

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,
JAHMAL PIERRE, and LINSLEY GREAVES**

Applicants (Appellants)

-and-

CITY OF HAMILTON

Respondent (Respondent)

**FACTUM IN SUPPORT OF THE CITY OF TORONTO'S MOTION
SEEKING LEAVE TO INTERVENE**
(Motion returnable December 12, 2025)

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Table of Contents

PART I – OVERVIEW	1
PART II – FACTS	2
A. Toronto Operates the Largest Shelter System in Canada.....	2
B. Encampments in Toronto	2
C. Toronto’s Interdivisional Protocol for Encampments	4
D. Toronto’s Interest in this Appeal.....	5
PART III – ISSUES	6
PART IV – LAW & ARGUMENT	6
A. Nature of the Case and Issues Involved.....	7
B. Toronto Has a Useful and Distinct Perspective	8
C. Toronto Has a Real Interest in this Appeal.....	9
D. No Undue Delay or Injustice Will Flow from Granting Toronto Leave to Intervene.....	9
PART V – ORDER SOUGHT	10
Schedule “A” – Authorities Cited	11
Schedule “B” – Statutes Cited	12
Schedule “C” – Draft Intervener Factum of the City of Toronto	13

PART I – OVERVIEW

1. The City of Toronto ("Toronto") seeks leave to intervene as a friend of the Court in this appeal, which addresses the scope of protections under the Charter afforded to individuals experiencing homelessness and sheltering in encampments on municipal property.
2. Toronto is the largest municipality in Canada and operates the largest shelter system in Canada, sheltering almost 9,000 people each night. It is uniquely placed to provide a perspective on the operational challenges faced by municipalities dealing with encampments and the fine balancing of the needs of individuals experiencing homelessness and the broader societal interest in access and use of municipal property.
3. Toronto would make submissions that address the appropriate analysis to determine whether s. 7 is engaged and to what extent, with respect to someone encamped on municipal property, and emphasize that greater s. 1 analysis is needed in these cases in order to ensure that the competing objectives of municipalities are adequately considered.
4. This is the first opportunity the Court of Appeal has had to consider whether and how section 7 is engaged in relation to homelessness encampments. The decision of this Court is likely to have an impact on strategic and frontline operations in most Ontario municipalities. Toronto, therefore, has an interest in the subject matter and outcome of this appeal, and will offer submissions that differ from those of the appellant, respondent and other interveners, which will assist the Court with this appeal.

PART II – FACTS

A. Toronto Operates the Largest Shelter System in Canada

5. Toronto has the largest population of people experiencing homelessness of any city in Canada.¹ Toronto's shelter system is also the largest in Canada, providing more beds per capita than any other Canadian city.² The system is a mix of emergency and transitional shelters, 24-hour respite sites and drop-in centres.³ These programs serve specific client populations such as adult men, adult women, mixed adult, youth, and families.⁴ Toronto also provides shelter to address the unique needs of those experiencing homelessness, including couples, 2SLGBTQ+ individuals, Indigenous people, seniors, youth, and refugees.⁵ Many shelters provide the option of accommodating a service animal or pet and are accessible for individuals with disabilities.⁶

6. Despite the diversity of offerings in its shelter system, Toronto continues to experience high demand and pressure for shelter services. As of November 7, 2025, Toronto was accommodating 8,919 people experiencing homelessness.⁷

B. Encampments in Toronto

7. In 2025, Toronto budgeted over \$34 million on services for those sleeping outdoors, including emergency and other forms of shelter, outreach services, and other

¹ Motion Record of the City of Toronto, Tab 2, Affidavit of Milton Barrera, affirmed November 13, 2025 at para. 3 [*Barrera Affidavit*].

² *Barrera Affidavit* at para. 3.

³ *Ibid.*

⁴ *Barrera Affidavit* at para. 5.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Barrera Affidavit* at para. 4.

social supports.⁸ As of November 7, 2025, there were 355 encampments across the City of Toronto.⁹ Of the 355 encampments, there were 255 encampments in parks at 92 locations; 5 parks have 10 or more encampments.¹⁰ The remaining 100 encampments were located at 83 right-of-way locations.¹¹ Toronto Fire Services has reported 112 uncontrolled encampment-related fires this year.¹²

8. Toronto created an Encampment Office (“EO”) in 2020, with the goal of coordinating Toronto’s response to encampments and providing access to shelter and available housing for individuals living in encampments.¹³ The EO currently has 27 full time staff.¹⁴ The EO’s role is to ensure various Toronto divisions are working effectively together to further Toronto’s objective of finding shelter and available housing for individuals who live in encampments.¹⁵ Many Toronto divisions are involved in managing encampments across the city, including Parks and Recreation, Transportation Services, Solid Waste Management Services, Toronto Paramedics Services, Toronto Fire Services, Municipal Licensing and Standards, and Corporate Security as part of the Corporate Real Estate Management Division.¹⁶

9. In addition, Toronto’s Streets to Homes program (“S2H”) provides 24/7 year-round outreach services to people experiencing homelessness outdoors, including in

⁸ *Barrera Affidavit* at para. 3.

