Court File No. COA-25-0166
Superior Court File No.: CV-21-00077187-0000

COURT OF APPEAL FOR ONTARIO

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, JAMAL PIERRE & LINSLEY GREAVES

Applicants (Appellants)

– and –

CITY OF HAMILTON

Respondent (Respondent on Appeal)

– and –

THE CORPORATION OF THE CITY OF KINGSTON

Proposed Intervenor

MOTION RECORD OF THE PROPOSED INTERVENOR, THE CORPORATION OF THE CITY OF KINGSTON (MOTION FOR LEAVE TO INTERVENE UNDER SUBRULE 13.03 (1))

November 14, 2025

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TAB 1

Court File No. COA-25-0166
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– and –

CITY OF HAMILTON

Respondent (Respondent on Appeal)

– and –

THE CORPORATION OF THE CITY OF KINGSTON

Proposed Intervenor

NOTICE OF MOTION OF THE PROPOSED INTERVENOR, THE CORPORATION OF THE CITY OF KINGSTON (MOTION FOR LEAVE TO INTERVENE UNDER SUBRULE 13.03 (1))

THE CORPORATION OF THE CITY OF KINGSTON ("***Kingston***") will make a motion to the Court on December 12, 2025, at 10:00 AM, or as soon after that time as the motion can be heard.

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

☐ in writing under subrule 37.12.1 (1) because it is (insert one of on consent, unopposed or made without notice);

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

☐ in person;

☐ by telephone conference;

☑ by video conference.

at the following location:

COURT OF APPEAL FOR ONTARIO
130 QUEEN STREET WEST
TORONTO ON M5H 2N5

THE MOTION IS FOR:

1. An Order under Rule 13.01 granting *Kingston* leave to intervene as a party, including leave to:

   (a) file a factum of up to 5,000 words or such other length as determined by this Honourable Court; and

   (b) make oral submissions for up to 20 minutes or such other length as determined by this Honourable Court;

2. An Order that there will be no award of costs either in the *City*'s favour or against the *City*, arising from this motion or otherwise in the appeal; and

3. Such further and other relief as counsel may request and this Honourable Court may consider just.

THE GROUNDS FOR THE MOTION ARE:

1. This appeal arises out of the City of Hamilton ("***Hamilton***")'s enforcement of its *By-Law 01–291* between August 2021 and August 2023 and, in particular, its prohibition on sheltering in public parks.

2. In the application below, the Appellants alleged that *Hamilton*'s enforcement actions during that period infringed their rights as guaranteed under sections 7 and 15 of the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*,

being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91 (24) (the "***Charter***").

3. The application judge heard and dismissed the application.

4. The Appellants appeal that decision to this Honourable Court.

5. Among other grounds of appeal, the Appellants argue that:

   (a) the application judge erred by applying the immunity threshold for Parliament and provincial legislatures of "clearly wrong, in bad faith or an abuse of process" to municipal councils (instead of the "clear disregard" standard); and

   (b) the application judge erred by determining there was no violation of section 7 of the *Charter* by breaching the doctrine of horizontal *stare decisis* by:

      (i) refusing to follow the decision in *Waterloo (Regional Municipality) v Persons Unknown* with respect to shelter inaccessibility as a factor in the section 7 framework; and

      (ii) failing to follow the decision in *Kingston (City) v English*.

6. Under subrule 13.01 (1), a person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims:

   (a) an interest in the subject matter of the proceeding;

   (b) that the person may be adversely affected by a judgment in the proceeding; or

   (c) that there exists between the person and one or more of the parties to the

proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

7. Under subrule 13.01 (2), on the motion, the court must consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

8. This appeal raises public law issues about *Charter*-guaranteed rights and entitlement to *Charter* damages.

9. Therefore, the threshold for leave to intervene is lower. A proposed intervenor must only satisfy one of the following criteria:

   (a) the proposed intervenor is a well-recognized group with special expertise and a broadly identifiable membership base;

   (b) the proposed intervenor has an important perspective distinct from the immediate parties; or

   (c) the proposed intervenor has a real and identifiable interest in the subject matter of the proceedings.

10. *Kingston* has an important perspective distinct from the immediate parties. Like *Hamilton*, it has tried to strike a balance between the needs of its homeless population and the rights of its other residents. However, its experience, and therefore its perspective, is distinct from *Hamilton*'s. Its perspective developed from the distinct (and diverse) needs of its homeless population, the distinct effects that homeless encampments have had on other residents in the City of Kingston, and the distinct legal issues that arose in *Kingston (City) v English*.

11. *Kingston* proposes to make the submissions, made from its distinct perspective, set out in its proposed factum (which forms part of the *Kingston*'s motion record.)

12. *Kingston* also has a real and identifiable interest in this appeal. *Kingston* has tried to find new solutions to the homelessness crisis. It continues to do so. This Honourable Court's decision on grounds of appeal repeated above in paragraph 5 may have a chilling effect on *Kingston*'s continuing attempts to find new solutions to the homelessness crisis.

