided during the 2021 process. And in reply I would state that a short notice period is irrelevant if the applicants had nowhere to go.

My friends addressed the idea of survival partners and stated that it would be unsafe to stay with an abusive partner rather than separating for the purposes of accessing a shelter space. But there's no evidence that any of our applicants declined shelter in order to remain with an abusive partner. In fact, Ashley was assaulted while separated from her partner.

There are allegations made against a couple of our applicants with respect to alleged violent behaviour. So, with respect to Darrin Marchand, my friend mentioned that Darrin threatened to get a gun and start shooting people, during his cross-examination. The context here is really important, and here's what happened. And as you'll see from, from the transcript, Darrin had just finished answering a series of questions about when he was shot in December 2021. He was emotional and it was off the cuff rhetorical comment not aimed at anyone. We took a five minute break from the cross-examination and resumed without incident. By the end of the examination he explained that he had just gotten upset because he was talking about the man who had shot him. He apologized for getting emotional and said that he wants to live peacefully and that was the end of it.

My friend also mentioned Julia's conviction for aggravated assaults but failed to mention that the assault took place while she was defending herself against a sexual assault, and her attacker was subsequently arrested and charged.

My friend suggested that the applicants sometimes have the ability to stay with friends and family, and I think it's really important to contextualize this and for the

Court to understand that this is not a viable, stable option that the applicants can turn to at will.

So, just briefly, with respect to Kristen, she did live with her Dad for a very short period of time until he was evicted. Her Dad is now homeless as well. And while Mr. Diacur mentioned that Kristen can't stay with her mom for long periods of time because they don't get along, you know, aside from the fact that I think this is irrelevant, he didn't mention that it's also because her mom has a boyfriend and the grandparents, who are co-signors, don't agree with her staying there.

Darrin can sometimes stay with his daughter, but also indicated that she doesn't have room for him. He can stay with a friend periodically, but visit - sorry, visit a friend periodically, but he can't stay there.

Cassandra, now, I addressed this in-chief, but just to clarify that she can't stay with her mother for extended periods of time without putting her mother's subsidized housing at risk.

Mario, during cold weather, he has a cousin that he can try to stay with. Mario often doesn't have a phone and if his cousin is not there, he just leaves to go to try to access a shelter or a warming centre.

And Sherri can sometimes stay in her mom's back yard in a tent, but the landlord doesn't like it. And her sister and her sister's boyfriend are also staying in a tent in the back yard.

With respect to tents that were lost to evictions and not just theft of tents, general theft of tents, my

friend suggested that they had not actually lost tents and belongings through encampment evictions, and this was false. There are several examples from the applicants about belongings lost as a result of evictions, and I'll simply state that this evidence is in the record. And in reply to my friend's assertion that the applicants voluntarily left belongings behind in the course of evictions, I'll only say that applicants, several applicants described rushing around trying to gather what belongings they could, and by no means taking everything that they wanted or needed.

My friends made a quite a point of focusing on Ashley MacDonald and the fact that she sometimes still stays in a tent, even though she is housed. So, what I want to emphasize there, aside from the, the street-entrenched and what I addressed in my opening, is that Ashley was not housed until June 29th, 2023, and so she was unhoused for the - essentially 21 months of the 24 period that we are focusing on.

It was stated today that Linsley Greaves, while he expressed discomfort in staying in shelters because he experiences racism, that he also experienced racism in encampments and that is not false - sorry, that is not true. When you look at his cross-examination transcript, what he said is that he experiences racism in shelters and sometimes see those people on the streets, including in encampments. But there was no mention of him experiencing racism in encampments.

And then lastly, Your Honour, with respect to assaults taking place in encampments, there's no evidence that any of the applicants were assaulted in encampments. And my friend mentioned Ashley MacDonald's assault, but

again, there's no evidence that this took place in an encampment. And by contrast, Kristen has been assaulted in shelter. Darrin witnessed a hatchet attack in shelter. Mario and Linsley feel that they are targeted and people pick fights with them in shelter. And several of the female applicants specifically describe how in encampments, by contrast, they can take steps to protect themselves, including staying with friends and using a buddy system.

So, unless you have any questions, Your Honour, those are my submissions.

THE COURT: No, thank you.

S. CROWE: Thank you.

THE COURT: There's more?

S. CHOUDHRY: Unfortunately yes. So - but I'll be brief as well, Your Honour. So, my reply submissions....

THE COURT: I don't care if it's not brief, but...

S. CHOUDHRY: Yeah.

THE COURT: ...just as long as it's reply.

S. CHOUDHRY: It's absolutely. So, the - the City stated that under the 2021 process there was no step five enforcement by the Hamilton Police Service...

THE COURT: Yeah.

S. CHOUDHRY: ...and they cited three pieces of evidence to support that proposition. Ms. Ciriello's Affidavit of October 2021, her July 2024 Affidavit, and then also her cross-examination in 2024. With respect, reviewing that evidence carefully, we do not believe it supports the City's factual assertion. That October 2021 Affidavit is sworn on October 9th, 2021, so it's only accurate up to that date. It doesn't address what happened after that date. The - Ms. Ciriello's July 2024 Affidavit is actually silent on whether there was step five enforcement by the Hamilton Police Service

under the 2021 process. So, in her Affidavits, there's really no evidence regarding what happened between October 9th, 2021 and October 20 - pardon me, August 2023, about - by the HPS.

In addition, there was - if you look at her cross-examination transcript, there was a series of questions put to Ms. Ciriello about the, about the role - the relationship between MLE, which sits under her division, the City and HPS.

THE COURT: Yes.

S. CHOUDHRY: And what she said at question 74, and the pinpoint here, and I'll give it to you, because it's important, is A8393. I - the question that was put to her:

> Q. So, you don't know if HPS has a specific policy on encampments?

And the answer she provided is:

> A. What, what we are saying is that HPS would use their own policies and their own judgment when and if to enforce. We do not dictate Hamilton Police policies or their enforcement, or level of compliance, or anything like that.

So, the answer is, we don't know, Sir.

THE COURT: Yeah.

S. CHOUDHRY: Okay. Then there's the issue - then there's an issue about whether the - so yesterday, but not today, but yesterday the - my friend said that the applicants have failed to account for other housing options that were available to the applicants. In particular, my friend's reference to residential care facilities, the YMCA and the YWCA. And they said, "Our failure to account for those options, and that we had

them discharge, are burdened that there was insufficient shelter supply. And the reference that they provided was Mr. Mastroianni's 2024 Affidavit. There's a, there's a - this is an important point and so I wanted to spend a couple of minutes on it. So, first is that no Court in Canada, in an encampment case, has ever looked beyond the emergency shelter system ever, to other housing options to determine if supply exceeds demand. That is a wholly novel proposition in Canadian law for which my friends have cited no authority. Neither *Waterloo* nor *Kingston* took that approach in Ontario. It is wrong.

The second point is that - what that state - Mr. Mastroianni was, was cross-examined on specifically these points, and he conceded in cross-examination, in 2024, that residential care facilities, the YMCA, the YWCA are not part of the emergency shelter system. He was asked specifically and said they weren't. He also agreed that the YMCA and the YWCA are transitional housing where residents enter long-term leases and pay rent. They are not shelters.

Mr. Mastroianni was also asked about the demand on the violence against woman, or VAW Shelter System, which is the only shelter system he did mention that in fact is a shelter system, and he was - he agreed with the proposition that those - that those shelters have been operated at or over capacity for years. So, the point being that you can't kind of *[indiscernible]* meant capacity with capacity that is not a shelter. And you can't then point to shelters that are shelters without counting for the demand for those spaces which are full. There's a broader point here as well, Your Honour. So, as you know, we put to you the June 2024 Reducing

Homelessness and Managing Encampment's Report, which was an Exhibit marked to Ms. Blake's Affidavit. What is important about that document is that it - the City document itself, defines the problem of capacity exclusively in terms of the emergency shelter system. Instead, there is not enough capacity in that system. It does not mention residential care facilities. It does not mention the YMCA. It does not mention the YWCA. And so to be candid, Your Honour, I expected that when we brought forward the June 2024 document, that - there would be some engagement on what it meant and how to read it, but we did not receive that engagement from our friends. And so we now have this situation where the City was relying on evidence principally through an Affidavit and Exhibits from one witness, but then we have a City document that it did not put into evidence, that we marked as an Exhibit to a cross-examination.

B. SHORES: Sorry. There - I've been giving my friends a lot of leeway, a lot of this isn't actually proper reply, but I think it needs to be clarified for the record, that the document was authenticated by Ms. Blake, but she was not taken, in her cross-examination, to the passages that my friend is referring to. And so to suggest that parts that were not taken to the witness and put to her in cross-examination, have some meaning, that the witness was not permitted to speak to, or to give her evidence of - particularly this is cross-examination. This is a document that was not in the applicants' record, put to her in cross-examination. This is - these submissions are improper.

THE COURT: Okay. Thank you. Go ahead.

S. CHOUDHRY: And, Your Honour, I mean, the point is, the document's admissible for the truth of its contents under the public document hearsay exception. It's not necessary, right?

THE COURT: I agree. You go ahead.

S. CHOUDHRY: And, and, and the only point I want to make is that when you have to choose between an affidavit and you have a City document that's a public document on the website, and the two can't be reconciled, then you should - if you can, you should prefer the City document. That's the only point I was going to make, Your Honour.

THE COURT: Okay.

S. CHOUDHRY: Okay. Yesterday it was alleged that there was sufficient shelter capacity in 2021 and 2024. There were cites to Mr. Mastroianni's Affidavits. You - there were two paragraphs there where he gave - where he basically gave - where Mr. Mastroianni gave occupancy data for two different months in 2021 and 2024. The point of course is that those numbers are about occupancy. They're not about the numbers of actively homeless or capacity. And, and so - and those of course, those figures were not in Mr. Mastroianni's Affidavit. Those figures are in the 2024 document that we just discussed, also in the point in time count. And those give you a comprehensive picture of the number of homelessness, the occupancy rates and also capacity. And you need to look at all that together.

Moving along. On the issue of property rights asserted by encampment residents, we just want to note that none of our clients have ever asserted that they have a property right to their encampments. And when people say "stay out of my space", sometimes that means, "I want a bit of privacy." It doesn't necessarily mean they own it.

With respect to the legal submissions about Section 7, my only point here - there - I have two quick points.

The first is the issue of horizontal *stare decisis* in the *Waterloo* case. The *Waterloo* case of course held that there were two conditions under which there was insufficient shelter capacity. One is the quantitative criteria in which we discussed, but the other is the inaccessibility idea. The inaccessible shelter beds from *Shantz* and *Stewart*.

THE COURT: Yes.

S. CHOUDHRY: And, and that is now - that part of *Waterloo*, we suggest is horizontal *stare decisis*.

THE COURT: You said that.

S. CHOUDHRY: Yeah, okay. On Section 15, the only two points I would make there is, first, that the issue of the importance of legislative context that my friend relied on for discrimination, that's properly - that shouldn't be used to gut Section 1. Those types of defences as to why one might limit a right are really - belong in Section 1, and legislative context shouldn't be used to circumvent that. The other is that no one is alleging in this case that Section 15 imposes a right to - and obligation to remedy equality. That's not what our *Charter* says and we're not arguing it does. And that's not what this case is about, just to be clear. Okay.

On Section 1, I have no - I think with respect to my friend's point that the 2023 - that, that basically between August 2021 and August 2023, the City complied with the minimal impairment requirement because it, on its account, permitted overnight encampments. The argument we would say is that if it - it - but it doesn't say it prohibited daytime encampments. And our argument is that it, it was - it violated the *Charter* by not doing so, and in that respect, even if the City is right that it permitted overnight encampments, which we

disagree with, it did not permit - it hasn't alleged it permitted daytime encampments. And it's failure to do so, in our view, if you accept that that violates Section 7....

THE COURT: And that's where you want me to take the law farther?

S. CHOUDHRY: Yeah. Yes, exactly. Yeah.

THE COURT: Okay.

S. CHOUDHRY: On mootness. So, I think....

THE COURT: I don't have to hear from you on mootness.

S. CHOUDHRY: I'm sorry?

THE COURT: I don't need to hear from you on mootness.

S. CHOUDHRY: Okay. All right. And so I won't go through *Phillips* and the *Westray Mine* disaster*[sic]*, although that's a walk down memory lane.

THE COURT: Well you just did.

S. CHOUDHRY: Yeah, ha, ha. And so....

THE COURT: *Borowski*, that's an old - that's an old - I remember that case.

S. CHOUDHRY: I, I'm sure you do.

THE COURT: That's an old case.

S. CHOUDHRY: Yeah, it's a very - yeah. And it's, it's a - but it's still very relevant.

THE COURT: I remember Joe Borowski.

S. CHOUDHRY: Do you really?

THE COURT: Yes, and Angela Costigan, who was one of the lawyers on the case.

S. CHOUDHRY: Yeah.

THE COURT: She, she was a defence lawyer in Toronto when I was, when I was a prosecutor.

S. CHOUDHRY: While my friends are in good company, I can assure them it gets cited everyday in, in constitutional cases. On - do you want to hear from me on damages and the *Mackin* standard?

THE COURT: You can, yes.

S. CHOUDHRY: Okay. So, so look, I think there is - there's a couple - there's two points that we'd make. My, my friends invoke the "but for" causation test, and we put to you in our Compendium a case called *Athey*(ph), which we, we gave our friends notice of last week. It's a - I think it's a decision by Mr. Justice Major, about what "but for" causation means. And, and what he says there is, "but for" causation doesn't mean that the cause is the only cause.

THE COURT: No, there can be more than one proximate cause.

S. CHOUDHRY: Yeah, exactly, and that's all that stands for, so - and, and you're well aware of that. And so on - you know, on Municipal councils and the limited immunity threshold, we would just reiterate the point that we made, which is that this is an undecided point of Canadian public law. Certainly there is no precedent in this - in Ontario. Certainly no precedent that post-dates *Mackin* and *Power*. And so it's - and we're offered a proposed standard. Our friends have offered a different standard. And all we can say at this point is that it's for the court - if it reaches this, this issue, to decide which standard is appropriate. And I don't think there's any - anything else I can help you with on that.

THE COURT: So, I'm going to make law either way.

S. CHOUDHRY: Yeah, that's what we'd say, because you know, *Power*....

THE COURT: There's always the first time.

S. CHOUDHRY: Yeah. And, and you know Honour - Your Honour, just to say this, that you know, it's true that *Mackin* and its abuse of power standard gets flipped over into *Power*, but *Power* gives it a different constitutional footing. It roots it in parliaments and legislatures, and their sovereignty and their

privileges. And none of that language is in *Mackin*. And because of how *Power* re-framed it, you know, it places - it doesn't make it automatic that Municipal By - Municipal Councils would get the benefit of the *Mackin* standard, but quite the opposite, especially given in light of the City of Toronto decision, which I put to you. Which of course reminds us of the old adage, which is that Municipalities are creatures of the legislature. And so, Your Honour, I have submissions for you if you want, on expert evidence and other points, but I'm not sure if it would be of assistance at this point.

THE COURT: Well, no really. I'm - I'm of mind to admit it. What I make of it is an open question, but.

S. CHOUDHRY: Fair.

THE COURT: Okay.

S. CHOUDHRY: Okay. So....

THE COURT: That helps?

S. CHOUDHRY: ...Your Honour, so on that point I just want to thank you. It's been three long days and we're very grateful for your time.

THE COURT: Oh, thank you very much both sides. You've done a monumental amount of work and I have had a chance to go through a lot of this stuff before the hearing. I've endorsed, "Heard and reserved." So, you'll be hearing from me in due course, but I don't usually take very long. I'm not going to leave this to my next non-sit week. I'm going to get right to it and get you an answer reasonably soon. Thank you.

COURT SERVICES OFFICER: Order, all rise.

MADAM REGISTRAR: Oyez, oyez, oyez, the sittings of this court are now concluded. Long live the King.

Form 3

Electronic Certificate of Transcript *(SubSection 5(2))*

Evidence Act

I, Barbara Thompson, certify that this document is a true and accurate transcript of the recording of, Kristen Heegsma et al - and - City of Hamilton, in the Superior Court of Justice, 45 Main Street East, Hamilton, Ontario, taken from Recording No: 4799 700 20241218 091621 10 RAMSAYJ.dcr, which has been certified in Form 1.

March 8, 2025
(Date)

B. Thompson, A.C.T.
Electronic Signature of Authorized Person
A.C.T. #6014683207, Ontario, Canada.

TAB 20

Court File No. CV-21-00077187-0000

ONTARIO SUPERIOR COURT OF JUSTICE

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

Applicants

- and -

CITY OF HAMILTON

Respondent

<u>AMENDED</u> FACTUM OF THE APPLICANTS

November 22, 2024

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PART I – OVERVIEW

1. The Applicants are 14 individuals who either are or have been unhoused in Hamilton. 8 are women; 8 are Indigenous; 2 are Black; one is a transgender woman. They commenced the Application in 2021 to challenge the constitutionality of the provisions of the *Parks By-Law* that prohibited tents on public property. In August 2023, the City adopted an encampment protocol. Accordingly, their challenge is now retroactive to the period between August 2021 (when the City repealed an earlier September 2020 encampment protocol) and August 2023. During that time, the Applicants erected tents or other shelters (**"encampments"**) on public property. The City evicted the Applicants and other unhoused individuals from the encampments, forcing them to "live rough" – without a tent, exposed to the elements, both overnight and during daytime.

2. The Applicants became unhoused for various reasons. Housing precarity has become an unfortunate reality in Hamilton, because of rising rental costs and inadequate Ontario Disability Support Program (**"ODSP"**) and Ontario Works (**"OW"**) benefits. Some individuals with complex mental health, addiction and/or trauma struggle to function in rental housing without supports. Women may become unhoused fleeing domestic violence. Chronically unhoused individuals may become trapped in a vicious cycle of homelessness which they cannot escape.

3. The encampment bans and evictions violated the Applicants' rights under section 7 of the *Charter*, both overnight and during daytime. Overnight bans and evictions were unconstitutional because shelter supply was insufficient to meet demand, leaving the Applicants no choice but to sleep outside. Other times, shelter beds were in theory available but often inaccessible to individuals with disabilities, couples, and people with pets. They Applicants were forced to sleep rough and face increased health risks which tents would have mitigated, depriving them of their security of the person and life. Overnight encampment bans and evictions also deprived them of their liberty, as shelter is critical to any individual's dignity and independence.

4. Daytime bans and evictions also deprived the Applicants of their security of the person and life, because they lost the potential health benefits of 24/7 shelter, including reduced risks of hypothermia and dehydration; easier access to medical care and access to essential items; and the ability to form communities to enhance their safety. They also deprived them of their liberty, since encampments enabled them to live in privacy and dignity.

5. These deprivations did not accord with the principles of fundamental justice, because they were overbroad, by interfering with conduct that did not necessarily conflict with public use of parks, and grossly disproportionate, since the negative effects outweighed the City's interests.

6. The encampment bans and evictions also violated section 15 of the *Charter*. They discriminated based on sex because they had a disproportionate impact on women, who account for approximately half of Hamilton's unhoused but receive a much lower proportion of shelter beds. Being unable to sleep in encampments increased their risk for sexual assault. They also discriminated based on race, since Indigenous persons are unhoused at approximately 10 times their rate in Hamilton's population; and on the combination of race and sex, because they have a particularly severe impact on Indigenous women like many of the Applicants.

7. The encampment ban and evictions also discriminated based on disability against persons with mental health and/or substance use disabilities, who may exhibit behaviour that leads to service restrictions; individuals with physical disabilities, including mobility issues, who may find it physically taxing to enter and leave shelters or move their belongings daily; and individuals with substance dependencies who cannot use them in shelter.

8. These violations were not justified under section 1. The order in the Notice is a minimally impairing alternative that would have allowed encampments and permitted public use of parks, by permitting a tent that is: at least 50 m away from a playground, school or childcare centre; in a grouping of no more than 6 tents; and at least 200 m away from any other grouping. The 2020 Protocol and 2023 Protocol contain similar terms.

9. The Applicants seek declarations that the encampment ban and evictions were unconstitutional, and damages in the amount of $445,000 under section 24(1) of the *Charter*.

PART II – FACTS

PROCEDURAL HISTORY

Current Application

10. On October 4, 2021, five of the original Applicants issued a Notice, and brought a motion for an injunction prohibiting the City from evicting encampment residents. On November 2, 2021, the Court dismissed the motion.[1]

[1] *Poff v. City of Hamilton*, 2021 ONSC 7224 [***Poff***].

11. On June 15, 2022, the Applicants filed a Fresh as Amended Notice of Application. On November 8, 2022, the Court granted the Applicants leave to file the Notice.

12. On May 12, 2023, the Applicants brought a motion for leave pursuant to section 12 of the *Ontario Evidence Act* to adduce the affidavits of eight expert witnesses. On October 30, 2023, the Court granted the Applicants' motion.

13. On September 9, 2024, the Court granted the Applicants leave to amend the Notice.

14. On November 5, 2024, the Applicants brought motions to strike portions of affidavits of four physicians, and to adduce transcripts of certain City Council and Committee meetings. On November 12, 2024, the Court granted leave to adduce the affidavits of the four physicians subject to different redactions, and denied leave to adduce the transcripts.

15. On November 18, 2024, the Applicants were granted leave to amend the Notice.

The 2020 Protocol

16. On July 29, 2020, unhoused individuals sought an injunction prohibiting the City from dismantling encampments during the COVID-19 pandemic, when the number and visibility of encampments increased. On July 30, 2020, the Court issued a 10 day interim injunction. On August 7, 2020, the interim injunction was extended on consent.[2]

17. On September 30, 2020, the parties executed a settlement agreement, which consisted of the "Bylaw Enforcement Protocol" (**"2020 Protocol"**), an encampment protocol that required the City to assess and accommodate individual needs before evicting encampment residents. In some cases, residents were able to remain encamped indefinitely. The 2020 Protocol established rules around the permissible size and locations of encampments, including: no more than 5 tents per cluster; none on sidewalks, roadways or boulevards; no blocking of an entrance or exit or deemed fire route; and at least 50 m from a playground, school or childcare centre. The parties subsequently agreed that the City could remove an encampment on Ferguson Avenue.[3]

18. On August 9, 2021, City Council voted to repeal the 2020 Protocol in an emergency meeting effective August 30, 2021 and returned to what it described as the "pre-protocol enforcement of City by-laws that prohibit camping on City property, including park areas".[4]

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[2] Information Report (September 9, 2021), p. 1, para 2, June 7, 2024 RTA [**AR**, Vol 1, Tab 8]; *Bailey et al. v. City of Hamilton* (Hamilton Court File No. CV-20-73435).
[3] Bylaw Enforcement Protocol [**AR,** Vol 1, Tab 7].
[4] Information Report (September 9, 2021), p. 1, para 1, June 7, 2024 RTA [**AR**, Vol 1, Tab 8].

The 2021 Process

19. The City replaced the 2020 Protocol with a new "Encampment Process" for responding to encampments (**"2021 Process"**). The objective of the 2021 Process was to remove people from encampments. It consisted of 6 steps, beginning with a complaint to Municipal Law Enforcement (**"MLE"**) and ending with eviction and site cleanup. Enforcement of trespass notices was by the Hamilton Police Service (**"HPS"**).[5]

The 2023 Protocol and Amendments

20. In August 2023, Council adopted the 2023 Protocol, which allows unhoused persons to erect tents in public parks, subject to restrictions including: 9 m^2/tent, 5 tents/grouping; 50 m between groupings of tents; prohibitions on encampments on sidewalks, roadways or boulevards and encumbering entrances/exits/fire routes; distance requirements from schools, playgrounds and childcare centres; and restrictions based on environmental considerations.[6]

21. These restrictions are similar to the 2020 Protocol. They are also similar to the relief requested in the Notice that tents be: in a park under the *Parks By-Law*; at least 50 m away from a school, playground and childcare centre; in groupings of no more than 6 tents; and at least 200 m away from any other grouping. The 2023 Protocol added new prohibited spaces, and distance requirements from several locations such as sports fields and dog parks.[7]

22. On September 25, 2024, Council amended the 2023 Protocol to prohibit encampments within 1 km of a proposed Temporary Outdoor Shelter site, and to prohibit encampments in three parks. It also voted to create an addition 192 shelter spaces, and a sanctioned encampment site referred to as "Temporary Outdoor Shelters" with 80 beds, with the intent of prioritizing couples and individuals with pets (expected December 2024).[8]

23. On October 23, 2024, Council amended the 2023 Protocol to prohibit encampments in seven more parks.[9]

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[5] Information Report (September 9, 2021), p. 2-3, June 7, 2024 RTA [**AR**, Vol 1, Tab 8].
[6] Affidavit of Danielle Blake (July 30, 3024), p. 7, 20 [**AR**, Vol 13, Tab 113]; 2023 Encampment Protocol, [AR Vol 1, Tab 9].
[7] Notice, para 1(c).
[8] City Council Minutes, (September 25, 2024), pp. 11-14, November 19, 2024 RTA [**AR**, Vol 20, Tab 159]. The City Minutes are also available online at: FileStream.ashx (escribemeetings.com).
[9] General Issues Committee Report (Oct 16, 2024), November 19, 2024 RTA [AR, Vol 20, Tab 159 b].

24. On November 6, 2024, Council voted to defer a vote on a motion to amend the 2023 Protocol to remove encampments in all City parks.[10]

APPLICANTS' WITNESSES

The Applicants

25. **Kristen Heegsma** is a 31 year old Indigenous woman who receives ODSP. She has PTSD, depression, anxiety, opiate and stimulant use disorder, and borderline personality disorder. She has been homeless almost continuously since 2019. She fled an abusive relationship and moved in with her grandparents, who kicked her out because they mistakenly believed she was reconciling with her ex-partner.[11]

26. *Encampments*: Kristen has stayed in encampments for periods ranging from a week to 5 months. She was able to stay in encampments for longer periods prior to the repeal of the 2020 Protocol. She left encampments after being told by Bylaw officers she had to leave, and felt she had no choice. She would pack up as many belongings as she could, but often lost some of her belongings because she could not pack everything.[12]

27. *Shelters*: Kristen has faced several barriers to accessing shelter. Women's shelters "are almost always full". Without a phone, she has to walk from shelter to shelter to find a bed. Her doctor's office and a former drop in centre regularly tried to find her shelter, but were unable to do so. She learns about shelter bed availability from other unhoused women and City staff. She has periodically been able to access a shelter bed, but has been repeatedly service restricted or kicked out – once, for a year from the hotel program – for several reasons, including: missing curfew after working a nightshift; a relationship breakdown that made her ineligible for a couples' hotel; and behaviours related to her mental health and substance use disorders. She could not stay in shelter

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[10] General Issues Committee Motion (November 6, 2024), November 19, 2024 RTA [**AR**, Vol 20, Tab 159 c]. The motion is also available online at:<filestream.ashx (escribemeetings.com)>

[11] Affidavit of Kristen Heegsma (June 7, 2022), paras 4-5 ["**Heegsma Affidavit**"] [**AR**, Vol 2, Tab 25]; Affidavit of Tim O'Shea (June 7, 2024), Exhibit A, p 4, para 2 ["**O'Shea Affidavit**"] [**AR**, Vol 4, Tab 74]; Affidavit of Rachel Lamont (June 7, 2024), Exhibit A, p 5, para 2 ["**Lamont Affidavit**"] [**AR**, Vol 4, Tab, 69]; Transcript of Cross Examination of Kristen Heegsma (August 23, 2024), p. 11, line 14 – p. 12, line 9 ["**Heegsma XE**"] [**AR**, Vol 2, Tab 27].

[12] Heegsma Affidavit, para 8 [**AR**, Vol 2, Tab 25]; Heegsma XE, p. 41, line 4-15, p. 57, line 17 – p. 59, line 5, p. 57, line 22 – p. 59, line 5 [**AR**, Vol 2, Tab 27].

with her partner when she was in a relationship. She is reluctant to stay in congregate living situations because was assaulted while in shelter.[13]

28. *Hamilton YWCA*: Kristen rented a room at the YWCA in or about mid to late 2021, where she stayed for approximately 3-4 months. Kristen had money stolen from her room and was discharged from the program.[14]

29. *Unsheltered*: Kristen has slept unsheltered, on the streets, on benches, heating grates, and in stairwells. Sometimes she uses a sleeping bag, tarp, and blanket. When Kristen cannot find somewhere to sleep, she walks around all night, where men try to solicit her for sex.[15]

30. *Couch surfing*: Kristen and her then partner stayed at a friend's apartment in mid-January 2022, but the friend was evicted. She couch surfed with her father, who was also evicted. In December 2022 or January 2023, she couch surfed in a rooming house, where she encountered a person with whom she had previous conflict. Over 48 hours, that person and others held Kristen hostage and beat her, breaking her nose and giving her black eyes. They stole her bank card, ID, gift cards and her ODSP benefits for the month. It was traumatizing.[16]

31. *Impact of encampment evictions*: Kristen was evicted from an encampment in Fall 2021 after *Poff*. A Bylaw officer told her she "had one day to move because they were shutting down all encampments, that we were no longer allowed them [*sic*], and I had to figure out something else". In the following 3 weeks, she was assaulted 7 times by a male acquaintance, robbed 3 times, and raped while sleeping on a park bench outside City Hall. These incidents worsened her mental health and substance use. When she can neither enter shelter nor stay in a tent, she usually wanders all night trying to find somewhere safe, putting her at an increased risk of violence. She hardly sleeps at night, is up for days at a time, and regularly falls asleep during the day. In late May 2020, she fell asleep while walking and fell, hitting her head and cutting it open. When unable to use a tent, she experiences: a lack of privacy for even basic needs such as getting changed and being out of the public gaze; exposure to the elements; a diminished sense of security without physical

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[13] Heegsma Affidavit, paras 2, 7, 17, 18-21, 29 [**AR**, Vol 2, Tab 25]; O'Shea Affidavit, para 5 [**AR**, Vol 4, Tab 74]; Heegsma XE, p. 41, line 2, p. 41, line 16 – 42, p. 46 line 16-23, p. 59 line 6-16, p. 60, line 14 – p. 61, line 9 [**AR**, Vol 2, Tab 27].
[14] Heegsma XE, p. 13, line 2-22 [**AR**, Vol 2, Tab 27].
[15] Heegsma Affidavit, paras 7, 10-12, 22-23 [**AR**, Vol 2, Tab 25].
[16] Heegsma XE, p. 14, line 22 – p. 15, line 59, p. 16, lines 21 – p. 17, line 11, p. 29, line 16 – p. 40, line 22, p. 42, line 23 – p. 43, line 16 [**AR**, Vol 2, Tab 27; O'Shea Affidavit, Exhibit A, para 1 [**AR**, Vol 4, Tab 74 a]; Lamont Affidavit, Exhibit A, paras 2-3 [**AR**, Vol 4, Tab 69 a]; Heegsma Affidavit, paras 11-14 [**AR**, Vol 2, Tab 25]; Supplementary Affidavit of Kristen Heegsma (April 27, 2023), para 2 ["**Heegsma Supplementary Affidavit**"] [**AR**, Vol 2, Tab 26].

barrier of a tent and the protection of friends in close proximity; an increased sense of despair, leading to increased substance use; the deterioration of her mental health, leading to increased substance use; increased isolation when she is forced to hide, leading to increased risk of overdose; fewer connections with street outreach services and medical supports; and increased risk of theft and violence.[17]

32. **Cassandra Jordan** is a 39 year old Indigenous woman who receives ODSP. She has degenerative disc disease, chronic pain, opioid and stimulant use disorder. Cassandra has been homeless since August or September 2020 after being unlawfully evicted from her rental unit.[18]

33. *Shelters*: After being evicted, Cassandra called shelters and was told that they were full. Without her own phone, she used a phone at the Welsey Day Centre (until it was shut down) and "called and called and called and called just to be rejected, rejected, rejected, rejected". She concluded the women's shelters are "almost always full" and stopped calling every day. Several outreach workers were unable to get her into shelter. She was once able to access a spot on the floor of Carol Anne's Place (**"CAP"**) for 2 nights. On the third night, CAP was either full, or she was denied access because she tested COVID positive. CAP sometimes prioritizes women who stayed the night before, who are sick, or very old. She could line up at CAP at 530 PM for a bed at 1000 PM, but still not get a space. It is difficult for her to continuously move her belongings in and out of shelter. Theft is rampant at CAP. Cassandra tries to use a wheelchair accessible washroom stall to bring in her belongings to protect against theft. Once, the accessible stall was not available, and Cassandra's suitcase with her clothing was stolen outside her stall. Shelter staff discharged Cassandra from Mary's Place because her abusive ex-partner kept showing up at the shelter. They informed her that her presence put other women at risk, and told her to enter shelter outside of Hamilton. She could not leave because her supports are in Hamilton.[19]

34. *Encampments*: Cassandra was evicted from the Ferguson Encampment on October 15, 2020. She lost her tent because Bylaw threw it away. She was offered a hotel spot and asked for a day to store her belongings, which the hotel could not accommodate. She was told her spot would be held until the next morning, but it was given away. She called shelters to try to get a bed and

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[17] Heegsma Affidavit, para 24-25 [**AR**, Vol 2, Tab 25]; O'Shea Affidavit, Exhibit A, para 2 [**AR**, Vol 4, Tab 74 a].
[18] Affidavit of Cassandra Jordan (June 3, 2022), paras 5, 7, 10 ["**Jordan Affidavit**"] [**AR**, Vol 2, Tab 28]; Affidavit of Jill Wiwcharuk (June 7, 2024), Exhibit B, para 2 ["**Wiwcharuk Affidavit**"] [**AR**, Vol 4, Tab 80 b].
[19] Jordan Affidavit, paras 10, 15, 19, 24-27 [**AR**, Vol 2, Tab 28]; Transcript of the Cross Examination of Cassandra Jordan (August 15, 2024), p. 12, line 15– p. 13, line 14, p. 35, line 2-10, p. 37, line 7 - p. 38, line 12, p. 41, line 14 – p. 42, line 1 ["**Jordan XE"**] [**AR**, Vol 2, Tab 29].

