

Court file number: CV-22-00000717-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**THE REGIONAL MUNICIPALITY OF WATERLOO**

Applicant

and

**PERSONS UNKNOWN AND TO BE ASCERTAINED**

Respondents

APPLICATION UNDER section 440 of the *Municipal Act, 2001*, S.O. 2001, c. 25 as amended

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**FACTUM OF *AMICUS CURIAE***

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October 31, 2022

PEREZ BRYAN PROCOPE LLP  
67 Yonge Street, 2<sup>nd</sup> Floor  
Toronto, Ontario  
M5E 1J8

Mercedes Perez  
LSUC no.: 48381L  
Tel: (416) 320-1914 ext. 101  
Fax: (416) 320-1914  
Email: [mperez@pbplawyers.com](mailto:mperez@pbplawyers.com)

*Amicus Curiae*

TO: MADORIN, SNYDER LLP  
Barristers & Solicitors  
55 King Street West, 6<sup>th</sup> Floor  
P.O. Box 1234  
Kitchener, Ontario N2G 4G9

James H. Bennett  
Tel: (519) 744-4491 ext. 222  
Fax: (519) 741-8060  
[jbennett@kw-law.com](mailto:jbennett@kw-law.com)

Lawyers for the applicant (respondent in the constitutional application), The  
Regional Municipality of Waterloo

AND TO: WATERLOO REGION COMMUNITY LEGAL SERVICES  
450 Frederick Street, Unit 101  
Kitchener, Ontario N2H 2P5

Shannon K. Down  
Tel: (519) 743-0254 ext. 20  
Fax: (519) 743-1588  
[shannon.down@wrcls.clcj.ca](mailto:shannon.down@wrcls.clcj.ca)

Ashley Schuitema  
Tel: (519) 743-0254 ext. 15  
Fax: (519) 743-1588  
[ashley.schuitema@wrcls.clcj.ca](mailto:ashley.schuitema@wrcls.clcj.ca)

Lawyers for the respondents (applicants in the constitutional application),  
Jennifer Draper, Sandra Hayward, Caleb Watson, Drew Zekai, Michael  
Wosik, Albert Tugwood, Mark Duke, John Slade, Andrew Entwistle and  
Sean King

AND TO: WATERLOO REGION POLICE SERVICE AND THE CHIEF OF POLICE  
200 Maple Grove Road  
P.O. Box 3070  
Cambridge, Ontario N3H 5M1

Gary Melanson  
Tel: (519) 650-8532  
Fax: (519) 650-8551  
[gary.melanson@wrps.on.ca](mailto:gary.melanson@wrps.on.ca)

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**PART I – THE PARTIES, THE NATURE OF THE APPLICATIONS AND THE ROLE OF *AMICUS CURIAE***

1. The applicant, the Regional Municipality of Waterloo (“the Region”), seeks a declaration that the respondents, homeless persons residing at an encampment located on unused, vacant and municipally owned property<sup>1</sup> (“the encampment”), are in breach of By-law Number 13-050, *A By-law Respecting the Conduct of Persons Entering Upon Buildings, Grounds and Public Transportation Vehicles Owned or Occupied by the Region* (“Code of Use By-law”).<sup>2</sup> The Region also seeks interim and final orders restraining homeless persons from remaining and/ or re-entering the encampment after the posted June 30, 2022 vacancy date.<sup>3</sup> Further, the Region

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<sup>1</sup> The property is located at 100 Victoria Street North in the City of Kitchener

<sup>2</sup> Notice of Application (July 5, 2022), **Application Record, pp. 3 and 4**

<sup>3</sup> Notice of Application (July 5, 2022), **Application Record, pp. 3 and 4**

seeks orders authorizing police to arrest and remove homeless persons, their shelters and belongings from the encampment and to lay charges as necessary.<sup>4</sup>

2. Waterloo Region Community Legal Services (“WRCLS”) represents some homeless residents of the encampment who will be personally impacted by the orders sought by the Region. These respondents delivered a notice of constitutional question on September 15, 2022 seeking sections 24(1) and 52(1) remedies pursuant to the *Charter of Rights and Freedoms*<sup>5</sup> (“*Charter*”). These respondents allege that the Code of Use By-law and related trespass notice breach their sections 7 and 15(1) *Charter* rights in ways that are not demonstrably justified in a free and democratic society.<sup>6</sup>

3. On October 17, 2022, this court ordered the appointment of *amicus curiae* “for the purpose of advocating on behalf of individuals living at the encampment ... whose capacity to engage or instruct counsel is in question, who have not retained counsel, and who have no other identified way to participate in these proceedings”.<sup>7</sup>

## **PART II - OVERVIEW**

4. The Code of Use By-law and related trespass notice violate the encampment residents’ section 7 and 15(1) *Charter* rights in ways that are not justifiable pursuant to section 1 of the *Charter*. There are multiple complex and intersecting challenges facing the encampment residents and at the core of these challenges is the unavailability of alternative housing options.