13. Further, *Kingston*'s intervention will not unduly delay or prejudice the determination of the rights of the parties to the appeal. *Kingston* has consulted with counsel for *Hamilton* and another potential intervenor to make best efforts to avoid duplication of arguments. If *Kingston* is granted leave to intervene in the appeal, *Kingston*::

    (a) does not intend to expand the issues in the appeal beyond those raised by the existing parties;

    (b) will not seek to adduce any fresh evidence or otherwise add to the appeal record;

    (c) will not unreasonably delay or lengthen the hearing of the appeal;

    (d) will comply with any deadlines and limits imposed by this Honourable Court on its factum or oral submissions;

    (e) will continue to consult with *Hamilton*'s counsel and other intervenors to make best efforts to avoid duplication of arguments; and

    (f) will not seek costs against any party or intervenor.

14. *Kingston* relies on Rule 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg

194.

15. *Kingston* relies on such further and other grounds as counsel may advise and this Honourable Court may permit.

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

1. The affidavit of Jennifer Campbell, affirmed November 13, 2025;

2. *Kingston*'s proposed factum;

3. Such further and other materials as counsel may advise and this Honourable Court may permit.

November 14, 2025

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HEEGSMA et al Appellants	-and-	HAMILTION (CITY) Respondent

Court File No. COA-25-0166

COURT OF APPEAL FOR ONTARIO

NOTICE OF MOTION OF THE PROPOSED INTERVENOR, CITY OF KINGSTON

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TAB 2

Court File No. COA-25-0166
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COURT OF APPEAL FOR ONTARIO

BETWEEN:

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Applicants (Appellants)

– and –

CITY OF HAMILTON

Respondent (Respondent on Appeal)

– and –

THE CORPORATION OF THE CITY OF KINGSTON

Proposed Intervenor

AFFIDAVIT OF JENNIFER CAMPBELL
(AFFIRMED NOVEMBER 13, 2025)

I, **JENNIFER CAMPBELL**, of the City of Kingston, **AFFIRM AND SAY:**

1. I am the Commissioner of Community Services for The Corporation of the City of Kingston (the "***City***"), and as such have knowledge of the things to which I depose in this affidavit or have received information about those things, in which case I identify the source of my information and I believe the information to be true.

2. As the Commissioner of Community Services, I am responsible for the leadership and operation of a portfolio of *City* departments, including the Housing & Social Services Department and the Recreation & Leisure Services Department.

3. The Housing & Social Services Department is, among other things, the service manager for Ontario Works, housing services, homelessness services and childcare and early years services in the City of Kingston (and the broader community in the county of Frontenac). This department funds emergency

homeless shelters, transitional housing and affordable housing.

4. The Recreation & Leisure Services Department is responsible for, among other things, developing, programming and maintaining (with support from the Public Works Department) public parks in the City of Kingston.

5. In early 2020, dozens of homeless persons erected shelters in Belle Park, a public park owned and maintained by the *City*, forming a large homeless encampment.

6. Since then, the *City* has experienced significant growth in the number, size and locations of homeless encampments in *City* parks and other public spaces.

7. The *City* has tried many different solutions to homelessness and to the negative effects of homeless encampments, including:

   (a) creating an encampment working group;

   (b) commissioning various reports to city council;

   (c) creating and implementing an "Encampment Protocol";

   (d) funding new and different emergency shelter providers;

   (e) funding a "tiny homes" project;

   (f) permitting emergency shelter, transitional/supportive housing and social program services to be delivered from *City*-owned or leased properties (in some cases, specifically acquiring properties in order to do so);

   (g) funding "headlease" initiatives to create new transitional/supporting housing solutions;

   (h) funding programs to improve communication between service providers and homeless persons so that homeless persons are aware of available emergency shelter spaces;

   (i) funding street outreach programs, including Prevention Diversion program workers and Housing First program case managers, to provide homeless persons with information on all of the services that are available to them;

   (j) creating "rack cards" which contain information on emergency shelters, food, washrooms and day service locations, which are distributed by street outreach workers and by-law enforcement officers;

(k) creating programs that provide homeless persons with access to safe storage of their belongings;

(l) providing homeless persons with free transit passes;

(m) supporting the use of Canada's Homeless Individuals and Families Information System (or HIFIS) for coordinating access between shelter sites;

(n) implemented emergency weather response sites to create additional shelter space for homeless persons in the event of extreme weather events; and

(o) funding and supporting the integrated care hub model (an innovative model where consumption and treatment services, support services, emergency shelter services and other social, economic and health services are all provided at the same site.)

8. In 2023, the *City* applied to the Superior Court of Justice for a permanent injunction to enforce the provisions of its *By-Law Number 2009–76* (which regulates the use of public parks) that generally prohibit camping in *City* parks.

9. In November 2023, the Court issued its judgment in that application ("***Kingston (City) v English***"), finding that the by-law's prohibition of homeless persons from temporarily erecting shelter overnight in parks infringed on the rights guaranteed under section 7 of the *Charter of Rights and Freedoms*. The Court read in an exception to the by-law to clarify that the prohibition on camping does not apply to the erecting of temporary shelter in parks by homeless persons commencing one hour before sunset and ending one hour after sunrise.