had workers call on her behalf. They were told that the shelters were full. She moved to a different encampment in JC Beemer Park. She did not have her own tent, but others shared their tents until she was able to get her own. She stayed there for approximately a year until November 24, 2021, when the City evicted the residents following a fire. She had been receiving treatment for a serious leg burn, was using a walker and did not have anywhere to store her belongings. She was admitted to the Barrett Centre (a crisis centre) for 5 days and discharged. Shelters were once again full.[20]

35. *Couch surfing*: Cassandra was able to temporarily stay with her mom after being discharged from the Barrett Centre. Since her mother lives in subsidized housing, she could not let Cassandra stay for an extended period without jeopardizing her tenancy. In January 2024, Cassandra briefly stayed with her boyfriend. He was abusive and she left.[21]

36. *Unsheltered*: Cassandra contacted shelters after leaving her mother's place, who told her they were full. She slept unsheltered outside, including in a tunnel, on the sidewalk outside CAP, on heating vents, behind City Hall, and outside a church. In the middle of the winter, Cassandra sought safety and warmth with others on the heating vents outside City Hall. The City boarded up the vents and the police removed everyone. She feared she would freeze to death.[22]

37. *Impact of encampment evictions*: Cassandra did not receive appropriate wound care for her burn after her eviction from JC Beemer. She lost contact with her treating doctor and Social Navigation. Cassandra witnessed a heavy police presence with Bylaw officers at encampment evictions, along with bobcats and garbage trucks to dispose of belongings. She describes the evictions as intimidating, traumatizing and forceful, and felt she had no option but to comply with directions to move. Packing up and moving is exhausting physically, mentally and emotionally. She lost essential belongings, including her tent, from encampment evictions. Without a tent, she has to sleep outside and searches for hard to find places. She finds it difficult to sleep and is so exhausted that at times she does not know what day it is and finds it harder to abstain from substances. She has been robbed. She also feels "all crippled up" and cannot walk properly from having to continuously move all her belongings around. When she is an encampment with people

[20] Jordan Affidavit, paras 10, 12, 14-16 [**AR**, Vol 2, Tab 28]; Jordan XE, p. 19, line 22 – p. 20, line 1, p. 20, line 10 – p. 24, line 8, p. 24, line 13 – p. 25, line 2 [**AR**, Vol 2, Tab 29].
[21] Jordan Affidavit, paras 17-18 [**AR**, Vol 2, Tab 28]; Jordan XE, p. 7, lines 19-23, p. 31, line 2 – p. 33, line 1 [**AR**, Vol 2, Tab 29].
[22] Jordan Affidavit, paras 17-18 [**AR**, Vol 2, Tab 28]; Jordan XE, p. 7, lines 19-23, p. 31, line 2 – p. 33, line 1 [**AR**, Vol 2, Tab 29].

she trusts, they look out for each other, take steps to prevent theft, and can huddle together to stay warm, and she can have a bit of time to rest. Despite the 2023 Protocol, Cassandra was asked to move her tent three times at Bayfront, sometimes a matter of twenty feet. Each move required her to move all of her belongings, which was very difficult in light of her disabilities and pain.[23]

38. **Misty Marshall** is a 32 year old Indigenous woman who receives approximately $340 in OW monthly. Misty has anxiety, depression, PTSD, opiate and stimulant use disorder, and asthma.[24] She became homeless in 2020. Prior to becoming homeless, she had been renting Air B&B's and staying in hotels. But her wallet was stolen and she lost all of her cash and ID; without ID, she could not rent a room.[25]

39. *Shelters*: On becoming homeless, other women repeatedly told Misty shelters were always full. In April or May 2021, Social Navigation contacted shelters on Misty's behalf, but were told that shelters were full. Misty also tried to get into the overflow shelter at CAP. Women lined up for hours to secure a spot at 1000 PM. As of May 2022, Misty was unable to get a spot at CAP because they were full. By 2024, she was able to stay once. Misty was unable to access overnight drop in programs at Willow's Place, which is sometimes full during the day. She was occasionally able to access overnight drop in at The Hub during cold alerts, but high demand meant she could only stay for an hour. She attempts to access shelter beds twice a week without success.[26]

40. *Encampments*: Misty has been evicted from several encampments. She witnessed the City showing up with bobcats. Once, she was given 20 minutes notice to leave. In October 2021, she stayed in a tent by the outdoor heating vents at City Hall. The City blocked the heating vents in the middle of winter. Misty did not bother to put up or stay in tents very much since 2022, because the City had "ramped up enforcement" and she would be required to move. She has also stayed with different friends in their tents. Following the repeal of the 2020 Protocol, police suddenly

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[23] Jordan Affidavit, paras 12-13, 22-23 [**AR**, Vol 2, Tab 28]; Wiwcharuk Affidavit, paras 2-3 [**AR**, Vol 4, Tab 80 a]; Transcript of Cross Examination of Jill Wiwcharuk (August 16, 2024), p. 44, lines 3-8l ["**Wiwcharuk XE**"] [**AR**, Vol 4, Tab 81]; Jordan XE, p. 21, lines 5-10, p. 40, lines 15-23, p. 46, line 18 – p. 47, line 24 [**AR**, Vol 2, Tab 29].
[24] Affidavit of Misty Marshall (May 12, 2022), paras 4, 6-7, 15, 17-18, 21-22 ["**Marshall Affidavit**"] [**AR**, Vol 3, Tab 43]; Wiwcharuk Affidavit, Exhibit G, para 2; [**AR**, Vol 4, Tab 80 g]; Supplementary Affidavit of Misty Marshall, (May 8, 2023), para 1 ["Supplementary Marshall Affidavit"] [**AR**, Vol 3, Tab 44].
[25] Marshall Affidavit, paras 4, 6-7, 15, 17-18, 21-22 [**AR**, Vol 3, Tab 43]; Supplementary Marshall Affidavit, para 1 [**AR**, Vol 3, Tab 44]; Wiwcharuk Affidavit, Exhibit G, para 2 [**AR**, Vol 4, Tab 80 G].
[26] Marshall Affidavit, paras 8-9, 12-13 [**AR**, Vol 3, Tab 43]; Transcript of Cross Examination of Misty Marshall (August 15, 2024), p. 20, paras 9-17, p. 21, line 16 – p. 24, line 8 ["**Marshall XE**"] [**AR**, Vol 3, Tab 45].

came around and told people that they could only stay for a week or two, followed by the City showing up with bulldozers. People started using tarps, which were easier to put up than tents.[27]

41. *Couch surfing*: Misty couch surfed with friends and acquaintances, starting in 2020, and more regularly since 2022 after realizing that she would not be able to put up a tent.[28]

42. *Unsheltered*: Misty sometimes wanders around at night in search of somewhere to stay. She has slept outside unsheltered in various locations. She has also stayed under a tarp.[29]

43. *Impact of encampment evictions*: When Misty does not have a stable place to stay overnight, she sometimes only gets one to two hours of sleep. Sometimes she stays up for days. She has trouble concentrating and has at times been unable to keep up with her mental health treatment. Conversely, when she was able to stay at Ferguson for several months, her doctor was better able to connect with her, she had access to food delivery and slept better. Misty lost contact with her doctor immediately following her eviction from Ferguson. When they reconnected a year later, she had "drastically decompensated". Outside an encampment, she has been repeatedly robbed, sometimes left with only the clothes on her back. She has been exposed to the elements while using a tarp instead of a tent and has had belongings stolen while staying under a tarp. When wandering the streets in search of shelter, she has seen men driving around CAP while women wait in line, appearing to solicit women for sex. Men have followed her in cars, soliciting her for sex. She has been sexually assaulted 3 times since June 2022 while couch surfing with male acquaintances. Some men expect sex from her in exchange for shelter. She has been threatened with sexual assault many times. She is at increased risk of sexual assault during winter, when she must seek indoor shelter.[30]

44. **Sherri Ogden** is a 31 year old Indigenous woman who receives ODSP benefits. She has depression and substance use disorders. She also experiences functional pain. She became homeless in 2017. She had been living with her mom and left because of a strained relationship.

45. *Encampments*: Sherri has stayed in several encampments, from a few days to 7 months. She has been evicted from almost every encampment. For a while, she would take down her tent

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[27] Marshall Affidavit, paras 15, 17-21 [**AR**, Vol 3, Tab 43]; Marshall XE, p. 31, lines 1-14 [**AR**, Vol 3, Tab 45].
[28] Marshall Affidavit, para 17 [**AR**, Vol 3, Tab 43]; Supplementary Marshall Affidavit, paras 1, 4 [**AR**, Vol 3, Tab 44].
[29] Marshall Affidavit, paras 21- 22, 26-27, 29 [**AR**, Vol 3, Tab 43]; Supplementary Marshall Affidavit, para 1 [**AR**, Vol 3, Tab 44].
[30] Marshall Affidavit, paras 11, 24-27, 29 [**AR**, Vol 3, Tab 44]; Supplementary Marshall Affidavit, paras 3-4 [**AR**, Vol 3, Tab 44]; Wiwcharuk Affidavit, Exhibit G, paras 3-4 [**AR**, Vol 4, Tab 80 g].

every morning and then return at night to avoid enforcement. However, Bylaw eventually caught on and showed up at her tent at 530 AM. Sherri recognized the Bylaw officer who told her to leave. When she refused, the officer called police, who showed up ten minutes later and evicted her. Sherri eventually gave up her tent because she thought it would prevent her from being targeted by the HPS and Bylaw.[31]

46. *Shelters*: Sherri has repeatedly been unable to access shelter. She has not stayed in a shelter since 2022, because they have been full. Despite often not having a phone, she repeatedly called shelters asking for a bed. Staff at the Wesley Centre also called for her. Shelters were always full. She stayed in the hotel program with her then-boyfriend for 2 weeks but was kicked out after a false allegation of domestic abuse. She was able to stay at CAP once.[32]

47. *Unsheltered*: Sherri has slept rough, including at the side of the road, in parking lots, on church doorsteps, and in stairwells and parking garages.[33]

48. *Impact of encampment evictions*: Sherri lost her belongings, including her tent, when the City enforced an eviction with bulldozers. Sherri finds it very difficult to sleep when she cannot stay in one location. She could sleep better and felt safer when she stayed in encampments with friends. It was also easier for her to concentrate and she felt healthier. She experiences heightened stress and anxiety from constantly having to be on the "lookout". She is often exhausted during the day. Although Sherri had a housing worker with the Hamilton regional Indian Centre, she has been told that she is "too unwell" to get into supportive housing with Indwell and the YWCA.[34]

49. **Jahmel Pierre** is a 34 year old Black transgender woman in receipt of OW and employed part time. She has been diagnosed with PTSD, anxiety, depression and substance abuse disorder. She had been homeless one and off for about three years. Most recently, Jammy became homeless after being evicted from the Transitional Living Program at the YWCA. Jammy was able to obtain housing on June 1, 2023, and remains housed.[35]

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[31] Transcript of Cross Examination of Sherri Ogden (August 14, 2024), p. 23, line 17 – p. 28, line 24, p. 42, lines 1-7 ["**Ogden XE**"] [**AR**, Vol 3, Tab 56].
[32] Affidavit of Sherri Ogden (June 2, 2022), paras 3-6 ["**Ogden Affidavit**"] [**AR**, Vol 3, Tab 54]; Wiwcharuk Affidavit, Exhibit C, p. 1, para 3, p. 3, para 13 [**AR**, Vol 4, Tab 80 c].
[33] Ogden Affidavit, paras 6-9, 11, 13, 15 [**AR**, Vol 3, Tab 54]; Ogden XE, p. 6, line 12 – p. 7, line 3, p. 9, line 3-11, p. 23, line 17 – p. 28, line 24, p. 43, lines 5-10 [**AR**, Vol 3, Tab 56]; Wiwcharuk Affidavit, Exhibit C, para 3 [**AR**, Vol 4, Tab 80 c].
[34] Ogden XE, p. 30, line 13 – p. 31, line 5 [**AR**, Vol 3, Tab 56]; Ogden Affidavit, paras 10, 16-17 [**AR**, Vol 3, Tab 54]; Wiwcharuk Affidavit, Exhibit C, para 4 [**AR**, Vol 4, Tab 80 c].
[35] Affidavit of Jammy Pierre, (June 7, 2022) ["**Pierre Affidavit**"], para 5-8 [**AR**, Vol 3, Tab 57].

50. *Shelters*: While Jammy was periodically able to access shelters and temporary hotel programs, she was repeatedly kicked out because she: missed curfew; got into an argument with staff, who threatened involuntary hospitalization (and left to avoid committal); was restricted from shelters for drug use, for periods of time ranging from a day to a week; she also lost her bed after stepping away for a few minutes. Shelters are sometimes full. She has sometimes been able to access an overflow bed at CAP. But she would not know it was full until 1030 PM or 1100 AM; if it is, she then must figure out where to stay for the night. When women's shelters are full, she sometimes accesses a men's shelter by changing her gender expression, which is very difficult. A men's shelter turned her away because of her gender expression. She has lost phones and ID to thefts while staying at CAP.[36]

51. *Encampments*: Jammy has stayed at several encampments. Each time, she has been evicted by the police. Eventually, she gave up on trying to put up a tent, knowing the City would soon tell her to move. Sometimes she would be told to move within a half hour of setting up a tent.[37]

52. *Unsheltered*: Jammy sometimes stayed outside without a tent.[38]

53. *Impact of encampment evictions*: Without a stable place to stay, Jammy would get one to two hours of sleep, and sometimes no sleep at all, to protect her belongings. This exacerbated her underlying mental health symptoms and substance use. Wandering the streets in search of somewhere to stay put her at an increased risk of theft and assault. The repeated, forced encampment evictions were traumatic and contributed to a worsening of her PTSD, depression and anxiety.[39]

54. **Darrin Marchand** is a 58 year old man, in receipt of ODSP. He has been diagnosed with psychosis (substance use), and opioid and stimulant use disorders. He has been homeless since 2017. His landlord threatened him with eviction, and he left his apartment.[40]

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[36] Pierre Affidavit, paras 9, 11, 13, 15, 17-18 [**AR**, Vol 3, Tab 57]; Transcript of Cross Examination of Jammy Pierre (August 16, 2024), p. 14, line 8-18, p. 15, line 13 – p. 16, line 3, p. 28, line 15-23, p. 30, line 20-23, p. 32, line 19 – p. 33, line 2 ["**Jammy XE**"] [**AR**, Vol 3, Tab 59]; Supplementary Affidavit of Jammy Pierre, (April 27, 2023) ["**Pierre Supplementary Affidavit**"], para 1-2 [**AR**, Vol 3, Tab 58].

[37] Pierre Affidavit, paras 21, 24 [**AR**, Vol 3, Tab 57]; Pierre XE, p. 61, line 19 – p. 62, lines 4-19 [**AR**, Vol 3, Tab 59].

[38] Pierre XE, p. 13, line 19 – p. 14, line 3 [**AR**, Vol 3, Tab 59].

[39] Pierre Affidavit, paras 25-26 [**AR**, Vol 3, Tab 57]; Lamont Affidavit, Exhibit G, p. 1, para 5 – p. 2, para 2 [**AR**, Vol 4, Tab 69].

[40] Lamont Affidavit, Exhibit B, p. 1, para 2 [**AR**, Vol 4, Tab 69]; Affidavit of Darrin Marchand, (June 2, 2022), para 7 ["**Marchand Affidavit**"] [**AR**, Vol 2, Tab 40].

55. *Shelters*: On December 17, 2020, Darrin was staying at the Salvation Army and witnessed a hatchet attack by one shelter resident on another resident. He was so traumatized that he was admitted to a crisis centre for a few days. He then discovered that he had been banned from all shelters and had to stay on the streets. He later tried to return to the Salvation Army in April 2022 but was told that he was service restricted. That same month, he was denied access to Mission Services due to a "conflict of interest". Darrin was service restricted from Good Shepherd after he was falsely accused of threatening a staff member. He continues to struggle with staying in shelters following the December 2020 attack. He also finds it difficult to sleep in shelters because of the noise. He has experienced theft in shelters, including his mother's ashes. More recently, Darrin has been able to access shelter for short periods. His trauma related to the December 2020 attack continues to manifest when he stays in shelter. When unable to access a shelter bed, Darrin has occasionally gone to the hospital and lied about his health to get warm.[41]

56. *Encampments*: Darrin stayed in encampments in several different locations, before he has been evicted by the police and Bylaw. Darrin experienced a sense of hopelessness when he was unable to stay either in an encampment or shelter. In summer 2021, Darrin was evicted from two different encampments, and moved to different greenspaces after receiving verbal warnings to avoid further criminalization. Eventually, he gave up on staying in encampments.[42]

57. *Unsheltered*: Darrin has slept rough. He sometimes spends his days and nights wandering outside, searching for a place to rest and sleep where he will not be ticketed or required to move.[43]

58. *Impact of encampment evictions*: On December 2, 2021, Darrin was living unsheltered and a man shot him in the shoulder. He was admitted to hospital, and later discharged to the Good Shepherd, which waived its service restriction because he was recovering. He was kicked out 2 months later because a nurse alleged that he threatened her, which he denies. When Darrin cannot stay in an encampment and cannot access shelter, he wanders around all day. He thinks about his predicament and becomes depressed. He feels isolated. Repeated encampment evictions have led him to lose belongings, and severed connections with supports including healthcare and food programs. He felt hopeless following his evictions, leading him to escalate his substance use,

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[41] Marchand Affidavit, paras 8-10, 14-15, 22-23, 31, 33-34, 39 [**AR**, Vol 2, Tab 40].; Supplementary Affidavit of Darrin Marchand (April 25, 2023), paras 1-2 ["**Supplementary Marchand Affidavit**"] [**AR**, Vol 2, Tab 41].
[42] Marchand Affidavit, paras 11-12 [**AR**, Vol 2, Tab 40]; Lamont Affidavit, Exhibit B, p. 1, para 3 [**AR**, Vol 4, Tab 69 b].
[43] Marchand Affidavit, paras 20, 24, 29 [**AR**, Vol 2, Tab 40]; Transcript of Cross Examination of Darrin Marchand (August 29, 2024), p. 7, line 21 ["**Marchand XE**"] [**AR**, Vol 2, Tab 42].

which triggered his psychosis. The benefits to him from staying in a tent were: increased protection from assaults; reprieve from the weather; improved sense of privacy; a place to store belongings; and more sleep.[44]

59. **Ashley MacDonald** is an Indigenous woman, in receipt of benefits under ODSP. Ashley has obsessive compulsive disorder, fetal alcohol disorder, depression and substance use disorder. Ashley has been homeless on and off throughout her life. Most recently, she became homeless in 2020 after being unlawfully evicted. Ashley was able to get into subsidized, supportive housing on June 29, 2023.[45] However, it has been difficult for her to transition into housing after so many years of homelessness. She was lonely, particularly because she was used to being around people all the time, and her new housing program did not allow guests until recently. She still spends some time in a tent but is spending more time in her apartment as time goes on.[46] Of note, Ashley was homeless for almost the entire time between the repeal of the 2020 Protocol and the introduction of the 2023 Protocol.

60. *Encampments*: Ashley has been repeatedly evicted from several parks, even when there was no shelter space available. Ashley was in an encampment during the 2020 Protocol, which allowed for high acuity individuals to remain encamped. Ashley was allowed to stay in one place because she was told that she was "too high acuity" to be in a shelter. She does not want to risk confrontation or criminal charges, so she feels that she has no choice but to leave when an encampment eviction takes place.[47]

61. *Shelters*: Ashley has often experienced shelters to be full. She could not access shelters when she was in a relationship because there was no space for couples. Even if her then partner was able to get into a men's shelter, it was unsafe for Ashley to remain outside. Ashley was assaulted when she was on the street alone, causing a serious head injury. Without a cell phone, it was difficult to reconnect with her partner. Ashley developed an understanding that the women's shelters are always full because there were more women on the street than men, and it was easier

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[44] Marchand Affidavit, paras 20, 22-23, 29-30, 35 [**AR**, Vol 2, Tab 40]; Lamont Affidavit, Exhibit B, p. 4, para 27 [**AR**, Vol 4, Tab 69 B].
[45] Transcript of Cross Examination of Ashley MacDonald (October 10, 2024), p. 5, lines 15-19, p. 72, q. 373; pp. 23, q. 101 – p. 24, q. 107, pp. 69-70, q. 367 ["**MacDonald XE**"] [**AR**, Vol 2, Tab 37].
[46]; MacDonald Affidavit, para 6 [**AR**, Vol 2, Tab 36]; MacDonald XE, p. 5, lines 15-19, p. 72, q. 373, pp. 23, q. 101 – p. 24, q. 107, pp. 69-70, q. 367 [**AR**, Vol 2, Tab 37].
[47] MacDonald Affidavit, paras 8-9, 14, 16 [**AR**, Vol 2, Tab 36].

for men to get into shelters.[48] Ashley has been told by shelters and transitional living programs that she is too high needs for their program. She has been service restricted from shelters. In one instance, she was kicked out of CAP despite having been followed and assaulted by her former landlord. She was also kicked out of a temporary hotel program.[49]

62. *Impact of encampment evictions*: Ashley lost many of her belongings, including tents, when the City dismantled encampments. She found encampment evictions to be traumatizing. She repeatedly lost connections with various supports, including healthcare. She was at greater risk of overdose and assault because she was more isolated following the evictions, and because she used to choose encampment sites in close proximity to safe injection sites.[50]

63. **Shawn Arnold** is a 55 year old man in receipt of ODSP benefits. He has opiate use disorder, stimulant use disorder, attention deficit hyperactive disorder. He became homeless in 2020. He had been staying with a friend, who later sold the house. He has had brief periods of housing since. At the present, he is precariously housed in a hotel after a fire at his rooming house. Shawn stayed in several encampments, shelters, on the streets unsheltered, and couch surfed.[51]

64. *Encampments*: Shawn was evicted by Bylaw or police from the Ferguson encampment. He witnessed police and Bylaw officers disposing of people's belongings and tents. Shawn decided to move in order to avoid the risk of losing his belongings. Shawn went to another encampment. During this time, Shawn was able to remain for several months after he was told that he scored a 16 on an assessment tool that determined the was high acuity, which gave him the right to remain encamped under the 2020 Protocol. However, when the 2020 Protocol was repealed, Shawn was told that he had to leave.[52]

65. *Shelters*: Shawn does not function well in shelters because of the crowded conditions, and because he is concerned that being exposed to drug use in shelters will compromise his sobriety.[53]

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[48] MacDonald Affidavit, paras 9-13, 18, 21-23 [**AR**, Vol 2, Tab 36]; MacDonald XE, p. 13, q. 52., p. 26, q. 123 – p. 31, q. 150, p. 33, q. 160 [**AR**, Vol 2, Tab 37].
[49] MacDonald Affidavit, paras 9-13, 18, 21-23 [**AR**, Vol 2, Tab 36]; MacDonald XE, p. 5, lines 15-19 , p. 13, q. 52, p. 72, q. 373, pp. 23, q. 101 – p. 24, q. 107, p. 26, q. 123 – p. 31, q. 150, p. 33, q. 160, pp. 69-70, q. 367 [AR, Vol 2, Tab 37].
[50] MacDonald XE, p. 16, q. 67 - p 17, q. 74, p. 22, q. 97-98 [**AR**, Vol 2, Tab 37]; MacDonald Affidavit, paras 19-20 [**AR**, Vol 2, Tab 36].
[51] Affidavit of Shawn Arnold, (May 9, 2022), paras 6, 8-9, 12-13 ["**Arnold Affidavit**"] [**AR**, Vol 2, Tab 20]; Transcript of Cross Examination of Shawn Arnold (August 14, 2024), p. 6, line 5-21, p. 16, line 6-13, p. 23, line 9-11 ["**Arnold XE**"] [**AR**, Vol 2, Tab 21]; Wiwcharuk Affidavit, Exhibit H, p. 1, para 2 [**AR**, Vol 4, Tab 80].
[52] Arnold Affidavit, paras 6, 8, 11-12 [**AR**, Vol 2, Tab 20].
[53] Arnold Affidavit, para 9 [**AR**, Vol 2, Tab 20]; Wiwcharuk Affidavit, Exhibit H, p. 1, para 2 [**AR**, Vol 4, Tab 80 h]; Arnold XE, p. 6, line 16 – p. 7, para 15 [**AR**, Vol 2, Tab 21].

66. *Unsheltered*: Shawn wandered the streets for four days without sleeping after being evicted from JC Beemer Park.[54]

67. *Impact of encampment evictions*: Shawn could rest and sleep while staying in an encampment for an extended period. He wandered the streets for days after an eviction, and would struggle to sleep without any privacy and the protection of community. Shawn lost belongings, including his tent, through encampment evictions. When he was able to remain in place, Shawn was able to benefit from a nearby methadone treatment program, receive meal support and connect with other social supports. When Shawn was evicted from JC Beemer, his housing worker could not find him to tell him that he had been approved for housing. He almost lost the housing as a result. Lastly, Shawn was exposed to the elements without a tent.[55]

68. **Gord Smyth** is a 57 year old man in receipt of ODSP benefits. His disabilities include depression, personality disorder, chronic obstructive pulmonary disorder, diabetes, heart disease, and degenerative disc disease. He uses a mobility scooter. Gord became homeless on June 30, 2021, after his landlord served him with an eviction notice to demolish the building. Prior to receiving the eviction notice, there had been talk (over the course of three years) that the building might be sold. Gord immediately started looking for housing and applied for subsidized housing. He was unable to find housing prior to eviction. He contacted and attended shelters, speaking with residents about their experiences. He learned that he would not be able to bring most of his belongings, or his dog. He worried that the congregate environment would trigger his personality disorder, leading to potentially violent behaviour. Gord purchased approximately $3000 in supplies so he could live outside. He obtained subsidized housing on November 27, 2021.[56]

69. *Encampments*: Gord stayed in several encampments. He was able to stay in the first encampment for seven days and was then given verbal notice to move from Bylaw. He was evicted from three more encampments, each time without an assessment of his individual needs as required under the 2020 Protocol. He was threatened with eviction from a fourth encampment, but Social Navigation completed an assessment and told him that he scored 13 – which meant he was high acuity and permitted to remain. However, the City's Encampment Task Force did not accept the

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[54] Arnold Affidavit, p. 2, para 13(a) [**AR**, Vol 2, Tab 20].
[55] Arnold Affidavit, para 13 (a)(b)(c)(d)(e)(f) [**AR**, Vol 2, Tab 20]; Arnold XE, p. 56, lines 7-10. [**AR**, Vol 2, Tab 21].
[56] Affidavit of Gord Smyth, (March 9, 2023), paras 5, 7-9, 11, 20 ["**Smyth Affidavit**"] [**AR**, Vol 3, Tab 62]; Transcript of Cross Examination of Gord Smyth (August 28, 2024), p. 10, q. 43 – p. 11, q. 50, p. 21, q. 116-117, p. 22, q. 122 – p. 27, q 127 ["**Smyth XE**"] [**AR**, Vol 3, Tab 63].

score, even though it had been completed by another City agency. A shorter version of the assessment was completed with Gord. They told him that he only scored 11, and would be required to leave. Gord refused to leave at that point.[57]

70. *Housing Search*: Gord wanted to ensure that he could afford any new housing. He had felt comfortable paying his previous $525 in rent on his ODSP benefits of approximately $1150. He eventually accepted an affordable unit but the landlord withdrew the offer. Gord was able to accept his current housing because it is subsidized, and moved in on November 27, 2021.[58]

71. *Impact of encampment evictions*: Gord was evicted during bad weather and found it difficult to move everything to a new location. He was in a mobility scooter and had a large amount of survival items. He was anxious every day, worrying that he would be evicted, or he would return to find his tent torn down. Conversely, when he was able to stay in one place, he had some piece of mind, and could connect with various supportive services.[59]

72. **Mario Muscato** is a 51 year old Indigenous man in receipt of ODSP benefits. Mario lost his right hand, and the majority of his fingers of his left hand after being electrocuted in 2018. He also has opioid and stimulant use disorder, HIV, post-traumatic stress disorder, major depressive disorder, acquired brain injury, and extensive neck and face burns resulting in chronic pain.[60] Mario has been homeless since 2017 after being evicted.[61]

73. *Shelters*: Mario has repeatedly experienced shelters to be full. Access is unpredictable, and he often walks around not knowing where he will be able to sleep. He has been repeatedly service restricted from shelters. He was banned from one of the three men's shelters and discovered that the other two shelters were full. He has missed curfew repeatedly, sometimes only by two minutes, which leads to him losing his bed. He has been falsely accused to bringing in alcohol. He was banned for over a month after staff suspected he was using drugs because he had been in the washroom for a while. In reality, Mario has very limited use of his hands and it takes him a long time to use the washroom. Mario has experienced theft in shelters. He has found that service restrictions are imposed without a formal investigation, based solely on an allegation. Mario realizes that he is sometimes targeted by other shelter residents because of the deformities in his

[57] Smyth Affidavit, paras 12-17 [**AR**, Vol 3, Tab 62].
[58] Smyth Affidavit, paras 3, 23-24, 28 [**AR**, Vol 3, Tab 62].
[59] Smyth Affidavit, paras 21- 25 [**AR**, Vol 3, Tab 62].
[60] Affidavit of Mario Muscato, (May 11, 2022), paras 2-3 ["**Muscato Affidavit**"] [**AR**, Vol 3, Tab 52]; Wiwcharuk Affidavit, Exhibit F, p. 1, para 2 [**AR**, Vol 4, Tab F].
[61] Muscato Affidavit, paras 6, 8-9, 18-20 [**AR**, Vol 3, Tab 52].

hands. In his words, "People are going to want to play the tough guy, and there you go. The fight's on. They figure, you know, if they can slap someone like me around, then people will be afraid of them." Mario has been service restricted for getting into fights that he did not instigate. The longest service restriction has been approximately six months.[62]

74. *Hotel programs*: Mario has also been repeatedly service restricted from hotel programs based on false allegations. In the first instance, the person who made the allegation later admitted she had made it up. Mario was admitted a second time, only to be restricted again. One restriction lasted between 2.5 – three months.[63]

75. *Encampments*: Mario has stayed in encampments in several locations. He has been able to stay for varying amounts of time, from days to seven months (at the Ferguson encampment). He has been repeatedly evicted by Bylaw and the police. Sometimes he moves pre-emptively to avoid being evicted. He has also stayed in more hidden locations to avoid being seen by the public and attracting police attention.[64]

76. *Housing Search*: Outreach workers have suggested to Mario that they could get him into a lodging home. However, Mario has heard from other people who have stayed in lodging homes, as well as a housing worker, that his entire ODSP cheque would be taken, with the exception of $150 that would be distributed as an allowance. Mario knows that he cannot survive with only $150 a month. He also understands that not all lodging homes will help with cooking and laundry. Mario also understood that lodging homes were more for people with "mental issues" and did not think he belonged. Mario would like to get into housing, and explained that "I think the public needs to be aware of the fact that we are out here because the rents are very, very high" and that he would consider living with multiple roommates in order to secure housing.[65]

77. *Impact of encampment evictions*: Mario is unable to carry many belongings around, or put up and take down a tent because of the deformity in his hands. When he does not have a stable place to stay, he hardly sleeps and many nights doesn't sleep at all. As a result, he is often groggy

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[62] Muscato Affidavit, paras 8-17, 21 [**AR**, Vol 3, Tab 52]; Transcript of Cross Examination of Mario Muscato (August 14, 2024), p. 28, line 17 – p. 29, line 7, p. 42, lines 2-7, p. 44, lines 9-11 ["Muscato XE"] [**AR**, Vol 3, Tab 53].
[63] Muscato Affidavit, paras 19-20 [**AR**, Vol 3, Tab 52], Vol 3, Tab 52]; Muscato XE, p. 33, line 33 – p. 34, line 3 [**AR**, Vol 3, Tab 52].
[64] Muscato Affidavit, paras 24-26 [**AR**, Vol 3, Tab 52].
[65] Muscato XE, p.13, para 3-9, p. 41, line 22 – p. 42, line 9 [**AR**, Vol 3, Tab 52]; Cross Examination of Mario Muscato, (October 13, 2021), p. 10, line 18 – p. 11, line 19 ["**2021 Muscato XE**"] [**AR**, Vol 3, Tab 51]; Muscato Affidavit, paras 24-26 [**AR**, Vol 3, Tab 52].

during the day and has trouble concentrating, keeping track of appointments, and having the physical energy to make it to appointments. He has less personal security.[66]

78. **Linsley Greaves** is a 54 year old Black man who was previously in receipt of OW benefits before being granted ODSP benefits around December 2022. He uses a wheelchair after having an amputation of his left leg below the knee in December 2022. Linsley has had periods of homelessness for over ten years. Most recently, Linsley was became homeless in 2020 after he was evicted. He has stayed in various locations since becoming homeless in 2020, including shelters, encampments, couch surfing, and unsheltered on the streets.[67]

79. *Shelters*: Linsley feels that his past street life "comes back to haunt him" in shelters, and he gets targeted with theft, property damage, and people trying to start fights. Linsley has experienced racism in shelters. Linsley has had a past dependency on crystal meth that made him both worry about getting caught using in shelters, and getting kicked out if he left to use and was not inside at the right times. Linsley has difficulty sleeping in shelters because of the noise and discomfort with sleeping around strangers. He has also experienced theft in shelters.[68]

80. *Encampments*: Linsley was initially able to stay in an encampment at Woodlands Park for almost two years during the time that overlapped with the 2020 Protocol. Bylaw officers eventually attended and said that the City "wanted their park back". The encampment residents were given three days to leave. Everyone else left, but Linsley stayed because he had been there for so long without causing issues, and thought he'd be able to stay. The City showed up with trucks and bulldozers and surrounded Linsley and some supporters who had showed up in protest. Linsley started packing up while City trucks drove around him. While the City offered to store some of his belongings, he was unable to find someone to follow up with, and ended up losing many of his belongings, including his tent. Linsley continued to experience encampment evictions from different locations. Before Woodlands, Linsley had difficulty being able to stay in one encampment location for more than a night because the City would come in the middle of the night – at 400 AM or 600 AM – and tell them they had to move.[69]

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[66] Muscato Affidavit, para 12, 27-28 [[**AR**, Vol 3, Tab 52].
[67] Affidavit of Linsley Greaves, (June 2, 2022), para 1, 6, 13, 22-25 ["**Greaves Affidavit**"] [**AR**, Vol 2, Tab 22]; Affidavit of Claire Bodkin, (September 6, 2024) Exhibit A, p. 2, para 4 ["**Bodkin Affidavit**"] [**AR**, Vol 4, Tab 64 a]; Supplementary Affidavit of Linsley Greaves, (June 27, 2023), paras 1-2 ["**Supplementary Greaves Affidavit**"] [**AR**, Vol 2, Tab 23].
[68] Cross Examination of Linsley Greaves, (August 14, 2024), p. 9, lines 9-19 ["**Greaves XE**"] [**AR**, Vol 2, Tab 24].
[69] Greaves XE, p. 24, line 14 [**AR**, Vol 2, Tab 24].