⁹ *Barrera Affidavit* at para. 9.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Barrera Affidavit* at para. 10.

¹³ *Barrera Affidavit* at para. 16.

¹⁴ *Barrera Affidavit* at para. 17.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

encampments. S2H has over 200 staff.¹⁷ S2H staff work year-round, 24 hours a day, seven days a week.¹⁸ S2H provides street outreach and housing-related supports to assist people with accessing shelter and available housing, identification, income support, and health supports and other services.¹⁹ From January 1 to November 11, 2025, 690 people were referred by S2H from encampments into the shelter system and 116 people staying in encampments were assisted by outreach staff to secure permanent housing.²⁰ In 2025, outreach staff attended encampment locations 3,954 times.²¹

C. Toronto's Interdivisional Protocol for Encampments

10. In 2024, Toronto City Council adopted a revised version of Toronto's Interdivisional Protocol for Encampments ("IDP").²² Toronto previously had an Interdepartmental Protocol that was adopted by City Council in 2005.²³ It was revised in the wake of the Ombudsman Toronto's 2021 report on Toronto's Processes for Clearing Encampments, which recommended updating the IDP.²⁴ Toronto engaged extensively with various stakeholders in its revision of the IDP.²⁵

11. The purpose of the IDP is to outline a clear, transparent and coordinated process to guide City of Toronto staff in delivering Toronto's response to encampments on its

¹⁷ *Barrera Affidavit* at para. 15.

¹⁸ *Ibid.*

¹⁹ *Barrera Affidavit* at paras. 13-14.

²⁰ *Barrera Affidavit* at para. 15.

²¹ *Ibid.*

²² *Barrera Affidavit* at para. 11.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

property and enforcement of Toronto's bylaws and/or other applicable laws or policies.²⁶

The IDP aims to clarify the roles and responsibilities of key divisions that are involved in addressing encampments, outline how Toronto will support people living in encampments with the goal of moving to space in the shelter system or available housing, and outline the process for initiating and conducting enforcement.²⁷

D. Toronto's Interest in this Appeal

12. Toronto's work in addressing encampments is informed, in part, by the jurisprudence emanating from the courts in encampment-related cases.²⁸ The courts' decisions have a direct impact of the strategic and frontline work Toronto undertakes to address encampments.²⁹ Toronto is required to balance the needs of its vulnerable homeless populations living in encampments with the needs and interests of the immediate and broader public.³⁰

13. Particularly in Toronto, a dense urban city with a large population living in a small geographic area, fair and safe access to and use of public space is a significant issue. As Canada's largest municipality with the largest shelter system and largest population of persons experiencing homelessness, Toronto has a unique perspective and understanding of the issues raised by encampments, as well as the needs and interests of municipalities that are involved in responding to them.³¹

²⁶ *Barrera Affidavit* at para. 12.

²⁷ *Ibid.*

²⁸ *Barrera Affidavit* at para. 18.

²⁹ *Ibid.*

³⁰ *Barrera Affidavit* at para. 19.

³¹ *Barrera Affidavit* at para. 20.

PART III – ISSUES

14. The sole issue is whether Toronto should be granted leave to intervene as a friend of the court in this appeal pursuant to Rule 13.02. Toronto submits that it meets the test and should be granted leave to intervene.

PART IV – LAW & ARGUMENT

15. The purpose of intervention as a friend of the court is to “render assistance to the court by way of argument.”³²

16. This Court has established that when deciding whether to grant leave to intervene, the following considerations are relevant:

- a. The nature of the case;
- b. The issues involved;
- c. The likelihood that the proposed intervener will make a useful contribution not otherwise offered by the parties; and
- d. Whether the intervention will cause injustice to the parties or undue delay.³³

17. When considering whether the proposed intervener will make a useful contribution, the court focuses on the proposed intervener and its expertise or interest in the issues at stake and the specific contribution the intervener proposes to make.³⁴

³² [*Rules of Civil Procedure*](#), R.R.O. 1990, Reg. 194, [r. 13.02](#).

³³ [*Peel \(Regional Municipality\) v. Greater Atlantic & Pacific Co. of Canada Ltd. \(C.A.\)*](#), 1990 CanLII 6886 (ONCA) at pp. 340.