10. Following the decision in *Kingston (City) v English*, the *City* has continued to try many different solutions to homelessness and to the negative effects of homeless encampments, within the limitations of *Charter*-guaranteed rights.

11. On September 12, 2024, Kingston Police advised the *City* that a man had violently attacked three people in and near the homeless encampment at Belle Park. Two men died in the attacks. A woman suffered life-threatening injuries. Kingston Police closed the affected area to protect the crime scene and complete its investigation.

12. When Kingston Police released the crime scene back to the *City* on September 27, the *City* closed approximately one and a quarter hectares of Belle Park to all users for an undetermined period. The purpose of the closure was to address a

rodent infestation, remove garbage and to investigate whether the encampment had disturbed contaminated soil. The *City* has not completed the soil remediation yet. This area of Belle Park remains closed to the public.

13. On July 2, 2025, the *City* temporarily closed another public park, Frontenac Parkette. At the time, Frontenac Parkette was adjacent to an emergency shelter. Homeless persons also used the park to shelter overnight and often remained there during the day. The *City* contracted the emergency shelter operator to expand to include day services to homeless persons at the shelter. In coordination with these services, the *City* closed the park to allow the service provider to use it during the day for programming, including gardening, education and other health and wellness activities.

14. At the *City*'s November 4, 2025, council meeting, the Deputy Mayor brought a motion proposing to direct staff to report back to council with the following:

    (a) a legal opinion on:

        (i) the risks and limitations associated with passing by-laws to prohibit certain high-risk activities, including erecting shelter, using or displaying drug paraphernalia and consuming illegal substances in and around certain defined "child safety zones", including within a specified distance of public playgrounds, schools, splash pads and children's sports fields;

        (ii) potential measures to mitigate identified legal risks, including consideration of other options to address encampments in public spaces; and

        (iii) the extent to which the proposed prohibitions may be addressed or restricted under existing federal, provincial or municipal laws; and

    (b) options for council's consideration regarding possible by-law amendments or other options to prohibit and improve protection from certain high-risk activities, including erecting shelter, using or displaying drug paraphernalia and consuming illegal substances within defined child safety zones.

    The motion passed by a vote of 12 to 1.

15. The *City*'s lawyers have advised me that they have consulted with lawyers for the City of Hamilton and another potential intervenor to make best efforts to avoid

duplication of arguments.

16. The *City*'s lawyers have advised me, and I agree, that if the *City* is granted leave to intervene in the appeal of *Heegsma v Hamilton (City)*, the *City*:

(a) proposes to make the submissions set out in its proposed factum (which will form part of the *City*'s motion record);

(b) does not intend to expand the issues in the appeal beyond those raised by the existing parties;

(c) will not seek to adduce any fresh evidence or otherwise add to the appeal record;

(d) will not unreasonably delay or lengthen the hearing of the appeal;

(e) will comply with any deadlines and limits imposed by the Court on the *City*'s oral or written submissions;

(f) will continue to consult with lawyers for the City of Hamilton and other intervenors to make best efforts to avoid duplication of arguments;

(g) will not seek costs against any party or intervenor to the appeal; and

(h) will ask that costs not be awarded against it.

17. I make this affidavit in support of the *City*'s motion for leave to intervene in the appeal and for no other or improper purpose.

SWORN REMOTELY by Jennifer Campbell at the City of Kingston before me remotely in the City of Kingston on November 13, 2025, in accordance with *O. Reg 431/20, Administering Oath or Declaration Remotely.*

Jennifer Campbell

K. Donohue

A Commissioner for Taking Affidavits

Jennifer Campbell

Kathleen Anne Donohue, a Commissioner, etc., Province of Ontario, for the Corporation of the City of Kingston. Expires October 28, 2028.

HEEGSMA et al -and- HAMILTION (CITY)
Appellants Respondent

Court File No. COA-25-0166

COURT OF APPEAL FOR ONTARIO

AFFIDAVIT OF JENNIFER CAMPBELL

(Affirmed November 13, 2025)

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TAB 3

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– and –

THE CORPORATION OF THE CITY OF KINGSTON

Intervenor

PROPOSED FACTUM OF THE INTERVENOR, THE CORPORATION OF THE CITY OF KINGSTON

November 14, 2025

THE CORPORATION OF THE CITY OF KINGSTON

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ABBREVIATIONS USED IN TEXT & CITATIONS

AF	Appellants' Factum
p	page;
pp	pages;
SCC	Supreme Court of Canada;
¶	paragraph; and
¶¶	paragraphs.

PART I – OVERVIEW

1. Canada is in a homelessness crisis. The homelessness crisis is inextricably linked to other concurrent and antecedent crises, including an addictions/mental health crisis.

2. The homelessness crisis has harmed, and continues to harm, Ontario communities. Obviously, it harms people experiencing homelessness. However, the crisis harms other members of the community too. Encampments occupy public spaces and too often leave them lawless, unsanitary and unusable by the public.[1]

3. Other levels of government have largely abdicated responsibility for the homelessness crisis to municipalities. Municipal parks and other public spaces have, by default, become de facto psychiatric facilities and emergency shelter spaces.