81. *Unsheltered*: Linsley lost his tent during his eviction from Woodlands Park. He stayed wherever he could, including on a heating vent behind the family courthouse with about 14 others who slept "sausage style" on the vent. The vents were subsequently turned off. He then went to a parking lot with some of the same people from the heating vents, but it was fenced off after a week. He stayed in other outdoor locations but everywhere he went, it felt like Bylaw or the police were "buzzing around" and tell him that he had to leave. If he stayed on a cluster of benches, the City would remove all but one bench.[70]

82. *Residential care facility*: Linsley has a housing worker who has discussed the possibility of getting him into a residential care facility. However, Linsley's understanding is that they are for elderly people, and he does not know if it would be a stable environment for him. One place that was mentioned was not viable because it was not wheelchair accessible.[71]

83. *Impact of encampment evictions*: Without a tent, Linsley experienced sleep deprivation and would often fall asleep during the day. He had trouble concentrating. His anxiety worsened and he was exposed to the elements. Linsley developed frostbite in his left foot after sleeping outside with only blankets in the winter of 2021/2022. He lost his left big toe as a result. In the weeks leading up to December 15, 2022, Linsley had been repeatedly evicted and his belongings kept getting wet while the temperature fluctuated above and below freezing. Paramedics with the City's Social Navigation program were concerned about his left leg and brought him to a doctor who routinely treats encampment residents. The doctor examined Linsley's left leg and was so concerned about this new injury that she sent him to the hospital, where he underwent an amputation below the left knee. As a result, Linsley is now permanently disabled and in a wheelchair. The loss of his leg has been devastating both physically and mentally. He feels ashamed and his mental health has been negatively impacted. He has struggled to maintain a relationship with his daughter because he cannot face her in his new state.[72]

84. **Cory Monahan** is a 48 year old man in receipt of ODSP benefits. His disabilities include fetal alcohol syndrome, attention deficit hyperactivity disorder, back pain and opioid and stimulant

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[70] Greaves Affidavit, paras 22-28 [**AR**, Vol 2, Tab 22].
[71] Greaves XE, p. 44, line 5 – p. 45, line 9, p. 57, lines 3-9 [**AR**, Vol 2, Tab 24].
[72] Greaves Affidavit, paras 29-31 [**AR**, Vol 2, Tab 22]; Supplementary Greaves Affidavit, paras 2-3 [**AR**, Vol 2, Tab 23]; Bodkin Affidavit, Exhibit A, p. 2, para 4 [**AR**, Vol 4, Tab 64 a]; Cross Examination of Claire Bodkin (September 6, 2024), p. 18, lines 5-16, p. 24, line 12 – p. 26, line 17, p. 28, lines 10 – p. 33, line 19 ["**Bodkin XE**"] [**AR**, Vol 4, Tab 65].

use disorders. Cory has been homeless for the majority of his life. His last housing was in 2021, but he was unlawfully evicted. As of June 2022, he had been on the waiting list for subsidized housing for years.[73]

85. *Encampments*: After being evicted and running out of money for a hotel, Cory put up a tent in Carter Park. After three days, the police and Bylaw showed up with trucks and bulldozers to evict everyone. Cory packed up his belongings and left to avoid a confrontation. He then went on to stay in several more encampments, for varying amounts of time before he was evicted by Bylaw officers. Cory has continued to be evicted from his encampments and lose belongings in the process.[74]

86. *Shelters*: Cory does not feel comfortable living with groups of strangers and finds it to be a destabilizing environment. He has a history of substance use, and tries to stay away from harder street drugs. At the same time, he has had a marijuana dependency and is unable to use in shelters. He has been service restricted from shelters on multiple occasions, recently in the middle of winter for eight weeks. Mission Services had a shelter program where alcohol use was permitted. However, Cory was uncomfortable being exposed to alcohol because of his fetal alcohol syndrome disorder and left after three days. More recently, Cory has a dog that is not permitted inside shelter. Cory has had repeated experiences where he is told that there is shelter space available, but when he shows up, they are full.[75]

87. *Impact of encampment evictions*: After Cory's eviction from Carter Park, he "gave up" and slept wherever he could. He lost 15 pounds. He is at increased risk of theft when he has to continuously pack up and move his belongings because it is easier for someone to grab something from his buggy. Cory dislocated his shoulder after he was repeatedly woken up by Bylaw and evicted before sunrise. He was rushing and injured himself. It is difficult for Cory to move his belongings so often. He lost some of the stability he experiences when he can stay in one location. His sleep is disrupted and he is exhausted from moving. Lastly, Cory often loses belongings in the

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[73] Affidavit of Cory Monahan, (May 12, 2022) paras 4-7 ["**Monahan Affidavit**"] [**AR**, Vol 2, Tab 46].
[74] Monahan Affidavit, paras 4, 7-8 [**AR**, Vol 2, Tab 46]; Supplementary Affidavit of Cory Monahan, (April 23, 2023), paras 1-3, 5 ["**Supplementary Monahan Affidavit**"] [**AR**, Vol 2, Tab 47].
[75] Monahan Affidavit, paras 10-16 [**AR**, Vol 2, Tab 46]; Monahan XE, p. 50 , line 5-25 [**AR**, Vol 2, Tab 48]; Transcript of Re-direct Examination of Cory Monahan, (August 30th, 2024), p. 8, lines 12-23 ["**Monahan Redirect**"] [**AR**, Vol 2, Tab 49]; Supplementary Monahan Affidavit, para 3 [**AR**, Vol 2, Tab 47].

course of encampment evictions because he does not have enough time to move everything when the City's trucks and bobcats arrive.[76]

88. **Ammy Lewis** is a 46 year old Indigenous woman in receipt of ODSP benefits. Her disabilities include PTSD, HIV, anxiety, depression, stimulant and opioid use disorder, and borderline personality disorder. Ammy does not have a strong chronological memory of her most recent homelessness. However, she was released from jail in late 2020, briefly housed, and then fled from her apartment in late 2021 after her landlord attempted to extort sex from her. Ammy obtained subsidized housing in February 2023.[77]

89. *Shelters*: Ammy went to shelters when she first became homeless, but they would not accept her with her dog (a Jack Russell Terrier/Chihuahua mix). Ammy's dog is an important source of emotional support and safety and it she could not separate from her dog. Eventually, Ammy's doctor's office was able to find a temporary foster home for her dog so she could access shelter. Ammy's doctor's office was unable to find a shelter spot for her because they were full and would not accept her dog, even if it was an emotional support animal.[78]

90. *Unsheltered, various locations*: After Ammy could not access shelter, she started sleeping outside, unsheltered, including in dumpsters, an underground parking lot, and abandoned cars.[79]

91. *Encampments*: Ammy received a tent after police found her sleeping in an underground parking lot. She stayed in a couple different locations, and then moved to greenspace at Cathedral Park. Once there, Bylaw officers would repeatedly tell her that she had to leave. At some point, the City evicted Ammy from her apartment and she was forced to temporarily return to an abusive situation. Ammy was also repeatedly assaulted while staying outside. While Ammy was encamped, she was constantly worried about when the City would come and enforce an eviction.[80]

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[76] Transcript of Cross Examination of Cory Monahan (August 15, 2024), p. 47, paras 6-21, p. 74, lines 4-7, p. 75, lines 8-15 ["**Monahan XE**"] [**AR**, Vol 2, Tab 48]; Monahan Redirect, p. 8, lines 23-24 – p. 9, line 10 [**AR**, Vol 2, Tab 49]; Monahan Affidavit, paras 19-20, 22 [**AR**, Vol 2, Tab 46].
[77] Cross Examination of Ammy Lewis (August 14, 2024), p. 9, lines 9-11 ["**Lewis XE**"] [**AR**, Vol 2, Tab 35]; O'Shea Affidavit, Exhibit B, p. 1, para 2 – p. 2 [**AR**, Vol 4, Tab 74]; Lamont Affidavit, Exhibit E, p. 1, paras 2-3 [**AR**, Vol 4, Tab 69]; Affidavit of Ammy Lewis, (June 14, 2022), paras 6-8 ["**Lewis Affidavit**"] [**AR**, Vol 2, Tab 33]; Cross Examination of Rachel Lamont, (October 7, 2024), p. 95, line 4-5 ["**Lamont XE**"] [**AR**, Vol 4, Tab 70].
[78] Lewis Affidavit, paras 8-10 [**AR**, Vol 2, Tab 33]; O'Shea Affidavit, Exhibit B, p. 1, para 3, p. 2, para 1 [**AR**, Vol 4, Tab 74]; Lamont XE, p. 139, line 12 – p. 140, line 19 [**AR**, Vol 4, Tab 70].
[79] Lewis Affidavit, para 11 [**AR**, Vol 2, Tab 33].
[80] Lewis Affidavit, paras 14-15 [**AR**, Vol 2, Tab 33]; Lamont Affidavit, Exhibit E, p. 2, para 3 [**AR**, Vol 4, Tab 69]; Lewis XE, p. 55, line 20 – p. 58, line 1 [**AR**, Vol 2, Tab 35].

92. *Impact of encampment evictions*: Ammy constantly worried about when the City would evict her, and where she would go next. She had to move several times, losing belongings and a sense of stability and connection to supports in the process. She had suicidal ideation, and an exacerbation of her post traumatic stress and substance use disorders.[81]

93. **Julia Lauzon** is a 27 year old Indigenous woman in receipt of ODSP benefits. She has borderline personality disorder, obsessive compulsive disorder, and substance abuse. She became homeless in May 2021 after losing custody of her child and ended up on the street. She obtained subsidized housing in September 2024.[82]

94. *Shelters*: Julia repeatedly attempted to get into shelters but was usually told that they were full. In March 2022, she tried for nine days in a row. She was sometimes told to call back every hour to see if a bed opened up, but didn't have a phone. There used to be a protocol where, if all shelters were full, Mary's Place would do a referral. That did not happen for Julia. She was able to stay in Mary's Place for a few days. After that, she could not get back into shelter despite outreach workers trying to find her a spot. Julia was occasionally able get a spot at CAP. However, she sometimes couldn't get there before it was full, particularly when she worked as a bartender until 11:00 p.m. When CAP was full, she would sleep right outside the building.[83]

95. *Encampments*: Julia stayed in tents in encampments in several different locations during her homelessness. She never knew how long she would be able to stay. The City repeatedly evicted Julia and her friends from their tents and gave her at least a dozen trespass notices.

96. *Unsheltered, outside*: Julia would sleep outside CAP when she could not get it. She slept outside on several occasions, including the time she was sexually assaulted.[84]

97. *Impact of encampment evictions*: Julia was employed at the start of her homelessness as a bartender. She was unable to look for new work due to the stress of living on the streets and not knowing where she would sleep at night. She hardly sleeps when she is constantly on the move. It puts her into constant survival mode where she cannot focus on other things, like going to appointments. Julia was sexually assaulted while sleeping outside without a tent. In the course of

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[81] Lewis Affidavit, para 15 [**AR**, Vol 2, Tab 33]; O'Shea Affidavit, Exhibit B, p. 2, para 1 [**AR**, Vol 4, Tab 74]; Lamont Affidavit, Exhibit E, p. 1, para 3 [**AR**, Vol 4, Tab 69].
[82] Affidavit of Julia Lauzon, (August 12, 2024), paras 2-4 ["**Lauzon Affidavit**"] [**AR**, Vol 2, Tab 31]; Transcript of Cross Examination of Julia Lauzon, (October 15 2024), p. 7, lines 27-34, p. 28, lines 147-148 ["**Lauzon XE**"] [**AR**, Vol 2, Tab 32].
[83] Lauzon Affidavit, paras 7-12 [**AR**, Vol 2, Tab 31]; Lauzon XE, p. 16, line 79-84 [**AR**, Vol 2, Tab 32].
[84] Lauzon Affidavit, paras 12-13 [**AR**, Vol 2, Tab 31]; Lauzon XE, p. 23, line 122-123 [**AR**, Vol 2, Tab 32].

defending herself, Julia was charged with aggravated assault against her attacker. Her attacker was later charged and convicted.

Applicants' Expert Witnesses

98. The Applicants adduced affidavits from eight expert witnesses:

a. **Ms. Leilana Farha** is Global Director of The Shift, and previously served as the UN Special Rapporteur on adequate housing.

b. **Dr. Stephen Gaetz** is a Professor in the Faculty of Education at York University and President and CEO of the Canadian Observatory on Homelessness. He has been qualified as an expert witness in previous proceedings.[85]

c. **Dr. Kate Hayman** is an Assistant Professor in the Emergency Medicine Division of the Department of Medicine, University of Toronto, and an emergency physician providing health care to unhoused and precariously housed.

d. **Dr. Stephen Hwang** is a Professor at the University of Toronto in the Departments of Medicine, Public Health Sciences, and Health Policy, Management, and Evaluation. He is a specialist in general internal medicine with training in public health and epidemiology. He has been qualified as an expert witness in previous proceedings.[86]

e. **Dr. Ameil Joseph** is an Associate Professor in the School of Social Work and of Equity, Identity, and Transformation with the Faculty of Social Sciences, at McMaster University. He is the Academic Director of Community Engaged Research and Relationships.

f. **Dr. Aaron Orkin** is a physician and epidemiologist, and Associate Professor in the Department of Family and Community Medicine and the Dalla Lana School of Public Health at the University of Toronto. He has been qualified as an expert witness in previous proceedings.[87]

g. **Dr. Kaitlin Schwan** is Director of the California Street Medicine Collaborative at the University of Southern California, and a Senior Researcher at the Canadian Observatory on Homelessness. She has been qualified as an expert witness in previous proceedings.[88]

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[85] *R v. Enns*, 2023 NSSC 381, para 3; *R v. Howell*, 2020 ABQB, para 161; *R v. Seeman*, 2022 SKKB 232, para 60; *Wright v. Yukon (Director of Public Safety and Investigations)*, 2023 YKSC 77, para 14.
[86] *Victoria (City) v. Adams*, 2008 BCSC 1363, para 67; *Church of Saint Stephen et al. v. Toronto*, 2023 ONSC 6566, para 16; *AB v. Canada (Citizenship and Immigration)*, 2022 CanLII 8009.
[87] *R. v. S.H.*, 2020 ONSC 2879, para 28; *R. v. J.R.*, 2020 ONSC 1938, para 28; *R. v. A.I.*, 2020 ONCJ 198, paras 45-46; *HMQ v. A.C.*, 2020 ONSC 2870, paras 71-72; *R. v. Z.A.*, 2020 ONSC 2824, para 27; *R. v. D.M.*, 2020 ONSC 3152, para 35; *R v. Ledesma*, 2020 ABCA 194, para 13; *R. v. Ali*, 2020 ONSC 2374, para 55; *R. v. S.B.*, 2020 ONSC 2997, para 48; *R. v. Brown*, 2020 ONSC 2626, para 30; *R. v. B.M.D.*, 2020 ONSC 2671, para 36; *R. v. M.J.I.*, 2020 ONSC 2497, para 33; *R. v. H.K.*, 2020 ONSC 3275, para 96; *R. v. Saboon*, 2020 ONSC 3102, para 70.
[88] *Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670, para 68 [***Waterloo***].

h. **Dr. Andrea Sereda** is a physician practicing at London Intercommunity Health Centre in London, Ontario and has provided care for unhoused people for 14 years. She has been qualified as an expert witness in previous proceedings.[89]

Applicants' Fact Witnesses

99. The Applicants adduced affidavits from four physicians who treated the Applicants: **Dr. Claire Bodkin, Dr. Jill Wiwcharuk, Dr. Rachel Lamont, and Dr. Timothy O'Shea.**

100. The Applicants also adduced affidavits from **Ms. Audrey Davis**, Director of the Hamilton Regional Indian Centre; **Ms. Olivia Mancini**, a case manager at the Salvation Army Booth Centre from 2015 to 2021; and **Ms. Medora Uppal**, CEO of the YMCA Hamilton.

RESPONDENT'S WITNESSES

101. The Respondent's expert witness is **Dr. Sharon Koivu**, an inpatient Addiction Physician. The Respondent adduced affidavits from City staff, who are named as relevant below.

PART III – ISSUES AND ARGUMENT

ISSUES

102. This Application raises the following issues: **(a) Issue 1**: Should the Court admit the expert evidence? **(b) Issue 2**: Should the Court admit the City documents? **(c) Issue 3**: Did encampment bans and evictions in public parks violate section 7? **(d) Issue 4**: Did encampment bans and evictions in public parks violate section 15? **(e) Issue 5**: Were the section 7 and/or 15 violations justified under section 1? **(f) Issue 6**: If they were, what is the appropriate relief?

Issue 1: Should the Court admit the expert evidence?

103. To admit expert evidence, four threshold requirements must be met: logical relevance, necessity, absence of an exclusionary rule, and a properly qualified expert. The benefits of admitting the evidence must also outweigh its risks.[90] The evidence of the Applicants' expert witnesses is relevant, and their expertise likely lies outside the Court's experience or knowledge:

a. **Ms. Farha**: international human rights treaties that shape *Charter* interpretation.[91]
b. **Professor Gaetz**: causes of being unhoused; barriers preventing unhoused individuals from staying in shelter; why the unhoused choose encampments over shelters.

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[89] *Kingston v. Doe*, 2023 ONSC 6662, para 104 [***Kingston***]; *Waterloo*, para 52.
[90] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, paras 19-23.
[91] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, paras 28-38 (international human rights law to interpret the *Charter*); *IATA v. Canada (Transportation Agency)*, 2024 SCC 30, paras 65-79 (admissibility of expert evidence on international law).

c. **Dr. Hayman**: health effects of sleeping rough compared to encampments, especially for unhoused women; why the unhoused choose encampments over shelters.
d. **Dr. Hwang**: health effects of sleeping rough compared to encampments.
e. **Professor Joseph**: historical trauma of the unhoused, especially racialized persons.
f. **Dr. Orkin**: the harms of encampment evictions, the impact of autonomy on health.
g. **Professor Schwann**: why the unhoused choose encampments over shelters; pre-existing disadvantages facing unhoused women.
h. **Dr. Sereda**: health effects of sleeping rough compared to encampments, especially for unhoused women; health harms of evictions; why the unhoused choose encampments over shelters.

104. The witnesses are highly qualified, as evidenced by their professional accomplishments; Gaetz holds the Order of Canada. They are independent and impartial. Courts in Ontario and across Canada have previously accepted Gaetz, Hwang, Orkin, Schwann and Sereda as experts. The benefit of admitting their evidence outweighs any risks.

105. The Court should not admit the Affidavit of Dr. Koivu, or should give it little weight. The Applicants do not object to her decision to "speak out" on safe supply in Parliament and the press. As *Black* and *Kingston* held, advocacy by experts is not disqualifying. Nor is it relevant that she has never practiced in Hamilton. But Dr. Koivu is unqualified to address general health outcomes for the unhoused. She is an inpatient addiction physician, who provides in-hospital addiction care to unhoused patients referred to her by other medical services for addiction. She does not provide outpatient care. She does not care for patients in encampments or shelters. Additionally, her publications are only about addiction.[92]

106. Her evidence is also not relevant. She compares the health outcomes of unhoused persons overnighting in shelters to those living in encampments. But she does not compare health outcomes or medical care for encampment residents to those living rough – a central issue in this case. Her testimony also strayed from her expertise. She drew on her experience as a camper to opine on whether tents protect from frostbite. 40 of the 69 sources she cites are inadmissible hearsay, being

[92] Transcript of Cross-Examination of Sharon Koivu, (September 6, 2024), p. 18, q. 56, pp. 20-47, q. 57- q. 180, pp. 49-53, q. 190- q. 212, pp. 69-74, q. 277-q. 290, pp. 75-84, q. 296- q. 357, Exhibits to XE 1-5 ["**Koivu XE**"] [**AR**, Vol 17, Tab 143]; *Black et al. v. City of Toronto*, 2020 ONSC 6398, para 31 [***Black***]; *Kingston*, para 104; Affidavit of Sharon Koivu (July 26, 2024), paras 5-6, Exhibit A CV of Dr. Sharon Koivu ["**Koivu Affidavit**"] **[AR**, Vol 17, Tab 142].

news stories on events in encampments across Canada. Many – likely most – stories involved incidents that she did not directly observe or in which she was not involved.[93]

Issue 2: Should the Court admit the City documents?

107. The Court should admit the following evidence under the public documents exception to the hearsay rule at common law and/or section 25 of the Ontario *Evidence Act*: **(a)** reports to Council and Committees with attachments; **(b)** data on housing and homelessness for the Housing and Homelessness Dashboard posted on the City's website, including supporting documentation explaining that data; **(c)** PDFs of various city websites; and **(d)** extracts from *The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*.

108. As the Court of Appeal has explained, "Under the public document exception to the hearsay rule, reports of public officials are admissible for the truth of their contents" because of "the inherent reliability and trustworthiness of records and reports generated by public officials" and "to avoid the inconvenience of public officials having to be present in court to prove them". These documents are admissible because: **(a)** they were made by public officials; **(b)** the public officials made them in discharging a public duty or function; **(c)** they were made to serve as a permanent record; and **(d)** they are available for public inspection.[94] All but one was authored by the City.

Issue 3: Did encampment bans and evictions in public parks violate section 7?

109. The prohibition on nighttime and daytime encampments violated section 7.

The legal framework: the Waterloo decision

110. The legal framework for encampment evictions and bans under section 7 is built on the British Columbia Court of Appeal's landmark 2009 decision in *Adams*.[95] *Waterloo* summarizes the legal framework as follows:[96]

a. Overnight encampment bans or evictions violate section 7 of the *Charter* if individuals cannot access shelter, when shelter beds:

   i. are **insufficient**, leaving the unhoused "no alternative but to sleep outside".[97]

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[93] Koivu Affidavit, para 15 **[AR**, Vol 17, Tab 142].
[94] *J.N. v. C.G.*, 2023 ONCA 77, para 26-28; *Francis v. Ontario*, 2020 ONSC 1644, paras 17 to 25 (exception extends to inquiries and commissions).
[95] *Victoria v. Adams*, 2008 BCSC 1363; *Victoria v. Adams*, 2009 BCCA 563 [***Adams***]; *Abbotsford v. Shantz*, 2015 BCSC 1909 [***Shantz***]; *Prince George v. Stewart*; 2021 BCSC 2089 [***Stewart***]; *Bamberger v. Vancouver*, 2022 BCSC 49; *Waterloo*; *Kingston*.
[96] *Waterloo*, paras 81-82.
[97] *Waterloo*, para 92.

ii. are **inaccessible**, because they are "impractical for homeless individuals either because the shelters do not accommodate couples, are unable to provide required services, impose rules that cannot be followed due to addictions, or cannot accommodate mental or physical disability, they are not low barrier and accessible to the individuals they are meant to serve."[98]

b. Overnight encampment bans and evictions deprive individuals of their:

i. **life**, because they interfere with "the ability to provide adequate shelter for oneself", which "is a necessity of life that falls within the right to life protected by section 7 of the *Charter*", since "exposure to the elements can result in serious harm, including death", especially "during the late fall and winter months" (of which courts have taken judicial notice);[99]

ii. **security of the person** for the same reasons – that is, they increase the "risk of significant health problems, both physical and psychological in nature";[100] and

iii. **liberty**, because they interfere with an "individual's dignity and independence".[101]

c. Theses deprivations contravene the principles of fundamental justice, because they are:

i. **overbroad** by interfering with conduct bearing no connection to the objective; and[102]

ii. **grossly disproportionate**, because the deleterious effect on life, liberty, and security of person vastly outweighs the beneficial effects of the law.[103]

111. *Waterloo* also held that the **daytime** encampment ban violated section 7, because "there is a legitimate need for people to rest and shelter during the day" and no countervailing interests of the public at large, since the property was a vacant lot, not a park. But *Waterloo* does not preclude a *Charter* challenge to a daytime ban in public parks. That would turn on factual issues, such as the size and placement of encampments and the park system's overall capacity (see below). *Kingston* supports this conclusion. The Court rejected the section 7 challenge to daytime bans in a public park but held: "That is not to say that a breach could not be established on the proper evidence. I disagree with the City that section 7 cannot be invoked to protect daytime sheltering in a public park as this would amount to the grant of a property right".[104]

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[98] *Waterloo*, para 92, following *Shantz*, para 82 and *Stewart*, para 74.
[99] *Waterloo*, para 96; also see: *Stewart*, para 86; *Kingston*, para. 77.
[100] *Waterloo*, para 104.
[101] *Waterloo*, para 101, following *Adams*, para 109.
[102] *Waterloo*, para 114.
[103] *Waterloo*, para 115.
[104] *Waterloo*, para 105, following *Shantz*, para 276; *Kingston*, para 113.

Insufficient shelter space in Hamilton

112. The City's own evidence shows that demand for shelter spaces exceeded supply during the relevant period. The City posts on its public website a "Housing and Homelessness Dashboard", which reports "Current Individuals Actively Homeless" and "Current Systemwide Shelter Bed and Room Capacity". A May 16, 2022 City memo to the Mayor and City Council on the dashboard states that it "contains data about the state of homelessness" and "is intended to support evidence-informed action and illustrate progress towards housing and homelessness goals" and "supports ongoing accountability". A "Data Notes" defines key terms in the dashboard, including "Actively homeless" as "individuals who were experiencing homelessness at the end of the month" and "Shelter Bed or Room Capacity" as "the total number of beds and rooms available on the last day of the month" that are "city-funded", such that "Beds and rooms combined represent the system capacity". A June 19, 2024 City report to the General Issues Committee, "Reducing Homelessness and Managing Encampments", further explains that each "hotel room" (which on the City's data account for the majority of shelter rooms) contains 4 beds.[105]

113. The underlying data is posted online. According to the "Actively homeless" spreadsheet, in August 2021 – when the 2020 Protocol was repealed – the total homeless was 1,182. The "Shelter beds available" spreadsheet reports that in August 2021, there were 249 shelter beds and 177 rooms (including 157 hotel rooms); if each room contained 4 beds, the "system capacity" was 957 beds.[106] Over time the gap grew worse. For example, in September 2021 there were 1202 unhoused individuals and 997 beds; in June 2022, 1539 and 950; in December 2022, 1530 and 576; in August 2023, 1881 and 573.[107] Mr. Mastroianni also put these shelter bed figures into

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[105] City of Hamilton – Housing and Homelessness Dashboard, RTA Aug 26, 2024, Document 2 [**AR**, Vol 19, Tab 154 a]; Buckle XE**,** Exhibit 1 ~~2~~, "Reducing Homelessness and Managing Encampments" (June 19, 2024), p. 12 [**AR**, Vol 14, Tab 116 a]; City's Response to Request to Admit dated July 15, 2024 [**AR**, Vol 19, Tab 151]. The Homelessness Dashboard is also available online at: <https://experience.arcgis.com/experience/3c7fd27e188b4ce0951d86d1a532be4a/page/Data-Notes/>.

[106] "Shelter Beds Available" and "Shelter Bed Occupancy", May 31, 2023 RTA [**AR** Vol 18, Tabs 144 c, d]; City of Hamilton – Housing and Homelessness Dashboard, RTA Aug 26, 2024, Document 2 [**AR**, Vol 18, Tab 152]. The Homelessness Dashboard is also available online at: https://open.hamilton.ca/search?collection=Dataset&tags=homelessness%2520dashboard.

[107] "Shelter Beds Available" and "Shelter Bed Occupancy", May 31, 2023 RTA [**AR** Vol 18, Tabs 144 c, d]; City of Hamilton – Housing and Homelessness Dashboard, RTA Aug 26, 2024, Document 2 [**AR**, Vol 18, Tab 152]. The Homelessness Dashboard is also available online at: https://open.hamilton.ca/search?collection=Dataset&tags=homelessness%2520dashboard.

evidence. He testified that shelter bed data can overstate capacity, because shelters do not provide empty beds in a room with a family to an unrelated person. Ms. Uppal confirmed this point.[108]

114. City documents tell the same story. A September 9, 2021 City report to the Emergency and Community Services Committee, "Encampment Response Update," states "Challenges remain in the access to available beds and in a number of instances capacity is not available." The picture painted in the June 2024 "Reducing Homelessness and Managing Encampments" report is dire:

> We know that the shelter system is consistently at 99-100% occupancy with **many individuals and families being turned away each night**. While we continue to provide **52 hotels rooms (or 208 beds)** as overflow, this paired with the **current capacity of 345 permanent and 20 temporary shelter beds does not come close to meeting the needs of the roughly 1592 people experiencing homelessness in the City**.

The June 2024 report also states the homeless count "is **consistently approximately 1600**" and "city-funded shelters are **consistently at, or over, capacity**".[109]

115. The City's witnesses also testified that demand for shelter beds exceeded supply. In October 2021, Mr. Mastroianni stated that "There have been occasions where no space was available at hotels or shelters."[110] In 2024, he twice agreed with the March 2023 statement of a coalition of Hamilton shelters that Hamilton's shelter system was on the "verge of collapse". Buckle agreed that "City-funded shelters are consistently at or overcapacity."[111] Shawn MacKeigan, Executive Director of Mission Services, agreed that lack of shelter capacity could place people (especially women, Indigenous people, members of the 2SLGBTQ community, and people with disabilities) at risk of physical harm, violence and even death; and insufficient capacity in the women's system has long been the focus of advocacy, and despite the creation of additional beds during COVID, that system is virtually always over capacity. James Moulton, Executive Director of Salvation Army, confirmed that his men's shelter has operated at over a 100% capacity for years. Ms. Tess McFazdean, Director of Women's Services at Good Shepherd, confirmed that

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[108] Affidavit of Robert Mastroianni (July 31, 2024), Exhibit A ["**Mastroianni Affidavit**"] [**AR**, Vol 16, Tab 132]; Transcript of Cross Examination of Robert Mastroianni (August 28, 2024), p. 41, q. 130-131 ["**Mastroianni XE**"] [**AR**, Vol 16, Tab 133]; Supplemental Affidavit of Medora Uppal (June 4, 2024), para 17 ["**Supplemental Uppal Affidavit**"] [**AR**, Vol 4, Tab 78].

[109] Buckle XE, Exhibit 1, "Reducing Homelessness and Managing Encampments", (June 19, 2024), pp. 4, 11, 12, note 1~~, July 15, 2024 RTA [**AR**, Vol 19, Tab 153]~~ [**AR**, Vol 14, Tab 116 a]; Information Report (September 9, 2021), p. 2-3, June 7, 2024 RTA [**AR**, Vol 1, Tab 8].

[110] Mastroianni Affidavit, para 62 [**AR**, Vol 16, Tab 132].

[111] Supplementary Affidavit of Rob Mastroianni (October 12, 2021), para 7 ["**Supplementary Mastroianni Affidavit**"] [**AR**, Vol 16, Tab 130]; Mastroianni XE, p. 23, q. 65 and p. 47, q. 152 [**AR**, Vol 16, Tab 133]; Transcript of Cross Examination of David Buckle (August 19, 2024), p. 36, q. 104 ["**Buckle XE**"] [**AR**, Vol 14, Tab 116].

all women's shelters have been overcapacity as of June 2021. Each female Applicants experienced the women's shelter system to be regularly, if not always at capacity. So did one male Applicant.[112]

Inaccessible shelter spaces in Hamilton

116. The evidence demonstrates that even if shelter beds are available, they are inaccessible to some unhoused persons, for the reasons set out in *Waterloo*. Moreover, if accessible shelter were available, a large majority of encampment residents would prefer it.

117. The City's evidence supports these conclusions. The City's May 15, 2024 "Encampment Report" to the General Issues Committees cited "barriers to emergency shelter" including "a lack of pet-friendly and couples' spaces, harm reduction friendly policies, privacy concerns, and requirements to leave and return to secure a bed every day, that precluded them from wanting to access the service". It stated that 71% of encampment residents "**would consider accessing spaces in the emergency shelter system more suitable to their needs** (i.e. some of the barriers to access were potentially reduced)". In addition, the Report stated that "**Housing also continues to be difficult to acquire for individuals living in encampments**, especially those who may require supports that assist in their transition."[113]

118. The City's June 2024 document repeated these points, stating:[114]

> While there will always be individuals who prefer to live outside, **there are individuals who would shelter within City-funded programs if there were appropriate spaces**. However, **city-funded shelters are consistently at, or over, capacity** (Figure 3). In addition to these capacity pressures, there are gaps in service for individuals with pets and couples without children. **Because there is no space for those who are unwilling to access shelter separately from their partners, these individuals often chose to live in encampments**. **Without additional resources in these targeted areas, encampments are likely to persist**.

