

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

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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 (Moving Party)

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**AMENDED FACTUM OF THE MOVING PARTY,  
THE CORPORATION OF THE CITY OF KINGSTON,  
MOTION FOR LEAVE TO INTERVENT**

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November 25, 2025

**THE CORPORATION OF THE CITY OF  
KINGSTON**

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## **ABBREVIATIONS USED IN TEXT & CITATIONS**

|     |                          |
|-----|--------------------------|
| Aff | Affidavit                |
| MR  | Motion Record            |
| p   | page;                    |
| pp  | pages                    |
| SCC | Supreme Court of Canada; |
| ¶   | paragraph; and           |
| ¶¶  | paragraphs.              |

## PART I – OVERVIEW

1. The Corporation of the City of Kingston (“**Kingston**”) seeks leave to intervene in this appeal as a friend of the court under Rule 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (the “**Rules**”).
2. Ontario is in a homelessness crisis. The homelessness crisis is inextricably linked to other concurrent and antecedent crises, including an addictions/mental health crisis.
3. 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.<sup>1</sup>
4. 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.
5. 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.
6. This appeal arises out of the City of Hamilton (“**Hamilton**”)’s attempts to balance the needs of its homeless population with the rights of its other residents.

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<sup>1</sup> See, for instance, Ramsay J’s comments in *Heegsma v Hamilton (City)*, 2024 ONSC 7154, ¶ 84.

7. 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 to:
- (a) declare that *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.
8. *Kingston* seeks to intervene in this appeal because the appeal raises public interest matters which both engage *Kingston's* distinct perspective and affect *Kingston*. In particular, those public interest matters are raised by the following grounds of appeal:
- (a) Justice Ramsay erred 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); 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*<sup>2</sup> with respect to shelter inaccessibility as a

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<sup>2</sup> 2023 ONSC 670 (“**Waterloo**”).

factor in the section 7 framework; and

(ii) failing to follow the decision in *Kingston (City) v English*.<sup>3</sup>

9. *Kingston* has developed its important and distinct perspective on these grounds of by:

- (a) implementing new solutions to address the diverse needs of its homeless population; and, at the same time;
- (b) seeking to apply its by-laws to try to give its residents safe and accessible public spaces, including by applying to the Court for injunctive relief.<sup>4</sup>

Since 2020, *Kingston* has been at the front of municipal efforts to address the homelessness crisis.

10. The resolution of those grounds of appeal will affect how *Kingston* is able to continue to do so.

11. *Kingston* therefore respectfully requests leave to intervene in the appeal by making submissions, through both a brief factum and brief oral submissions, on the above grounds of appeal.

## PART II – FACTS

12. *Kingston* is a single-tier municipality under the *Municipal Act, 2001*.

13. In 2009, its council passed a by-law regulating how Kingston residents and visitors may use *Kingston's* public parks (the “***Kingston Parks By-Law***”).<sup>5</sup>

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<sup>3</sup> 2023 ONSC 6662 (“*Kingston (City) v Doe*”).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, ¶ 2.

14. Since 2020, *Kingston* has experienced significant growth in the number, size and locations of homeless encampments in *City* parks and other public spaces.<sup>6</sup>
15. During this period, *Kingston* has explored and implemented many new and creative potential solutions to homelessness and the negative effects of homeless encampments.<sup>7</sup>
16. Until 2023, the *Kingston Parks By-Law* prohibited camping in all parks except for two very narrow exceptions (being special event group camping and camping in certain designated campsites in Ontario Park).<sup>8</sup>
17. In 2023, *Kingston* applied to the Superior Court for a permanent injunction to enforce the *Kingston Parks By-Law*'s camping prohibition to dismantle a large homeless encampment that grew in an area of *Kingston*'s Belle Park (immediately adjacent to a safe injection site and homeless service provider hub).<sup>9</sup>
18. In response to *Kingston*'s application, a number of homeless persons who regularly sheltered at the encampment made their own application. They sought a declaration that the *Parks By-Law*'s camping prohibition infringed on their *Charter*-guaranteed rights under sections 7 and 15. They sought a declaration that the camping prohibition was inoperative insofar as it applied to prevent homeless persons from erecting temporary shelters in parks when the number of homeless persons in Kingston exceeded the number of accessible shelter beds.
19. On November 23, 2023, Justice Carter gave his decision and reasons (reported as *Kingston (City) v Doe*).

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<sup>6</sup> Aff of Jennifer Campbell, November 13, 2025 ("***Aff of J Campbell***"), MR p 17, ¶¶ 5 – 6.

<sup>7</sup> *Aff of J Campbell*, MR pp 17 – 18, ¶ 7.

<sup>8</sup> *Kingston (City) v Doe*, ¶ 3.

<sup>9</sup> *Aff of J Campbell*, MR p 18, ¶ 8.