4. Municipalities have tried to strike a complex and uneasy balance between providing the public with safe, accessible public spaces and recognizing the diverse needs of their homeless populations, including the need to shelter somewhere sometimes.

5. This appeal arises out of the City of Hamilton ("***Hamilton***")'s attempts to strike that balance.

6. The Appellants are 14 homeless persons who lived in Hamilton, Ontario, between August 2021 and August 2023. They asked the Ontario Superior Court of Justice

[1] See, for instance, Ramsay J's comments in *Heegsma v Hamilton (City)*, 2024 ONSC 7154 ("***Heegsma***"), ¶ 84.

to:

(a) declare that the *Hamilton's* enforcement of its *By-Law 01–291* (the "***Parks By-Law***") during that period infringed their rights as guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91 (24) (the "***Charter***"); and

(b) award them damages as a remedy under subsection 24 (1) of the *Charter* for those alleged infringements.

7. Justice Ramsay heard their application and dismissed it.

8. The Appellants appeal that decision to this Court.

9. Among many other grounds of appeal, the Appellants argue that:

(a) Justice Ramsay erred by applying the immunity threshold for Parliament and provincial legislatures of "clearly wrong, in bad faith or an abuse of process" to municipal councils (instead of the "clear disregard" standard); and

(b) Justice Ramsay erred by determining there was no violation of section 7 of the *Charter* by breaching the doctrine of horizontal *stare decisis* by:

(i) refusing to follow the decision in *Waterloo (Regional Municipality) v Persons Unknown*[2] with respect to shelter inaccessibility as a factor in the section 7 framework; and

[2] 2023 ONSC 670 ("***Waterloo***").

(ii) failing to follow the decision in *Kingston (City) v Doe*.[3]

10. We respectfully submit that Ramsay J made no such errors. These grounds of appeal must therefore fail.

11. Justice Ramsay's decision in *Heegsma* recognized that democratic governments, like municipalities, are best equipped to achieve the balance between the needs of homeless persons and the negative effects of "lawless, unsanitary encampments".[4]

12. A municipality must be free to legislate, enforce and otherwise find new solutions to the homelessness crisis without:

(a) the chilling effect of fear of liability (unless it acts in a way that is clearly wrong, in bad faith or an abuse of power); and

(b) concern that the courts that review their actions will be rigidly bound by mixed law/fact "legal findings" about the "right to shelter"[5] made in cases raising different legal issues and applying the law to substantially different facts.

13. Accordingly, we ask this Honourable Court to dismiss these grounds of appeal.

PART II – FACTS

14. *Kingston* takes no position on the facts.

[3] 2023 ONSC 6662 ("***Kingston***").
[4] *Heegsma*, ¶¶ 84 & 85. Justice Carter made a similar observation in *Kingston*, ¶¶ 130 – 132.
[5] *Kingston*, ¶ 89.

PART III – ARGUMENT

(1) DID RAMSAY J ERR 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)?

***Justice Ramsay applied the correct immunity to Hamilton's actions*.**

Introduction

15. The Appellants argue that the application raised "the novel legal question of the immunity threshold for municipal by-laws".[6]

16. The Appellants argue that Ramsay J was required to apply the "clear disregard" immunity threshold to the acts of *Hamilton*.

17. Respectfully, both arguments are incorrect.

18. Municipal governments enjoy immunity for acts carried out under a valid by-law (even if that by-law is later found to be unconstitutional) unless the municipality acted clearly wrongly, in bad faith or in abuse of power ("***good faith immunity***").

19. The SCC established the public law principle of a limited *good faith immunity* in *Welbridge Holdings Ltd. v. Greater Winnipeg*.[7] It further developed the limits and applicability of *good faith immunity* in two key subsequent decisions: *Mackin v New Brunswick (Minister of Finance)*[8] and *Vancouver (City) v Ward*.[9] The SCC's

[6] AF, ¶ 129.
[7] [1971] S.C.R. 957 ("***Welbridge***").
[8] 2002 SCC 13 ("***Mackin***");
[9] 2010 SCC 27 ("***Ward***").

decision in *Canada (Attorney General) v Power*[10] confirmed that the *good faith immunity* principle continued to be good law. *Power* did not modify either the scope, applicability or policy rationale for *good faith immunity*.

20. Justice Ramsay correctly applied this standard to *Hamilton*'s actions enforcing the *Parks By-Law*.[11]

21. This ground of appeal must fail.

Welbridge

22. The SCC established the limited *good faith immunity* in *Welbridge* to immunize a **municipality** from a claim founded on the municipality's alleged negligence in passing an invalid **municipal by-law**.

23. In *Welbridge*, the SCC held that a municipality exercising its legislative authority was immune from claims in negligence: "the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care."[12]

24. However, the SCC made the immunity limited, not absolute. The municipality was immune from negligence claims, but still owed people affected by its legislation a duty of honesty (which, if breached, could lead to liability.)[13]

25. The SCC deliberately made no distinction between a municipal council passing a by-law and a provincial Legislature or Parliament:

> A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it

[10] 2024 SCC 26 ("***Power***").
[11] *Heegsma*, ¶ 65.
[12] *Welbridge*, p 970.
[13] *Ibid*, p 967.