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<sup>4</sup> Notice of Application (July 5, 2022), **Application Record, pp. 3 and 4**

<sup>5</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [“*Charter*”]

<sup>6</sup> Notice of Constitutional Question (Sept. 15, 2022)

<sup>7</sup> Order Appointing *Amicus Curiae* (Oct. 17, 2022)

One possible constitutional remedy is a declaration that the Code of Use By-law is inoperable with respect to this encampment.

### **PART III - THE FACTS**

5. *Amicus curiae* adopts the statement of facts outlined in the factum of WRCLS.
6. With respect to the encampment residents on whose behalf *amicus curiae* has been asked to advocate, they face multiple intersecting systemic and personal barriers that impede their ability to retain and instruct counsel, including lack of or fluctuating mental capacity, active substance abuse, lack of reliable access to basic modes of communication, and distrust of the legal system.<sup>8</sup> Due to mental health related disabilities, these residents do not appear to understand or remember that there are legal proceedings underway that could result in their eviction from the encampment.<sup>9</sup> Overall, many of the encampment residents struggle with serious mental health or drug addiction issues.<sup>10</sup>
7. Additional relevant facts are highlighted in the sections below.

### **PART IV – ISSUES AND ARGUMENT**

8. *Amicus curiae* will address the following issues:
  - a. General *Charter* Principles
  - b. Does the *Charter* apply?
  - c. International human rights law and the principle of conformity
  - d. Section 7 of the *Charter*
  - e. Section 15(1) of the *Charter*

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<sup>8</sup> Supplemental Affidavit of Nancy Singer (Sept. 14, 2022), **Supplemental Responding Record, p. 216, para 6**

<sup>9</sup> Supplemental Affidavit of Nancy Singer (Sept. 14, 2022), **Supplemental Responding Record, p. 216, para 7**

<sup>10</sup> Cross-Examination of Dr. Laura Pin (Oct. 5, 2022), **Transcript, p. 40**

- f. Intersection of sections 7 and 15(1) of the *Charter*
- g. Should the orders sought by the Region be granted?

**A. General Charter Principles**

9. Applicants seeking *Charter* remedies must prove a *Charter* violation on a balance of probabilities.<sup>11</sup> Once a violation is proved, the onus shifts to government to demonstrate, on a balance of probabilities, that the limit on fundamental rights is reasonable and demonstrably justified in a free and democratic society.<sup>12</sup>

10. The goal of *Charter* interpretation is to secure for all people “the full benefit of the *Charter*’s protection”. The *Charter* is remedial in purpose and *Charter* rights must be interpreted purposively, generously, contextually and in a large and liberal manner.<sup>13</sup>

**B. Does the Charter apply?**

11. Section 32(1) of the *Charter* reads as follows:

32. (1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

12. The *Charter* applies to “government”, “governmental entities” and “government action” including the actions of municipalities and municipal by-laws.<sup>14</sup>

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<sup>11</sup> [R. v. Collins, 1987 CanLII 84 \(SCC\)](#), para. 21 (*per* Lamer J.)

<sup>12</sup> [R. v. Oakes, 1986 CanLII 46 \(SCC\)](#), paras. 63 to 67 (*per* Dickson C.J.)

<sup>13</sup> [Quebec \(Attorney General\) v. 9147-0732 Quebec Inc.](#), 2020 SCC 32 (CanLII), para. 7 (*per* Brown and Rowe JJ.)