³⁴ [*Elementary Teachers' Federation et al v. Her Majesty*](#), 2018 ONSC 6318 [*Elementary Teachers*] at [para. 11](#).

18. In a *Charter* case, the threshold to be met by a proposed intervener is lower because of the public interest in the litigation.³⁵ The proposed intervener usually must establish at least one of three criteria:

- a. it has a real, substantial and identifiable interest in the subject matter of the proceedings;
- b. it has an important perspective distinct from the immediate parties; or,
- c. it is a well-recognized group with a special expertise and a broadly identifiable membership base.³⁶

19. As will be set out in more detail below, Toronto meets the test to be granted leave to intervene as a friend of the court in this appeal.

A. Nature of the Case and Issues Involved

20. This appeal is brought by 14 unhoused individuals in Hamilton.³⁷ They had been living in encampments on municipal property for many months. The appeal concerns Hamilton's enforcement of its bylaws and related policies and procedures at those encampments between 2021 and 2023, and whether such enforcement is in breach of ss. 7 and 15 of the *Charter*.

21. This appeal is the first time this Court is considering the issue of homeless encampments on municipal property in Ontario. The Court's decision will likely impact all municipalities in Ontario, providing direction to municipalities on the protections, if any, afforded by the *Charter* to those living or sheltering on public property.

³⁵ *Elementary Teachers* at [para. 9](#).

³⁶ *P.S. v. Ontario*, 2014 ONCA 160 at [para. 6](#); *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 at [para. 2](#).

³⁷ Notice of Appeal, COA-25-CV-0166, filed March 10, 2025.

B. Toronto Has a Useful and Distinct Perspective

22. Toronto also has the largest population of people experiencing homelessness in Canada and has hundreds of encampments located on its property.³⁸ As such, Toronto has a unique understanding of the challenges in balancing the needs and interests of people in encampments with the immediate and broader community's need and interest in accessible and safe public spaces.³⁹

23. The Supreme Court has stated that "an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue."⁴⁰ If granted leave to intervene, Toronto will advance submissions that are different from those advanced by the City of Kingston and the other potential interveners.

24. Toronto will provide a useful and distinct perspective on the appeal. Toronto intends to make submissions on the following points:

- a. Courts Should Exercise Caution in Using the Availability of Municipal Shelter Beds as a Metric in the Section 7 Analysis;
- b. Section 7 does not Impose a "Truly Accessible" Standard on Municipal Shelters;
- c. The Law must Allow for the Consideration and Balancing of Societal Interests in These Circumstances

³⁸ *Barrera Affidavit* at paras. 3, 9.

³⁹ *Barrera Affidavit* at para. 20

⁴⁰ [Reference re Workers' Compensation Act, 1983 \(Nfld.\) \(Application to intervene\)](#), 1989 CanLII 23 (SCC).

25. Toronto's proposed submissions are further set out in its draft Intervener Factum, attached as Schedule "C".

C. Toronto Has a Real Interest in this Appeal

26. The issues raised by this appeal are of real interest to Toronto. This appeal concerns the application of the *Charter* to people sheltering on municipal property, the health and safety of municipal residents, raises potential occupiers' liability issues for municipalities, and important questions regarding the right to access, use and enjoy public property, among other significant issues.

27. As it currently stands, the protections, if any, afforded by section 7 of the *Charter* to those living in parks or on other municipal property are unclear. The impact of section 7 of the *Charter* on a municipality's capacity to address encampments (especially entrenched encampments) in parks and other municipal property requires clarity.

28. With the largest population of people experiencing homelessness in Canada and hundreds of encampments, including entrenched encampments, Toronto has a real interest in the issues raised on appeal and a valuable perspective gained both from its experience with encampments and its position as the nation's largest municipality. Toronto believes its perspective and submissions will be helpful to the Court.

D. No Undue Delay or Injustice Will Flow from Granting Toronto Leave to Intervene

29. In her Endorsement, dated August 7, 2025, Justice Favreau set out a timetable for intervention motions in this appeal.⁴¹ Toronto will comply with the timetable. Toronto

⁴¹ [*Heegsma v Hamilton \(City\)*, 2025 ONCA 588.](#)

does not intend to introduce any fresh evidence in this appeal and is seeking only to intervene as a friend of the court. No undue delay or injustice will flow from granting Toronto leave to intervene in this appeal.

PART V – ORDER SOUGHT

30. Toronto does not seek its costs of its proposed intervention, and asks that, should leave be granted, no costs be awarded against it.

31. Toronto requests an order granting it leave to intervene in the appeal, including the right to file a factum not to exceed twenty pages and the right to make oral argument at the hearing not exceeding fifteen minutes.