> is exercising discretionary statutory authority. In exercising such authority, **a municipality (no less than a provincial Legislature or the Parliament of Canada)** may act beyond its powers in the ultimate view of a court... It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach.[14]

26. The SCC explained the policy rationale for the limited immunity: a limited immunity recognized a municipality's "public character" which involved "its political and social responsibility to all those who live and work within its territorial limits".[15]

27. The SCC (and other courts below it) went on to apply the *good faith immunity* principle in other cases to action taken under valid provincial and federal legislation (later declared invalid.)[16]

28. Nonetheless, the SCC's first application of *good faith immunity* was to immunize a **municipality** from liability for passing **municipal legislation** (later declared invalid).

Mackin

29. In *Mackin*, the SCC applied *good faith immunity* in the context of action taken under valid provincial legislation later declared unconstitutional (because it violated the rights guaranteed under section 11 (d) of the *Charter*).

30. The SCC began its analysis of the availability of damages by referring to *Welbridge* as authority for the *good faith immunity* rule of public law: "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

[14] *Ibid*, p 958.
[15] *Ibid*, p 968.
[16] For example, in *Guimond v Quebec (Attorney General)*, [1996] 3 S.C.R. 347, ¶ 13, in which again the SCC cited *Welbridge* as the authority for the establishment of the *good faith immunity*.

application of a law that is subsequently declared to be unconstitutional."[17]

31. To the extent that the scope of *good faith immunity* changed between *Welbridge* and *Mackin*, the scope of the immunity only became more limited (so that, instead of the state being immune from any claim except for dishonesty, the state was now no longer immune from claims founded in "clear wrongness", bad faith (which includes dishonesty) and abuse of process).

32. There is no policy rationale why this more limited *good faith immunity* should apply to Parliament and provincial legislatures but not to municipalities.

33. *Mackin* confirmed that *good faith immunity* applies in a claim for damages under subsection 24 (1) of the *Charter*. The SCC explained the policy rationale for doing so:

> 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.[18]

34. This policy rationale (balancing constitutional rights with effective government) applies equally to the law-making and law-applying functions of municipalities as it does to Parliament and provincial legislatures.

Ward

35. In *Ward*, the SCC revisited the application of *good faith immunity* to claims for *Charter* damages.

36. The SCC described the *good faith immunity* principle as recognizing that:

> …the state must be afforded some immunity from liability in damages

[17] *Mackin*, ¶ 78.
[18] *Mackin*, ¶ 39.

> 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 does not wish to chill the exercise of policy-making discretion.[19]

37. Again, this policy rationale (to not chill legislative discretion) applies equally to municipalities when they perform legislative and policy-making functions as it does to Parliament or provincial legislatures.

38. The SCC also cited *Mackin* for the following policy rationale:

> … duly enacted laws should be enforced, until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power" … 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.[20]

39. Again, this policy rationale (to not chill law enforcement) applies equally to municipalities who are responsible for enforcing their by-laws as it does to Parliament or provincial legislatures. Municipalities are empowered to make laws, to administer those laws and to enforce those laws.[21]

40. The SCC ultimately found that the *good faith immunity* principle did not apply to the facts before it (simply because it was "not a situation of state action pursuant to a valid statute that was subsequently declared invalid").[22]

41. However, *Ward* entertained the possibility that, at the "countervailing factors" step of the analysis, the state could establish new immunities, other than *good faith immunity*, by showing that, in other circumstances, *Charter* damages "would deter state agents from doing what is required for effective government". *Ward* suggests

[19] *Ward*, ¶ 40.
[20] *Ward*, 39.
[21] See ¶¶ 46 – 61 below.
[22] *Ward*, ¶ 41.

that, if the state succeeded in establishing a new immunity (again, other than *good faith immunity*), a "minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate".[23]

42. The "clear disregard" fault standard connotes either proceeding with a course of action in the face of 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 good reason to inquire.[24] This immunity is therefore more limited than *good faith immunity* (meaning the exception allowing for state liability is broader than the exceptions in *good faith immunity*).

43. In *Heegsma*, *Hamilton* did not seek to establish a new immunity. *Hamilton* merely relied on *good faith immunity* because its impugned actions were undertaken under valid municipal legislation (being the *Parks By-Law*).

44. Justice Ramsay was therefore correct to apply the principle of *good faith immunity* and to ask whether *Hamilton* "acted wrongly, in bad faith or in an abuse of process".[25]

Governmental Nature of Municipalities

45. The applicability of *good faith immunity* to municipalities is entirely consistent with the governmental nature of municipalities.

46. As noted above, municipalities have enjoyed *good faith immunity* since the very establishment of the principle. *Welbridge* recognized that municipalities are governments. It does not matter that they lack constitutional status and, alas, are

[23] *Ward*, ¶ 42 - 43.
[24] *Brazeau v Canada (Attorney General)*, 2020 ONCA 184, ¶ 87.
[25] *Heegsma*, ¶ 66. NOTE: Justice Ramsay also found (presumably, "in the alternative") that *Hamilton* also did not show "a disregard for the applicants' *Charter* rights".

but “creatures of statute.”