<sup>14</sup> [Godbout v. Longueuil \(City\)](#), 1997 CanLII 335 (SCC), paras. 50 to 51, (LaForest J.); *Charter*,

### **C. International human rights law and the principle of conformity**

13. Even where provisions of international law have not been expressly incorporated into Canadian law, the presumption of conformity remains an established interpretive principle in *Charter* litigation. This principle affirms that the *Charter* provides protection at least as great as that afforded by similar provisions in international human rights instruments ratified by Canada.<sup>15</sup> The text of binding international instruments reflect Canada’s international human rights obligations and are an “important indicia” of the meaning of “the full benefit of the *Charter*’s protection”.<sup>16</sup> The presumption of conformity operates as an interpretive tool to assist courts in delineating the “breadth and scope of *Charter* rights” as well as defining the principles of fundamental justice in section 7.<sup>17</sup> Non-binding sources of international law are given lesser weight but nonetheless have persuasive value in *Charter* interpretation.<sup>18</sup>

14. The Supreme Court of Canada has recognized that “[o]ur *Charter* is the primary vehicle through which international human rights achieve domestic effect” and that in particular, sections 7 and 15 “embody the notion of respect of human dignity and integrity”.<sup>19</sup> Identical wording between *Charter* rights and the rights recognized in international instruments is not required for the presumption of conformity to apply.<sup>20</sup>

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ss.32(1)

<sup>15</sup> [Quebec \(Attorney General\) v. 9147-0732 Quebec Inc., 2020 SCC 32 \(CanLII\)](#), paras. 31 to 34 (per Brown and Rowe JJ.)

<sup>16</sup> [Quebec \(Attorney General\) v. 9147-0732 Quebec Inc., 2020 SCC 32 \(CanLII\)](#), paras. 31 to 34 (per Brown and Rowe JJ.)

<sup>17</sup> [Quebec \(Attorney General\) v. 9147-0732 Quebec Inc., 2020 SCC 32 \(CanLII\)](#), paras. 31 to 34 (per Brown and Rowe JJ.); [Suresh v. Canada \(Minister of Citizenship and Immigration\), 2022 SCC 1 \(CanLII\)](#), paras. 46, 59, 60

<sup>18</sup> [Quebec \(Attorney General\) v. 9147-0732 Quebec Inc., 2020 SCC 32 \(CanLII\)](#), paras. 35 to 38 (per Brown and Rowe JJ.)

<sup>19</sup> [R. v. Ewanchuk, 1999 CanLII 711 \(SCC\)](#), para. 73 (per L’Heureux-Dube and Gonthier JJ.)

<sup>20</sup> [Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 \(CanLII\)](#), paras. 69 to 79 (per McLachlin C.J. and LeBel J.)

15. Canada has voted in favour or ratified a number of international instruments that recognize adequate housing as a fundamental human right that is inextricably linked to other rights, including the rights to life, security of the person, and equality. For example, Canada voted in favour of the *Universal Declaration of Human Rights* in 1948, recognizing that

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>21</sup>

16. Canada ratified the *International Covenant on Economic, Social and Cultural Rights* in 1976 which provides that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right ...<sup>22</sup>

17. State parties to the *International Covenant on Economic, Social and Cultural Rights* are committed to ensuring that enumerated rights will be exercised without discrimination.<sup>23</sup>

18. The United Nations has also recognized that all individuals should possess “a degree of security of housing tenure that guarantees legal protection against forced eviction”, that security of tenure can include informal settlements such as occupations of land, and further that “forced eviction constitutes a gross violation of human rights”.<sup>24</sup> In 1991, the United Nation’s Committee on Economic, Social and Cultural Rights affirmed that “instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in

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<sup>21</sup> [Universal Declaration of Human Rights, Dec. 8, 1948, G.A. Res. 217A \(III\), U.N. Doc. A/810 \(1948\)](#), Art. 25(1)

<sup>22</sup> [International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966., 993 U.N.T.S.3; S. Exec. Doc.D, 95-2 \(1978\); S. Treaty Doc. No. 95-19; 6 I.L.M., 360 \(1967\)](#), Art. 11

<sup>23</sup> [International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966., 993 U.N.T.S.3; S. Exec. Doc.D, 95-2 \(1978\); S. Treaty Doc. No. 95-19; 6 I.L.M., 360 \(1967\)](#), Art. 2

<sup>24</sup> [Victoria \(City\) v. Adams, 2008 BCSC 1363 \(CanLII\)](#), para. 89; aff’d [Victoria \(City\) v. Adams,](#)



the most exceptional circumstances”.<sup>25</sup> This is reflected in Article 17 of the *International Covenant on Civil and Political Rights*, ratified by Canada in 1976, which provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home ...” and that “everyone has the right to the protection of the law against such interference or attacks”.<sup>26</sup>

19. Canada has ratified a number of other international human rights instruments that recognize housing as a fundamental human right, including the *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>27</sup>, the *Convention on the Rights of the Child*<sup>28</sup>, the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>29</sup>, and the *Convention on the Rights of Persons with Disabilities*<sup>30</sup>.