32. A copy of Toronto's draft Order is at Tab 3 of Toronto's Motion Record.⁴²

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



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⁴² Motion Record of the City of Toronto, Tab 3, Draft Order.

Schedule “A” – Authorities Cited

	Jurisprudence
1.	<i>Peel (Regional Municipality) v. Greater Atlantic & Pacific Co. of Canada Ltd. (C.A.)</i>, 1990 CanLII 6886 (ONCA)
2.	<i>Elementary Teachers’ Federation et al v. Her Majesty</i>, 2018 ONSC 6318
3.	<i>P.S. v. Ontario</i>, 2014 ONCA 160
4.	<i>Bedford v. Canada (Attorney General)</i>, 2009 ONCA 669
5.	<i>Reference re Workers’ Compensation Act, 1983 (Nfld.) (Application to intervene)</i>, 1989 CanLII 23 (SCC).
6.	<i>Heegsma v Hamilton (City)</i>, 2025 ONCA 588.

Schedule “B” – Statutes Cited

	Statutes	Sections
1.	<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194.	13.02

Schedule "C" - Draft Factum

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Table of Contents

PART I – OVERVIEW	1
PART II – ISSUES	1
PART III – LAW & ARGUMENT	3
A. Courts Should Exercise Caution in Using the Availability of Municipal Shelter Beds as a Metric in the Section 7 Analysis.....	3
i. Courts should avoid focusing solely on the number of shelter beds in a municipality’s shelter system.....	4
ii. Courts should be cautious of conducting point-in-time audits of a shelter system.....	5
iii. Courts should carefully evaluate an individual’s personal circumstances	6
B. S. 7 does not impose a “truly accessible” standard on municipal shelters	7
i. Indoor shelter need only provide equal protection against living rough.....	7
ii. The “truly accessible” requirement creates a positive right	9
C. Considering and Balancing Societal Interests	10
i. S. 1 Analyses in Existing Encampment Jurisprudence	11
ii. The Broader Societal Interests and Impacts in Encampment Cases	13
PART IV – ORDER SOUGHT	16

PART I – OVERVIEW

1. Like other municipalities across Canada, public municipal spaces in Toronto have increasingly become sites of private occupation by those experiencing homelessness.
2. With the growth in encampments, municipalities' management of encampments have come before the courts in form of *Charter* challenges from those who have been told they cannot camp in public parks or rights of way. In adjudicating the question, the courts have followed the decision of *Adams v. Victoria* by the British Columbia Court of Appeal. That Court determined that municipalities cannot prevent a person from providing themselves with basic shelter in municipal parks when there are insufficient municipal shelter spaces to accommodate the municipality's homeless population.
3. While this negative right was narrowly circumscribed when it was first recognized by the British Columbia Court of Appeal, its ambit and impact has gradually expanded. Over time, the court's scrutiny of shelter capacity has expanded to include scrutiny of shelter adequacy. The court's scrutiny of temporary overnight shelter has expanded to include scrutiny of daytime shelter. The ever-increasing scope of this negative right has created serious challenges for municipalities, whose premises have increasingly become the sites of entrenched private occupation.
4. As courts have treated these issues in different ways, it has created uncertainty for municipalities. Municipalities have responded by increasing shelter space, rolling out housing initiatives and expanding frontline outreach programs to address homelessness. With their enforcement options limited, municipalities have taken

positive steps to secure the health and safety of both those living in encampments on municipal premises and of the public impacted by them. Among other things, municipalities provided portable washrooms, needle patrols, fire safety education, fire suppression and waste collection to individuals sheltering in municipal public spaces.

5. Beyond the burdens placed on municipalities, the rise of private occupation of public municipal spaces has hindered the public benefit of these municipal spaces. Municipalities have had to manage the real community tensions and public impacts, including health and safety risks, that are created when public spaces cease to be accessible to all.

6. Clarity is needed in the law so that all municipalities can understand the ambit of the section 7 protection for those sheltering outdoors and so that they can better manage its impact. To assist the court in that task Toronto has identified three issues for the Court's consideration. First, Toronto submits that courts should be very cautious in using shelter bed availability as the sole metric for determining whether section 7 is engaged. Second, Toronto submits that section 7 does not impose a "truly accessible" standard on municipal emergency shelter space. Third, Toronto submits that there must be space in these circumstances for courts to consider the rights, needs, and interests of the public under section 1 and to balance those against the protected individual right.

PART II – ISSUES

7. The City of Toronto intervenes to raise the following issues:

- A. Courts Should Exercise Caution in Using the Availability of Municipal Shelter Beds as a Metric in the Section 7 Analysis;
- B. Section 7 does not Impose a “Truly Accessible” Standard on Municipal Shelters; and,
- C. The Law must Allow for the Consideration and Balancing of Societal Interests in These Circumstances.