20. The proceedings in *Kingston (City) v Doe* raised many of the same public policy matters raised in this appeal, including:
- (a) the scope of the right guaranteed by section 7 of the *Charter* in the context of homeless persons' need to shelter outdoors; and
  - (b) the application of the doctrine of horizontal *stare decisis* in the context of the growing body of jurisprudence on the matter described in clause (a).
21. Since the decision in *Kingston (City) v Doe*, *Kingston* has continued to explore new possible solutions to the homelessness crisis<sup>10</sup> and to apply its by-laws to give its residents safe and accessible public spaces.
22. On September 12, 2024, a man 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 of Belle Park to protect the crime scene.<sup>11</sup>
23. When Kingston Police released the crime scene back to *Kingston* on September 27, *Kingston*, under the authority of the *Kingston Parks By-Law*, closed approximately one and a quarter hectares of Belle Park to all users for an undetermined period. During the closure, *Kingston* undertook a clean-up of the area, including addressing rodent infestation, removing garbage and investigating whether the encampment had disturbed contaminated soil. This area of Belle Park remains closed to the public.<sup>12</sup>
24. On July 2, 2025, *Kingston* temporarily closed Frontenac Parkette. At the time,

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<sup>10</sup> *Aff of J Campbell*, MR p 18, ¶ 8

<sup>11</sup> *Aff of J Campbell*, MR p 18, ¶ 11.

<sup>12</sup> *Aff of J Campbell*, MR pp 18 – 19, ¶ 12.

Frontenac Parkette was adjacent to an emergency shelter. Homeless persons also used the Frontenac Parkette to shelter overnight and often remained there during the day. *Kingston* contracted the emergency shelter operator to expand services 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.<sup>13</sup>

25. At *Kingston's* November 4, 2025, council meeting, *Kingston's* 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

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<sup>13</sup> *Aff of J Campbell*, MR p 19, ¶ 13.

- (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.<sup>14</sup>

### **PART III – ARGUMENT**

#### **(1) SHOULD THIS COURT GRANT KINGSTON LEAVE TO INTERVENE TO MAKE SUBMISSIONS IN THIS APPEAL?**

***This Court should grant Kingston leave to intervene.***

- 26. The only issue raised by this motion is whether this Honourable Court should grant *Kingston* leave to intervene in the appeal on the grounds of appeal identified above.
- 27. Rule 13.02 of the *Rules* grants the Court discretion to add a person as a party for the purpose of rendering assistance to the Court by way of argument.
- 28. *Kingston* wishes to make arguments in this appeal for the purpose of assisting the Court.
- 29. *Kingston's* intervention will not unduly delay or prejudice any party. *Kingston* will:
  - (a) not expand the issues in the appeal beyond those raised by the parties;
  - (b) not seek to adduce any fresh evidence or otherwise add to the appeal record;

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<sup>14</sup> *Aff of J Campbell*, MR p 19, ¶ 14.

- (c) not unreasonably delay or lengthen the hearing of the appeal;
  - (d) comply with any deadlines and limits imposed by the Court;
  - (e) continue to consult with lawyers for *Hamilton* and other intervenors to make best efforts to avoid duplication of arguments; and
  - (f) not seek costs against any party or intervenor to the appeal.<sup>15</sup>
30. In exercising its discretion, the Court should consider: (a) the nature of the case; (b) the issues which arise; and (c) the likelihood that the proposed intervenor is able to make a useful contribution to the resolution of the matter without causing injustice to the parties.<sup>16</sup>
31. However, this Honourable Court has recognized that, in *Charter* cases, the Court's decision will have a great impact on persons other than the parties. Accordingly, permitting interventions is more desirable in *Charter* cases than in other cases and the Court should accordingly apply a more relaxed standard.<sup>17</sup>
32. In considering *Kingston*'s motion for leave to intervene, this Honourable Court should apply the more relaxed standard. This appeal raises *Charter* issues. The grounds of appeal on which *Kingston* seeks to intervene are either (a) *Charter* issues; or, in the case of the horizontal *stare decisis* issues, (b) will significantly affect how *Charter*-related determinations bind future *Charter* cases.

***Kingston has a real substantial and identifiable interest.***

33. *Kingston* is interested in this appeal because the determination of this appeal will

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<sup>15</sup> *Aff of J Campbell*, MR p 20, ¶ 16.

<sup>16</sup> *Bedford v Canada (Attorney General)*, 2009 ONCA 669, ¶ 2.

<sup>17</sup> *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd (CA)*, 74 O.R. (2d) 164.

have a great impact on *Kingston*. The homelessness crisis continues unabated. *Kingston* must continue to explore new solutions.