20. International human rights instruments ratified by Canada “extend to all parts of federal States without any limitations or exceptions”, meaning that federal, provincial, territorial and municipal governments are all equally bound by them.<sup>31</sup>

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[2009 BCCA 563 \(CanLII\)](#), para. 35

<sup>25</sup> [Victoria \(City\) v. Adams, 2008 BCSC 1363 \(CanLII\)](#), para. 89; aff'd [Victoria \(City\) v. Adams, 2009 BCCA 563 \(CanLII\)](#), para. 35

<sup>26</sup> [International Covenant on Civil and Political Rights, GA Res 2200A \(XXI\), OHCHR \(23 March 1976\) 17](#), ratified by Canada in 1976

<sup>27</sup> [Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, OHCHR \(18 December 1979\), 27\(1\)](#), Arts.14.2(h) and 15(4), ratified by Canada in 1981

<sup>28</sup> [Convention on the Rights of the Child, GA Res 44/25, OHCHR \(2 September 1990\) 49](#), Arts. 16.1 and 27, ratified by Canada in 1991

<sup>29</sup> [International Convention on the Elimination of All Forms of Racial Discrimination, GA Res 2106 \(XX\), OHCHR \(4 January 1969\)](#), Art. 5(e)(iii), ratified by Canada in 1970

<sup>30</sup> [United Nations, Convention on the Rights of Persons with Disabilities, Treaty Series 2515 \(December 2006\)](#), 3, Arts. 4 and 28, ratified by Canada in 2010

<sup>31</sup> Farha, Leilani and Schwan, Kaitlin, UN Special Rapporteur on the Right to Adequate Housing, *A National Protocol for Homeless Encampments in Canada*, p. 11, Affidavit of Dr. Laura Pin sworn Sept. 7, 2022, Exhibit C, p. 91, **Supplemental Responding Record**

**D. Section 7 of the Charter**

21. Section 7 of the *Charter* guarantees that “[e]veryone 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.”<sup>32</sup>

22. Applicants alleging a section 7 breach must demonstrate on the balance of probabilities that: (a) the challenged legislation or government action interferes with or deprives them of the right to life, liberty, and/or security of the person, and (b) that the interference or deprivation is not in accordance with the principles of fundamental justice.<sup>33</sup>

**(a) The enforcement of the Code of Use By-law and related trespass notice violate the encampment residents’ rights to life, liberty and security of the person**

**Right to Life**

23. The section 7 right to life is engaged where “the law or state action imposes death or an increased risk of death on a person, either directly or indirectly”.<sup>34</sup> In contrast, concerns about individual autonomy and quality of life are understood to fall within the ambit of the rights to liberty and security of the person.<sup>35</sup>

24. The ability to provide oneself with adequate shelter has been found to constitute a basic necessity of life, falling within the ambit of the section 7 *Charter* right to life because where there are no practical shelter alternatives, homeless people are exposed to a risk of serious harm including death.<sup>36</sup> This interpretation is in keeping with international human rights instruments.

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<sup>32</sup> *Charter*, section 7

<sup>33</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), paras. 54 and 55

<sup>34</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 62; [Canada \(Attorney General\) v. PHS Community Services Society, 2011 SCC 44 \(CanLII\)](#), para. 93

<sup>35</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 62

<sup>36</sup> [Black et. al. v. City of Toronto, 2020 ONSC 6398 \(CanLII\)](#), paras. 50 to 52; [Victoria \(City\) v. Adams, 2008 BCSC 1363 \(CanLII\)](#), paras. 143 to 145; aff'd [Victoria \(City\) v. Adams, 2009](#)

### **Right to Liberty**

25. Liberty is engaged when state compulsions or prohibitions affect fundamental life choices. Liberty means more than freedom from physical restraint. It includes “the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference” and relates to matters that are “fundamentally or inherently personal such that ... they implicate basic choices going to the core of what it means to enjoy individual dignity and independence”.<sup>37</sup> Courts have found that prohibiting homeless persons from taking simple measures to protect themselves through the creation of temporary shelters, in circumstances where there are no practical shelter alternatives, is a significant interference with dignity and independence and that the choice to shelter oneself falls within the liberty right.<sup>38</sup>