PART III – LAW & ARGUMENT

A. Courts Should Exercise Caution in Using the Availability of Municipal Shelter Beds as a Metric in the Section 7 Analysis

8. In deciding encampment cases, the courts have focused on the simple metric of available municipal shelter space to determine whether section 7 is engaged. It is a metric that should be relied on with caution.

9. In *Adams*, the B.C. Court of Appeal found that the City of Victoria could not prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds.¹ Since then, the availability of shelter space in a given municipality has become the default metric on which courts rely to determine whether an individual's s. 7 rights have been breached.

10. It is trite to say that homelessness is a complicated social issue that can be difficult to quantifiably measure. Before determining whether section 7 rights are even engaged, courts should:

¹ *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII), [para. 166](#)

- carefully consider the breadth of a municipality's outreach and other support programs in addition to its traditional shelter offerings;
- avoid disproportionate judicial scrutiny of existing programs to address homelessness; and
- focus on the particular circumstances of an individual seeking protection under section 7.

i. Courts should avoid focusing solely on the number of shelter beds in a municipality's shelter system

11. A municipal shelter system's capacity to accommodate individuals experiencing homelessness is a factor when evaluating and resolving s. 7 claims. But as the Court noted in *Kingston*, a municipality should be entitled to choose amongst various options when crafting responding to encampments.² Those options could include other programs to address homelessness that fall outside of the traditional shelter system, such as accessible long-term care beds, withdrawal management (detox) beds in a hospital setting, supportive housing units, housing planning, respite and drop in centers, outreach services and programs that serve those living rough, among others.

12. This is especially important when the court is assessing the risk of unnamed and unidentified members of a municipalities homeless population having to sleep rough – whose personal circumstances are unknown and unknowable to the court.

13. Moreover, by focusing on available shelter beds, courts place an emphasis on the creation of more shelter beds, when the nature of homelessness requires more

² *The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662 (CanLII), [para. 132](#)

nuanced and comprehensive solutions. Focusing on shelter beds alone reinforces the idea that expanding shelter capacity solves homelessness.³

ii. Courts should be cautious of conducting point-in-time audits of a shelter system

14. Courts should also be wary of engaging in the judicial monitoring a municipality's response to homelessness. In cases where demand for shelter space vastly outstrips availability, a comparison of the available shelter beds to demand may make sense, but it is less clear when a municipality is largely addressing the needs of its homeless population.

15. The number of individuals experiencing homelessness can vary significantly on a daily-to-day basis, as do the number of available shelter spaces. The number of available shelter beds can increase or decrease depending on the season, changes to shelter programming by the municipality or a third-party provider, or fluctuations in the number of people coming to the municipality from elsewhere. The availability of municipal shelter spaces can also change from moment to moment. Where a person may not obtain emergency shelter space in the morning it may be available in the afternoon or the next day. Given the fluctuating nature of shelter availability, a court's attempt to assess constitutionality by counting each bed on a given day amounts to a moving target.

16. Courts' attempts to definitively count the homeless population can also be fraught. In the *Waterloo* case, for example, the court relied on a bi-annual "point-in-time"

³ *Ibid.*

count to find that 1085 people were experiencing homelessness in the Region of Waterloo. Of the 1085 people, 412 were living on the street, sleeping in parks or squatting in temporary shelter and 191 were accessing emergency shelters. However, another 385 individuals were experiencing hidden homelessness (meaning provisionally accommodated or couch surfing), and another 63 individuals were institutionalized.⁴ While such point in time assessments of homelessness are effective tools for a municipality in creating policy, caution should be used when relying on the same data to conclusively assess the number of people who may have to sleep rough on any given day or over any given period.

17. When a municipality is able to reasonably and safely accommodate its homeless population courts should avoid the “micromanagement” of a municipality’s operation of the shelter system, understanding that its responses to homelessness are varied and fluctuating.⁵

iii. Courts should carefully evaluate an individual’s personal circumstances

18. Courts should require that individuals living in encampments and making claims under s. 7 lead evidence of their continued efforts to seek shelter in the shelter system and elsewhere, *even when* demand for shelter space exceeds supply. This is especially important when one considers that certain individuals may never choose to go into shelter, and/or may spend extended periods of time in an encampment. A finding of

⁴ *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670, [paras. 17-18](#).

⁵ *Poff v. City of Hamilton*, 2021 ONSC 7224, [para. 28](#); *Heegsma v. Hamilton (City)*, 2024 ONSC 7154, [para. 85](#).

unconstitutionality cannot depend solely on the number of shelter beds, if individuals requiring shelter are not pursuing efforts to find shelter themselves.