47. Canadian courts have repeatedly recognized that municipalities are governments.

48. The democratic accountability of municipalities is analogous to the democratic accountability of Parliament and provincial legislatures. Municipalities are empowered to make laws, to administer them and to enforce them. Municipalities perform a quintessentially governmental function.[26]

49. Therefore, the role of municipalities closely mimics the role of provincial governments. They are essentially “delegated government”. This makes municipalities distinct from administrative tribunals or other public bodies.[27]

50. Indeed, the municipality is the level of government closest to citizens and therefore most responsive to their needs, to local distinctiveness and to population diversity. This makes their law-making and law-implementation powers particularly important.[28]

Power

51. The Appellants argue that “*Power* affirmed *Macklin*’s holding that the immunity threshold is highest for legislatures that violate *Charter* rights through statutes.”[29]

52. The Appellants further argue that “*Power* reaffirmed that the *Macklin* threshold “concerned **only** the enactment of legislation” and justified that threshold by express reference to the constitutional principles of “parliamentary sovereignty”, “the separation of powers” (in particular, “respect for the legislative role” and

[26] *Godbout v Longueuil (City)*, [1997] 3 S.C.R. 844, ¶ 51.
[27] *Nanaimo (City) v Rascal Trucking Ltd*, [2000] 1 S.C.R. 342, ¶ 31.
[28] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, ¶ 3.
[29] AF , ¶ 129.

"parliamentary privilege")."[30]

53. Respectfully, *Power* does not stand for those propositions.

54. The issue before the SCC in *Power* was whether or not *good faith immunity* had been or should be superseded with **absolute** immunity (at least with respect to the enactment of unconstitutional legislation – distinct from the implementation or enforcement of unconstitutional legislation).[31]

55. The reasons in *Power* reflect the way in which Canada pleaded and argued its case. One must read the reasons in this context.

56. Canada argued that various constitutional principles, including separation of powers, parliamentary sovereignty and parliamentary privilege, required a finding that Canada enjoyed absolute immunity when exercising its legislative powers.[32]

57. The SCC declined to overrule *Mackin*. It found that the established limited immunity, *good faith immunity*, is more consistent with and better reconciles with "the constitutional principles underpinning both legislative autonomy and accountability, parliamentary sovereignty, the separation of powers, parliamentary privilege, the broad and purposive approach to rights and remedial provisions in the *Charter*, and constitutionalism and the rule of law".[33]

58. In *Heegsma*, Ramsay J did not find that *Hamilton* (or municipalities in general) enjoy absolute immunity from liability or any broader immunity than *good faith immunity*. Therefore, *Power* is not relevant or applicable to this appeal (except in

[30] AF, ¶ 129.
[31] *Power*, ¶¶ 3 & 13.
[32] *Ibid*, ¶¶ 24 & 46.
[33] *Ibid*, ¶ 77.

so much as it confirms that *Mackin* is still good law).

59. Therefore, it is irrelevant to this appeal whether or not municipalities enjoy parliamentary sovereignty or parliamentary privilege.

60. *Power* did not modify either the scope, applicability or policy rationale for the *good faith immunity* principle.

Conclusion

61. More than ever, municipalities need effective governance to address the many challenges they face, including, of course, addressing the homelessness crisis.

62. When a democratically elected council enacts a by-law to attempt to address challenges, the municipality must be able to enforce it, without fear of liability, unless it acts in a way that is clearly wrong, in bad faith or an abuse of power (a municipality must enjoy *good faith immunity*).

63. Justice Ramsay correctly applied the *good faith immunity* principle to *Hamilton*'s enforcement of its (valid) *Parks By-Law*.

64. This ground of appeal must fail.

(2) DID RAMSAY J BREACH THE DOCTRINE OF HORIZONTAL *STARE DECISIS* BY REFUSING TO FOLLOW THE DECISION IN *WATERLOO* WITH RESPECT TO SHELTER INACCESSIBILITY AS A FACTOR IN THE SECTION 7 FRAMEWORK?

Justice Ramsay correctly distinguished Waterloo – it was not binding.

Introduction

65. The Appellants argue that Ramsay J. rejected the binding decision in *Waterloo*

and “neither distinguished [it] nor explained why horizontal *stare decisis* was inapplicable.”[34]

66. A court is required by the principle of horizontal *stare decisis* to follow a **binding** prior decision of the same court in the province.[35]

67. As a first step, judges must examine prior decisions and the *ratio decidendi* to determine whether the *ratio* is binding or distinguishable.[36]

68. A decision is not binding if it is distinguishable on different facts[37] or on different issues.[38]

69. If the court determines at the threshold stage that a prior decision is “not binding” because it is distinguishable, horizontal *stare decisis* does not apply. There is no need for the court to go any further in its analysis.

70. Justice Ramsay correctly found that *Waterloo* was not binding on him because *Waterloo* considered a different issue and applied the law to substantially different facts.