### **Right to Security of the Person**

26. The right to security of the person protects “both the physical and psychological integrity of the individual.” This right is infringed by “serious state-imposed psychological stress”, objectively measured, that need not rise to the level of nervous shock or psychiatric illness.<sup>39</sup> The Supreme Court has held that a combination of any of the following factors - stigma, loss of privacy, stress and anxiety, possible disruption of family and social life, uncertainty as to outcome and risk of sanction – is sufficient to constitute a breach of security of the person<sup>40</sup>.

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[BCCA 563 \(CanLII\)](#); [Abbotsford \(City\) v. Shantz, 2015 BCSC 1909 \(CanLII\)](#), para. 132

<sup>37</sup> [R. v. Malmö-Levine](#); [R. v. Caine, 2003 SCC 74 \(CanLII\)](#), para. 85 (*per* Gonthier and Binnie JJ); [R. v. Morgentaler, 1988 CanLII 90 \(SCC\)](#), p. 163 (*per* Wilson J.)

<sup>38</sup> [Victoria \(City\) v. Adams, 2009 BCCA 563](#), para 109

<sup>39</sup> [New Brunswick \(Minister of Health and Community Services v. G.\(J.\)\)](#), 1999 CanLII 653 (SCC), paras. 58 to 67 (*per* Lamer C.J.)

<sup>40</sup> [New Brunswick \(Minister of Health and Community Services v. G.\(J.\)\)](#), 1999 CanLII 653 (SCC), paras. 58 to 67 (*per* Lamer C.J.)

27. “Personal autonomy” lies at the heart of the right to security of the person. This concept of “personal autonomy” encompasses the right to make choices concerning one’s own body, control over one’s physical and psychological integrity, and basic human dignity.

**Evidence of breaches of the rights to life, liberty and security of the person**

28. The enforcement of the Code of Use By-law and the related trespass notice violate the encampment residents’ rights to life, liberty and security of the person.

29. In “The Protection of Welfare Rights under the *Charter*”, Professor Martha Jackman wrote as follows:

. . . [A] person who lacks the basic means of subsistence has a tenuous hold on the most basic of constitutionally guaranteed human rights, the right to life, to liberty, and to personal security. Most, if not all, of the rights and freedoms set out in the *Charter* presuppose a person who has moved beyond the basic struggle for existence. The *Charter* accords rights which can only be fully enjoyed by people who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income. As the United Church's brief to the Special Joint Committee declared: "other rights are hollow without these rights".<sup>41</sup>

30. International human rights instruments ratified by Canada (discussed above) help define “the full benefit of the *Charter*’s protection” by delineating the scope of the section 7 *Charter* rights. In particular, those instruments make clear that adequate housing and shelter (including shelter in informal settings such as encampments) is a fundamental human right that is centrally integrated within the rights to life, liberty and security of the person.

31. The evidence in this application amply reveals serious breaches of the encampment residents’ section 7 rights to life, liberty and security of the person arising from both threatened eviction and actual eviction in circumstances where the Region suffers from an extreme

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<sup>41</sup> [Black et. al. v. City of Toronto, 2020 ONSC 6398 \(CanLII\)](#), para. 49

alternative housing shortage relative to its homeless population and given the extreme intersecting vulnerabilities of encampment residents. The evidence includes the following:

- (a) Housing is a core social determinant of health<sup>42</sup>
- (b) When beds are available, emergency shelters expose homeless persons to physical and sexual violence, death, life threatening infections, serious injury, theft, lack of privacy, stigma, loss of belongings, separation from spouses/ survival partners/ family/ friends, and a multitude of daily assaults on personal dignity<sup>43</sup>
- (c) Emergency shelters that are abstinence based create critical health problems, such as those that can arise from forced withdrawal (ie. seizures, cardiac arrest) (it is estimated that 95% of encampment residents are substance dependant)<sup>44</sup>
- (d) Evicting residents from encampments damages relationships of trust between them and providers of the basic necessities of life such as housing, medical and addictions services; these relationships of trust are crucial given prior traumatic experiences within the health/ social assistance/ criminal justice systems<sup>45</sup>