119. Mr. Buckle described some of these reasons as "assumed or real" in his affidavit, but on cross-examination, conceded they were "true" or "real", and agreed that heterosexual couples often

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[112] Transcript of Cross Examination of Shawn MacKeigan, (August 21, 2024), p. 63, line 2 - p. 65, line 2 ["**MacKeigan XE**"] [**AR**, Vol 17, Tab 139]; Transcript of Cross Examination of James Moulton, (August 26, 2024) p. 19, q. 47 ["**Moulton XE**"], [AR, Vol 17, Tab _]; Transcript of Cross Examination of Tessa McFazdean, (August 22, 2024), p. 31, line 21 – p. 32, line 6 , ["**McFazdean XE**"] [**AR**, Vol 17, Tab 137]; Factum of the Applicants, paras 27, 33, 29, 46, 50, 61, 73, 89, 94; Affidavit of Ameil Joseph, (June 14, 2022), p. 2, para 4. [**AR**, Vol 9, Tab 99].

[113] Buckle XE, Exhibit 2, "Encampment Report" (May 15, 2024), pp. 13-14, ~~October 18, 2024 RTA [**AR**, Vol 20, Tab 156 b]~~ [**AR**, Vol 14, Tab 116 b]; Buckle XE, Exhibit 1 ~~2~~, Reducing Homelessness and Managing Encampments" (June 19, 2024) [**AR**, Vol 14, Tab 116 a].

[114] Buckle XE, Exhibit 1 ~~2~~, Reducing Homelessness and Managing Encampments" (June 19, 2024), p. 12 [**AR**, Vol 14, Tab 116 a].

choose to remain outdoors because they cannot stay together in shelters; and those who wish to avoid substance use around shelters do not enter shelters.[115]

120. The City's evidence is that in December 2023, 65% of encampment residents had high or very high acuity. In 2021, Mr. Mastroianni testified that behaviours associated with high acuity can lead exclusion from shelters because they are "difficult to manage in a congregate setting." He echoed these observations in 2024.[116] Mr. MacKeigan agreed that shelters are not equipped to support people with complex mental health needs, and that behaviours associated with mental health and substance use disabilities can lead to service restrictions.[117]

121. The evidence of the Applicants' expert witnesses shows that these barriers are a function of how homeless shelters operate. Dr. Gaetz's stated "there are many rational reasons why individuals and families might choose not to stay at a homelessness shelter, and these reasons are usually related to the operational features of shelters", including that shelters operate overnight and discharge people in the morning, are set up for individuals and are separated by gender/gender identity, provide shelter in a congregate setting with many people in the same room, may limit the number of nights an individual can stay, operate on a first come first served basis, have a curfew, generally do not have staff trained to deal with mental illness, have rules and restrictions, do not permit personal possessions beyond the minimum, and generally do not allow drinking and drug use. People may also fear other shelter residents, and during COVID-19, catching communicable diseases.[118]

122. Professor Schwan's evidence includes the Pan-Canadian Women's Housing and Homelessness Survey, which reported the same results in relation to women. Dr. Hayman's evidence is that patients have reported to her that they will not or prefer not to reside in shelter because of fear of violence and sexual violence in shelters, and that their belonging have been stolen in shelters. Dr. Sereda's evidence makes the same points. The evidence of Olivia Mancini, a Registered Social Worker, Researcher, and former staff member at Salvation Army and CAP, Mr.

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[115] Affidavit of David Buckle (July 31, 2024), para 16 ["**Buckle Affidavit**"] [**AR**, Vol 14, Tab 115]; **Buckle XE,** pp. 34, q. 106 - pp. 40, q . 119 [**AR**, Vol 14, Tab 116].
[116] Buckle Affidavit, paras 9; 26 [**AR**, Vol 14, Tab 115]; Mastroianni XE dated October 13, 2021, p. 8, Q12; Mastroianni XE, pp. 16 q. 49, - pp. 17, q. 52 [**AR**, Vol 16, Tab 131].
[117] MacKeigan XE, p. 56, lines 3-15, p. 59, lines 9-16 [**AR**, Vol 17, Tab 139].
[118] Gaetz Affidavit, paras 25, 30.

Moulton and Mr. McFazdean confirmed that threats, violence, and property damage all occur in shelters with varying frequencies.[119]

Lack of Affordable Housing

123. The Applicants, like many low income Hamiltonians, are unable to afford rental housing. The Applicants receive benefits under the OW or ODSP. A single person on OW receives approximately $733 per month. A single person on OW receives approximately $1228 per month.[120] City witnesses estimated the average one-bedroom rental cost to be between $1400-1600. The City's Dashboard indicates that the average monthly rent in Hamilton in 2022 was $1242. The City's witnesses acknowledged that the lack of affordable and accessible housing limits people's ability to leave shelters.[121]

Health risks of encampment bans and eviction

124. Dr. Hwang's uncontradicted expert evidence supports the very conclusion that **every** court in Canada has reached: "if homeless people who sleep outside are prohibited from erecting any form of shelter such as a tent, tarpaulin, or cardboard box, it is absolutely clear that this would have a substantial and potentially severe adverse effect on their health, and would likely increase their risk of death". This is because (emphasis added):

a. "a lack of protection from wind and rain would increase the wind chill effect, which would greatly increase the risk of **hypothermia**";
b. "prolonged exposure to cold and dampness increases the risk of **skin breakdown and skin infections**, particularly in the feet [and] can lead to immersion foot or trench foot";
c. "exposure to the cold increases the risk of developing **respiratory tract infections**", "a lack of shelter from the sun would greatly increase homeless people's risk of severe **sunburn and heatstroke** during the summer months"; and
d. "a lack of a tent or other structure to provide even a minimal degree of protection from the elements, light, and noise would result in even more **disturbed and fragmented**

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[119] Affidavit of Stephen Gaetz, (June 14, 2022), paras 25, 30 ["**Gaetz Affidavit**"] [**AR**, Vol 5, Tab 87]; Affidavit of Kaitlin Schwann (June 13, 2022), Exhibit B, The Pan-Canadian Women's Housing and Homelessness Survey ["**Schwann Affidavit**"] [**AR**, Vol 11, Tab 105 b]; Affidavit of Kate Hayman, (February 28, 2023), para 7, especially 7(a) and (b) ["**Hayman Affidavit**"] [**AR**, Vol 7, Tab 90]; Affidavit of Andrea Sereda (May 12, 2023), paras 26-33 ["**Sereda Affidavit"]** [**AR**, Vol 12, Tab 108]; Affidavit of Olivia Mancini (July 18, 2023), paras 23, 26-27 ["**Mancini Affidavit**"] [**AR**, Vol 4, Tab 72]; Transcript of Cross Examination of James Moulton, (August 26, 2024), p. 34, q. 103 – p. 35, q. 109 [**AR**, Vol 17, Tab 141]; Transcript of Cross Examination of Tessa McFazdean (August 22, 2024), p. 19, line 11 - p. 21, line 6 [**AR**, Vol 17, Tab 137].

[120] *General*, O Reg 134/98, sections 41(1), 42(1) (Ontario Works); *General*, O Reg 222/98 (ODSP), sections 30(1), 31(1).

[121] Moulton XE, p. 14, q 30-32 [**AR**, Vol 17, Tab 141]; MacKeigan XE, p. 34, lines 9-19, p. 64, line 14 - p. 66, line 11 [**AR**, Vol 17, Tab 139]

> **sleep**" which causes an "increased risk of **diabetes, cardiovascular disease, obesity, depression, and injuries**".[122]

The risks of sunburn, heatstroke and sleep disturbance occur **all year around**. Dr. Hayman's evidence reported the same risks, and added that women who sleep rough are at particularly high risk for negative health outcomes, especially from interpersonal violence.[123]

Health and other harms of daytime bans and evictions

125. Dr. Sereda's and Dr. Hayman's uncontradicted evidence is that daytime encampments:

a. provide **health benefits** in the form of shelter 24 hours a day, 7 days a week, mitigating the risks of hypothermia, heatstroke and dehydration, enabling individuals to receive emotional and physical support from a community of encampment dwellers, and decreasing the risk of overdose;
b. enable residents to live continuously in a single location, which **enhances their access to medical care, social workers** (who can help them access the Ontario Disability Support Program, Ontario Works, and social housing, and apply for government-issued identification), **medication delivery**, and **donations of food and blankets**;
c. give rise to communities that provide individuals with **increased safety**, including by enabling them to remain with their partners, share food and blankets, and mitigate the risk of sexual assault, assault, and theft;
d. enable **couples** or "survival partners" to remain together; and
e. enable residents to live with **greater dignity**, including by providing a modicum of **privacy** and solitude and enabling them to keep personal possessions, have pets that provide emotional support, and come and go without a curfew.[124]

126. The City's January 18, 2023 "Encampment Pilot Evaluation" underscores these very concerns:[125]

> **Others living in encampments moved to less conspicuous areas where they would not be found** and therefore would not need to move as frequently. This **impacted the ability of HFSO staff to aid as it became more difficult for staff to find them to make necessary referrals and provide harm reduction and other basic supplies.** Additionally, due to gaps between making contact with people living in encampments it **became more difficult for HFSO staff to maintain continuity in providing a housing plan, as this requires ongoing interaction with staff** and coordination with other services in the community.

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[122] Hwang Affidavit (February 27, 2023) paras. 7-9 [**AR**, Vol 7, Tab 93].
[123] Hayman Affidavit, paras. 10(a), 15 [**AR**, Vol 7, Tab 90].
[124] Sereda Affidavit, paras 14, 16, 21-22, 25 [**AR**, Vol 12, Tab 108]; Hayman Affidavit, paras 12, 14a, 15-16 [**AR**, Vol 7, Tab 90].
[125] Affidavit of Danielle Blake (June, 30, 2024), Exhibit C, Encampment Pilot Evaluation (January 18, 2023), pp 14-15 [**AR**, Vol 13, Tab 113 c].

127. This is consistent with the Applicants' experiences, who attempted to hide from enforcement, moved pre-emptively to avoid enforcement, and/or lost access to supports and services.[126]

128. Daytime encampments, subject to restrictions on size, clustering and distancing, would **not** crowd out the public use of parks in Hamilton. Mr. Buckle's evidence is that 271 persons were living in encampments.[127] Under the 2023 Protocol, each person can occupy 9 m^2. Thus, these tents would occupy 2439 m^2, i.e. 0.6 acres, or 0.02% of Hamilton's 3480 acres of Municipally-owned parkland. The City has not provided **any** evidence that there is not ample space for **both** the unhoused **and** other members of the public in Hamilton's parks.[128]

The overnight and daytime encampment bans and evictions violated section 7

129. The encampment bans and evictions violated the section 7 rights of the Applicants. The overnight ban was unconstitutional because they could not access overnight shelter. Supply was insufficient to meet demand, leaving no choice but to sleep outside. Shelter beds that were in theory available but inaccessible for the reasons described above. They were forced to sleep rough as a result, subjecting them to increased health risks that tent would have mitigated. Increased risks are deprivations of security of the person and life, since "a risk of such a deprivation suffices" under section 7 and the harms need not materialize – although many did for the Applicants. Moreover, the psychological health encompassed by security of the person need not rise to the level of nervous shock or psychiatric illness, and includes stigma, loss of privacy, stress and anxiety, possible disruption of family and social life, uncertainty as to outcome and risk of sanction.[129]

130. Overnight encampment bans and evictions were also deprivations of the Applicant's liberty, which includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference", regarding "fundamentally or inherently personal [matters] … that … implicate basic choices going to the core of what it means to enjoy individual dignity and independence". This Court should follow

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[126] Factum of the Applicants, paras 31, 43, 45, 58, 62, 67, 75
[127] Buckle Affidavit, paras 6, 7(k), [AR, Vol 14, Tab 115]; 2023 Encampment Protocol, [AR Vol 1, Tab 9].
[128] Buckle Affidavit (July 31, 2024), paras. 6, 7(k) [**AR**, Vol 14, Tab 115]; Buckle XE, p 20, line 23 - p 21, lines 18 [**AR**, Vol 14, Tab 116]. See also, the website put to Mr. Buckle in cross-examination, City of Hamilton - Park Finder, website: <https://www.hamilton.ca/things-do/parks-green-space/parks-trails/parkfinder>.
[129] *CCR v. Canada*, 2023 SCC 17, para 56; *Carter v. Canada (AG)*, 2015 SCC 5, para 62 [***Carter***]; *R. v. Malmo-Levine*, 2003 SCC 74, para 89 [***Malmo-Levine***]; *Suresh v. Canada (MCI),* 2002 SCC 1, para 27; *Kingston*, para 49, applying *New Brunswick v. G.(J.)*, [1999] 3 SCR 46 [***G.(J.)***].

Waterloo, where correctly held (following *Adams*) that "creating shelter to protect oneself is …critical to any individual's dignity and independence". [130]

131. The daytime ban also deprived the Applicants of their security of the person and life interests, because it deprived them of the potential health benefits of 24/7 shelter, including reducing the risks of hypothermia and dehydration; impeded access to medical care and survival items; and deprived them the ability to form communities to enhance safety. They were deprived of their liberty because encampments had enabled them to live with privacy and dignity.

132. These deprivations – overnight and daytime – did not accord with the principles of fundamental justice, because they were overbroad. Encampment bans and evictions interfered with conduct that did not necessarily interfere with public use of parks. The order sought by the Applicants would have accommodated ample public use of parks while permitting encampments. The deprivations were also grossly disproportionate, since the negative effects on life, liberty, and security of person vastly outweighs any legitimate City interest.

Issue 4: Did encampment bans and evictions violate section 15?

133. The encampment bans violated section 15, by discriminating on the basis of sex, race (including in combination with sex), and disability.

134. The test for section 15 has two steps: (a) does the law draw a distinction; and (b) does the distinction reinforce, perpetuate, or exacerbate disadvantage. For Step 1, a facially neutral law draws a distinction if it has a disproportionate impact on a protected group that "is forced to take on burdens more often than others". Encampment bans and evictions forced unhoused persons who were women, indigenous (especially indigenous women) and individuals with disabilities to take on more burdens than others. Step 2 is made out by the harms caused by encampment evictions above under section 7, as well as the group-specific harms specified below.[131]

Sex: encampment ban and evictions discriminated based on sex

135. The best evidence of the demographic makeup of Hamilton's unhoused is the Point in Time Count (**"PiT"**), which since 2018, has been mandated by the federal and provincial governments. *Waterloo* relied on the PiT for its demographic breakdown of the homeless population, and so

[130] *Malmo-Levine*, para 85; *Waterloo*, para 101.
[131] *Fraser v. Canada (Attorney General)*, 2020 SCC 28, paras. 53-55; *R. v. Sharma*, 2022 SCC 39.

should this Court. The most recent PiT for Hamilton is from 2021. According to the PiT, 53% of the persons surveyed identified as women – roughly their percentage of the general population.[132]

136. Although women account for approximately half of Hamilton's unhoused, they account for a much lower proportion of shelter beds. In Aug. 2021, there were 218 men's and 26 women's beds. There were more men's than women's beds **every** month until the 2023 Protocol was enacted. For example, in September 2021 there were 218 men's and 26 women's beds; in June 2022, 193 and 104; in December 2022, 198 and 109; in August 2023, 198 and 66.[133] The same shelter bed figures were put into evidence by Rob Mastroianni.[134]

137. City reports tell the same story. The September 2021 "Encampment Response Update" states: "During the COVID-19 pandemic, emergency shelter capacity has been expanded; however, occupancy pressures exist, particularly for women".[135] Ms. McFazdean confirmed that all women's shelters were full as of June 2021, and Mr. McKeigan stated that the women's shelters have had a lack of capacity for years, despite the creation of additional beds during COVID-19.[136]

138. Ms. Medora Uppal, CEO of the YWCA Hamilton, which operates CAP, a low-barrier drop-in for unsheltered women which is an "overflow space women can attend when they cannot access the standard shelters". She testified that there were frequently no shelter beds for women, and that and it was common for shelters to turn away women with complex needs. CAP had to turn away women 636 times between December 2019 and March 2022, due to a lack of capacity.[137] She also testified that the City's data *undercounts* the demand for women's shelters, because it only includes data from City-funded shelters. It excludes data on demand for Violence Against Women (**"VAW"**) shelters, which are not City-funded. It is wrong to factor in VAW capacity without also taking account demand for their services.[138]

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[132] *Waterloo*, para. 18; p. 4; City of Hamilton, 2021 Point Connection Results, p. 4, May 31, 2023 RTA [**AR**, Vol 18, Tab 144 s]. Also available online at: https://www.hamilton.ca/sites/default/files/2022-10/PIT-2021-City-of_hamilton-Results.pdf.
[133] City of Hamilton, Data from Housing and Homelessness Dashboard – Shelter Beds Available, May 31, 2023 RTA [**AR**, Vol 18, Tab 144 d].
[134] Affidavit of Robert Mastroianni (July 31, 2024), Exhibit A [**AR**, Vol 16, Tab 132].
[135] Information Report (September 9, 2021), p. 4, para 5, June 7, 2024 RTA [**AR**, Vol 19, Tab 149 a].
[136] Factum of the Applicants, para 115.
[137] Affidavit of Medora Uppal (July 17, 2023), paras. 2, 4, 9, 15 ["**Uppal Affidavit**"] [**AR**, Vol 4, Tab 77]; Supplementary Affidavit Uppal, para. 15 [**AR**, Vol 4, Tab 78].
[138] Uppal Affidavit, paras 2, 4, 9, 15 [**AR**, Vol 4, Tab 77]; Supplementary Affidavit Uppal, para. 15 [**AR**, Vol 4, Tab 78].

139. Although encampment bans and evictions left unhoused persons of both genders with no choice but to sleep rough because of insufficient and inaccessible shelter beds, they had a disproportionate impact on women because women had a lower share of shelter beds relative to their proportion of the unhoused. Put simply, in a bad situation, women were worse off than men. The encampment bans and evictions drew a distinction based on sex under Step 1 of the section 15 test.

140. In addition to the general harms experienced by the unhoused, unhoused women experienced sex-specific harms – specifically assaults and sexual assaults. Ms. Uppal provided many specific examples of sexual assaults in the vicinity of CAP, men attempting to break into CAP, street level harassment, men loitering around CAP, bear mace attacks – which were all reported to the police.[139] This is consistent with the experiences the female Applicants.[140]

141. This evidence is consistent with expert evidence. The "Pan-Canadian Women's Housing and Homelessness Survey" reported that 75% of women identify as a survivor of trauma or abuse. It also reported other evidence of how unhoused women experience pre-existing disadvantages: the primary reason women and gender diverse people lost their most recent housing is a relationship breakup, suggesting that housing for this group is deeply dependent on maintaining a personal relationship with a partner; and 79% report having a disability.[141]

Race: encampment ban and evictions discriminated on based on race, and race with sex

142. According to a City document, "2021 PiT Infographic – Indigenous Respondents":[142]

> **Indigenous Peoples continue to be overrepresented among community members experiencing homelessness in Hamilton**. Of Hamilton's general population, **2% of residents identify as Indigenous or having Indigenous ancestry**. Among community members responding to Hamilton's PiT survey, **23% self-identified as Indigenous or having Indigenous ancestry**.

143. Encampment bans and evictions have a disproportionate impact on Indigenous persons, who are overrepresented among the unhoused, and draw a distinction under Step 1.

144. Moreover, encampment evictions and bans also draw a distinction on the combination of race and sex – "intersectional discrimination" – because they have a particularly severe impact on

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[139] Uppal Affidavit, paras 22-30 [**AR**, Vol 4, Tab 77].
[140] Factum of the Applicants, paras 31, 43, 53, 58, 61-62, 91, 96-97
[141] Schwann Affidavit, Exhibit B, pp. 36-37, 45-47, 50-53 [**AR**, Vol 11, Tab 105 b].
[142] "Indigenous Respondents", 2021 Point in Time Survey (Hamilton, Ontario), Appendix "C" to Report HSC22021, May 31, 2023 RTA. ["**Point in Time - Indigenous Respondents**"][**AR** Vol 18, Tab 144 u]

Indigenous women. Two City documents state that slightly over half (55%) of unhoused Indigenous persons were women. They are the victims of sex discrimination arising from the greater shortage of women's shelter beds and the gender-specific harms of being unhoused, especially the greater risk of sexual assault. In addition, Indigenous women are unhoused at 10 times the rate of non-Indigenous women. Unhoused Indigenous women therefore are at a disadvantage relative to both unhoused Indigenous men and non-Indigenous women.[143]

145. These distinctions were discriminatory. Not only do unhoused Indigenous individuals experience harms from lack of shelter capacity, shelters are often unsafe for Indigenous people. The evidence of Audrey Davis, Executive Director of the Hamilton Regional Indian Centre, is that non-Indigenous shelters are often unsafe and inaccessible for a variety of reasons, including a lack of cultural competency amongst staff and an inability to practice traditions; many Indigenous people experience racism in the shelter system; while Indigenous people can access Hamilton's shelters, they often feel unsafe doing so; and being able to smudge in shelter is not enough to make it culturally appropriate there needs to be someone who understands their plight and situation. Encampment evictions and bans also represent a continuation of practices of displacing Indigenous people from the land.[144]

146. The *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* explains the disadvantages that unhoused Indigenous women face: a cycle where poverty makes access to any form of housing impossible, forcing them to live in shelters, on the street, or in other forms of precarious housing, which fuels drug and alcohol abuse, and in turn renders them at greater risk of sexual violence. They also exchange or trade sex to meet their basic needs.[145] The Applicant Misty Marshall has been repeatedly sexually assaulted while couch surfing, and threatened with same many more times, by men who expect sex in return for shelter.[146]

Disability: encampment ban and evictions discriminated based on disability

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[143] *Bjorkquist v AGC*, 2023 ONSC 7152, paras 88-114; "2021 POINT IN IN TIME COUNT (Hamilton, Ontario) INDIGENOUS RESPONSES", Appendix "B" to Report HSC22021, May 31, 2023 RTA [**AR,** Vol 18, Tab 144 t]; Point in Time - Indigenous Respondents, [**AR** Vol 18, Tab 144 u].
[144] Affidavit of Audrey Davis (July 19, 2023), paras 5 –7 ["**Davis Affidavit**"] [**AR**, Vol 4, Tab 66]; Transcript of Cross Examination of Audrey Davis (August 29, 2024), p. 47, paras 6-21, p. 74, line 4-7, p. 75, line 8-15 ["**Davis XE**"] [**AR**, Vol 4, Tab 67].
[145] Affidavit of Benjamin Hognestad (June 7, 2024), Exhibit A, "Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls", pp. 537-545, 614, 661 [**AR**, Vol 4, Tab 68 a].
[146] Factum of the Applicants, para 43

147. The leading Supreme Court case on disability discrimination is *Eldridge*. The section 15 breached turned on the combination of a facially neutral policy (medical care provided without sign language interpretation) that had a disproportionate impact on a disadvantaged group (the hearing impaired), coupled with the government's failure to take positive steps to **accommodate** that group – through providing sign language interpretation. *Eldridge* incorporated the duty to accommodate into section 15.[147]

148. The encampment ban and evictions discriminated based on disability against at least three different categories of disabled persons.

149. *First*, as explained above, individuals with mental health and/or substance use may be considered high acuity, meaning that they may display disruptive behaviour in the congregate setting of a shelter as a result of their disabilities, which often leads to service restrictions. This reality is reflected in the fact that a large proportion (65% to 70%) of encampment residents are high acuity, and as such are disproportionately impacted by encampment bans.

150. *Second*, individuals with physical disabilities, including mobility issues, may find it physically taxing to enter and leave shelters every day and move their belongings from site to site. Several of the Applicants indicated that they either cannot move all of their belongings, or have considerably difficulty doing so due to their disabilities.[148] In *Matsqui-Abbotsford*, the British Columbia Supreme Court recently held that daytime encampments bans and evictions may discriminate on the basis of disability against unhoused persons whose disabilities severely limit their mobility and physical capacity and render it extremely difficult or impossible to pack up their belongings and move every day.[149]

151. *Third*, individuals with substance dependencies cannot use them while in shelter. Ms. McFazdean and Mr. Moulton all confirmed that they do not allow substances to be used on site.[150] Moreover, behaviours related to substance use can lead to service restrictions.[151]

Issue 5: Were the section 7 and/or 15 violations justified under section 1?

152. Under the *Oakes* test, the City bears the onus under section 1. The Applicants reserve the right to make section 1 submissions during the hearing in response to the City's written

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[147] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.
[148] Factum of the Applicants, paras 37, 71, 77, 83, 87
[149] *Matsqui-Abbotsford Impact Society v. Abbotsford (City)*, 2024 BCSC 1902, paras 84-90.
[150] McFazdean XE, p. 15, line 7-18 [**AR**, Vol 17, Tab 137]; Moulton Affidavit, para 16(4) [**AR**, Vol 17, Tab 141].
[151] MacKeigan XE, p. 59, lines 9-15 [**AR**, Vol 17, Tab 139]; Mancini Affidavit, para 28 [**AR**, Vol 4, Tab 71].

submissions on section 1. Without prejudice to any subsequent section 1 submissions, the Applicants make four preliminary points.[152]

153. *First*, it is difficult to justify a section 7 violation under section 1, because "the rights protected by s. 7 – life, liberty, and security of the person – are very significant and cannot ordinarily be overridden by competing social interests". Section 7 rights can be limited in "exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like", or "where the competing societal interests are themselves protected under the *Charter*." None of those conditions apply here.[153]

154. *Second*, the blanket encampment ban, and evictions undertaking pursuant to the ban, were not minimally impairing. An alternative would have been to permit encampments under the terms proposed by the Applicants in the Notice, which would have permitted the public use of parks.

155. *Third*, the *Charter* must be interpreted in accordance with Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, which guarantees the right to adequate housing. The UN Committee on Economic, Social and Cultural Rights interprets Article 11(1) as prohibiting forced evictions only being justifiable in the most exceptional circumstances, and prohibited when it would render persons homeless and vulnerable to some violation of other rights – e.g. the right to life. Article 11(1) also extends to informal settlements like encampments.[154]

156. *Fourth*, the last stage of the *Oakes* tests asks if the beneficial effects of the law outweigh its deleterious effects. It does not, for the same reasons that the deprivations of life, liberty, and security of the person are grossly disproportionate under section 1 – sleeping rough poses a serious risk to physical and psychological health and is life-threatening.

Issue 6: What is the appropriate relief?

Two remedial options

157. The Applicants seek declarations that encampment bans and evictions were unconstitutional and *Charter* damages for the physical and psychological harms they caused. There

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[152] *R. v. Oakes*, [1986] 1 SCR 103.
[153] *G. (J.)*, para 99; *Reference re Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, p. 518; *Carter*, para 95.
[154] Affidavit of Leilani Farha (June 15, 2022), paras 14, 19, 21 [**AR**, Vol 5, Tab 83]; *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4*, December 13, 1991, E/1992/23 and *General Comment No. 7*, May 20, 1997, E/1998/2; United Nations Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, September 19, 2018, A/73/310/Rev.1.

are two legal options for how to Court characterize the legal source of the encampment ban and eviction. There are two options: **(a) Option 1**: if the *Parks By-Law* banned encampments, the appropriate relief is a declaration that those prohibitions violated the *Charter* and award damages under section 24(1) of the *Charter*; **(b) Option 2**: if the *Parks By-Law* banned encampments but conferred an **implied discretion** to not enforce them, the Court should issue of declarations that the evictions of the Applicants violated the *Charter* and award *Charter* damages.

The need for declarations

158. The Court must issue declarations. The *Charter* damages claim is retroactive – covering the time between the repeal of the 2020 Protocol in August 2021 and the enactment of the 2023 Protocol – and presupposes that encampment bans and evictions were unconstitutional during that time. A declaration is a precondition to issuing *Charter* damages.

159. In any event, even if a declaration were not required for the retroactive damages claim, the Court has discretion to issue it. As the Supreme Court explained in *S.A.*:

> Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where **(a)** the court has jurisdiction to hear the issue, **(b)** the dispute is real and not theoretical, **(c)** the party raising the issue has a genuine interest in its resolution, and **(d)** the responding party has an interest in opposing the declaration being sought.

Shot Both Sides emphasized that the key considerations are "whether there is practical utility in granting a declaration and whether the Crown has an interest in opposing the declaration".[155]

160. There is no dispute that the Court has jurisdiction and the dispute is real and not theoretical. The Applicants raised the issue because they have a genuine interest in its resolution. The City revoked the 2020 Protocol. The August 2023 Protocol has not been static, and Council may amend it again. The Court should issue declarations to set down constitutional baselines for the City. The Supreme Court in *Khadr* issued a declaration because of the practical value of providing prospective legal **advice** in the context of a concrete factual context that was fluid, and should do so here.[156] The City has an interest in opposing the declaration being sought, to avoid damages.

Charter Damages: Legal Framework

161. In *Power*, the Supreme Court affirmed the four-step test for determining whether damages are an appropriate and just remedy in *Ward*: **(a) Step 1**: has a *Charter* right been breached? **(b)**

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[155] *S.A. v. Metro Vancouver Housing*, 2019 SCC 4, para 60; *Shot Both Sides v. Canada*, 2024 SCC 12, para 70.
[156] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, para 47.

Step 2: would damages fulfill one or more of the related functions of compensation, vindicating the right, or deterring future breaches? **(c) Step 3**: has the state demonstrated that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust? **(d) Step 4**: What is the appropriate quantum of damages? [157]

Step 1: has a Charter right been breached?

162. The encampment bans and evictions violated sections 7 and 15 of the *Charter*. These violations cannot justified under section 1.

Step 2: would Charter damages serve compensation, vindication and/or deterrence?

163. Damages would: **(a) compensate** the Applicants for the distinct physical and psychological harms their have suffered, and the common experience of sleep deprivation, loss of belongings, and exposure to the elements; **(b) vindicate** their section 7 and 15 rights, especially since it is unlikely their damages could give rise private cause of action, and the breach of their rights was serious; and **(c) deter** the City from repealing the encampment ban entirely in the future – which did in August 2021 – or adopting restrictions that are overbroad or not minimally impairing.

Step 3: do countervailing concerns render damages inappropriate or unjust?

164. Under Step 3, the question is whether good governance concerns defeat an award of damages, or conversely, whether damages promotes good governance by encouraging constitutional compliance and deterring *Charter* breaches. The answer turns on the **institution** violating the *Charter* rights and the **legal instrument** at issue, which in combination establish a "**immunity threshold**" that must be surmounted.[158]

165. Under Option 1, this Application raises the novel legal question of the immunity threshold **for municipal by-laws** that breach the *Charter*, not yet been addressed by an Ontario court.

166. *Power* affirmed *Mackin*'s holding that the immunity threshold is highest for **legislatures** that violate *Charter* rights through **statutes**. Immunity gives way to liability only if the law was "clearly wrong, in bad faith or an abuse of power". *Power* reaffirmed that *Mackin* "concerned **only** the enactment of legislation", and justified it by express reference to the constitutional principles

[157] *Canada (AG) v. Power*, 2024 SCC 26, para 42 [***Power***]; *Vancouver v. Ward*, 2010 SCC 27, para 61.
[158] *Power*, paras 5, 46, 61, 68, 69, 71, 84, 99, 113, 114.

of "parliamentary sovereignty", "the separation of powers" – in particular, "respect for the legislative role", and "parliamentary privilege".[159]

167. Municipal by-laws do not warrant *Mackin/Power* limited immunity. Municipalities "hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status" like legislatures: *City of Toronto*. They enjoy neither parliamentary sovereignty nor parliamentary privilege. But in recognition of their elected status, some degree of immunity for by-laws is appropriate – a "clear disregard" standard, which means "either proceeding with a course of action in the face of a known risk that the *Charter* will be violated or by deliberately failing to inquire about the likelihood of a *Charter* breach when the state knows that there is a good reason to inquire."[160]

168. Hamilton's repeal of the 2020 Protocol in August 2021 did not meet the "clear disregard" standard. The reason is that the Ontario courts accepted *Adams* as good law in Ontario beginning in **October 2020**, in *Black*. While Black *did* not grant an injunction against an encampment eviction, it accepted *Adams*' basic proposition that encampment evictions in "situations in which the municipalities did not have sufficient shelter space available" would violate section 7. The Court found that "here is no evidence that the shelter system does not have capacity to accommodate, safely, those currently living in the parks who wish to seek shelter". *Poff* also accepted *Adams*, even though it found that shelter beds were available on the facts.[161]

169. The record before **this** Court tells a different story. On the City's own data, on demand for shelters beds exceeded supply every month from August 2021 onward and grew progressively worse over time. Maintaining an encampment ban showed "clear disregard" for section 7. The same data shows a shortage of women's to men's beds existed throughout this period as well also showed a "clear disregard" for sex discrimination. The October 2021 PiT put the City on notice that the ban had "clear disregard" for sex, race, and intersecting race and sex discrimination. The City was aware or should have been aware that the ban discriminated based on disability.