34. In order to determine the appeal, the Court must consider whether municipalities enjoy immunity from *Charter* damages for acts carried out under a valid by-law (if later that by-law is declared unconstitutional) unless (a) the municipality acted clearly wrongly, in bad faith or in abuse of power (“**good faith immunity**”); or (b) the municipality showed clear disregard for a claimant’s *Charter* rights.
35. *Kingston* seeks to ensure that the Court affirms Ramsay J’s decision to apply the *good faith immunity* principle to *Hamilton*’s enforcement of its *Parks By-Law*. If it does not, the Court’s decision will have a chilling effect on *Kingston*’s willingness to legislate and enforce its by-laws to address the homelessness crisis.
36. The Court must also consider the extent to which the decisions in *Kingston (City) v Doe* and *Waterloo (Regional Municipality) v Persons Unknown*<sup>18</sup> bind future courts when they consider municipal by-laws that affect homeless persons sheltering in public spaces.
37. *Kingston* seeks to ensure that the Court affirms Ramsay J’s decision that those two earlier decisions made determinations of mixed fact and law, were distinguishable on their facts and issues, and therefore did not bind him. If it does not, the Court’s decision will similarly have a chilling effect on *Kingston*’s willingness to legislate and enforce its by-laws to address the homelessness crisis.
38. Accordingly, we ask this Honourable Court to grant *Kingston* leave to intervene on these grounds of appeal.

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<sup>18</sup> 2023 ONSC 670.

***Kingston has an important and distinct perspective.***

39. *Kingston's* perspective on this appeal is distinct and important. Since 2020, Kingston has been at the front of municipal efforts to address the homelessness crisis. Its application in *Kingston (City) v Doe* raised many of the same issues as this appeal.
40. If granted leave to intervene, *Kingston* anticipates (subject to any further consideration by counsel and efforts to avoid duplication of arguments) that it will make the arguments set out in the proposed factum included in its motion record.<sup>19</sup>
41. Those arguments may be summarized as follows:
- (a) municipal governments enjoy *good faith 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 wrong, in bad faith or in abuse of power;
    - (i) the SCC established the *good faith immunity principle* to immunize a **municipality** from a claim founded on the municipality's alleged negligence in passing an invalid **municipal by-law**;
    - (ii) the policy rationales for the *good faith immunity* principle apply equally to the law-making and law-enforcing functions of municipalities as they do to Parliament and provincial legislatures;
    - (iii) the applicability of *good faith immunity* to municipalities is entirely

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<sup>19</sup> Proposed Factum, MR Tab 3, p 23.

consistent with the governmental nature of municipalities; and

- (iv) the SCC's decision in Canada (Attorney General) v Power did not modify the scope, applicability or policy rationale for the *good faith immunity* principle;
- (b) Waterloo's determinations were not binding on Ramsay J because:
  - (i) those determinations were determinations of mixed fact and law;
  - (ii) Waterloo considered a different issue; and
  - (iii) Waterloo applied the law to substantially different facts;
- (c) Kingston (City) v Doe's determinations were not binding on Ramsay J because:
  - (i) those determinations were determinations of mixed fact and law;
  - (ii) Kingston (City) v Doe considered a different issue; and
  - (iii) Kingston (City) v Doe applied the law to substantially different facts.

42. Accordingly, we ask this Honourable Court to grant *Kingston* leave to intervene on these grounds of appeal.

#### **PART IV – THE ORDER SOUGHT**

43. The *City* respectfully requests an Order:

- (a) granting *Kingston* leave to intervene as a friend of the court, including leave to:

- (i) file a factum of up to 5,000 words or such other length as determined by this Honourable Court; and
  - (ii) make oral submissions for up to 20 minutes or such other length as determined by this Honourable Court; and
- (b) that there will be no award of costs either in *Kingston's* favour or against *Kingston*, arising from this motion or otherwise in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25<sup>th</sup> day of  
November, 2025.



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## **CERTIFICATE AS TO TIME & AUTHENTICITY**

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

- (a) I estimate that I will require ten minutes for my oral argument; and
- (b) I am satisfied as to the authenticity of every authority cited in this factum.

This factum contains 2,521 words, inclusive of footnotes.

Dated at the City of Kingston this 25<sup>th</sup> day of November, 2025.



**THE CORPORATION OF THE CITY OF KINGSTON  
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## **SCHEDULE A – LIST OF AUTHORITIES**

1. Bedford v Canada (Attorney General), 2009 ONCA 669;
2. Canada (Attorney General) v Power, 2024 SCC 26;
3. Heegsma v Hamilton (City), 2024 ONSC 7154;
4. Kingston (City) v Doe, 2023 ONSC 6662;
5. Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd (CA), 74 O.R. (2d) 164; and
6. Waterloo (Regional Municipality) v Persons Unknown, 2023 ONSC 670.

## **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.

### **Rules of Civil Procedure, R.R.O. 1990, Reg 194**

#### **Leave to Intervene as Friend of the Court**

- 13.01 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

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

Court File No. COA-25-0166

**COURT OF APPEAL FOR ONTARIO**

**AMENDED FACTUM OF THE  
PROPOSED INTERVENOR, CITY OF  
KINGSTON**

**THE CORPORATION OF THE  
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