19. The court should specifically consider whether a named claimant is seeking and/or rejected indoor shelter (including private sources of shelter) that is equal or better at reducing the risks of living rough than living outdoors with only basic shelter. The court must determine whether a named claimant is exercising a preference to live in an encampment or whether there is truly no other alternative that offers equal or better protection of their life, liberty and security of the person.

B. S. 7 does not impose a “truly accessible” standard on municipal shelters

i. Indoor shelter need only provide equal protection against living rough

20. S. 7 of the Charter narrowly addresses the state’s conduct in the course of enforcing and securing compliance with the law, when it deprives an individual or their right to life, liberty, and security of the person.⁶ In *Adams*, the B.C. Court of Appeal found that the Victoria’s by-law was of no force and effect insofar as it applied to prevent homeless people from erecting temporary overnight shelter in parks when – and only when - the number of homeless people exceeds the number of available shelter beds.⁷

21. The Court in *Waterloo* has gone much further than *Adams*. It found that that section 7 is engaged not only where there are insufficient municipal shelter spaces to meet the demands of a municipality’s homeless population, but also where a

⁶ *New Brunswick (Minister of Health and Community Services) v. G (J)* 1999 CanLII 653 (SCC), at [para. 65](#).

⁷ *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII), [para. 166](#).

municipality's shelter spaces are not "truly accessible" to the individuals seeking shelter.⁸

22. The *Waterloo* case does not define "truly accessible" shelter but refers to available space that is *impractical* for individuals experiencing homelessness. According to the Court, this could mean space that does not accommodate couples, or that imposes rules that cannot be followed due to addictions.⁹

23. The "truly accessible" requirement set out in the *Waterloo* case plainly exceeds the bounds established by the s. 7 jurisprudence, by requiring municipalities to provide "truly accessible" shelter, even though this does not engage the right to life, liberty and security of the person.

24. None of these rights are engaged where a person is sheltering outdoors and is offered an indoor space that may not match their specific individual needs or preferences, but that provides equivalent or better protection for their life and security of the person than the alternative of sleeping outdoors with only basic shelter. If a municipality complies with the *Charter* by allowing an individual to erect basic shelter in the form of a tent or a tarp, why then would providing an equivalently adequate space in a shelter not satisfy the *Charter*?

25. Furthermore, the "truly accessible" standard is defined entirely by the subjective needs of an individual, whereas the effects of the state interference must be assessed

⁸ *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670, [para. 93](#).

⁹ *Ibid.*

objectively, judging their impact on a person of reasonable sensibility.¹⁰ If the right were interpreted with the “broad sweep” provided for in *Waterloo*, any number of accessibility criteria could be challenged, considerably expanding the scope of judicial review, and, in the process, “trivializing what it means for a right to be constitutionally protected”.¹¹

26. Thus, while providing “truly accessible” shelter space to an individual is undoubtedly desirable, failure to provide it does not breach the Charter.

ii. The “truly accessible” requirement creates a positive right

27. The “truly accessible” standard would essentially expand what the courts have recognized as a negative right (i.e. the right to be free of state interference with the ability to provide oneself with basic shelter outdoors) to include a positive obligation by the state to provide indoor shelter that accommodates personal needs and/or preferences.

28. As the B.C. Court of Appeal confirmed in *Adams*, while a municipality may have to take some action in response to or to comply with the *Charter*, s. 7 does not compel a municipality to provide the homeless population with adequate shelter.¹²

29. The “truly accessible” standard would impose on a municipality a positive duty to provide shelter space that meets the specific needs of an individual, even when the s. 7 rights of an individual are otherwise satisfied through the provision of equivalent or

¹⁰ *New Brunswick (Minister of Health and Community Services) v. G (J)* 1999 CanLII 653 (SCC), paras. [59-60](#)

¹¹ *Ibid.*

¹² *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII), [paras. 94-96](#); *New Brunswick (Minister of Health and Community Services) v. G (J)* 1999 CanLII 653 (SCC) at [para. 100](#); *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 (CanLII) at [para. 104](#).

better protection for their life and security of the person than the alternative of sleeping outdoors with only basic shelter.