170. For executive decisions to enforce the encampment ban, *Power* reaffirmed that the "clearly wrong, in bad faith or an abuse of power" did **not** apply to "**executive conduct under the law**",

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[159] *Power*, para 61; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, para 79.
[160] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para 2; *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, para 87.
[161] *Black*, para 145; *Poff*, paras 231-233, 236, 240.

as in *Ward* (strip search) or *Henry* (prosecutorial misconduct short of malice).[162] For example, the Ontario Court of Appeal awarded damages for an unconstitutional search pursuant to *Trespass to Property Act*, without citing *Mackin*. Moreover, the constituent legislation for Hamilton – the *City of Hamilton Act* – does not require the enactment of an encampment ban.[163]

171. Nor can the City claim the "clearly wrong, in bad faith or an abuse of power" standard for the enforcement of the 2021 Process, because *Power* affirmed that that standard does not apply to a "**government decisions made under government policies**". *Charter* violations authorized by government policies do not attract **any** immunity at all, because "[w]hen the executive branch adopts a government policy, it confers powers on itself … [and] there is good reason not to extend the limited government immunity to government policies".[164]

Step 4: amounts

172. The Applicants seek *Charter* damages in the amount of: (a) **$5,000** per Applicant **($70,000** total) for the common experience of sleep deprivation, loss of belongings, and exposure to the elements; and (b) **$375,000** to for violations of their *Charter* rights: Kristin Heegsma: $75,000; Linsley Greaves: $75,000; Misty Marshall: $75,000; Darrin Marchand: $50,000; Ammy Lewis: $25,000; Mario Muscato: $15,000; Ashley MacDonald: $5,000; Shawn Arnold: $5,000; Cassandra Jordan: $5,000; and Gord Smyth: $5,000.

PART IV – ORDER SOUGHT

26. The Court should issue: **(a)** declarations that the encampment ban and evictions were unconstitutional, and **(b)** damages in the amount of $445,000 under section 24(1) of the *Charter*

27. The Applicants seek costs, and ask that none be awarded against it because of the public interest nature of this Application.



Sujit Choudhry / Sharon Crowe / Wade Poziomka / Michelle Sutherland / Curtis Sell

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[162] *Power*, para 70; *Ward*; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24.
[163] *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255; *City of Hamilton Act, 1999*, SO 1999, c 14, Sch C.
[164] *Power*, para 71; *Conseil scolaire francophone de la Colombie-Britannique v. BC*, 2020 SCC 13, para 177.

SCHEDULE "A"

LIST OF AUTHORITIES

Jurisprudence

1. *AB v. Canada (Citizenship and Immigration)*, 2022 CanLII 8009
2. *Abbotsford v. Shantz*, 2015 BCSC 1909
3. *Bamberger v. Vancouver*, 2022 BCSC 49
4. *Black et al. v. City of Toronto*, 2020 ONSC 6398
5. *Bjorkquist v AGC*, 2023 ONSC 7152
6. *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184
7. *Canada (AG) v. Power*, 2024 SCC 26
8. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3
9. *Carter v. Canada (AG)*, 2015 SCC 5
10. *Church of Saint Stephen et al. v. Toronto*, 2023 ONSC 6566
11. *CCR v. Canada*, 2023 SCC 17
12. *Conseil scolaire francophone de la Colombie-Britannique v. BC*, 2020 SCC 13
13. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.
14. *Francis v. Ontario*, 2020 ONSC 1644
15. *Fraser v. Canada (Attorney General)*, 2020 SCC 28
16. *Henry v. British Columbia (Attorney General)*, 2015 SCC 24.
17. *Kingston v. Doe*, 2023 ONSC 6662
18. *HMQ v. A.C.*, 2020 ONSC 2870
19. *IATA v. Canada (Transportation Agency)*, 2024 SCC 30
20. *J.N. v. C.G.*, 2023 ONCA 77

21. *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13

22. *Matsqui-Abbotsford Impact Society v. Abbotsford (City)*, 2024 BCSC 1902

23. *New Brunswick v. G.(J.)*, [1999] 3 SCR 46

24. *Poff v. City of Hamilton*, 2021 ONSC 7224

25. *Prince George v. Stewart*; 2021 BCSC 2089

26. *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32

27. *R. v. A.I.*, 2020 ONCJ 198

28. *R. v. Ali*, 2020 ONSC 2374

29. *R. v. B.M.D.*, 2020 ONSC 2671

30. *R. v. Brown*, 2020 ONSC 2626

31. *R. v. D.M.*, 2020 ONSC 3152

32. *R v. Enns*, 2023 NSSC 381

33. *R. v. H.K.*, 2020 ONSC 3275

34. *R v. Howell*, 2020 ABQB

35. *R. v. J.R.*, 2020 ONSC 1938

36. *R v. Ledesma*, 2020 ABCA 194

37. *R. v. Malmo-Levine*, 2003 SCC 74

38. *R. v. M.J.I.*, 2020 ONSC 2497

39. *R. v. Oakes*, [1986] 1 SCR 103

40. *R. v. S.B.*, 2020 ONSC 2997

41. *R. v. S.H.*, 2020 ONSC 2879

42. *R. v. Saboon*, 2020 ONSC 3102

43. *R v. Seeman*, 2022 SKKB 232

44. *R. v. Sharma*, 2022 SCC 39.

45. *R. v. Z.A.*, 2020 ONSC 2824

46. *Reference re Motor Vehicle Act (British Columbia),* [1985] 2 SCR 486

47. *S.A. v. Metro Vancouver Housing*, 2019 SCC 4

48. *Shot Both Sides v. Canada*, 2024 SCC 12

49. *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255

50. *Suresh v. Canada (MCI),* 2002 SCC 1

51. *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34

52. *Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670

53. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23

54. *Wright v. Yukon (Director of Public Safety and Investigations)*, 2023 YKSC 77

55. *Vancouver v. Ward*, 2010 SCC 27

56. *Victoria (City) v. Adams*, 2008 BCSC 1363

57. *Victoria v. Adams*, 2009 BCCA 563

Legislation, Regulations and International Treaties

City of Hamilton Act, 1999, SO 1999, c 14, Sch C.

City of Hamilton *By-Law 01-219* (*Parks By-Law*)

General, O Reg 134/98 (Ontario Works)

General, O Reg 222/98 (ODSP).

International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Canadian Charter of Rights and Freedoms

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.

(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.

…

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Constitution Act, 1982

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

City of Hamilton *By-Law 01-219 (Parks By-Law)*

Hours of Entrance

3 (1) No person shall enter into or be in any park, except during the times the park is open to the public or during such times as otherwise expressly authorized by permit.

(2) A park shall only be open to the public:

(a) where there is displayed at, within or adjacent to a park a posted sign or notice as to the times such park is open to the public, during the times so indicated on such sign or notice; or

(b) in the absence of a posted sign or notice as referred to in subsection a park shall only be open to the public each day from six o'clock in the forenoon a.m.) until eleven o'clock in the afternoon (11:00 p.m.).

…

Encroachment

12 (a) Unless expressly authorized by permit, no person shall encroach upon or take possession of any park, or any part or area within a park, by any means whatsoever, including but not limited to the placing, construction, installation or maintenance of any fence, structure or other thing, the dumping or storage of any materials, or by planting any plant or otherwise cultivating, grooming or landscaping any part of the grounds thereof;

(b) Where the Director determines that an encroachment upon a part or area of a park will be reasonable in the circumstances and will not be detrimental to the interests of the City, the Director may authorize by permit an encroachment upon a part or area of a park, upon such terms and conditions as the Director may deem appropriate in the circumstances, and may take or require to be taken such measures or actions as the Director deems reasonable to ensure that any authorized encroachments are and continue to be satisfactory to the City;

(c) The Director is authorized to remove or cause to be removed, and to dispose of or cause to be disposed of, any unauthorized or no longer authorized encroachment from any park by any means and in any manner whatsoever, as the Director may, in the exercise of an absolute discretion, deem appropriate in the circumstances, including but not limited to the issuance of an order to remove an encroachment against the person or persons responsible for the encroachment.

(d) No person, responsible for an authorized encroachment, shall fail to comply with the terms and conditions of the permit authorizing such encroachment

(e) No person responsible for an encroachment shall fail to remove an encroachment, when directed or ordered by the Director, where such encroachment is not authorized or no longer authorized by permit.

(f) In the event that a person or persons, against whom an order to remove an encroachment from a park has been made or issued by the Director, fails to comply with said order within the time indicated on the order, the Director may cause the encroachment to be removed and disposed of, all at the expense of such person or persons and the amount of such expense may be recovered by the City by action or may be added by the City Clerk to the collector's roll against any lands within the City of Hamilton owned by such person or persons and collected in a like manner as municipal taxes.

…

Camping and Lodging

17 Unless authorized by permit, no person shall dwell, camp or lodge in any park.

Tents and Structures

18 Unless authorized by permit, no person shall place, install or erect any temporary or permanent tent or structure in any park.

…

***General*, O Reg 134/98 (Ontario Works)**

44. (1) The budgetary requirements for an applicant or recipient who receives board and lodging from the same source and who is not a person whose budgetary requirements are determined under subsection (2) or (3) or section 43 shall be equal to the sum of the following amounts:

1. The amount paid for board and lodging up to the maximum set out in the following Table:

Table

Number of Dependants other than a Spouse	Number of Dependants 18 Years or Older	Number of Dependants 0-17 Years	Recipient Amount in dollars	Recipient and Spouse Amount in dollars
0	0	0	533	688
1	0	1	664	752
1	1	0	752	790
2	0	2	737	813
2	1	1	825	851
2	2	0	873	887
3	0	3	806	874
3	1	2	894	912
3	2	1	942	948
3	3	0	980	984

For each additional dependant of a sole support parent, add $120 if the dependant is 18 years of age or older or $69 if the dependant is 0 to 17 years of age. Otherwise, for each additional dependant, add $100 if the dependant is 18 years of age or older or $61 if the dependant is 0 to 17 years of age.

2. If the applicant or recipient resides north of the 50th parallel and is without year round road access, an amount determined in accordance with the following Table:

Table

Number of Dependants other than a Spouse	Recipient Amount in dollars	Recipient and Spouse Amount in dollars
0	272	403
1	420	485
2	511	578
3	605	672

For each additional dependant, add $99.

3. Subject to subsection (6), for the month in which the administrator receives an application for a special diet allowance and is satisfied that a member of the benefit unit requires a special diet allowance because of a medical condition set out in Schedule 1 to Ontario Regulation 564/05 (Prescribed Policy Statements) made under the Act and for each succeeding month, up to and including the month in which the administrator requests a new application and a reassessment of the requirement for a special diet allowance, an amount that is the lesser of, for each member of the benefit unit,

i. the sum of the amounts determined by the administrator in accordance with Schedule 1 to Ontario Regulation 564/05, and

ii. $250.

4. For each member of the benefit unit who is 65 years of age or older, an amount for personal needs due to advanced age equal to $44.

5. $71 (Special Boarder Allowance).

6. For the month in which an approved health professional confirms that a member of the benefit unit is pregnant and for each succeeding month up to and including the month in which the pregnancy ends, and subsequently, if the member of the benefit unit is breast-feeding, for each succeeding month up to and including the month in which the infant is 12 months of age, a nutritional allowance equal to,

i. $50, if an approved health professional confirms that the person requires a non-dairy diet, or

ii. $40, otherwise

(2) The budgetary requirements for an applicant or recipient who is a sole support parent to whom subsection 11 (2) or (4) applies or is a sole support parent who is a dependant under the *Ontario Disability Support Program Act, 1997* shall be equal to the sum of the following amounts:

1. An amount for dependants of the dependant determined in accordance with the following Table:

Table

Number of Dependants of the Dependant	Maximum Amount Amount in dollars
1	366
2	419
3	479
4	537
5 or more	568

2. If the applicant or recipient resides north of the 50th parallel and is without year round road access, an additional amount equal to the sum of $212 for the first dependant of the dependant, $98 for the second dependant of the dependant and $102 for any subsequent dependants of the dependant.

3., 4. Revoked: O. Reg. 301/11, s. 5 (5).

5. Subject to subsection (6), for the month in which the administrator receives an application for a special diet allowance and is satisfied that a member of the benefit unit requires a special diet allowance because of a medical condition set out in Schedule 1 to Ontario Regulation 564/05 (Prescribed Policy Statements) made under the Act and for each succeeding month, up to and including the month in which the administrator requests a new application and a reassessment of the requirement for a special diet allowance, an amount that is the lesser of, for each member of the benefit unit,

i. the sum of the amounts determined by the administrator in accordance with Schedule 1 to Ontario Regulation 564/05, and

ii. $250.

6. For the month in which an approved health professional confirms that a dependant of the dependant is pregnant and for each succeeding month up to and including the month in which the pregnancy ends, and subsequently, if the dependant of the dependant is breast-feeding, for each succeeding month up to and including the month in which the infant is 12 months of age, a nutritional allowance equal to,

i. $50, if an approved health professional confirms that the person requires a non-dairy diet, or

ii. $40, otherwise

…

***General*, O Reg 222/98 (ODSP)**

30. (1) The budgetary requirements for an applicant or recipient to whom sections 32, 33 and 33.1 do not apply shall be equal to the sum of the following amounts:

1. The amount payable for basic needs, which is the sum of the following:

i. The amount determined in accordance with the following Table:

Table

Column 1 Number of dependent adults included in the benefit unit	Column 2 Recipient if there is no spouse included in the benefit unit	Column 3 Recipient with spouse included in the benefit unit, if Column 4 is not applicable	Column 4 Recipient with a spouse included in the benefit unit if each of the recipient and the spouse is a person with a disability or a person referred to in subparagraph 1 i of subsection 4 (1) or paragraph 3, 5.1, 5.2, 6, 7 or 8 of subsection 4 (1)
0	$706	$1,018	$1,409
1	$1,094	$1,216	$1,607
2 or more	$1,293	$1,437	$1,828

ii. If more than two dependent adults are included in the benefit, an additional amount of $222 for each subsequent dependent adult included in the benefit unit.

1.1 An amount of $143, in the case of a benefit unit in which no spouse is included and all dependants included in the benefit unit are less than 18 years old.

2. If the applicant or recipient resides north of the 50th parallel and is without year round road access, an amount determined in accordance with the following Table:

Table

Number of Dependants other than a Spouse	Recipient Amount in dollars	Recipient and Spouse Amount in dollars
0	272	431
1	430	530
2	526	628

For each additional dependant, add $102.

3. The amount payable for the cost of shelter calculated under section 31.

4. Subject to subsection (5), for the month in which the Director receives an application for a special diet allowance and is satisfied that a member of the benefit unit requires a special diet allowance because of a medical condition set out in Schedule 1 to Ontario Regulation 562/05 (Prescribed Policy Statements) made under the Act and for each succeeding month, up to and

including the month in which the Director requests a new application and a reassessment of the requirement for a special diet allowance, an amount that is the lesser of, for each member of the benefit unit,

i. the sum of the amounts determined by the Director in accordance with Schedule 1 to Ontario Regulation 562/05, and

ii. $250.

5. For the month in which an approved health professional confirms that a member of the benefit unit is pregnant and for each succeeding month up to and including the month in which the pregnancy ends, and subsequently, if the member of the benefit unit is breast-feeding, for each succeeding month up to and including the month in which the infant is 12 months of age, a nutritional allowance equal to,

i. $50, if an approved health professional confirms that the person requires a non-dairy diet, or

ii. $40, otherwise.

(2) The total amount paid under paragraphs 1 and 3 of subsection (1) with respect to a recipient and his or her spouse shall not exceed $2,070.

(3) Subsection (4) applies with respect to the special diet for a member of a benefit unit if,

(a) on April 30, 1998, the monthly amount determined for basic needs under the *Family Benefits Act* with respect to that member was increased under paragraph 6 of subsection 12 (5) of Regulation 366 of the Revised Regulations of Ontario, 1990 by an amount greater than $250; and

(b) in each subsequent month, the additional cost required to provide the special diet has continued to be greater than $250.

(4) Under the circumstances set out in subsection (3), the amount set out in subparagraph ii of paragraph 4 of subsection (1) shall be deemed to be the additional cost required to provide the special diet on April 30, 1998.

(5) For the purposes of paragraph 4 of subsection (1), in order to establish for the Director that a member of the benefit unit requires, or in the case of a reassessment continues to require, a special diet allowance, the member shall submit to the Director the following:

1. A special diet allowance application form approved by the Director, specifying the medical condition for which the special diet allowance is being requested and completed by an approved health professional and the member.

2. Additional information respecting his or her requirement for a special diet allowance because of a medical condition as requested by the Director under subsection 25 (2).

3. An additional application form approved by the Director and completed by an approved health professional, other than the health professional who completed the application form under paragraph 1 or any earlier forms, as requested by the Director.

31. (1) In this section,

"shelter" means the cost for a dwelling place used as a principal residence with respect to any of the following:

1. Rent, other than amounts paid for parking and cable.

2. Principal and interest on a mortgage or loan incurred to purchase the dwelling place or to make repairs that the Director determines are necessary in order for the property to continue to be used as a dwelling place.
3. Occupancy costs paid under an agreement to purchase the dwelling place.
4. Taxes.
5. Premiums for an insurance policy with respect to the dwelling place or its contents.
6. Reasonable and necessary payments, approved by the Director, for the preservation, maintenance and use of the dwelling place.
7. Common expenses required to be contributed for a condominium unit or a co-operative housing unit except that portion of the common expenses allocated to the cost of energy for heat.
8. The following utilities, if they are not included in rent or common expenses:
i. An energy source used for household purposes other than for heat.
ii. Water and sewage.
iii. Rental of a furnace and a hot water heater.
9. Rent under a land lease.
10. The cost of energy for heat. O. Reg. 222/98, s. 31 (1); O. Reg. 167/99, s. 5.
(2) The following rules apply for calculating the cost of shelter:
1. Determine the actual cost payable for shelter under subsection (1).
2. Determine the maximum amount payable for shelter in accordance with the following Table:
Table

Benefit Unit Size	Maximum Monthly Shelter Allowance Amount in dollars
1	522
2	821
3	889
4	964
5	1,041
6 or more	1,078

3. Subject to paragraph 4, the amount payable for shelter shall be the lesser of the amount determined under paragraph 1 and the maximum amount determined under paragraph 2.
4. If the cost of energy for heat exceeds the maximum amount payable for shelter under paragraph 2, the cost payable for shelter shall be the cost of energy for heat.
5. The amount payable for shelter determined under paragraph 3 or 4 shall be increased by $76 if the applicant or recipient has a spouse included in the benefit unit and both spouses are persons with a disability or members of a prescribed class described in subparagraph 1 i of subsection 4 (1) or paragraph 3, 5.1, 5.2, 6, 7 or 8 of subsection 4 (1).
6. If an applicant or a recipient is a tenant of an authority or agency that provides low rental housing accommodation on behalf of Canada, Ontario or a municipality, shelter does not include

that portion of the rent for which the applicant or recipient is liable with respect to a person living in that rental accommodation who is not a member of the benefit unit.

…

***International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3**

Article 11(1)

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

TAB 21

Court File No. CV-21-00077817-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KRISTEN HEEGSMA, DARRIN MARCHAND, GORD SMYTH, MARIO MUSCATO, SHAWN ARNOLD, ~~BRADLEY CALDWELL, CHRISTINE DELOREY, GLENN GNATUK, TAYLOR GOGO-HORNER~~, CASSANDRA JORDAN, JULIA LAUZON, AMMY LEWIS, ASHLEY MACDONALD, COREY MONAHAN, MISTY MARSHALL, SHERRI OGDEN, JAHMAL PIERRE, and LINSLEY GREAVES ~~and PATRICK WARD~~

Applicants

-and-

CITY OF HAMILTON

Respondent

FACTUM OF THE RESPONDENT

Date: December 6, 2024

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PART I—OVERVIEW

1. The Applicants seek *retroactive* declarations that sections 3, 12, 17 and 18 of City of Hamilton By-Laws 86-077 and 97-162 (together, the "**Streets By-Law**") and section 16(12) of By-Laws 86-077 and 97-162 (together, the "**Streets By-Law**") (collectively, the "**Impugned By-Laws**") were unjustified infringements of the Canadian *Charter of Rights and Freedoms*[1] and were of no force and effect. The Applicants' challenge is limited to the period between August 2021 and August 2023, when they claim the City did not have an encampment protocol in place. The Applicants claim that the City evicted the Applicants from encampments in the City's public parks in the August 2021 to August 2023 period, and seek a declaration that the alleged evictions violated the *Charter.* The Applicants also claim they are entitled to damages under s.24(1) of the *Charter.*

2. The Respondent, City of Hamilton (the "**City**"), submits that there have been no *Charter* breaches, that no relief is warranted, and that this Application should be dismissed in its entirety.

3. The Impugned By-Laws are enactments of general application that protect and foster the public assets of the municipality, the economic and social well-being of the City, and the health, safety and well-being of all persons and property in the City.[2] Their enforcement is and has at all relevant times been governed by certain protocols and processes, also enacted by City Council and confirmed via by-law from time to time, that have guided and limited the enforcement of the Impugned By-Laws in circumstances where homeless individuals are encamped in the City's public parks.

4. There is no dispute that homelessness is a complex and terrible social ill, and that the state of being homeless can result in serious harm to those experiencing it. Indeed, this is why the City marshals and expends vast amounts of money and resources annually to support homeless individuals in obtaining housing and in mitigating the harms of homelessness. Among many other things noted below, the City actively funds and partners with charitable organizations in the community to provide hundreds of emergency indoor shelter beds that are free and accessible.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "***Charter***").
[2] *Municipal Act, 2001*, SO 2001, c 25, ss. 2, 10.

5. It does not follow, however, that that the City or the Impugned By-Laws caused or contributed to homelessness during the period between August 2021 and August 2023, or that the Impugned By-laws caused any harm to the Applicants—or any other individual experiencing homelessness. The evidence fails to show any such thing. The Impugned By-Laws and the City's protocols and processes with respect to encamped individuals have always complied with s.7 and s.15 of the *Charter*. The City has gone well above and beyond permitting individuals to raise **temporary overnight** shelter in its public parks at all relevant times, which is the sole, narrow ability that s.7 has been recognized to sometimes protect in the applicable *Charter* case law, and there is no evidence to establish that the Impugned By-Laws discriminate against the Applicants or anyone else, on any basis, including any protected by s.15 of the *Charter*, or any not justified under s.1 of the *Charter*. There have been no infringements of any of the Applicants' *Charter* rights, ongoing or past.

6. The Impugned By-Laws and the City's protocols and processes with respect to encamped individuals have always complied with s.7 and s.15 of the *Charter*. There have been no infringements of any of the Applicants' *Charter* rights, ongoing or past. The Applicants' own evidence acknowledges that indefinite encampments are at present permitted in most of the City's public parks, and that any harms they have suffered are consistent with those caused by homelessness itself.

7. The Applicants constrain their claim to things they say occurred in the past, rendering the forward-looking s.52(1) declaratory relief also sought by the Applicants moot.

8. To the extent that the Applicants seek retroactive s.52(1) declarations, they do so in order to claim retroactive section 24(1) *Charter* damages. However, in *Canada (A-G) v Power*[3], the Supreme Court of Canada ("**SCC**") confirmed there is a general presumption against combining remedies under ss.24 and 52 of the *Charter*. Seeking *Charter* damages is duplicative of the declarations sought. In any event, the City submits that the Applicants have not established entitlement to *Charter* damages on the merits, and good governance immunity defeats any award of damages in any event.

PART II—FACTS

The Parties

9. The City is a single-tier municipal corporation. Pursuant to the *Municipal Act, 2001*, municipalities are created by the Province of Ontario "for the purpose of providing good government" regarding matters

[3] *Canada (Attorney General) v. Power*, 2024 SCC 26.

within their jurisdiction. Single-tier municipalities are authorized by the *Municipal Act, 2001* to "provide any service or thing that the municipality considers necessary or desirable for the public", and to pass by-laws respecting (inter alia): public assets of the municipality; the economic and social well-being of the municipality; the health, safety and well-being of persons; and protection of persons and property.[4]

10. The Applicants are 14 individuals who have experienced homelessness in the City. As noted above, the Applicants' Amended Notice of Application raises constitutional issues with respect to several specific sections of the Impugned By-Laws, i.e. ss. 3, 12, 17 and 18 of the Parks By-Law and s.16(12) of the Streets By-Law. The Impugned By-Laws, including these specified sections of them, were enacted to protect and foster the public assets of the municipality, the economic and social well-being of the City, and the health, safety and well-being of all persons and property in the City.

The Impugned By-Laws are subject to the City's encampment protocols and processes

11. The Impugned By-Laws' enforcement is and has at all relevant times been governed by certain protocols and processes enacted by City Council and confirmed via by-law from time to time. These protocols and processes have guided and limited the enforcement of the Impugned By-Laws in circumstances where homeless individuals are encamped in the City's public parks.

12. There are three distinct time periods involved in this matter, as set out below.

Time Period #1: The Former Protocol

13. Beginning in October, 2020 and until August 30, 2021, the City operated under a "By-Law Enforcement Protocol" (the "**Former Protocol**"), which provided that, while there were some areas where encampments would remain prohibited under the Impugned By-Laws (sidewalks, streets, playgrounds within parks, for example), encampments would otherwise be permitted in public parks in the City for at least a period of time.

14. The Former Protocol was complaint-based. Upon receipt of a complaint about an encampment, City employees on the 'Housing Focused Street Outreach Team' (the "**HFSOT**") – who regularly engage with people experiencing homelessness - would be directed to engage with the people at the encampment. HFSOT would administer a questionnaire called the 'Vulnerability Index—Service

[4] *Municipal Act, 2001,* SO 2001, c 25, ss. 2, 10.

Prioritization Decision Assistance Tool' ("**VI-SPDAT**") to aid in providing assistance. The VI-SPDAT is a questionnaire that results in a numerical 'acuity' score. The higher the acuity, the greater the complexity of that individual's issues contributing to their homelessness. Under the Former Protocol, the VI-SPDAT 'acuity' score assisted in determining what further engagement steps were appropriate: for individuals with 'low to moderate' acuity (VI-SPDAT score of 13 or below), they would be given notice that after 14 days their encampment could be removed, but they would also be provided with housing supports. Assistance with moving to shelter or housing (transportation, financial assistance, storage of possessions) was also made available. For individuals with 'high' acuity (VI-SPDAT score of 14 or higher), the 14-day timeline would not apply. Outreach efforts would continue.[5]

Time Period #2: The Encampment Process

15. As of August 30, 2021, the City rescinded the Former Protocol and began employing a 6-step Encampment Process (the "**Encampment Process**"). The Encampment Process was complaint-based (Step 1). Municipal Law Enforcement ("**MLE**") would then attend the encampment to determine if there was a violation of the Impugned By-Laws, provide education and seek voluntary compliance (Step 2). If there was no voluntary compliance, HFSOT would attend at the encampment and provide various types of support (Step 3). If a violation of the Impugned By-Law continued, MLE would re-attend, issue a trespass notice and notify Hamilton Police (Step 4). Then, the police would respond under the *Trespass to Property Act* (Step 5). The final step was clean up after an encampment removal (Step 6).[6]

Time Period #3: The Current Protocol

16. On August 18, 2023 the Encampment Process was replaced by a new protocol; it remains in force (the "**Current Protocol**"). The Current Protocol was based on extensive public consultations. It provides that people may erect tents or temporary shelters in public parks in the City, provided that they are not spatially in a "prohibited area" (for example, not within 100 metres of a school, daycare, playground, pool, etc., or within 10 metres of a private property line, and groups of up to 5 tents or temporary shelters must be spaced at least 50 meters from other such groups). The Current Protocol provides an 8-step process for enforcement in the event a tent or temporary shelter is in a prohibited

[5] Respondent's Record ("**RR**"), Tab 2, Affidavit of M. Ciriello, October 5, 2021 at para 4; RR, Tab 2, Affidavit of M. Ciriello, October 9, 2021 at paras 2-3.
[6] RR, Tab 2, Affidavit of M. Ciriello, October 5, 2021 at para 7-9.

area, as defined, which begins with notification and attempts to gain voluntary compliance, prior to involving MLE officers and police. The Current Protocol also provides for addressing health and safety concerns, while allowing people to stay encamped, provided that the health or safety concern is remediated. There is no time limit on how long a person may remain encamped in a tent or temporary shelter, so long as there otherwise is compliance with the Current Protocol.[7]

17. From September 1, 2023 to June 30, 2024, the Hamilton Police Service Encampment Engagement Team ("**EET**") assisted City MLE officers in issuing 651 notices (non-compliance or trespass) at locations that were not in compliance with the Current Protocol. The EET spent 327 hours enforcing those notices. Significantly, "enforcement" in this circumstance is defined as gaining compliance with the Current Protocol. Inspector Miscione of the Hamilton Police Service confirmed that no force was used with respect to any person by EET during those hours and no person was arrested or charged for refusing to leave an encampment. The EET's role was to maintain safety, keep the peace, and mitigate any situation that might arise.[8]

Enforcement of Impugned By-Laws has never happened overnight, or as night is approaching

18. Whether under the Former Protocol, the Encampment Process and the Current Protocol, the only enforcement action taken by City MLE officers with respect to encampments in public parks in the City has been issuing trespass notices. City MLE officers do not enforce trespass notices, or remove people from tents or temporary shelters, or dismantle or remove tents or temporary shelters that are occupied. City MLE officers have never issued trespass notices to encamped individuals in City parks overnight, or as night is approaching. City MLE officers endeavour to leave encampments before sundown, and City MLE officers do not work overnight.[9]

19. These facts are confirmed by the Applicants' own evidence. All 14 of the Applicants have given evidence that they and others have encamped in public parks in the City, including temporarily overnight and for longer periods of time, as set out in the chart below:

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[7] RR, Tab 22, Confirming By-Law; Application Record ("**AR**"), Tab 113, Affidavit of D. Blake, July 30, 2024 paras 7-40 and Exhibit A.
[8] AR, Tabb 134, F. Miscione 2024 Affidavit, Exhibit A, page 4.
[9] AR, Tab 119, Affidavit of M. Ciriello, July 29, 2024, at para 10; AR, Tab 120, M. Ciriello Transcript, August 21, 2024, p. 21 (Q78); RR, Tab 6, Affidavit of Lee Rynar, October 10, 2021, at para 5.

Affiant/Deponent	Location of Evidence in Record
Kristen Heegsma	• Affidavit, June 7, 2022, pg. 2, para 8 • Transcript, August 23, 2024, at pg. 56 (Q 270); pg. 63 (Q 302)
Darrin Marchand	• Transcript, October 13, 2021, at pg. 9, (Q27-33) • Transcript, August 29, 2024, at pg. 56-57, (Q204-211)
Gord Smyth	• Transcript, October 13, 2021, at pg. 20 (Q61-62)
Mario Muscato	• Transcript, October 13, 2021, at pg. 3, (Q7-10) • Affidavit, May 11, 2022, pg. 3, para 4 • Transcript, August 14, 2024, at pg. 37 (Q183)
Shawn Arnold	• Transcript, August 14, 2024, at pg. 24 (Q111), pg. 26-27 (Q121-122)
Cassandra Jordan	• Transcript, August 14, 2024, at pg. 8 (Q24), pg. 9 (Q32)
Julia Lauzon	• Transcript, October 15, 2024, at pg. 10 (Q45), pg. 12 (Q55), pg. 12-13 (Q59), pg. 22-23 (Q119-123)
Ammy Lewis	• Transcript, August 14, 2024, at pg. 14. (Q56), pg. 27-30 (Q116-122), pg. 43 (Q184)
Ashley MacDonald	• Affidavit, June 13, 2022, at pg. 1, para 6 • Transcript, October 10, 2024, at pg. 10-11, (Q43-46), pg. 23-24 (Q101-108), pg. 26 (Q121-122), pg. 40 (Q193-195), pg. 53 (Q281-282)
Cory Monahan	• Affidavit, May 12, 2022, at pg. 2, para 7 • Transcript, August 15, 2024, at pg. 11-12 (Q47-51), pg. 69-70 (Q376)
Misty Marshall	• Affidavit, May 12, 2022, at pg. 2, para 15 • Transcript, August 15, 2023, at pg. 43-44 (Q199-201)
Sherri Ogden	• Affidavit, June 2, 2022, at pg. 1, para 7 • Transcript, August 14, 2024, pg. 40 (Q250-251)
Jahmal (Jammy) Pierre	• Affidavit, June 7, 2022, at pg. 3, para 19 • Transcript, August 16, 2024, at pg. 34 (Q131), pg. 43-44 (Q167-171)
Linsley Greaves	• Affidavit, June 2, 2022, at pg. 2, para 13 • Transcript, August 14, 2024, at pg. 46 (Q183-184)

20. Six of the Applicants specifically confirmed that receipt of trespass notices from City MLE officers, ticketing by police officers, or removal of encampments only occurs in the morning or daytime:

Affiant/Deponent	Location of Evidence in Record
Jahmal (Jammy) Pierre	• Transcript, August 16, 2024, pg. 44 (Q177)
Gord Smyth	• Transcript, August 28, 2024, pg. 34 (Q192-194)
Cassandra Jordan	• Transcript, August 15, 2024, pgs. 28 (Q100), 51 (Q163)
Sherri Ogden	• Transcript, August 14, 2024, p. 28, (Q165)
Cory Monahan	• Transcript, August 15, 2024, pg. 75, Q411, pg. 76 (Q418)
Ashley MacDonald	• Affidavit, June 13, 2022, pg. 6, para 24

21. One of the Applicants, Ashley MacDonald, claimed that she had once been ticketed by police at 6:00pm. On cross-examination, she clarified that this was in the summer, and as such it was not dark or as dusk was approaching. Later in her testimony, Ms. Macdonald indicated that she was actually not certain of the time she was ticketed, and that it could even have occurred in the morning.[10]

22. Another of the Applicants, Cory Monahan, claimed that he was repeatedly awoken “first thing in the morning” by City MLE officers. On re-examination, he was not sure of the time when this occurred.[11]

[10] AR, Tab 37, A. MacDonald, Transcript, October 10, 2024, pgs. 61 (Q 325-328), 64 (Q 343-347).
[11] AR, Tab 49, Cory Monahan, Transcript, August 15, 2024, pg. 75 (Q411); AR, Tab 50, Cory Monahan, Transcript, August 30, 2024, pg 88 (Q466-468).