71. This ground of appeal must fail.

Different Issues

72. With respect to overnight sheltering, Ramsay J made no decision on the constitutionality of Hamilton’s enforcement of the *Parks By-Law*’s overnight sheltering prohibitions because the issue was not before him. He found as a fact

[34] AF, ¶ 26.
[35] *R v Sullivan*, 2022 SCC 19, ¶ 86.
[36] *Ibid*, ¶¶ 64.
[37] *Ibid*, ¶ 86.
[38] *Ahmed v Alberta College of Pharmacy*, 2025 ABCA 265, ¶ 23.

that *Hamilton* did not enforce the overnight sheltering prohibitions.[39]

73. Therefore, to the extent that the Appellants complain that Ramsay J failed to follow *Waterloo*'s binding legal conclusions regarding the constitutionality of enforcing overnight sheltering prohibitions,[40] those complaints are simply unfounded.

Different Facts

74. With respect to the issue of daytime sheltering, it is implicit in Ramsay J's reasons that he distinguished *Waterloo* on the basis of different facts.

75. First, the principle of *stare decisis*, whether horizontal or vertical, does not direct courts on determinations of mixed fact and law.[41] Variability in determinations of mixed fact and law are to be expected and, indeed, are necessary.[42]

76. The Appellants incorrectly argue that *Waterloo* determined that "s. 7 was violated by inaccessible shelter beds and daytime sheltering restrictions and evictions."[43] In fact, *Waterloo* determined that, "**in the circumstances of the Encampment residents***",* section 7 of the *Charter* was "invoked [during the daytime] where the number of homeless individuals exceed[ed] the number of truly accessible indoor sheltering spaces".[44] That was a determination of mixed fact and law.

77. As Carter J correctly found in *Kingston*, in *Waterloo*, Valente J*:*

    (a) at no point expressly adopted any of the conclusions in the so-called "right

[39] *Heegsma*, ¶¶ 12 – 13 & 69.
[40] AF, ¶¶ 90 - 92
[41] *Essex (County) v Enbridge Gas Inc*, 2025 ONCA 268 ("***Essex***"), ¶ 28. NOTE: at ¶ 90 of the AF, the Appellants concede that, similarly, Ramsay J's determination regarding causation was a determination of mixed fact and law.
[42] *R v JC*, 2023 ONSC 6093, ¶ 66.
[43] AF, ¶ 26.
[44] *Waterloo*, ¶ 105.

to shelter" decisions from British Columbia as a determination of law;

(b) did not consider himself bound by any determinations of law in the British Columbia "right to shelter" decisions;

(c) performed an independent section 7 analysis **of the evidence before him** in accordance with the framework set out by the SCC in *Bedford v Canada (Attorney General)*[45]; and

(d) came to the conclusion that the section 7-guaranteed rights of the respondents were engaged by the Region by-law's daytime sheltering prohibitions expressly based "**on the evidence**" before him.[46]

78. Second, clearly, Ramsay J distinguished *Waterloo* on its different facts. He expressly remarked that the dispute in *Waterloo* was "in connection with an encampment on a gravel parking lot". The Appellants in this appeal were sheltering in public parks.

79. This is a significant difference. In *Waterloo*, Valente J expressly found that, because the respondents were sheltering on vacant land (and not a park or other public space), section 7 of the *Charter* was "invoked" without any need to balance the needs of persons sheltering with the rights of others.[47]

80. Accordingly, because the Appellants were sheltering in public parks, Ramsay J considered it necessary to balance the needs of the homeless against the rights of other residents before finding that section 7 was invoked.

81. In paragraphs 71 to 76 of his reasons, Ramsay J considered the needs of the

[45] 2013 SCC 72 ("***Bedford***").
[46] *Kingston*, ¶¶ 93 – 95.
[47] *Waterloo*, ¶ 105.

homeless.[48] In paragraphs 77 and 78, he considered the rights of Hamilton's other residents.[49] After balancing those needs against those rights, in paragraph 79, he concluded: "[f]or these reasons, I do not extend the prohibition on enforcement to daytime or indefinite camping."[50]

82. Clearly, Ramsay J found that, on the facts before him, *Hamilton*'s enforcement of the *Parks By-Law*'s prohibition on daytime sheltering did not invoke section 7.

83. The question of whether the facts invoke the protection of section 7 of the *Charter* is a threshold question. If the Court finds that the impugned legislation or action does not amount to a deprivation of the right to life, to security or to liberty (as the meaning of each of those three interests have been circumscribed by the jurisprudence), section 7 is not invoked or engaged and there is no need to proceed through the rest of the analytical framework[51] set out in *Bedford*.[52]

84. Justice Ramsay correctly recognized that he was not bound by *Waterloo*'s determination that the Region's prohibition of daytime sheltering invoked section 7 because that was a determination of mixed fact and law. He then correctly distinguished *Waterloo* on its different facts.

Conclusion

85. More than ever, municipalities need to find solutions to the homelessness crisis that respond to the needs of their communities, including the diverse needs of their homeless populations.