30. Imposing a “truly accessible” standard would be prohibitively onerous for a municipality. Every city and town would need to know the specific combination of needs of every individual experiencing homelessness, which may change over time. Every city and town would need to have that kind of space available at the exact time where those needs and/or individuals present themselves. This is an impossible standard for municipalities to meet.¹³

31. A failure to act as the gatekeeper against such positive rights claims in section 7 cases risks imposing a positive obligation on government (and the resulting resource allocation) where current constitutional law does not require it.¹⁴

C. Considering and Balancing Societal Interests

32. The jurisprudence demonstrates that a s.7 breach has only been justified in very rare circumstances. However, in *Charkaoui*, former Chief Justice McLachlin stated that “the task [of justifying a breach under section 1] may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenges complex”.¹⁵

33. In *R v. Michaud*, this Court noted:

[I]n some situations the state may be able to show that the public good—a matter not considered under s. 7, which looks only at the impact on the rights claimants—justifies depriving an individual of life, liberty or security

¹³ *The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662 (CanLII) [para. 129](#); *Heegsma v. Hamilton (City)*, 2024 ONSC 7154 (CanLII) [paras. 70-72](#).

¹⁴ *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 (CanLII), at [para. 82](#); *La Rose v. Canada*, 2023 FCA 241 (CanLII) at [para. 92](#).

¹⁵ *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at [para. 66](#).

of the person under s. 1 of the *Charter*". This, in my view, is one such situation. More are predictable in light of *Bedford*'s instruction that the public good sought to be achieved by the challenged law can be considered only in the s. 1 analysis.¹⁶

34. The relentless focus on the individual claimant in the s. 7 analysis leaves no room to consider and balance any countervailing societal interests, benefits and risks, except at the s. 1 stage.¹⁷ Section 1 is meant to allow the government to justify the impact of a law or state action with a consideration of broader societal interests, but the courts have often been reluctant to find such a justification in s. 7 cases because of the nature of the right protected under that section.¹⁸ This can result in a lack of meaningful consideration of legitimate justifications for the impugned *Charter* breach, and no meaningful consideration of the broader societal interests and impacts involved, including the public benefits of the impugned law and any countervailing risks created in striking it down.

i. S. 1 Analyses in Existing Encampment Jurisprudence

35. The issue of homelessness is a complex social and public policy issue. It is the result of a variety of factors and has no single solution. Similarly, the related issue and impacts of encampments on public property is complex and multifaceted.

36. Yet, the current encampment jurisprudence in Ontario have not fully considered balancing the individual s. 7 right of people experiencing homelessness with the rights, needs and interests of the broader public, particularly the risks and impacts of

¹⁶ *R. v. Michaud*, 2015 ONCA 585 [*Michaud*] at [para. 83](#), quoting the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, 2015 SCC 5 at [paras. 82, 94-95](#).

¹⁷ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at [paras. 126-128](#), *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74 at [paras. 96-97](#), and *Michaud* at [para. 79](#).

¹⁸ *Michaud* is one of the few examples of a justification under s. 1 made out after a finding of a breach of s. 7.

encampments – especially entrenched encampments – on the immediately surrounding communities and individuals who are affected by them.

37. In the present appeal, Justice Ramsay found there was no breach of s. 7 and so did not conduct any s. 1 analysis. In *Waterloo* and *Kingston*, both decided in 2023, the court applied limited s. 1 analyses.

38. In *Waterloo*, the court noted the difficulty with justifying a s. 7 breach without “exceptional conditions, such as disasters, the outbreak of war, epidemics and the like.”¹⁹ The court then found that none of those conditions applied in that case and thus concluded that there was no justification for the breaches.²⁰ The entire section 1 analysis was addressed in three paragraphs and took no notice of the impacts of the entrenched encampment on health and safety or the broader societal interests that were impacted.

39. In that case, the encampments were located on a gravel parking lot in Kitchener and it was estimated that over 50 people were living in the encampment at the time of the hearing.²¹ The court summarized the evidence of the risks of the encampments at issue in that case²² including rat droppings and rodent burrows, human feces and urine on the property, alcohol and drug consumption, presence of barbecues and propane tanks in and around tents, physical altercations, and trespasses onto neighbouring

¹⁹ *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670 [Waterloo] at [para. 129](#), quoting the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999 CanLII 653 \(SCC\)](#) at para. 99, citing *Reference re Motor Vehicle Act (British Columbia)*, [1985 CanLII 81 \(SCC\)](#), [1985] 2 S.C.R. 486 at p. 518.

²⁰ *Waterloo* at [paras. 128-130](#).

²¹ *Waterloo* at [paras. 14, 19](#).

²² *Waterloo* at [paras. 47-50](#).

properties.²³ None of those risks or other broader societal interests were considered in the s. 1 analysis.