23. Applicant Linsley Greaves stated that "an officer" required him to move from an encampment during the evening, although he did not think it was a City MLE officer. Upon cross-examination, Mr. Greaves acknowledged that he was not actually sure that this had occurred at night—he just felt as if it was because he had been asleep.[12]

24. Applicant Misty Marshall claimed that "[a] couple of weeks" prior to the date on which she swore her May 12, 2022 affidavit, she and some friends were told by a police officer that they would have to leave John Rebecca Park at 11:00pm, the posted closing time for that park, while they were sitting on a park bench with blankets and a tarp. Upon cross-examination, Ms. Marshall was uncertain about the date of this incident.[13] Notably, Misty Marshall also claims impacts from the dismantling of the Ferguson Ave. encampment in October, 2020, and it appears that some of the other Applicants also do so. However, the City dismantled that encampment with the express agreement of the parties.[14]

Encampment Clean-Up

25. The City has had policies in place at all relevant times to ensure that an encampment site is not cleaned up or removed if an occupant is present. [15] The Current Protocol has expanded upon this with a multi-factor approach to determining when a site has been abandoned, emphasizing the importance of ensuring property is truly abandoned before disposing of it. [16]

26. The Applicants have offered no authority—and the Respondent submits that there is none—to suggest that the City has a *Charter* obligation to allow the Applicants to store their possessions in public parks indefinitely. While the City has recognized, through its policies, that an individual's belongings are important to them, the Applicants imply that discarding *any* item, under any circumstance, is depriving a person of a critical survival need. That is not the case. Many of the Applicants, under cross-examination, admitted that they had left an encampment site and left their tents or other property behind:

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[12] AR, Tab 24, Linsley Greaves, Transcript, August 14, 2024, p. 24-27 (Q101-109).
[13] AR, Tab 43, Misty Marshall, Affidavit, May 12, 2022, pg. 5, para 28.
[14] Applicants' Factum at paras 17, 43 and 75
[15] RR, Tab 12, K. Bunn 2021 Affidavit, paras. 6, 16; RR, Tab 2, M. Ciriello October 5, 2021 Affidavit, para. 9 (f) and 12(e).
[16] AR, Tab 119, M. Ciriello 2024 Affidavit, para. 11-12; AR, Tab 117, K. Bunn 2024 Affidavit, paras. 5-8.

Affiant/Deponent	Location of Evidence in Record
Sherri Ogden	• Transcript, August 14, 2024, pg. 29-30, Q. 175-177; pg. 31, Q. 186-190. Ms. Ogden claimed that her tent was "bulldozed", but admitted on cross-examination that she had been given a "couple days" notice, and did not take her tent with her, "[b]ecause I guess I gained too much stuff, and so I don't feel like taking it all with me. Because I know I can get another tent somewhere."
Mario Muscato	• Transcript, August 14, 2024, pg. 40, Q.200. Mr. Muscato admitted on cross-examination that when police or municipal law enforcement officers have told him to move, they did not take his tent, stating "We were always pretty civil about it."
Shawn Arnold	• Transcript, August 14, 2024, pg. 43-44, Q. 182. At his cross-examination, Mr. Arnold—despite being improperly prompted by his counsel to change his evidence—explained that on an occasion when he believes the City came with a Bobcat and removed his belongings, he did not actually witness this occur; he had actually been away for "a couple of days" and one of his friends had said that he did not think Mr. Arnold was coming back.
Cory Monahan	• Transcript, August 15, 2024, pg. 42, Q. 217; pg. 42-43, Q. 224; pg. 43-44, Q. 229-236; Transcript, August 15, 2024, pg. 46, Q. 250. Mr. Monahan claimed that he was "bulldozed" out of a parking lot at Gage Park after having stayed there to end of winter 2022, but admitted he was not present when this alleged "bulldozing" happened; that he was aware notice had been given; and that he had left his tent over the weekend and went to stay at the Budget Inn with his girlfriend. He also recounted another event where he claimed his encampment was cleared within twelve hours of setting it up, but admitted that he was not present when this occurred, either.
Misty Marshall	• Transcript, August 15, 2024, Pg. 32, Q. 157-159. Marshall claimed in her Affidavit that the City showed up with Bobcats to remove belongings with only 20 minutes' notice, but admitted on cross-examination that people were required to depart because the park was a crime scene, and it had been caution-taped "for the whole night and early morning."
Cassandra Jordan	• Transcript, August 15, 2024, pg. 20-21, Q. 74-76. Ms. Jordan stated that, when the Ferguson encampment was dismantled in 2020, she lost her tent; but she also admitted she was offered a hotel and was permitted the opportunity to make arrangements for her other possessions to be stored.
Ammy Lewis	• Transcript, August 14, 2024, pg. 50-51, Q. 261-217. Ms. Lewis admitted on cross-examination that where her doctor Dr. O'Shea had reported "she has lost all of her belongings on multiple occasions" this was due to theft.
Linsley Greaves	• Transcript, August 14, 2024, pg. 27-28, Q.112-115; Transcript, August 14, 2024, pg. 9, Q.119. Mr. Greaves admitted he was given three days' notice to move, and took no steps to move because he wanted to stay. Nevertheless, he accepted the City's offer to store his belongings temporarily.
Jahmal (Jammy) Pierre	• Transcript, pg. 35-40, Q. 134-151. Ms. Pierre claimed that her tent was "bulldozed," but admitted that she was not present when this allegedly occurred; and was evasive when asked whether she had been given notice in advance.

The City's role in addressing homelessness

27. Beyond the protocols and processes noted above, the City works extensively to address homelessness through other means. The City's primary goal has always been to have housing options available for encamped individuals.[17] The City also acts as a "system service manager" for homelessness response on behalf the Governments of Ontario and Canada. The City receives federal and provincial funding and also contributes funds from its own tax levy to address homelessness.[18]

28. The City provides funding to and administers many services and programs intended to address homelessness, including emergency indoor shelters, licensed Residential Care Facilities, and the HFSOT. The City also administers 'Access to Housing' applications (which are used to connect applicants to supportive housing), housing stability benefits, eviction prevention programs, rapid rehousing programs and intensive case management for homeless individuals.[19]

29. The City-funded and administered services and programs are based around best practices known as "Housing First" (aiming to get homeless individuals into housing as swiftly as possible, so other issues can start to be addressed) and "Coordinated Access" (a client-centered, standardized process for intake, assessment, and referral of homeless individuals to housing and other services). These practices seek to ensure that individuals are both housed and matched to the right level of support based on their needs, preferences and the available resources.[20]

30. One aspect of Coordinated Access is that data is collected by all City-funded temporary shelters using a common software database known as 'Homeless Individuals and Families Information System' ("**HIFIS**"). HIFIS allows the City to track when individuals first interact with the homelessness-serving system in the City, as well as their progress through the system and outcomes.[21]

31. The total budget allocated by the City for homelessness and indoor emergency shelters has risen from over $61.5 million for the 2021-2022 fiscal year to over $67 million for the 2024-2025 fiscal year, inclusive of funding from the federal and provincial governments and the City's own tax levy.[22]

32. The 2024-2025 figure includes over $3.1 million in new funding for indoor emergency shelters;

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[17] RR, Tab 3, M. Ciriello Affidavit, October 9, 2021 at para 5.
[18] AR, Tab 129, Affidavit of R. Mastroianni, Oct 6, 2021 at para 4.
[19] AR, Tab 129, Affidavit of R. Mastroianni, Oct 6, 2021 at paras 5-7.
[20] AR, Tab 129, Affidavit of R. Mastroianni, Oct 6, 2021 at para 14; RR, Tab 17, 2021 S. MacKeigan Affidavit, paras 7-8, 12-14.
[21] AR, Tab 129, Affidavit of R. Mastroianni, October 6, 2021 at para 15.
[22] AR, Tab 130, Affidavit of R. Mastroianni, October 12, 2021 at para 2; AR, Tab 132, Affidavit of R. Mastroianni, July 31, 2024 at para 7-8, 18.

plus over $600,000.00 for the Hamilton Regional Indian Centre's Indigenous drop-in program; over $700,000.00 to enhance Rapid Rehousing and Intensive Case Management supports; and approximately $350,000.00 to be provided to housing landlords for exceptional unit damage as a result of housing an individual from City-funded case management programs.[23]

33. The City made significant funding investments along with and in the course of developing the Current Protocol, including new permanent full-time positions in the HFSOT (two—annual cost: $251,000.00); MLE (two—annual cost: $277,000.00) and the Parks and Cemeteries Dept. (one—annual cost: $124,000.00). The City also approved year-round washroom and shower facilities for public parks costing $576,240.00 for the period September 1, 2023 to March 31, 2024, with a further $987,840.00 approved in 2024 to make those washroom and shower facilities permanent.[24]

34. Between August 1, 2021 and May 31, 2024, the City also spent over $2.1 million on additional security near encampments to protect them from theft and vandalism.[25] Since 2021, vigilantism from the public against encampment residents has increased, including actions such as setting tents on fire.[26]

35. A budget was presented to City Council in 2021 to address clean-up costs in public parks in the City, which budget has been incrementally increased since then. In 2022, 240 encampment sites were cleaned, costing $118,421.00, compared to 262 sites in 2021 costing $215,000.00. In January 2023, City Council approved an increase of $200,000.00 annually to the Public Works Dept.'s operating budget, to be used for *ad hoc* clean up or other costs incurred as a result of encampments on City property, and in July 2023 added three more full-time Parks and Cemeteries Dept. positions at an annual cost of $245,000.00. Vehicles and equipment were also leased between September 1, 2023 and March 31, 2024 at an annualized cost of $33,000.00, with a capital cost of $220,000.00.[27]

36. In addition to the budget outlays, the City's Parks and Cemeteries staff must use hazardous materials protocols when addressing human waste and discarded drug paraphernalia[28], and have been confronted with aggressive and threatening behaviours from encampment residents,[29] though not all encampment residents have been confrontational.[30] City Staff have had to repair damage related to fires, the felling and burning of trees and other wood, unsafe discarding of cigarette butts in areas

[23] AR, Tab 113, Affidavit of D. Blake, July 30, 2024 at para 41.
[24] AR, Tab 113, Affidavit of Danielle Blake, July 30, 2024 at para 41.
[25] AR, Tab 115, Affidavit of David Buckle, July 31, 2024 at para 22.
[26] AR, Tab 117, Affidavit of Kara Bunn, July 31, 2024 at para 10.
[27] AR, Tab 117, Affidavit of Kara Bunn, July 31, 2024 at para 14.
[28] RR, Tab 12, K. Bunn 2021 Affidavit, paras. 9, 13-15; RR, Tab 13, S. Hasselman Affidavit, October 7, 2021 at paras. 15-16.
[29] AR, Tab 123, S. Hasselman 2024 Affidavit, paras. 10, 13.
[30] AR, Tab 125, C. Manning Affidavit, para. 11.

susceptible to fire, and the unauthorized accessing of electricity, and damage to public washroom facilities and water fountains.[31] All of these cause increased overtime hours and budget overruns.[32] City Staff also field and respond to complaints from the public about encampments.[33] Additionally, the City provides what Parks District North Superintendent Cory Manning described as "regular cleanup" to assist with keeping existing encampments clean, specifically taking only items that encampment residents have indicated are garbage.[34] Despite describing a good relationship with encampment residents, Mr. Manning described that encampments, in his observation, are becoming more entrenched; and some encampment residents see their encampment site as their possession.[35]

The City-funded indoor emergency shelter system

37. The City partners with and allocates funding to indoor emergency shelter providers in the community, namely Good Shepherd, Mission Services, the Salvation Army and St. Joseph's Womenkind. The City-funded indoor emergency shelter system is comprised of: (a) the Men's sector; (b) the Women's sector (inclusive of women and women with children); (c) the Family sector; and (d) the Youth sector. During the COVID-19 pandemic, the City received additional funding allowing it to contract with local hotels to provide overflow spaces for homeless individuals when the indoor emergency shelters reached capacity; that funding is no longer available, but the City does presently retain the ability to place homeless families in hotel spaces on an *ad hoc* basis.[36]

38. In the City there are also: (a) four Violence Against Women ("**VAW**") shelters, which are separately funded by the province (the City pays for overflow beds at each VAW location, which it can access); (b) charities and service providers who offer temporary shelter programs of various sizes that are not tracked or funded by the City, such as the YMCA, which offers 174 beds for men at its James St. facility (despite a fire in the summer of 2024) and the YWCA, which operates a Transitional Living Program including temporary housing for women at its MacNab St. facility; (c) the Hamilton Regional Indian Centre, which operates a drop-in program specifically serving individuals who identify as Indigenous and who choose to seek service from an Indigenous agency; and (d) approximately 750

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[31] RR, Tab 12, K. Bunn 2021 Affidavit, para. 9; RR, Tab 13, S. Hasselman October 7, 2021 Affidavit, paras. 17-18; RR, Tab 14, S. Hasselman October 11, 2021 Affidavit, para. 13-15; AR, Tab 123, S. Hasselman 2024 Affidavit, paras. 8-9.
[32] RR, Tab 12, K. Bunn 2021 Affidavit, paras. 10-11.
[33] AR, Tab 125, C. Manning Affidavit, para. 10; RR, Tab 14, S. Hasselman October 11, 2021 Affidavit, para. 16; AR, Tab 123, S. Hasselman 2024 Affidavit, paras. 10-11, Exhibits C and D.
[34] AR, Tab 125, C. Manning Affidavit, para. 6.
[35] AR, Tab 125, C. Manning Affidavit, paras. 11-12.
[36] AR, Tab 132, Affidavit of R. Mastroianni, July 31, 2024 at paras 13-18 and Exhibit A.

spaces in 90 City-licenced and City-subsidized Residential Care Facilities ("**RCFs**"), each of which provide safe and affordable supportive housing in a communal setting for people who require assistance with the daily activities of life. Many RCFs serve both men and women. Some specialize in serving those with mental illnesses, addictions and/or disabilities. Some specialize in serving youth or seniors.[37]

39. In sum, it is not possible to determine the total number of emergency indoor shelter beds available in the City based only on those that receive City funding or that are tracked by the City.

City-funded indoor emergency shelters are accessible to all, regardless of culture, ethnicity, indigenous status, religion, disability, gender or sexual orientation or expression

40. The services provided by City-funded indoor emergency shelters are free to the individual and accessible.[38] They accept admissions 24 hours a day, 7 days a week; and if one shelter is full, HIFIS allows the City's partners to canvass each others' capacity.[39] There are no restrictions on indoor shelter access in the City based on an individual's acuity, and the City offers intensive case management programs for individuals of high acuity.[40] In emergency indoor shelters, individuals have access to various supports, including but not limited to harm reduction supplies, housing planning, access to medical services, supports to connect individuals to needed services, access to income support, access to meals, facilities for personal hygiene, hygiene products, washrooms, laundry facilities, and safety.[41]

41. The City's partners in providing indoor emergency shelter welcome everyone at their facilities: cisgender, transgender, Two-Spirit, non-binary and gender diverse individuals of all races and ethnicities, sexual orientations, cultural backgrounds and religious affiliations, and no religion. Individuals are able to actively engage in cultural practices, and cultural, religious and medical dietary needs are accommodated. Further, private and quiet space is made available for religious or cultural practice, inclusive of Indigenous cultural practices such as smudging. Staff support residents in accessing culturally safe and responsive services through referral and advocacy. Where requested, translators are used to assist with communication and service planning.[42]

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[37] AR, Tab 132, Affidavit of R. Mastroianni, July 31, 2024 at paras 13-21.
[38] AR, Tab 129, Affidavit of R. Mastroianni, Oct 6, 2021 at para 28.
[39] AR, Tab 129, Affidavit of R. Mastroianni, Oct 6, 2021 at para 29.
[40] AR, Tab 132, Affidavit of R. Mastroianni, July 31, 2024 at paras 4, 12.
[41] AR, Tab 129, Affidavit of R. Mastroianni, Oct 6, 2021 at para 28.
[42] AR, Tab 136, Affidavit of T. Macfadzean, Jul 26, 2024 at para 18; AR, Tab 138, Affidavit of S. MacKeigan, Jul 29, 2024 at paras 4-5.

City-funded indoor emergency shelters have rules prohibiting violence, drug use and pets, as well as providing for division by gender at some sites, but these do not preclude access

42. Many of the Applicants refer in their evidence to perceived barriers that they believe have prevented them from using the City-funded emergency indoor shelter system and/or reasons that they prefer to encamp in public parks. These perceived barriers include shelter policies on bed checks, service restrictions, drug use, pets and couples. None of these perceived issues are actual barriers; they reflect personal preferences. Moreover, each reflects a necessary policy for indoor emergency shelter providers to have in place for their continued operation.

43. As Danielle Blake explained on cross-examination, "[p]eople that have pets, that are part of couples, that are drug users have the option to go to shelters. It just would not be their preference to go to a shelter that restricts pets or drug use or them being with their partner."[43] This was echoed in the cross-examination of Kristen Heegsma, who admitted that she could access shelter without the person she was in a relationship with.[44] Dr. Gaetz described in his affidavit,[45] and agreed on his cross-examination,[46] that people may choose not to go to an emergency indoor shelter. Among the reasons stated by Dr. Gaetz are those that are more properly thought of as preferences, not actual barriers: separation from a partner, family member, or pet; inconvenient entry/exit times; concerns about storing or moving personal belongings; perception of shelters as inhospitable, alienating or demeaning.[47] Other of the Applicants' witnesses made the common-sense acknowledgment that not all needs or preferences are of equal priority. Dr. Sereda agreed, on cross-examination, that the need for shelter takes precedence over other needs, such as wanting a feeling of community, or a feeling of autonomy, that are not as high priority. Dr. Sereda agreed that the Maslow's Hierarchy of Needs, which concept she relied on in her opinion, also placed the need for shelter in priority to wanting to stay with a partner or a pet.[48] Dr. Orkin, despite his assertion in his affidavit that "choice is itself healthful,"[49] agreed on cross-

[43] AR, Tab 114, D. Blake Transcript, August 19, 2024, pg. 19 (Q. 51).
[44] AR, Tab 27, K. Heegsma Transcript, August 23, 2024, pg. 47 (Q. 226-227).
[45] AR, Tab 87, S. Gaetz Affidavit, paras. 52-53.
[46] AR, Tab 89, S. Gaetz, Transcript, August 30, 2024, pg. 128, (Q. 239).
[47] AR, Tab 87, S. Gaetz Affidavit, paras. 52-53.
[48] AR, Tab 110, A. Sereda, Transcript, August 23, 2024, pg. 30, (Q. 113-116); pg. 31 (Q. 117); pg. 33-3 (Q. 127-129). Dr. Hayman, while agreeing generally with the concept of triage, would not agree that the need to provide a person with shelter take precedence over other needs that are not as high priority; instead deferring to the patient "based in large part on their understanding of what is best for their health:" AR, Tab 92, K. Hayman, Transcript, August 16, 2024, pg. 18-19, (Q. 51); pg. 21, (Q. 53).
[49] AR, Tab 102, A. Orkin Affidavit, para. 26.

examination that not every choice made by a person is healthy for them.[50] Dr. Orkin also agreed that there are even circumstances where coercion is in the interests of a person's health.[51]

44. Emergency indoor shelter providers work to ensure that their beds and spaces are being used. Bed checks are conducted nightly to ensure that an individual who checks in is actually using the shelter facilities. This is not a 'curfew', though it is sometimes impugned as such. If an individual leaves a shelter facility without advising that they will be returning, the bed may be reassigned should two consecutive bed checks indicate it is not being used. Any belongings left behind are made available for pick-up. This is necessary to ensure that no beds or resources are wasted.[52]

45. Threats of violence, as well as actual violence and other crimes, are strictly prohibited in City-funded emergency indoor shelters, as is the possession of weapons. If an individual becomes violent, commits a theft or other crime, or is found with a weapon, they may be 'service restricted' from the shelter for a period of time, with the length of the service restriction being proportional to the gravity of the incident. Service restrictions of this kind only apply to the shelter location where the incident occurred, and other emergency indoor shelters can still be accessed by the individual. The only time a person would be service restricted 'system-wide' is if they have been involved in separate incidents at all shelters leading to overlapping service restrictions at the same time. Service restrictions are necessary to help keep emergency indoor shelter staff members safe.[53]

46. It is clear that some of the Applicants can and sometimes do threaten violence or become violent, or carry weapons. Julia Lauzon was incarcerated for an assault that occurred outside the Salvation Army emergency indoor shelter.[54] Gord Smyth noted in his affidavit evidence that he can react violently if "triggered", and stated upon cross-examination that he "absolutely" has been violent to other people.[55] Corey Monahan indicated he was service restricted from an indoor emergency shelter for carrying a jackknife that was as long as his hand; he denied staff's allegation that he responded with racial slurs.[56] During his cross-examination, Darrin Marchand even threatened that he was going to "go get a gun and

[50] AR, Tab 104, A. Orkin Transcript, August 26, 2024, pg. 33-34 (Q. 85-89).
[51] AR, Tab 104, A. Orkin, Transcript, August 26, 2024, pg. 64 (Q 154); pg. 73 (Q. 166).
[52] AR, Tab 140, Affidavit of J. Moulton, July 31, 2024 at para 28-31.
[53] AR, Tab 140, Affidavit of J. Moulton, July 31, 2024 at para 16-23.
[54] AR, Tab 32, Transcript of J. Lauzon at pg. 6 (Q20-24).
[55] AR, Tab 62, Affidavit of G. Smyth, March 9, 2023, at para 10; AR, Tab 63, Transcript of G. Smyth at pg. 30 (Q166).
[56] AR, Tab 48, Transcript of C. Monahan at pg. 55-56 (Q300-305).

start shooting people".[57] Mr. Marchand in that same examination purported that he had been service restricted from a temporary shelter even though he had only argued with another resident and had been falsely accused of fighting.[58] The credibility of such evidence is open to serious question.

47. While drug users are welcome to access City-funded indoor emergency shelters, drug use or drug dealing on site is prohibited. This is necessary for the protection of clients who may be battling addictions and for other safety-related reasons.[59]

48. Pets are not allowed in indoor emergency shelters, though service animals are excepted. This is necessary because of issues posed by allergies, loud noises and aggressive animals.[60]

49. Notably, none of the Applicants have offered any evidence that their pet is a certified service animal. Two of the Applicants who have pets were able to place their pets in foster homes and then access shelter or housing, namely Ammy Lewis and Jahmal (Jammy) Pierre.[61] Gord Smyth has claimed he will not consider fostering or boarding his pet because she is a "service dog", but, while he claims to have a "doctor's note" in this regard, he has not produced it.[62]

50. The organization of some sites within the indoor emergency shelter system are gender-specific (male and male-identifying in the Men's sector; female and female-identifying in the Women's sector). This can mean that couples are not able to remain together and would need to stay in separate shelter sites. This is not always the case, and same-sex couples have stayed together even in gender-specific shelters, but it is necessary in shelter facilities that are designed for single individuals, i.e. twin-sized beds/congregate setting and semi-private spaces/communal washroom and shower facilities.[63] Some City-funded shelters in the Family sector do accept couples; preference is to families with children.[64]

51. The Applicants' experts take pains to try to paint every relationship between homeless individuals as a "survival" partnership, and every separation as traumatic, but the evidence shows that is not true.

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[57] AR, Tab 42, Transcript of D. Marchand at pg. 52 (Q 192).
[58] AR, Tab 42, Transcript of D. Marchand at pg. 34 (Q109-112).
[59] AR, Tab 140, Affidavit of J. Moulton, July 31, 2024 at paras 24-25.
[60] AR, Tab 140, Affidavit of J. Moulton, July 31, 2024 at paras 26-27.
[61] AR, Tab 35, A. Lewis, Transcript, August 14, 2024, pg. 23, (Q98-99); AR, Tab 59, J. Pierre, Transcript, pg. 42-43 (Q159-166).
[62] AR, Tab 63, G. Smyth, Transcript, August 28, 2024, pg. 28-29, (Q 155-156, 162).
[63] AR, Tab 138, Affidavit of Shawn MacKeigan, July 29, 2024 at paras 4-5.
[64] AR, Tab 132, R. Mastroianni Affidavit, July 31, 2024 at para 32.

Two of the Applicants have reported being subjected to violence at the hands of their partners,[65] which strongly suggests that being separated from these violent partners would in fact be better for their survival. The Applicants' expert Dr. Sereda conceded on cross-examination that if there is abuse between a couple, separating them might aid that person experiencing the abuse to get help; and that an abusive relationship would not be accurately described as a survival partnership.[66]

City-funded indoor emergency shelters have fluctuating capacity

52. The City acknowledges that the City-funded indoor emergency shelter system as a whole is sometimes at capacity, inclusive of overflow spaces. However, this is not always true. Shelter bed availability is extremely fluid and changes rapidly, often hourly. If an individual is unable to find a space at one point in a day, it is possible capacity may change later in that day or the following day.[67]

53. For example, in the months of September-October, 2021, the occupancy levels of the City-funded indoor emergency shelter system were:

- Women's Shelters: 108%
- Family Shelters: 99%
- Youth Shelters: 61%
- Men's Shelters: 97%

Overflow Locations

- Hotel (Women): 89%
- Hotel (Family): Available *ad hoc*
- Hotel (Couples & Women): 95%
- Men's: 38% (of 60 beds)

There was accordingly capacity in the Men's, Youth, and Family indoor emergency shelter sectors, and there was overflow capacity available in the hotel for women and couples.[68]

54. Similarly, in the months of June-July 2024, the City-funded Youth shelter sector had capacity available, and the City-funded Women's, Men's and Family shelter sectors had overflow capacity available.[69] When City-funded shelter space is not available, there are often other options available. which staff are able to help people pursue—particularly for women, such as overnight drop-in spaces.[70]

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[65] AR, Tab 27, K. Heegsma Transcript, August 23, 2024, p 18, (Q 77); AR, Tab 29, Cassandra Jordan, Transcript, August 15, 2024, p 47-48 (Q 156).
[66] AR, Tab 110, A. Sereda, Transcript, August 23, 2024, p 77, (Q 295-296).
[67] AR, Tab 132, R. Mastroianni Affidavit, July 31, 2024 at paras 4, 12.
[68] AR, Tab 129, Affidavit of R. Mastroianni, Oct 6, 2021 at para 62.
[69] AR, Tab 132, Affidavit of R. Mastroianni, July 31, 2024 at paras 28-29.
[70] AR, Tab 132, Affidavit of R. Mastroianni, July 31, 2024 at para 30.

The Applicants have obtained housing and/or declined offers of housing

55. Seven of the Applicants have obtained housing, with City supports, namely Ammy Lewis, Ashley MacDonald, Jahmal (Jammy) Pierre, Shawn Arnold, Gord Smyth, Cory Monahan, and Julia Lauzon.[71] All but one of this group (Mr. Monahan) remain housed.

56. Four of the Applicants have declined housing when offered, namely Sherri Ogden, Mario Muscato, Linsley Greaves, and Cory Monahan.[72] The Applicant Misty Marshall admitted on cross-examination that she has not made an Access to Housing application, which is a necessary first step to accessing supportive housing.[73]

57. Another notable circumstance is that of Ashley MacDonald, who has obtained housing, with City supports, but who still prefers to encamp in public parks in the City at least some of the time. On her cross-examination she admitted that procuring drugs is part of the reason she prefers to encamp in a tent; and that she is neither in, nor intending to get, treatment for her substance use disorder.[74]

58. Several of the Applicants acknowledged that they have the option of staying with family, particularly Mario Muscato, Cassandra Jordan, Darrin Marchand (during the day) and Kristen Heegsma (only for three to four days at a time).[75]

59. Some of the Applicants admitted declining to enter shelter when it was available: Gord Smyth, Shawn Arnold, Linsley Greaves, and Cory Monahan;[76] or declining to seek shelter (for reasons other than shelter capacity): Ashley MacDonald, Sherri Ogden, Kristen Heegsma and Darrin Marchand.[77]

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[71] AR, 35, A. Lewis, Transcript, August 14, 2024, pg. 44-45 (Q. 186-190); AR, Tab 37, A. MacDonald, Transcript October 10, 2024, pg. 5-6 (Q. 15-22), pg. 23-24, (Q. 103-106); AR, Tab 59, J. Pierre, Transcript, pg. 6 (Q. 19); pg. 7 (Q. 23); AR, Tab 21, S. Arnold, Transcript, August 14, 2024, pg. 18 (Q.76); AR, Tab 63, Gord Smyth, Transcript, August 28, 2024, pg. 46 (Q. 253); AR, Tab 48, C. Monahan, Transcript, August 15, 2024, pg. 26 (Q.131): note that Mr. Monahan was housed from October 2020 to November 30, 2021; AR, Tab 32, J. Lauzon, Transcript, October 15, 2024 pg. 6 (Q.25-26).

[72] AR, Tab 56, S. Ogden, Transcript, August 14, 2024, at pg. 7 (Q23); AR, Tab 53, M. Muscato, Transcript, August 14, 2024, at pg. 12 (Q54); AR, Tab 24, L. Greaves, Transcript, August 14, 2024, at pg. 44-45 (Q175-176); AR, Tab 48, C. Monahan, Transcript, August 15, 2024, at pg. 32 (Q158-Q159);

[73] AR, Tab 45, M. Marshall, Transcript, August 15, 2024, pg. 18 (Q. 87-88).

[74] AR, Tab 37, A. MacDonald, Transcript October 10, 2024, pg. 23-24 (Q. 103-106); pg. 38-39 (Q. 180-188).

[75] AR, Tab 53, M. Muscato, Transcript, August 14, 2024, at pg. 39 (Q198); AR, Tab 29, C. Jordan, Transcript, August 15, 2024, at pg. 31 (Q108), pg. 31 (Q110), pg. 32 (Q. 112); AR, Tab 42, D. Marchand, Transcript, August 29, 2024, at pg. 8 (Q26), pg. 9-10 (Q31); AR, Tab 27, K. Heegsma Transcript, August 23, 2024, pg. 27-28 (Q. 119-123).

[76] AR, Tab 63, G. Smyth, Transcript, Aug 28, 2024, at pg. 27 (Q146), pg. 31 (Q167), pg. 45 (Q247); AR, Tab 61, G. Smyth Transcript Oct 13, 2021 pg 11 (Q36); AR, Tab 21, S. Arnold, Transcript, Aug 14, 2024, at pg. 16 (Q69), pg. 17 (Q71), pg. 28 (Q128): Note Mr. Arnold states at pg. 28 (Q131) he did ultimately accept offer of shelter; AR, Tab 24, L. Greaves, Transcript, Aug 14, 2024, at pg. 29 (Q. 120), pg. 31-32 (Q. 124-126), pg. 56, Q216; AR, Tab 48, Cory Monahan, Transcript, Aug 15, 2024, at pg. 51, Q. 273-276.

[77] AR, Tab 37, A. MacDonald, Transcript, October 10, 2024, at pg. 47 (Q242); AR, Tab 56, S. Ogden, Transcript, August 14, 2024, pg. 43 (Q. 269); pg. 47 (Q. 296-297); AR, Tab 27, K. Heegsma, Transcript, August 23, 2024, pg. 60 (Q. 286); AR, Tab 42, D. Marchand, Transcript, August 29, 2024 pg. 57 (Q. 212).

60. Indeed, one City witness has observed encampment residents are being encouraged by organized groups to resist housing supports, and instead to insist on remaining in encampments.[78] He has observed a prevailing view among people living in encampments (though not necessarily shared by all) that living in an encampment is the first resort when living unhoused, and is preferable to staying in an indoor shelter, whereas previously living in an encampment was viewed as temporary measure of last resort.[79] This poses difficulties in engaging people with housing supports.