86. When courts are asked to review those solutions, they must not be bound by

[48] *Heegsma*, ¶¶ 71 – 76.
[49] *Heegsma*, ¶¶ 77 & 78.
[50] *Heegsma*, ¶ 79.
[51] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, ¶ 47.
[52] 2013 SCC 72.

mixed law/fact conclusions made in earlier cases that raised different legal issues and applied the law to substantially different facts.

87. Justice Ramsay correctly determined that he was not bound by the determinations in *Waterloo*.

88. This ground of appeal must fail.

(3) DID RAMSAY J BREACH THE DOCTRINE OF *STARE DECISIS* BY FAILING TO FOLLOW THE DECISION IN *KINGSTON*?

Justice Ramsay correctly distinguished Kingston - it was not binding.

89. The Appellants argue that Ramsay J was bound by the determination in *Kingston* that sheltering restrictions deprive homeless persons of life and security of the person.[53]

90. As argued above, Ramsay J was not bound by the determination in *Kingston* because:

(a) there was no determination in *Kingston* that the prohibition on daytime sheltering deprived homeless persons of life and security of the person:

> … the Respondents led only limited evidence with respect to the effects of not being able to shelter. While some of the evidence would presumably apply equally to daytime sheltering as it would to nighttime sheltering, there is no specific evidence to that effect.[54]

(b) the determination in *Kingston* that the prohibition on nighttime sheltering deprived homeless persons of life and security of the person was

[53] AF, ¶ 90.
[54] *Kingston*, ¶ 96.

irrelevant because that issue was not before Ramsay J; and, in any event,

(c) the determination in *Kingston* that the prohibition on nighttime sheltering deprived homeless persons of life and security of the person was a determination of mixed fact and law and therefore was not binding.[55]

91. With respect to Carter J's statement that he disagreed with the City of Kingston "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",[56] that statement was not binding because:

(a) it is clearly *obiter* (as noted above, this issue was not before Carter J on the evidence, or lack of evidence, before him); and

(b) it simply rejected the argument that section 7 could **never** be invoked, no matter the facts, to protect daytime sheltering (because this would amount to the grant of a property right) – recognizing that future courts may make their own determination of mixed fact and law on the question.

In any event, any determination or future determination on this issue is a determination of mixed fact and law and therefore not binding.

92. Justice Ramsay correctly recognized that he was not bound by the determination in *Kingston* that the prohibition on nighttime sheltering deprived homeless persons of life and security of the person.

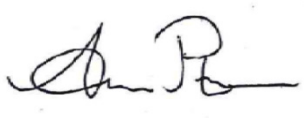
93. This ground of appeal must fail.

[55] *Essex*, ¶ 28. I note again that, at ¶ 90 of the AF, the Appellants concede that, similarly, Ramsay J's determination regarding causation was a determination of mixed fact and law.
[56] AF, ¶ 86.

PART IV – THE ORDER SOUGHT

94. The *City* respectfully requests that this Honourable Court dismiss the above grounds of appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th day of November, 2025.



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CERTIFICATE AS TO TIME & AUTHENTICITY

I, Andrew Reeson, Counsel for the Interenor, The Corporation of the City of Kingston, hereby certify that:

(a) I estimate that I will require twenty minutes for my oral argument; and

(b) I am satisfied as to the authenticity of every authority cited in this factum.

This factum contains 4,219 words, inclusive of footnotes.

Dated at the City of Kingston this 14th day of November, 2025.

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SCHEDULE A – LIST OF AUTHORITIES

1. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241;
2. *Ahmed v Alberta College of Pharmacy*, 2025 ABCA 265;
3. *Bedford v Canada (Attorney General)*, 2013 SCC 72;
4. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44;
5. *Brazeau v Canada (Attorney General)*, 2020 ONCA 184;
6. *Canada (Attorney General) v Power*, 2024 SCC 26;
7. *Essex (County) v Enbridge Gas Inc*, 2025 ONCA 268;
8. *Godbout v Longueuil (City)*, [1997] 3 S.C.R. 844;
9. *Guimond v Quebec (Attorney General)*, [1996] 3 S.C.R. 347;
10. *Heegsma v Hamilton (City)*, 2024 ONSC 7154;
11. *Kingston (City) v Doe*, 2023 ONSC 6662;
12. *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13;
13. *Nanaimo (City) v Rascal Trucking Ltd*, [2000] 1 S.C.R. 342;
14. *R v JC*, 2023 ONSC 6093;
15. *R v Sullivan*, 2022 SCC 19;
16. *Vancouver (City) v Ward*, 2010 SCC 27;
17. *Waterloo (Regional Municipality) v Persons Unknown*, 2023 ONSC 670; &
18. *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957.

SCHEDULE B – TEXT OF STATUTES

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.

HEEGSMA et al Appellants	-and-	HAMILTON (CITY) Respondent

Court File No. COA-25-0166

COURT OF APPEAL FOR ONTARIO

PROPOSED FACTUM OF THE INTERVENOR, CITY OF KINGSTON

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HEEGSMA et al Appellants	-and-	HAMILTION (CITY) Respondent

Court File No. COA-25-0166

COURT OF APPEAL FOR ONTARIO

MOTION RECORD OF THE PROPOSED INTERVENOR, CITY OF KINGSTON

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