40. In *Kingston*, the court noted that justification under s. 1 would “rarely be made out” where a s. 7 breach was found.²⁴ In that case, because the respondent City of Kingston had not advanced s. 1 arguments with respect to the bylaw at issue’s prohibition on camping, the court found that it was not justified.²⁵ The s. 1 analysis in that case comprised four paragraphs.

ii. The Broader Societal Interests and Impacts in Encampment Cases

41. Encampments, particularly entrenched encampments, often have a significant negative impact on communities and individuals who live near or use the premises being occupied. Encampments tend to emerge in municipal parks, which are more conducive as makeshift campsites than rights-of-way, roadways or other municipal properties, though encampments under overpasses or bridges or on other municipal properties can also have significant negative impacts. Entrenched encampments by their nature tend to become areas with significant accumulations of waste and debris, which creates inherent fire risks, especially when those living in encampments light fires and use propane, among other sources of fuel, to keep warm and to cook food. Encampments can become sites of drug use and criminal activity including trafficking and violence.

²³ *Waterloo* at [para. 47](#).

²⁴ *The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662 [*Kingston*] at [para. 116](#).

²⁵ *Kingston* at [para. 116](#).

42. Even setting aside the safety risks that are frequently present in encampments, encampments by their very nature have the effect of privatizing public space for individual use. An area of a public park that contains an encampment cannot be used by others. As such, encampments restrict the intended purpose of public parks. In *Batty*, the court accepted that the objective of Toronto's parks bylaw was "sensible", noting that [the bylaw]:

[i]s an attempt to balance, in a fair way, the different uses we wish to make of our public parks so, at the end of the day, we all get to enjoy them. The [Toronto parks by-law] certainly contains restrictions, but ones with the evident purposes of enabling all to share a common resource...".²⁶

43. Similarly, the court in *Black* noted that "Toronto is indeed a densely populate city and has limited parkland...The City cannot have its hands tied and be prevented from managing its parks so that they are safe and accessible to everyone."²⁷

44. These comments are applicable to all municipalities, where public parks are an important resource for all residents, particularly residents who do not have backyards or private outdoor spaces of their own, for their physical and mental wellbeing.

45. Evidence regarding the challenges that municipalities face regarding encampments, and a government's justification for a bylaw which prohibits camping or dwelling on municipal property or the removal of an encampment for these reasons, must be meaningfully considered in the *Charter* analysis. Without such consideration, the courts effectively grant a freestanding right to occupy public property indefinitely.

²⁶ *Batty v. City of Toronto*, 2011 ONSC 6862 at [para. 95](#).

²⁷ *Black et al. v. City of Toronto*, 2020 ONSC 6398 at [para. 143](#).

46. As property owners and occupiers, municipalities must ensure the reasonable safety of people entering on their properties.²⁸ This responsibility for safety as an owner/occupier extends to everybody, whether it be people in encampments; other residents, including children, who use municipal parks recreationally; and people using other kinds of properties such as rights-of-way and roadways. Municipalities are responsible for ensuring safe and equitable access to their properties and the integrity of their infrastructure.

47. Entrenched encampments significantly interfere with these obligations. In regulating against or acting to prevent an entrenched encampment, municipalities are often acting further to their duties and powers as owners, occupiers and regulators to ensure the safe and continued enjoyment of that property by the public and to prevent dangerous use and occupation of public space.

48. Where a government acts to balance the rights, needs and safety of the public, it engages in a balancing that is best left to the legislature. Judicial deference is particularly appropriate. This Court has noted that judicial deference to legislative choice is particularly appropriate where the legislation is concerned with public welfare or safety.²⁹ Similarly, the Supreme Court of Canada has emphasized that “[i]n carrying out their duties, courts are not to second-guess legislatures and the executives; they are

²⁸ See [Occupiers' Liability Act, R.S.O. 1990, c. O.2](#).

²⁹ *Michaud* at [para. 106](#); see also *R. v. Timminco Ltd.* (2001), [2001 CanLII 3494 \(ONCA\)](#) and *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), [2002 CanLII 16893 \(ONCA\)](#).

not to make value judgments on what they regard as the proper policy choice; this is for the other branches.”³⁰

49. Toronto submits that this Court should re-affirm these principles particularly in the context of encampment cases and ensure that the s. 1 analysis in such cases is done meaningfully and with recognition of the significant adverse impacts that encampments, particularly entrenched encampments, may be having on a community.

PART IV – ORDER SOUGHT

50. Toronto seeks no order and takes no position on the particulars of the present appeal. It seeks only to make submissions to share its unique position with the Court and to assist the Court with the issues raised on appeal.

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

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³⁰ *Vriend v. Alberta*, [1998 CanLII 816 \(SCC\)](#) at para. [136](#).

B E T W E E N :

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Applicants (Appellants)

and

CITY OF HAMILTON
Respondent (Respondent)

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

**FACTUM IN SUPPORT OF THE CITY OF
TORONTO'S MOTION SEEKING LEAVE
TO INTERVENE**

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