Encampments are not safer than other forms of shelter

61. Numerous witnesses gave evidence regarding the health and safety risks that are posed by encampments, both for encampment residents and the surrounding community. Compellingly, the Applicants themselves have spoken to these issues:

a. There is drug use in encampments,[80] and drug dealers target people who live in encampments;[81]

b. Linsley Greaves, a Black man who reported being the target of racial slurs by other shelter residents, recognized that he has also encountered this in encampments;[82]

c. People experience theft in encampments;[83]

d. People are at risk of assault in encampments.[84]

62. There is notable agreement among the expert witnesses that **homelessness itself is associated with negative health outcomes**.[85] These health outcomes associated with homelessness include lower life expectancy,[86] higher rates of chronic disease,[87] higher rates of mental health

[78] RR, Tab 8, D. Buckle 2021 Affidavit, para. 31; AR, Tab 115, D. Buckle 2024 Affidavit, para. 21.
[79] AR, Tab 115, D. Buckle 2024 Affidavit, para. 20.
[80] AR, Tab 21, S. Arnold, Transcript, August 14, 2024, pg. 29 (Q134).
[81] AR, Shawn Arnold, Transcript, August 14, 2024, pg. 29-30, Q. 135. See also AR, Tab 24, L. Greaves, Transcript, August 14, 2024, pg. 15 (Q. 60-61).
[82] AR, Tab 24, L. Greaves, Transcript, August 14, 2024, pg. 13 (Q. 51-52).
[83] AR, Tab 24, L. Greaves, Transcript, August 14, 2024, pg. 21 (Q. 93); AR, Tab 32, J. Lauzon, Transcript, October 15, 2024, pg. 11 (Q.53); AR, Tab 37, A. MacDonald Transcript, pg 66 (Q. 355); AR, Tab 35, A. Lewis, Transcript, pg. 27 (Q. 117), pg. 42-43 (Q. 180-181);
[84] AR, Tab 28, C. Jordan Affidavit, para. 23; AR, Tab 59, J. Pierre Transcript, August 16, 2024, pg. 46 (Q.182); AR, Tab 35, A. Lewis, Transcript, pg. 27-28 (Q. 117). Note: Ashley MacDonald reported having been assaulted, but refused to give more detail, stating “There's punishments for people talking to people – bad things.” (AR, Tab 37, A. MacDonald, Transcript, pg. 36, Q. 173); AR, Tab 92, Dr. Kate Hayman, Transcript, August 16, 2024, pg. 25 (Q.62).
[85] See, e.g., AR, Tab 142, Koivu Affidavit, para. 19; AR, Tab 93, Hwang Affidavit, para. 5; AR, Tab 87, Gaetz Affidavit para. 31-32; AR, Tab 102, Orkin Affidavit, para. 23;
[86] AR, Tab 87, Gaetz Affidavit para. 31-32.
[87] AR, Tab 142, Koivu Affidavit, para 46; AR, Tab 93, Hwang Affidavit, para 5; AR, Tab 87, Gaetz Affidavit para 31-32.

conditions, [88] higher rates of substance abuse conditions,[89] inadequate sleep,[90] exposure to the elements,[91] and becoming targets of physical violence and threats.[92]

63. The expert witness called by the City, Dr. Sharon Koivu, spoke in detail about the health risks of encampments specifically. These include:

a. People with substance use disorders being attracted to encampments because of the lack of restrictions on drug use and absence of rules, resulting in increased drug use, less safe use, and harming recovery;[93]

b. The presence of vulnerable people and diverted drugs at encampments creates unsafe situations and opportunities for violence and exploitation aimed at the people living in encampments.[94] Yet encampments give people living in them a false sense of security;[95]

c. Disease transmission due to lack of sanitation and rodents, including injection drug use in unsanitary conditions;[96] the lack of mitigating practices, such as masks, distancing, and cleanliness;[97]

d. Exposure to temperature extremes causing heat stroke, dehydration, rhabdomyolisis (skeletal muscle tissue breakdown) due to heat exposure[98] and hypothermia, frostbite, and associate gangrene due to exposure to cold;[99] as well as trench foot due to prolonged exposure to damp and cold;[100]

e. Risk of injury: burns, explosion, carbon monoxide poisoning due to fires/propane tanks;[101]

f. Dog bites from dogs within encampments;[102]

g. Dr. Koivu also reported that, from her experience, “I observed deterioration in physical and mental health in people who moved into encampments. For many people this led to bad health outcomes and even death.”[103]

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[88] AR, Tab 142, Koivu Affidavit, para. 51; Hwang Affidavit, para. 5; AR, Tab 87, Gaetz Affidavit para. 31-32, 38.
[89] AR, Tab 87, Gaetz Affidavit para. 31-32, 38-39; AR, Tab 90, Hayman Affidavit, para. 11.
[90] AR, Tab 93, Hwang Affidavit, para. 5.
[91] AR, Tab 93, Hwang Affidavit, para. 5.; Dr. Andrea Sereda, Transcript, August 23, 2024, pg. 50, Q. 190.
[92] AR, Tab 142, Koivu Affidavit, para. 47; AR, Tab 93, Hwang Affidavit, para. 5; AR, Tab 92, K. Hayman, Transcript, August 16, 2024, pg. 32-33, Q. 80.
[93] AR, Tab 142, Koivu Affidavit, para. 44, 54, 55-56, 58-59
[94] AR, Tab 142, Koivu Affidavit, paras. 26, 47, 49-50, 53.
[95] AR, Tab 142, Koivu Affidavit, para. 67, 73.
[96] AR, Tab 142, Koivu Affidavit paras. 33-35, 37-38, 40-41, 45, 64.
[97] AR, Tab 142, Koivu Affidavit, para. 45.
[98] AR, Tab 142, Koivu Affidavit, paras. 29-32.
[99] AR, Tab 142, Koivu Affidavit, paras. 20-22, 66.
[100] AR, Tab 142, Koivu Affidavit, para. 27.
[101] AR, Tab 142, Koivu Affidavit, paras. 23-25.
[102] AR, Tab 142, Koivu Affidavit, para. 36.
[103] AR, Tab 142, Koivu Affidavit, para. 57.

64. City workers also gave evidence regarding the conditions and activities they have observed in encampments: fire hazards;[104] exposed wires or unauthorized access to electricity;[105] encampments attracting drug dealing activity;[106] drug use,[107] hazards from discarded drug paraphernalia;[108] people at encampments brandishing weapons;[109] assaults or other violent crime,[110] theft,[111] poor sanitation (though noting that sanitation has improved via the City making 24/7 washrooms and showers available);[112] people in encampments becoming a target for abuse, violence, or exploitation;[113] and people in encampments threatening others, being verbally abusive, or exposing themselves to others.[114]

65. The Applicants' own witnesses have acknowledged in their affidavits or conceded on cross-examination that violence, assault, or other safety concerns are present in encampments,[115] as are theft,[116] drug use or overdose;[117] risks of fires or burns due to unsafe use of generators or other heating devices;[118] hypothermia or frostbite,[119] poor sanitation and spread of disease.[120]

66. Encampments also pose risks to the surrounding community, including:

a. Inability to use park areas where encampments are located; [121]

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[104] RR, Tab 10, Semonovitch Affidavit, para. 17; RR, Tab 8, Buckle 2021 Affidavit, para. 29(a); AR, Tab 115, Buckle 2024 Affidavit, para. 17; RR, Tab 12, Bunn 2021 Affidavit, para. 9; AR, Tab 123, Hasselman 2024 Affidavit, para. 7.
[105] RR, Tab 12, Bunn 2021 Affidavit, para. 9; AR, Tab 117, Bunn 2024 Affidavit, para. 10; AR, Tab 123, Hasselman 2024 Affidavit, para. 10(b);
[106] RR, Tab 10, Semonovitch Affidavit, para. 17; AR, Tab 123, Hasselman 2024 Affidavit, para. 4;
[107] RR, Tab 8, Buckle 2021 Affidavit, para. 29(b); AR, Tab 115, Buckle 2024 Affidavit, para. 17; RR, Tab 12, Bunn 2021 Affidavit, para. 9; AR, Tab 117, Bunn 2024 Affidavit, para. 10;
[108] RR, Tab 13, Hasselman 2021 Affidavit, para. 4; AR, Tab 111, Aston Affidavit, para. 10;
[109] RR, Tab 13, Hasselman 2021 Affidavit, para. 4; AR, Tab 123, Hasselman 2024 affidavit, para. 10(a); AR, Tab 117, Bunn 2024 Affidavit, para. 10
[110] RR, Tab 8, Buckle 2021 Affidavit, para 29(d); AR, Tab 115, Buckle 2024 Affidavit, para 17.
[111] RR, Tab 8, Buckle 2021 Affidavit, para 29(c); AR, Tab 115, Buckle 2024 Affidavit, para 17.
[112] RR, Tab 8, Buckle 2021 Affidavit, para. 29(h); AR, Tab 115, Buckle 2024 Affidavit, para. 17.
[113] RR, Tab 10, Semonovitch Affidavit, para. 17; AR, Tab 111, Aston Affidavit, para. 10; AR, Tab 117, Bunn 2024 Affidavit, para. 10(a); AR, Tab 115, Buckle 2024 Affidavit, para. 18;
[114] AR, Tab 123, Hasselman 2024 affidavit, paras. 10(d),10(e) and 12; AR, Tab 117, Bunn 2024 Affidavit para. 10
[115] AR, Tab 70, Dr. Rachel Lamont, Transcript, October 7, 2024, page 28, Q. 83; AR, Tab 102, Aaron Orkin Affidavit, para. 22; AR, Tab 110, Dr. Andrea Sereda, Transcript, August 23, 2024, page 76, Q. 290; AR, Tab 79, Medora Uppal, Transcript, October 13, 2021, pg. 9, Q. 20; AR, Tab 105, Schwan Affidavit, para. 28.
[116] AR, Tab 70, R. Lamont, Transcript, October 7, 2024, page 28 (Q. 84); AR, Tab 102, A. Orkin Affidavit, para. 22; AR, Tab 110, A. Sereda, Transcript, August 23, 2024, page 76 (Q. 290); AR, Tab 92, K. Hayman, Transcript, pg. 27-28, Q. 66.
[117] AR, Tab 102, Orkin Affidavit, para. 22; RR Tab 23, Medora Uppal, Transcript, October 13, 2021, pg. 9, Q. 20; AR, Tab 92, K. Hayman, Transcript, pg. 28, Q. 71-72; AR, Tab 89, S. Gaetz, Transcript, August 30, 2024, pg. 127, Q. 238.
[118] AR, Tab 102, Aaron Orkin Affidavit, para. 22;
[119] AR, Tab 70, Rachel Lamont, Transcript, October 7, 2024, page 28, Q. 85-86; AR, Tab 102, Aaron Orkin Affidavit, para. 22;
[120] AR, Tab 102, Aaron Orkin Affidavit, para. 22; AR, Tab 110, Andrea Sereda, Transcript, August 23, 2024, page 76, Q. 290
[121] RR, Tab 10, Semonovitch Affidavit, para. 17; AR, Tab 123, Hasselman 2021 Affidavit, paras. 10, 12, 16

b. Exposing children to drug use, overdose, aggressive behaviour, or sexual acts[122] (notably, Sherri Ogden conceded on cross-examination that she herself was concerned about exposing children in parks to drug use);[123]

c. Risk of injury from discarded drug paraphernalia;[124]

d. Property damage, graffiti, and vandalism to parks and neighbouring properties;[125]

e. Thefts and break-ins in areas where encampments are located;[126]

f. In one instance, a series of "trip lines" set by an encampment resident.[127]

g. Risk of infection due to fecal contact and contamination;[128] and

h. Dogs posing danger to people in the area.[129]

67. The impact of encampments upon encamped individuals such as the Applicants and the surrounding community is also captured in the data provided by the City's first responders, namely Hamilton Police Service, Hamilton Paramedic Service, and Hamilton Fire Department.

68. Hamilton Paramedic Service data shows that:

a. ***Number of dispatches***: October 1, 2020 to August 31, 2021 there were a total of 87 dispatches to assist an encampment resident in the main geographic areas where encampments were located during that time ("**Encampment Areas**"). As well, there were a further 158 dispatches to the John and Rebecca Streets area; although those were not definitively linked to assisting an encampment resident (as opposed to people with no fixed address who happen to be in the area when they require assistance), as that is an area where homelessness-serving supports are located.[130]

An updated set of data for the time frame of January 2023 through June 2024 recorded a total of 274 dispatches to assist an encampment resident in the main geographic areas where encampments were located during that time ("**Updated Encampment Areas**") plus 5 dispatches to the John and Rebecca area, and 99 to the City Hall/Whitehern area. The City Hall/Whitehern area is another area near homelessness-serving supports, and, like John and Rebecca area, dispatches to that area could not be definitively linked to an encampment resident specifically.[131]

b. ***Frequency of dispatches***: The data from October 1, 2020 to August 31, 2021 showed that the frequency of dispatches of HPS to Encampment Areas had increased since May of

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[122] RR, Tab 13, Hasselman 2021 Affidavit, para. 12; AR, Tab 123, Hasselman 2024 affidavit, para. 10(c); AR, Tab 111, Aston affidavit, para. 13;
[123] AR, Tab 56, Sherri Ogden, Transcript, pg. 38, Q. 237-239.
[124] AR, Tab 123, Hasselman 2024 affidavit, para. 11;
[125] RR, Tab 8, Buckle 2021 Affidavit, para. 29(f); AR, Tab 117, Bunn 2024 Affidavit, para. 10; AR, Tab 123, Hasselman 2024 affidavit, para. 11; AR, Tab 89, Gaetz Transcript, pg. 137, Q. 249
[126] RR, Tab 8, Buckle 2021 Affidavit, para. 29(e);
[127] RR, Tab 13, Hasselman October 11, 2021 Affidavit, para. 8.
[128] AR, Tab 142, Koivu Affidavit, paras. 39, 42.
[129] AR, Tab 142, Koivu Affidavit, para. 36; Bunn 2024 Affidavit para. 10.
[130] RR, Tab 16, Loy 2021 Affidavit, paras. 8-11.
[131] AR, Tab 125, Loy 2024 Affidavit, paras. 3-8.

2021.[132] The updated data set for the timeframe of January 2023 through June 2024 showed that while the frequency of dispatches to the Updated Encampment Areas had fluctuated, each month in 2024 to date has had a higher number of dispatches to the Updated Encampment Areas than the same month in 2023.[133]

c. ***Primary problems reported***: From October 1, 2020 to August 31, 2021, the top three types of primary problems in all of the Encampment Areas, collectively, were: (i) opioid overdose suspected (18%); (ii) trauma/injury (16%); and (iii) drug/alcohol overdose (13%); and in the John and Rebacca area, they were (i) opioid overdose suspected (38%), (ii) drug/alcohol overdose (33%), and (iii) altered level of consciousness (9%)[134] The updated data set for the time frame of January 2023 through June 2024 showed the top three types of primary problems in all of the Updated Encampment Areas, collectively, were: (i) opioid overdose suspected (7%); (ii) trauma/injury (7%); and (iii) musculoskeletal (4%).[135]

d. ***Category of primary problems***: From October 1, 2020 to August 31, 2021, the top three categories of primary problems reported among all of the Encampment Areas were (i) Endocrine/Toxological (34%), (ii) Musculoskeletal-Trauma (24%), and (iii) General and Minor (21%); and in the John and Rebecca area, they were (i) Endocrine/Toxological (73%), (ii) Neurological (17%), and (iii) Musculoskeletal-Trauma (4%).[136] The updated data set for the time frame of January 2023 through June 2024 showed the top three medical categories were (i) Endocrine/Toxicological (26%), (ii) General and Minor (25%); and (iii) Neurological (24%).[137]

69. Hamilton Police Service data shows that:

a. ***Responses to encampment locations*****:** When reviewing Computer Aided Dispatch ("**CAD**") data related to six identified encampment locations, between October 1, 2020 and September 30, 2021, there were 499 CAD 'events' (dispatches). The top five types of CAD events by volume were, in descending order, mischiefs (primarily Suspicious Person and Trespassing), other (911 advised, ambulance assist, fire, person down, protest, warrants), medical, violent (assault, harassment, shooting, stabbing, weapons) and property (theft, break and enter). Activity for these sites was noted to steadily increase from spring months to summer months.[138]

An updated data set from July 1, 2023 to June 30, 2024 for five identified encampment locations found there were 395 CAD events for those areas. The top five types of CAD events by volume were, in descending order, mischiefs, other (911 advised, ambulance assist, fire, person down, protest, warrants), medical, property (theft, break and enter) and person in crisis. Again, activity was noted to steadily increase from spring months to summer months.[139]

b. ***Responses to events involving 'encampment' or 'tent'***: When reviewing CAD data where 'encampment' or 'tent' is recorded in the notes section, between October 1 2020 and September 30 2021, there were 1,103 such events. The top five types of CAD events by volume were, in descending order, mischief, other, medical, property, and violent. Activity was noted to be is clustered in the downtown core and near the Four Points Sheraton hotel in the east end.[140]

An updated CAD data set from July 1, 2023 to June 30, 2024 where 'encampment' or 'tent' is recorded in the notes section revealed that there were 2,659 such events. The top five types of

[132] RR, Tab 16, Loy 2021 Affidavit, paras. 12.
[133] AR, Tab 125, Loy 2024 Affidavit, para. 9.
[134] RR, Tab 16, Loy 2021 Affidavit, paras. 15-16.
[135] AR, Tab 125, Loy 2024 Affidavit, para. 11.
[136] RR, Tab 16, Loy 2021 Affidavit, paras. 17-18.
[137] AR, Tab 125, Loy 2024 Affidavit, para. 12.
[138] RR, Tab 15, Miscione 2021 Affidavit, Exhibit A, page 2.
[139] AR, Tab 134, Miscione 2024 Affidavit, Exhibit A, page 5.
[140] RR, Tab 15, Miscione 2021 Affidavit, Exhibit A, page 3.

CAD events by volume were, in descending order, mischief, other, medical, property, and person in crisis. Activity was again noted to be clustered in the downtown core. [141]

70. Hamilton Fire Department data show that:

a. CAD Event data regarding dispatches that relate to encampments (based on dispatch notes indicating an encampment) show 208 fire department dispatches from July 1, 2023 to December 31, 2023 and 176 from March 1, 2024 to July 26, 2024.[142]

b. Fire Department Management software data from July through September 2023 and January 2024 show 130 dispatches in that time frame that the responding officer had indicated was related to an encampment.[143]

71. In sum, taking the expert and first responder evidence as a whole, it is clear that the harms that the Applicants report, and upon which they a base their claims for *Charter* damages, are consistent with the health outcomes associated with the state of being homeless and not any of the Impugned By-Laws.

PART III—ISSUES

72. The seven issues for the Court to decide on this Application are:

i. What weight should be given to the expert evidence of Dr. Koivu?

ii. What weight, if any, should be given to the Applicants' purported expert evidence?

iii. Has the City prevented the Applicants from exercising an ability to raise temporary overnight shelter in public parks such that s.7 *Charter* has been infringed?

iv. Has the City breached the Applicants' s.15 *Charter* rights?

v. If any *Charter* breaches have occurred, are they justified pursuant to s. 1 of the *Charter*?

vi. Is the s.52 relief sought by the Applicants moot, given the Current Protocol? and

vii. Are the Applicants entitled to *Charter* damages pursuant to section 24(1) of the *Charter*?

73. The Amended Factum of the Applicants raises the admissibility of certain documents that were not properly adduced into evidence by the Applicants. Three volumes of the Application Record (Vols. 18-20) containing these purported 'City documents' were struck at the Case Management Conference on December 4, 2024. Documents in the struck volumes of the Application Record are referenced at paragraphs 16, 18, 19, 22, 23, 24, 107, 112, 113, 114, 118, 135, 136, 137, 142 and 144 of the Amended Factum of the Applicants. The portions of those paragraphs and corresponding footnotes relying upon the struck documents should be disregarded by the Court.

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[141] AR, Tab 134, Miscione 2024 Affidavit, Exhibit A, page 5.
[142] AR, Tab 121, Haalstra Affidavit, para. 6; Exhibit A.
[143] AR, Tab 121, Haalstra Affidavit, para. 7; Exhibit B.

PART IV—LAW AND ARGUMENT

Issue #1: The expert evidence of Dr. Koivu is proper and should be given full weight

74. The Applicants seek to rely upon opinion evidence in support of their position that encampments are a better option for unhoused individuals than indoor shelters. To rebut that evidence, the City retained an expert witness, Dr. Sharon Koivu, to provide her opinion. Dr. Koivu is a physician. She also holds a Certificate of Added Competency in Addiction Medicine. Through her practice, which spans 39 years, she has gained extensive experience treating patients who are vulnerably housed or experiencing homelessness. Contrary to the Applicant's incorrect submission, Dr. Koivu does treat homeless patients who are living in indoor shelters and encamped in tents.[144]

75. Dr. Koivu's evidence speaks to her expertise on the question of health outcomes for people experiencing homelessness who live in encampments, as compared to indoor shelters. Her evidence responds to the evidence of several of the Applicants' expert witnesses, who purport that encampments are preferable to indoor shelters or that tents are a healthy choice for people experiencing homelessness. As noted above, Dr. Koivu, in her expert opinion, disagrees that encampments are a safe alternative to indoor shelters.

76. Dr. Koivu provides an expert perspective that contextualizes the need for the few limits on encampments that remain in the Current Protocol, such as limits on encampment sizes and locations, as well as the mechanisms for addressing health and safety issues relating to encampments. Dr. Koivu's evidence is consistent with evidence from other City witnesses that "Housing First" principles would dictate that living in an encampment should be a temporary measure of last resort, and that indoor shelters are preferable. This is also consistent with the City's aims as stated in the Current Protocol, including that the City's actions be:

> grounded in the understanding that housing is a fundamental human need, and that people in our community deserve housing and homelessness responses that are based on intentional planning and good evidence and that have measurable positive impacts and outcomes. Working to provide permanent housing for all is critical and will require an ongoing commitment from the City, community, and other levels of government to find innovative, meaningful solutions.[145]

77. Dr. Koivu's expert evidence should be accepted by the Court and given full weight.

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[144] AR, Tab 142, Koivu Affidavit, pg. 4 at para 10.
[145] AR, Tab 9, Current Protocol, p 3.

Issue #2: Some of the Applicants' expert evidence is inadmissible—the rest should be given no or minimal weight

78. The well-known *White Burgess* case confirmed that an expert's duty to be fair, objective and non-partisan is a threshold requirement for admissibility.[146] This duty is informed by three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.[147]

79. Some of the expert evidence put forward by the Applicants does not meet the threshold criteria, namely of (a) Ms. Farha and (b) Prof. Joseph.[148] Further, the evidence of the other 6 experts proffered by the Applicants may meet the basic admissibility criteria, but they are either not relied upon at all by the Applicants in their Amended Factum (in the case of Dr. Orkin) or have revealed themselves to be advocates for unhoused individuals rather than independent and impartial experts; should the Court allow their evidence in, it should be weighed in light of the ways in which advocacy taints it. It is clear that an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out their primary duty to the Court.[149] The Respondent's submissions with respect to each of the Applicants' proffered experts are set out below.

Leilani Farha

80. Ms. Farha's purported evidence is inadmissible—it is merely legal argument by a lawyer cloaked as opinion.[150] Indeed, Ms. Farha acknowledged on cross-examination that "I am an international human rights lawyer and I use international human rights law to dispute forced evictions."[151] She also confirmed

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[146] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para. 46; R. 4.1.01(1)(a), *Rules of Civil Procedure*.
[147] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 32.
[148] *R. v. Mohan*, [1994] 2 SCR 9 at p 20.
[149] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 SCR 182 at para 49
[150] See, i.e. AR, Tab 83, Farha Affidavit at para 4, para 20 & Exhibit G
[151] AR, Tab 85, Farha Transcript, August 27, 2024, pgs. 35-36 (Q. 73-74).

that she is an advocate for the "implementation of the human right to housing for people living in encampments,"[152] which is the subject matter of her opinion and a question of law.

81. Ms. Farha appeared to be unaware of the well-established legal principle in Canada that the very same 'commentaries' from international bodies upon which the Applicants seek to rely[153] to urge a certain interpretation of the *UN International Covenant on Economic, Social and Cultural Rights* ("**ICESCR**") are simply not binding.[154] Even if Ms. Farha's legal opinion evidence was otherwise admissible, her conclusions are unreliable given her misapprehension of the applicability of international law in Canada. Additionally, the ICESCR itself clarifies (at Article 25) that it does not create any positive obligation on any ratifying government: "[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."[155] The Courts have been clear that while there is a role for international and comparative law in interpreting *Charter* rights, that role is only to "support or confirm an interpretation arrived at" by applying the usual, purposive approach to *Charter* interpretation.[156] The Applicants point to no purposive interpretation of s.7, s.15 or s.1 of the *Charter* that differs from that set out in the existing case law. The Respondent submits that there is none.

82. The Court should not admit Ms. Farha's affidavit and cross-examination transcript into evidence; alternatively, her evidence should be given no weight.

Prof. Ameil Joseph

83. The Applicants have not established that any of Prof. Joseph's purported evidence is relevant or that it is of any assistance to the trier of fact, much less that his various social science comments are necessary to the Court.[157] Notably, the Applicants only purport to cite Prof. Joseph's evidence in one footnote in their Factum (fn 112), but do not actually reference any of his evidence in the corresponding

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[152] AR, Tab 85, Farha Transcript, August 27, 2024, pgs. 37 (Q 78)
[153] See 'Comments' referenced in L. Farha's affidavit as cited at footnote 154 of the Applicants' Amended Factum.
[154] *Toussaint v. Canada (Attorney General)*, 2010 FC 810 at para. 68.
[155] AR, Tab 83(h), ICESCR. It is well-established that "[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statutes": *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paragraph 69. ICESCR has not been implemented by statute. It has no direct application within Canadian law.
[156] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at paras 27-47.
[157] Applicants' Factum at para. 103.

paragraph. The Court should not admit Prof. Joseph's affidavit and cross-examination transcript into evidence, it is not relevant or necessary; alternatively, his evidence should be given no weight.

Dr. Aaron Orkin

84. The Applicants do not cite or purport to rely upon any of Dr. Orkin's evidence in their Factum at all. They appear to consider it irrelevant. His evidence is of limited use and should be given little weight.

Dr. Stephen Gaetz

85. Dr. Gaetz's evidence is of limited relevance. While he purports to opine on homeless shelters and the reasons an unhoused person may prefer encampments to indoor shelters, he acknowledged under cross-examination that he had no or limited knowledge of Hamilton shelters.[158] Moreover, Dr. Gaetz lacks independence and impartiality, and there is bias present in his evidence. He even provides what can only be described as actual policy recommendations at paras 58-60 of his affidavit,[159] though on cross-examination he was evasive, describing this instead as "things that we should consider."[160] To the extent that Dr. Gaetz's evidence is admissible, it should be given no or minimal weight.

Dr. Kate Hayman

86. Dr. Hayman agreed on cross-examination that she is an advocate for people experiencing homelessness, and that her involvement in this case is part of that work advocating for people experiencing homelessness.[161] Her evidence is thus biased, and lacks independence and impartiality. Dr. Hayman's evidence was also largely focused on her Toronto-based practice, such as a survey of reported experiences by encampment residents in Toronto, and Dr. Hayman's own experience trying to find her patients shelter in Toronto. She admitted that she cannot give any evidence about any "evictions" in Hamilton, the state of shelters in Hamilton, the availability or adequacy of shelters in Hamilton, or any alleged violations of the Applicants' *Charter* rights in Hamilton.[162] In sum, to the extent that Dr. Hayman's evidence is admissible, it should be given no or minimal weight.

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[158] AR, Tab 89, Gaetz Transcript, pgs. 27-28, Q. 72, pp. 42 – 46, Qs. 93 – 103, pgs. 77 – 79, Qs. 148 – 153, pg 123, Q. 231
[159] AR, Tab 87, Gaetz Affidavit, paras. 58-60.
[160] AR, Tab 89, Gaetz Transcript, August 30, 2024, pg. 170-172, Q. 297-302.
[161] AR, Tab 92, Hayman, Transcript, August 16, 2024, pg. 17, Q. 45-46.
[162] AR, Tab 92, Hayman, Transcript, August 16, 2024, pg. 18, Q. 49, pg. 25, Q. 61

Dr. Stephen Hwang

87. Dr. Hwang's evidence is of limited relevance. Counsel for the Applicants confirmed in Dr. Hwang's cross-examination that he was not "giving any opinion about anything that's occurring in the City of Hamilton at all."[163] If Dr. Hwang's evidence is admissible, it should be given minimal weight.

Dr. Kaitlin Schwan

88. Dr. Schwan describes herself as a "publicly-engaged scholar", rather than an advocate, but understands others would describe her as an advocate for a right to housing.[164] Under cross-examination, Dr. Schwan admitted that "we're very, very far away from actually realizing the right to housing in Canada. We have so far to go."[165] While Dr. Schwan claimed that such advocacy comments were separate from her role as an expert in a previous encampments case (*City of Kingston v Doe)*,[166] the fact of the matter is that, like Ms. Farha, Dr. Schwan is a partisan advocate for policy change. Indeed, her work includes co-authoring a proposed "Encampments National Protocol" with Ms. Farha, which aims to guide policy changes regarding homeless encampments in Canada.[167] To the extent that Dr. Schwan's evidence is admissible, it should be given minimal weight.

Dr. Andrea Sereda

89. Dr. Sereda agreed on cross-examination that she is an advocate for people experiencing homelessness; in fact, she acknowledged that she was on the 'Organizing Committee' of an advocacy group in London, Ontario known as 'The Forgotten 519' which published a press release in July, 2022 claiming that there is a "WAR ON THE IMPOVERISHED", and that impoverished persons are suffering like combatants in a war. Dr. Sereda acknowledged that one goal of this advocacy group was to pressure the City of London to cease any removal of encampments and to allocate more resources to addressing homelessness.[168] Dr. Sereda omitted her work with this advocacy group from the *curriculum vitae* that she provided in this matter, but acknowledged that she should have included it.[169] She later tried to deny

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[163] AR, Tab 95, Hwang transcript, August 28, 2024, pg. 16, Qs 39.
[164] AR, Tab 107, Schwan Transcript, pg. 22-23, Q71-74
[165] AR, Tab 107, Schwan Transcript, pg. 29031, Q98-103
[166] AR, Tab 107, Schwan Transcript, p. 24 – 27, Q. 78-86
[167] AR, Tab 83, Farha Affidavit at para 8(f).
[168] AR, Tab 110, Sereda Transcript, pg 9-14 (Q26-49).
[169] AR, Tab 110, Sereda Transcript, pg 17 (Q61).

that her involvement in this case is part of her continuing advocacy work, but she admitted that her expert evidence in this case "would look to improve the lives of people who are living unhoused."[170] To the extent that Dr. Sereda's evidence is admissible, it should be given minimal weight.

ISSUE #3—There has been no breach of s.7 of the Charter

90. To establish a breach of section 7 of the *Charter*, the Applicants must satisfy the Court that: (a) there is a deprivation of life, liberty or security of the person caused by state action; and (b) such deprivation is contrary to the principles of fundamental justice.[171] If a deprivation is established, the City must demonstrate it is a reasonable limit as set forth in s.1 of the *Charter*,[172] addressed below.

91. The right to life is engaged where the law or state action imposes death or an increased risk of death on a person.[173] Homelessness can indeed be very harmful to those experiencing it, but none of the evidence adduced in this case indicates that the City causes homelessness or those harms, much less death or the threat of it. The evidence instead demonstrates that the City's actions and policies have been undertaken to mitigate and minimize any risk of harm to people who are experiencing homelessness in the City. There has been no infringement of the Applicants' right to life.

92. The Applicants have also not shown that the Impugned By-Laws or their manner of enforcement lead to a risk of serious harm or interference with (a) any liberty interest, or (b) the security of the person of the Applicants. Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference", while security of the person encompasses "a notion of personal autonomy involving… control over one's bodily integrity free from state interference".[174]

93. The evidence does not demonstrate any breach of the Applicants' s.7 rights to liberty or security of the person. Any enforcement of the Impugned By-Laws—whether under the Former Protocol, the Encampment Process, or the Current Protocol—has always taken place in a manner that complies with

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[170] AR, Tab 110, Sereda Transcript, pg 25 (Q91).
[171] *Carter v. Canada (A-G),* 2015 SCC 5 at para 55, cited in *Abbotsford (City) v. Shantz,* 2015 BCSC 1909 at para. 183.
[172] *R. v. Oakes,* [1986] 1 SCR 103
[173] *Carter v. Canada (Attorney General),* 2015 SCC 5 at para 62.
[174] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64, citing *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44.

the *Charter*. No encampment removals have ever taken place such that individuals could not shelter in public parks temporarily overnight. This point is critical, because s.7 of the *Charter* has only been interpreted to protect a person's ability to erect **temporary, overnight** shelter in a public park on nights when the number of people experiencing homelessness in a municipality outnumber the available and accessible indoor sheltering spaces.[175] The evidence is clear that no-one (including the Applicants) has ever been prevented from raising temporary overnight shelter in a public park at any relevant time, because encampment enforcement simply has **never** occurred overnight.

94. Moreover, the Applicants cannot show that on any particular night in the City of Hamilton there has been a lack of available and accessible indoor sheltering spaces, in part because they focus solely on the City-funded indoor emergency shelter system, but also because the evidence shows that the City-funded indoor emergency shelter system is not always at capacity. Indeed at the two points in time that are in evidence, there was at least overflow capacity available in all sectors of the City-funded indoor emergency shelter system.

95. The main body of encampment case law establishing that the ability to raise temporary overnight shelter in public parks is protected by s.7 in some circumstances is from British Columbia, namely the *Adams*[176] and *Shantz*[177] decisions. Strictly speaking, those cases are not binding in Ontario. However, the City acknowledges that both cases have been considered in Ontario, including in Justice Goodman's reasons in the injunction motion in this matter. They therefore provide helpful guidance regarding the extent of s.7 *Charter* protection at issue in this Application.

96. The ability protected under s.7 as established in the *Adams* and *Shantz* decisions is specific and narrow.[178] As was noted by the British Columbia Court of Appeal in *Adams*:

> We are told that the phrase "temporary shelter" has been a source of dispute. There has been disagreement as to whether "temporary" refers to the nature of the shelter's construction, or to the length of time that it is able to remain in place. The evidence in this case was directed at the need for homeless persons to erect temporary overnight shelter, in order to be able to sleep outside. The declaration granted should, therefore, refer to "temporary overnight shelter" rather than simply to "temporary shelter". This should clarify

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[175] *Victoria (City) v. Adams*, 2008 BCSC 1363, aff'd 2009 BCCA 563 at para 160 and *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at paras 222-224; as summarized by *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at paras 4, 12-15.
[176] *Victoria (City) v. Adams*, 2008 BCSC 1363, aff'd 2009 BCCA 563;
[177] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909.
[178] *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at paras. 4, 12-15.

> the intention that **the City is required to allow shelters to remain in place only for the overnight period** [**emphasis** added].[179]

97. The Court further explained in *Adams,* describing the trial judge's decision, "the decision did not grant the homeless a freestanding constitutional right to erect shelter in public parks".[180] A finding of unconstitutionality must first be linked to a factual finding that the number of homeless people in the municipality exceeded the number of available shelter beds in the municipality on a given night.[181] The analysis of whether there are sufficient indoor sheltering spaces also considers the accessibility of those spaces to individuals sheltering in parks.[182] As noted above, the City-funded indoor emergency shelter system is free to access and has no actual barriers to use, only perceived ones. That is to say, while the Applicants claim that they are justified in declining indoor shelter and must encamp in public parks for numerous reasons—including not wanting to be separated from a partner or pet; finding shelter rules restrictive; or disagreeing with the policies at some shelters that do not permit drug use on-site—the Applicants have offered nothing suggestive of true inaccessibility or that there has ever been any threat to their life, liberty, or security of the person as a result. Nor is it true that s.7 invites a subjective test. If that were so, many personal preferences could suddenly attract *Charter* protection.

98. It is clear that property rights are, by conscious legislative choice, not protected by the *Charter*.[183] In *Shantz,* the Court concluded that property and related economic rights are not included within *Charter* protections and there has been no recognition by any Court in Canada that the *Charter* creates any positive obligations on governments in relation to social and economic interests. The Court also found that the right to obtain the basic necessities of life was not a foundational principle underlying the guarantees of s. 7 of life, liberty and security of the person.[184] The Ontario Superior Court has previously held that the encampment case law does not create or indicate that there exists any s.7 protected 'right to shelter' generally.[185] Similarly, the Court of Appeal for Ontario in *Tanudjaja* concluded that it is a doubtful that s. 7 of the *Charter* confers a freestanding or general right to adequate housing.[186]

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[179] *Victoria (City) v. Adams,* 2009 BCCA 563 at para 160.
[180] *Victoria (City) v. Adams,* 2009 BCCA 563 at para 74.
[181] *Victoria (City) v. Adams,* 2009 BCCA 563 at para. 74.
[182] *Bamberger v Vancouver (Board of Parks and Recreation),* 2022 BCSC 49 at para 15.
[183] *Quebec (Attorney General) v. Laroche,* [2002] 3 SCR 708 at para 52-53
[184] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at paras 176-177.
[185] *The Corporation of the City of Kingston v Doe*, 2023 ONSC 6662 at para 61-62.
[186] *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852 at para 30.

99. No authorities in any province in Canada have to date recognized a *Charter* right to erect a temporary shelter in public parks for any period longer than overnight. Trying to suggest otherwise, the Applicants rely on the recent *Region of Waterloo*[187] decision ("***Waterloo***"), but that case only recognized a right to erect temporary shelter beyond overnight hours where the encampment in question was located in an unused municipally-owned vacant lot and **not** in a public park:

> Like Chief Justice Hinkson found in *Shantz*, at para. 276, I find on the evidence that "there is a legitimate need for people to rest and shelter during the day" but, **unlike the British Columbia's Supreme Court's Chief Justice, I find that there is no need in the case of the Encampment to balance their needs with the rights of the Region's other residents. Unlike in *Adams* and *Shantz*, the Property is not a park or other space designed with the purpose of being enjoyed by the public at large. Instead, the Property is a vacant lot to be used by the Region as a temporary parking lot** and lay down construction area at some undefined future date. Therefore, based on these facts, there is no need to consider how the impact of the Encampment residents sheltering overnight may impair the interests and rights of other residents of the Region [emphasis added].[188]

100. *Waterloo*'s finding that the particular by-law in that case *was* unconstitutional is not binding on this Court, which is dealing with different by-laws.[189] Further, Waterloo is distinguishable on the facts: this case concerns parks, not a vacant lot. There *is* a need to balance the needs and rights of other City of Hamilton residents, as there was in *Adams* and *Shantz.*

101. Further, the Impugned By-Laws and City's enforcement actions are in accord with the principles of fundamental justice. They are neither overbroad nor arbitrary.

102. In *Heywood*, the majority of the SCC described the principle of overbreadth in this way:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. A court must consider whether those means are necessary to achieve the state objective. If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.[190]

103. A law must also not operate to limit the rights protected by s.7 in an arbitrary manner:

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[187] *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670.
[188] *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670 at para 105.
[189] *The Corporation of the City of Kingston v Doe*, 2023 ONSC 6662 at paras. 92-95.
[190] *R. v. Heywood,* [1994] 3 SCR 761 at pp. 792-793, applied and accepted in *Victoria (City) v. Adams,* 2009 BCCA 563 at paras 112-114.

> It is a well-recognized principle of fundamental justice that laws should not be arbitrary… The state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person.
>
> A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect…
>
> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. [emphasis in original].[191]

104. As in *Adams*, there is an objective and real connection between the Impugned By-Laws, the Former Protocol, the Encampment Process and the Current Protocol and the City's goal of "maintenance of the environmental, recreational and social benefits of urban parks".[192] After all, the City bears "the responsibility to the public to preserve public places for the use of all".[193] It must accordingly balance the needs of all. The City has carefully considered and calibrated the Impugned By-Laws, with enforcement remaining subject to the Former Protocol, the Encampment Process and the Current Protocol, only doing what is necessary to pursue its legitimate objective. The City has acted consistently at all relevant times. The Applicants have failed to demonstrate that the Impugned By-Laws are overbroad, arbitrary, or otherwise contrary to the principles of fundamental justice.

105. In sum, there has been no deprivation of life, liberty or the security of the person of the Applicants caused by the City in any manner, let alone contrary to the principles of fundamental justice.

ISSUE #4—There has been no breach of s.15 of the Charter

106. Section 15(1) of the *Charter* provides that:

> 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.[194]

107. To establish a breach of s.15(1), the Applicants must satisfy a two-part legal test: (1) does the law create a distinction based on an enumerated or analogous ground?; and (2) does the distinction

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[191] See *Victoria (City) v. Adams*, 2009 BCCA 563 at para 117 citing *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at paras 129-131
[192] *Victoria (City) v. Adams*, 2009 BCCA 563at para 119.
[193] *Victoria (City) v. Adams*, 2009 BCCA 563at para 4.
[194] Recently cited in *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725 at para 265.

create a disadvantage by perpetuating prejudice or stereotyping?[195] Further, s.15 protects substantive equality; the effect that a law has on different groups is part of determining if discrimination exists.[196]

108. At the first step of the s.15(1) analysis, the question is whether the law or state action creates or contributes to a disproportionate impact on the claimant group based on a protected ground in comparison to other groups.[197]

109. As a basic principle, the case law confirms that homelessness is **not** a protected ground under s.15 of the *Charter*. This is for three principal reasons: (a) homelessness is clearly not a ground that is enumerated within s.15(1); (b) homelessness is not an immutable or constructively immutable personal characteristic such that it could be considered analogous to the grounds that are enumerated in order to attract the protection of s.15(1); (c) homelessness is too vague a concept to meaningfully define a protected class in any event.[198] As stated the *Tanudjaja* case:

> Homelessness is not an analogous ground under s. 15(1) of the *Charter*. The application does not propose to protect "discreet and insular minorities". It is an attempt to take "disparate and heterogeneous groups" and treat them as an analogous ground under s. 15(1) of the *Charter*. Such groups do not obtain this protection.[199]

The Applicants are doing the very same thing. The Applicants' s.15 arguments fail at the very outset.

110. Assuming the Applicants could ever establish that they are a protected group, they would then need to demonstrate that the Impugned By-Laws are also "a cause of the disproportionate impact" to complete the first step in the analysis.[200] As helpfully summarized in the recent *Metro Taxi* decision, the focus must not be on any historic or systemic disadvantage.[201] Moreover, the inquiry "requires a comparison of the actual impact of the law on members of the claimant class to the actual impact of the law on others in the social and political setting in which the question arises".[202] The social and political setting in this case includes the existence of homelessness and the steps the City has taken in response

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[195] *R v. Kapp*, 2008 SCC 41 at para. 17;
[196] *R. v. Sharma,* 2022 SCC 39 at paras 37-38.
[197] *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725 at para 271
[198] *Tanudjaja v Canada (AG)*, 2013 ONSC 5410 at paras 122–37; *Abbotsford (City of) v Shantz*, 2015 BCSC 1909 at para 231.
[199] *Tanudjaja v Canada (AG)*, 2013 ONSC 5410 at paras 136.
[200] *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725 at para 271 citing *Sharma,* at paras. 49-50.
[201] *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725 at para 282.
[202] *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725 at para 284.

to it, including the Impugned By-Laws, the Former Protocol, the Encampment Process and the Current Protocol. It would also include the fact, admitted to by Dr. Aaron Orkin, citing a publication of expert witness Dr. Stephen Hwang, that:

> Although some groups are overrepresented among the nation's homeless population due to wider social inequities embedded in Canadian society, notably people of Aboriginal ancestry (Hwang 2001), **homelessness does not discriminate on the basis of age, gender, sexuality or race**. In turn, Canada's homeless population reflects the country's overall diversity … there's people from every walk of life who experience homelessness [**emphasis** added].[203]

111. If the second step of the s.15(1) analysis is reached, there would then be an assessment of the impact of the harm caused to the affected group, and "whether the distinction imposes a burden or denies a benefit in a discriminatory manner"; the second step will be met if a law creates a distinction that "reinforces, perpetuates, or exacerbates disadvantage."[204] The Court may consider arbitrariness, prejudice, and stereotyping and should consider the "broader legislative context, including the objects of the scheme, relevant policy goals, and whether the lines are drawn mindful as to those factors".[205] If a claimant establishes a breach of s.15(1) of the *Charter*, the burden shifts to the government to demonstrate that a breach is demonstrably justified under s. 1 of the *Charter*, as discussed below.

112. The Applicants conflate their arguments about the potential that there may be a disproportionate **number** of women, disabled and/or indigenous people among the homeless population with an argument that there is a disproportionate **impact** upon them.[206] This is simply not the case. There may be many reasons why certain groups are over-represented in the homeless population, but that does not mean that this is an impact of the Impugned By-Laws, let alone a disproportionate impact, nor that it is the result of any act or omission on the part of the City.

113. Justice Smith in *Metro Taxi* explained why demonstrating a disproportionate impact is essential to demonstrating a s.15 breach:

> [294] Recall that in *Sharma*, at para. 40, the Supreme Court of Canada set out the difference between impact and disproportionate impact:

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[203] AR, Tab 104, Orkin, Transcript, August 26, 2024, pg. 57-59, Q 143.
[204] *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725 at para 274 citing *Fraser,* at para. 76; *Sharma*, at paras. 51, 55.
[205] *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725 at para 276 citing *Sharma*, at para. 59; *Withler v. Canada (Attorney General),* 2011 SCC 12 at para. 67.
[206] Applicants' Factum at paras 139 and 143.

> We start with the difference between impact and disproportionate impact. All laws are expected to impact individuals; merely showing that a law impacts a protected group is therefore insufficient. At step one of the s.15(1) test, claimants must demonstrate a disproportionate impact on a protected group, as compared to non-group members. Said differently, leaving a gap between a protected group and non-group members *unaffected* does not infringe s.15(1)…
>
> [299] But in my view, it is incorrect to say that anything that has an adverse impact on the class will have a disproportionately negative impact. This is contrary to the guidance provided in *Sharma* and is therefore insufficient. The s.15(1) analysis is not limited to showing that there is merely an adverse impact; there must be a disproportionate impact.[207]

114. As such, the question is not whether the Applicants—assuming they could ever be found to comprise a protected class at all—are adversely affected by the Impugned By-Laws. That does not, on its own, constitute proof of a s.15 infringement. Rather, they would need to show that they, as compared to other groups, have been prejudiced in some additional manner caused by the Impugned By-Laws.[208]

115. There is no evidence whatsoever that the Impugned By-Laws have impacted differently, or have ever been enforced differently against, women, Indigenous individuals, the disabled, and/or LGBTQIA2S+ individuals. The Applicants' s.15 arguments fail at both stages of the applicable test.

116. In sum, the Applicants are not a protected class at all, and there has been no disproportionate impact upon them such that there can have been any breach of s.15 at any relevant time.

ISSUE #5—If there has been any breach of s.7 or s.15, it is justified under s.1 of the Charter

117. The *Charter* 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. The criteria that must be established to justify the infringement of a right or freedom guaranteed by the *Charter* under s.1 are the well known *Oakes* test. The burden is on the City to justify the infringement:

1) Is the limit prescribed by law?
2) Is the purpose for which the limit is imposed pressing and substantial?
3) Are the means by which the legislative purpose is furthered proportionate?
    a. Is the limit rationally connected to the purpose?
    b. Does the limit minimally impair the *Charter* right?
    c. Is the law proportionate in its effect?[209]

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[207] *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725
[208] *Abbotsford (City) v. Shantz,* 2015 BCSC 1909 at para. 235.
[209] *R v Oakes,* 1986 CanLII 46 (SCC) at p 138-140 ("*Oakes*").

Prescribed by law

118. There is no issue that the provisions of the Impugned By-laws are prescribed by law. The Impugned By-laws were duly enacted by the City.

Pressing and substantial purpose

119. The Courts have accepted that the preservation of parks is a sufficiently important objective for the purposes of the s.1 *Oakes* analysis.[210]

120. The Courts have also accepted that a municipality needs to manage the lands that it owns for the benefit of all of its citizens and that the activities of those who encamp on lands owned by a municipality can cause the very harms that the Impugned By-Laws attempt to prevent, i.e. by appropriating public space to the exclusion of others, constructing structures on public lands, damaging public lands, creating nuisances on public lands, and creating unsightliness on public lands. This has been held to be, and is, a pressing and substantial purpose.[211]

Proportionality

(a) Rational Connection

121. The measures adopted must be rationally connected to the objective. The Courts have accepted that whether and what sort of shelter the homeless will be permitted to erect, and where, is encompassed in the issue of urban encampments and usage of parks and provisions such as the Impugned By-Laws have a rational connection to the important objective identified by the City.[212]

(b) Minimal Impairment

122. The proportionality analysis requires that the impugned provision "impair 'as little as possible' the right or freedom in question". In the circumstances of this case, given the impact of encampments on the community and the risks of harm to the occupants of encampments, the Impugned By-Laws, or

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[210] *Victoria (City) v Adams*, 2008 BCSC 1363 at para 200, aff'd *Victoria (City) v Adams*, 2009 BCCA 563 at para 128
[211] *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at para 240
[212] *Oakes* at p 139; *Victoria (City) v Adams*, 2008 BCSC 1363 at para 203; *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at para 241.

alternatively the City's actions under the Former Protocol, the Encampment Process and/or the Current Protocol, minimally impaired any the rights of the Applicants.[213]

(c) Proportionate in Effect

123. The final step in the s. 1 analysis is to weigh the purpose of the limitation against its deleterious effects in light of the values underlying the *Charter*. Again, in the context of the impact of encampments on the community and the risks to the occupants of encampments, the Impugned By-Laws, or alternatively the City's actions under the Former Protocol, the Encampment Process and/or the Current Protocol, are proportional to any deleterious effects.[214]

124. It has been held that infringements of s. 7 that have been found to be contrary to the principles of fundamental justice will only be justified under s.1 in rare circumstances. If there is a breach of s.7, this is the type of case with sufficiently exigent and complex circumstances that the SCC foresaw when it specifically made room for s.1 to justify a s.7 breach.[215]

125. If any breach of s.7 or 15 is found to have occurred in this case, it is justified under s.1.

ISSUE #6—The Applicants' claim for s.52 declarations of invalidity/inapplicability is moot

126. As the Applicants' claims are, in their own description, "retroactive,"[216] the Applicants' forward-looking request for s.52 declaratory relief (i.e. that portions of the Parks By-Law and the Streets By-Law be declared of no force and effect, or inapplicable to homeless individuals) is rendered moot.

127. In determining whether an issue is moot, a Court will consider whether the tangible and concrete dispute has disappeared and the issue has become academic; and, if so, whether the Court should nonetheless exercise its discretion to hear the fact-specific case.[217] In the circumstances of this case, the challenge to parts of the Impugned By-Laws is moot.[218] That is, no tangible and concrete dispute

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[213] *Oakes* at p 139.
[214] *Oakes* at p 139-140.
[215] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at p 518 per Lamer J. (as he then was); see also *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66.
[216] Para 158 of the Applicants' Amended Factum.
[217] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at p. 353.
[218] See, for example, *Dubois v Saskatchewan*, 2022 SKCA 15, where the repeal of by-laws challenged by protesters who were arrested and removed from a protest camp rendered a challenge to the by-laws moot; the question of whether there was a past violation of the protesters' rights remained live.

exists with respect to the Impugned By-Laws, because the Current Protocol—which is unchallenged—is in place and governs the enforcement of the Impugned By-Laws in manner that exceeds what the *Charter* requires. No purpose would be served by declaring any portion of the Impugned By-Laws unconstitutional at present because they have been effectually superseded by the Current Protocol. Further, it would be a fiction—in other words, purely academic—to consider the Impugned By-Laws in isolation from the Former Protocol and Encampment Process which previously governed the enforcement of the Impugned By-Laws and also exceeded *Charter* requirements. The only remaining dispute between the parties is backwards-looking, focused on whether the Applicants should receive any monetary *Charter* damages for purported past harms. A s.52 declaration of invalidity/inapplicability would have no practical effect on the right of the Applicants or anyone else, and there is accordingly no need for the Court to exercise its discretion to nevertheless consider this moot issue.[219] Speculation that the City may amend the Current Protocol or the Impugned By-Laws at some point in the future, with no indication that any changes would not be *Charter*-compliant, does not negate mootness.

ISSUE #7—Charter Damages

128. The City has not breached the Applicants' *Charter* rights. The Applicants have no entitlement to *Charter* damages. Further, even if it were to be found that the Impugned By-Laws did infringe upon any of the Applicants' *Charter* rights, an award of *Charter* damages would not be the appropriate remedy.

129. The SCC confirmed in *Canada (A-G) v Power*[220] that although there is not a categorical restriction, there is a "general presumption against combining remedies under subsections 24(1) and 52(1)," as the Applicants seek to do in this proceeding. As that Court previously held in *Mackin,* "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional. In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action".[221] The City submits that this is such a case

[219] *Borowski v Canada (Attorney General),* [1989] 1 SCR 342 at p. 353.
[220] *Canada (Attorney General) v. Power*, 2024 SCC 26 at para 45
[221] *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick,* 2002 SCC 13 at paras 78 & 79 ("***Mackin***").

where the general presumption should apply, as the City have exercised their powers in good faith, including under the prevailing by-laws and various protocols. *Charter* damages are not an appropriate remedy to seek in an application seeking section 52(1) declarations.

130. In any event, the Applicants fail to establish an award of damages is an appropriate remedy. In *Ward v Vancouver (City)*, the SCC explained the four-stage approach to be taken in order to determine whether an award of damages is an appropriate remedy for an infringement of the *Charter*:

i. The plaintiff must establish a *Charter* violation not justified by s.1;

ii. The plaintiff must establish a functional justification for damages (i.e. damages serving a useful function or purpose) in relation to the remedial purposes of compensation for the individual harmed, meaningful vindication of the right (i.e. with respect to the harm done to society) or deterrence of future *Charter* breaches;

iii. If a functional justification is established by the plaintiff, the defendant Crown may attempt to establish countervailing factors, which can include another adequate alternative remedy or interference with good governance; and

iv. The Court will then set the quantum of damages that are appropriate and just, if any, based on the need to put the plaintiff in the position he or she would have been in had the breach not been committed, proportionality, seriousness of violation and fairness to all parties.[222]

131. With respect to Stage 1 of the *Ward* analysis, the Applicants have **not** established any *Charter* violation not justified by s.1, as set out above.

132. At Stage 2 of *Ward*, the Applicants must demonstrate that an award of damages is "appropriate and just", and that an award is functionally required to fulfill one or more of the objects of compensation, vindication of the right, or deterrence of future *Charter* breaches.[223] The Applicants initially relied only upon compensation as their object, but are now relying upon all three functions.[224]

133. In considering an award of *Charter* damages for compensatory reasons at Stage 2 of *Ward*, the Court is to import the tort concept of causation.[225] The reason is that the Court's concern is similarly to restore the claimant to the position she would have been in had the breach not been committed.[226]

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[222] *Ward v Vancouver (City)*, 2010 SCC 27
[223] *Vancouver (City) v. Ward*, 2010 SCC 27 at para 32.
[224] Applicants Factum at para 163.
[225] *Boily v. Canada*, 2022 FC 1243 at paras 195-196.
[226] *Ward*, at paragraph 48 as cited in *Boily v. Canada*, 2022 FC 1243 at para 195.

"In order for a claimant to be compensated for an injury they have suffered, the injury must have been caused by the infringement of a *Charter* right", as proven on a balance of probabilities.[227] In this case, Applicants have failed to show that any harms they allege are due to any breach of a *Charter* right by the City. Rather, the harms alleged by the Applicants are consistent with the effects of living with homelessness. The Applicants cannot show that their claimed damages are caused by the City, much less a *Charter* infringement by the City.

134. In applying Stage 3 of the *Ward* framework, even if the damages are functionally justified at Stage 2, a respondent government may establish that other considerations "render s. 24(1) damages inappropriate or unjust".[228] In considering whether there are countervailing factors that weigh against awarding *Charter* damages at Stage 3, in the *Ward* decision itself, Chief Justice McLachlin (as she then was) recognized that one of the restrictions on the availability of *Charter* damages is when other remedies, such as declaratory relief, are available that can address the breach:

> The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach.[229]

135. *Charter* damages are only available when a declaration would fail to satisfy the functional need for compensation, vindication or meaningful deterrence.[230] In this case, even if a *Charter* breach were to be found, the need for compensation, vindication or meaningful deterrence in a *retroactive* claim—when the current regime is unchallenged—is nominal. A declaration would more than serve those aims..

136. A further countervailing factor that would weigh against an award of *Charter* damages in this case is concerns for good governance.[231] The Court of Appeal for Ontario noted in *Brazeau* that:

> The state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law

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[227] *Boily v. Canada*, 2022 FC 1243 at para 196.
[228] *Vancouver (City) v. Ward*, 2010 SCC 27 at para 33.
[229] *Vancouver (City) v. Ward*, 2010 SCC 27 at para 35.
[230] *Canada (Attorney General) v. Power*, 2024 SCC 26
[231] *Vancouver (City) v. Ward*, 2010 SCC 27 at para 33

does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained [in the *Mackin* case]:

> The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government.[232]

137. Good governance immunity is only pierced where it can be shown that a law "was clearly unconstitutional, or that its enactment was in bad faith or an abuse of power."[233] This is a high threshold.[234] If the threshold is not met, the balance of the applicable constitutional principles tilts in favour of good governance immunity being applied to the state action—the constitutional imperative that the government be afforded the autonomy to govern effectively will defeat any claim to *Charter* damages.[235] In this case, an award of *Charter* damages would more than just chill the exercise of government discretion, it would contravene the good governance immunity available to municipalities so they can serve their functions under the *Municipal Act, 2001*.

138. The Impugned By-Laws and the Former Protocol, Encampment Process and Current Protocol, are not clearly unconstitutional. They exceed the requirements to comply with s.7 established in the line of encampment cases going back to *Adams*. Far from bad faith or an abuse of power, the enactments are part of the City's overarching response to homelessness; which includes administering massive investment in sheltering initiatives and mitigation of harms, both to the homeless and others in the community. The City has acted in good faith, exercising power cautiously and reasonably.

139. The Applicants have failed to meet the high threshold in this case. Good governance immunity applies. An award of *Charter* damages would be inappropriate.

140. The Applicants argue that the "immunity threshold" for municipal by-laws is lower than for provincial or federal statutes, arbitrarily choosing a "clear disregard" standard rather than the actual

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[232] *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184 at para 48 citing *Vancouver (City) v. Ward*, 2010 SCC 27 at paras 39-40 citing *Mackin* at para 78.
[233] *Canada (Attorney General) v. Power*, 2024 SCC 26 at para. 4.
[234] *Canada (Attorney General) v. Power*, 2024 SCC 26 at para. 4.
[235] *Canada (Attorney General) v. Power*, 2024 SCC 26

good governance standard.[236] The Applicants' argument is based on a basic misunderstanding of municipalities as a third level of government and of municipal legislative powers. They provide no authority for their suggestion that good governance immunity does not apply to municipalities exercising their legislative functions, and the Respondents submit there is no such authority.

141. The good governance defence applies to municipal by-laws. In establishing the limited immunity in the exercise of a government's law-making power, the SCC in *Mackin* relied on *Welbridge Holdings Ltd. v. Greater Winnipeg*, a previous SCC decision involving alleged harm arising from a by-law subsequently declared *ultra vires*.[237] It is well-established that the separation of powers applies to municipal governments (no less than a provincial legislature or the federal Parliament).[238] The immunity established in *Ward* and *Mackin,* and affirmed in *Power,* applies to municipalities acting in its legislative capacity in enacting a by-law.[239] This immunity applies equally to City actions taken in good faith under the Impugned By-Laws.[240]

142. At Stage 4 of the *Ward* analysis, if *Charter* damages are considered appropriate, the Court must assess a quantum. The quantum of *Charter* damages:

a. must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches;

b. have regard to the impact of the breach on the claimant;

c. reflect the seriousness of the state conduct, and

d. be appropriate and just from the perspective of the claimant and the state.[241]

143. The Applicants seek Charter damages in the amount of "$5,000 per Applicant… for the common experience of sleep deprivation, loss of belongings, and exposure to the elements" and "$375,000 for violations of their *Charter* rights". They cite no authority to suggest that such sums are appropriate.

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[236] Applicants' Amended Factum at paras 164 to 167. Further, good governance immunity applies to City actions taken in good faith under the Impugned By-laws. The Applicants misconstrue *Power* at paragraphs 170 and 171 of their Factum. Contrary to the Applicants' arguments, *Power* affirmed that the immunity threshold in *Mackin* applies to the "'enactment or application' of legislation later declared unconstitutional."
[237] *Mackin* at para. 78; *Welbridge Holdings Ltd v Greater Winnipeg*, 1970 CanLII 1 (SCC).
[238] *Welbridge Holdings Ltd v Greater Winnipeg*, 1970 CanLII 1 (SCC) at 968 & 969
[239] *Nelson (City) v. Marchi*, 2021 SCC 41;
[240] *Power* at pars. 70 & 71
[241] *Ward* at para 57.

144. To the extent that *Charter* damages are being sought for compensatory purposes, the Applicants have failed to provide evidence of any harm suffered[242] beyond harms caused by their precarious housing status, for which the City is not responsible.

145. The total quantum of *Charter* damages sought by the Applicants is also excessive. Generally, if awarded at all, damage awards under the *Charter* are quite modest. More substantial damages awards are only made where there is evidence of serious state misconduct that needs to be deterred—such as conduct that was intentional, malicious, high handed, or oppressive.[243]

146. Most of the case law with respect to *Charter* damages reflect awards much lower than sought by the Applicants, including in the *Ward* decision itself, where the *Charter* damages award for an illegal strip search was set at $5,000.00. Other cases include:

Case Name	Case Notes
Carr v Ottawa Police Services Board, 2017 ONSC 4331	$7,500.00 in deterrence-based *Charter* damages for the breach of the Plaintiff's s.7 right triggered by her being left naked in a holding cell for several hours.
Russell v BC, 2018 BCSC 1757	$1,000.00 for breach of an accused's right to counsel.
McGowan v Montréal, 2018 QCCS 1740	$3,000.00 for arbitrary detention.
Stewart v Toronto Police Services Board, 2020 ONCA 255	$500.00 awarded for arbitrary detention and unreasonable search during the G20 summit.
Thibodeau v GTAA, 2024 FC 274	A total award of $3,500.00 for three violations of language rights

147. As these cases make clear, the damages sought by the Applicants are unjustifiable and excessive.

PART V—RELIEF SOUGHT

148. For the reasons set out herein, the Respondent respectfully requests that this Application be dismissed, with costs.

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[242] *Ward* at para 48.
[243] *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184; *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF December, 2024.

I certify I am satisfied as to the authenticity of every authority cited in this Factum.



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Schedule "A"
Authorities Cited

1. *Canada (Attorney General) v. Power*, 2024 SCC 26
2. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23
3. *R. v. Mohan*, [1994] 2 SCR 9
4. *Toussaint v. Canada (Attorney General)*, 2010 FC 810
5. *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC)
6. *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32
7. *Carter v. Canada (Attorney General)*, 2015 SCC 5
8. *R. v. Oakes*, [1986] 1 SCR 103
9. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44
10. *Victoria (City) v. Adams*, 2008 BCSC 1363
11. *Victoria (City) v Adams*, 2009 BCCA 563
12. *Abbotsford (City) v. Shantz*, 2015 BCSC 1909
13. *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49
14. *Quebec (Attorney General) v. Laroche*, [2002] 3 SCR 708
15. *The Corporation of the City of Kingston v Doe*, 2023 ONSC 6662 at para 61-62.
16. *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852
17. *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670
18. *R. v. Heywood*, [1994] 3 SCR 761 at pp. 792-793
19. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35
20. *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725
21. *R v. Kapp*, 2008 SCC 41
22. *R. v. Sharma*, 2022 SCC 39
23. *Withler v. Canada (Attorney General)*, 2011 SCC 12
24. *Re BC Motor Vehicle Act*, [1985] 2 SCR 486
25. *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9
26. *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342
27. *Dubois v Saskatchewan*, 2022 SKCA 15
28. *Vancouver (City) v Ward*, 2010 SCC 27
29. *Boily v. Canada*, 2022 FC 1243
30. *Welbridge Holdings Ltd v Greater Winnipeg*, 1970 CanLII 1 (SCC)
31. *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184
32. *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13
33. *Welbridge Holdings Ltd v Greater Winnipeg*, 1970 CanLII 1 (SCC)
34. *Nelson (City) v. Marchi*, 2021 SCC 41
35. *Carr v Ottawa Police Services Board*, 2017 ONSC 4331
36. *Russell v BC*, 2018 BCSC 1757
37. *McGowan v Montréal*, 2018 QCCS 1740
38. *Stewart v Toronto Police Services Board*, 2020 ONCA 255
39. *Thibodeau v GTAA*, 2024 FC 274
40. *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074

Schedule "B"
Statutes Cited

***Municipal Act, 2001,* SO 2001, c 25, ss. 2, 10**

Purposes

2 Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.
…

Broad authority, single-tier municipalities

10 (1) A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public.

By-laws

(2) A single-tier municipality may pass by-laws respecting the following matters:

…

4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.

5. Economic, social and environmental well-being of the municipality, including respecting climate change.

6. Health, safety and well-being of persons.

7. Services and things that the municipality is authorized to provide under subsection (1).

8. Protection of persons and property, including consumer protection.

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 , ss. 1, 7, 15(1), 24, 52**

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.

…

Enforcement of guaranteed rights and freedoms

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
…

Primacy of Constitution of Canada

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

City of Hamilton *By-Law 01-219* (the "Parks By-Law")

Hours of Entrance

3 (1) No person shall enter into or be in any park, except during the times the park is open to the public or during such times as otherwise expressly authorized by permit.

(2) A park shall only be open to the public:

(a) where there is displayed at, within or adjacent to a park a posted sign or notice as to the times such park is open to the public, during the times so indicated on such sign or notice; or

(b) in the absence of a posted sign or notice as referred to in subsection a park shall only be open to the public each day from six o'clock in the forenoon a.m.) until eleven o'clock in the afternoon (11:00 p.m.).

…

Encroachment

12 (a) Unless expressly authorized by permit, no person shall encroach upon or take possession of any park, or any part or area within a park, by any means whatsoever, including but not limited to the placing, construction, installation or maintenance of any fence, structure or other thing, the dumping or storage of any materials, or by planting any plant or otherwise cultivating, grooming or landscaping any part of the grounds thereof;

(b) Where the Director determines that an encroachment upon a part or area of a park will be reasonable in the circumstances and will not be detrimental to the interests of the City, the Director may authorize by permit an encroachment upon a part or area of a park, upon such terms and conditions as the Director may deem appropriate in the circumstances, and may take or require to be taken such measures or actions as the Director deems reasonable to ensure that any authorized encroachments are and continue to be satisfactory to the City;

(c) The Director is authorized to remove or cause to be removed, and to dispose of or cause to be disposed of, any unauthorized or no longer authorized encroachment from any park by any means and in any manner whatsoever, as the Director may, in the exercise of an absolute discretion, deem appropriate in the circumstances, including but not limited to the issuance of an order to remove an encroachment against the person or persons responsible for the encroachment.

(d) No person, responsible for an authorized encroachment, shall fail to comply with the terms and conditions of the permit authorizing such encroachment

(e) No person responsible for an encroachment shall fail to remove an encroachment, when directed or ordered by the Director, where such encroachment is not authorized or no longer authorized by permit.

(f) In the event that a person or persons, against whom an order to remove an encroachment from a park has been made or issued by the Director, fails to comply with said order within the time indicated on the order, the Director may cause the encroachment to be removed and disposed of, all at the expense of such person or persons and the amount of such expense may be recovered by the City by action or may be added by the City Clerk to the collector's roll against any lands within the City of Hamilton owned by such person or persons and collected in a like manner as municipal taxes.
…

Camping and Lodging

17 Unless authorized by permit, no person shall dwell, camp or lodge in any park.

Tents and Structures

18 Unless authorized by permit, no person shall place, install or erect any temporary or permanent tent or structure in any park.

UN International Covenant on Economic, Social and Cultural Rights

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

…

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE

Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

Court File No. CV-21-00077817-0000

KRISTEN HEEGSMA et. al. - and - CITY OF HAMILTON

Applicants Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
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CITY of HAMILTON **774**
Respondent (Respondent)

Court File No.COA-25-CV-0166

Ontario
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APPEAL BOOK - VOLUME 1

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