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<sup>42</sup> Regional Municipality of Waterloo, Community Services Committee, Addendum Agenda (June 7, 2022), Exhibit "C" to the Affidavit of Lynn Kubis (Aug. 31, 2022), **Responding Record, Vol. I, p. 34**; Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II**

<sup>43</sup> Regional Municipality of Waterloo, Special Council, Addendum Agenda (Aug. 18, 2022), Recommendations from Community Services Committee, Exhibit "F" to the Affidavit of Lynn Kubis (Aug. 31, 2022), **Responding Record, Vol. I, p. 61**; Affidavit of Kathryn Bulgin (Aug. 16, 2022), **Responding Record, Vol. I, pp. 276 to 281**; Affidavit of Jennifer Draper (Aug. 15, 2022), **Responding Record, Vol. I, pp. 283 to 289**; Affidavit of Mark Duke (Aug. 11, 2022), **Responding Record, Vol. I, pp. 291 to 295**; Affidavit of Liam Flanagan (Aug. 11, 2022), **Responding Record, Vol. I, pp. 297 to 300**; Affidavit of Andrew Mandic (Aug. 11, 2022), **Responding Record, Vol. I, pp. 302 to 305**; Affidavit of Lee-Anne Mason (Aug. 24, 2022), **Responding Record, Vol. I, pp. 307 to 310**; Affidavit of Albert Tugwood (Aug. 15, 2022), **Responding Record, Vol. I, pp. 317 to 323**; Affidavit of Michael Wosik (Aug. 11, 2022), **Responding Record, Vol. I, pp. 325 to 329**; Affidavit of Kaitlin Schwan (Aug. 31, 2022), **Responding Record, Vol. II, p.103, para 15 and p. 107, paras. 23 and 24**

<sup>44</sup> Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, pp. 18 and 19, paras. 48 and 49**

<sup>45</sup> Special Council Minutes (Aug. 18, 2022), Exhibit "G" to the Affidavit of Lynn Kubis (Aug. 31, 2022), **Responding Record, Vol. I, p. 67**; Affidavit of Jordan Aylott (Aug. 15, 2022), **Responding Record, Vol. I, p. 271 to 274**; Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, p. 7, para 18**

- (e) Evicting residents from the encampment ruptures easy access to physically proximate services/ sources of donations providing the basic necessities of life, such as water, hygiene, clothing, food, community fridges, medical, addiction care and support, housing services, financial services, and safe injection sites<sup>46</sup>
- (f) Eviction exposes residents to dangerous housing alternatives, for example sex in exchange for housing arrangements, remaining or returning to abusive relationships, and living rough and unsheltered on the streets<sup>47</sup>
- (g) Evicting residents from encampments can mean loss of “survival items” such as tents, cooking and warming tools, and clothing which often take significant effort to obtain and are crucial not just for survival and physical and mental health but also for dignity and a sense of identity and self-worth<sup>48</sup>
- (h) Increased psychological stress and anxiety due to (a) the urgent need to focus exclusively on “survival living” under extremely challenging conditions; (b) the uncertainty of whether an alternative shelter arrangement can be found; (c) how to access the basic necessities of life such as food and water; and (d) encamping elsewhere while under constant threat of further eviction<sup>49</sup>

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<sup>46</sup> Affidavit of Kathryn Bulgin (Aug. 16, 2022), **Responding Record, Vol. I, pp. 276 to 281**; Affidavit of Jennifer Draper (Aug. 15, 2022), **Responding Record, Vol. I, pp. 283 to 289**; Affidavit of Mark Duke (Aug. 11, 2022), **Responding Record, Vol. I, pp. 291 to 295**; Affidavit of Liam Flanagan (Aug. 11, 2022), **Responding Record, Vol. I, pp. 297 to 300**; Affidavit of Andrew Mandic (Aug. 11, 2022), **Responding Record, Vol. I, pp. 302 to 305**; Affidavit of Lee-Anne Mason (Aug. 24, 2022), **Responding Record, Vol. I, pp. 307 to 310**; Affidavit of Sean Simpall (Aug. 15, 2022), **Responding Record, Vol. I, pp. 312 to 315**; Affidavit of Albert Tugwood (Aug. 15, 2022), **Responding Record, Vol. I, pp. 317 to 323**; Affidavit of Michael Wosik (Aug. 11, 2022), **Responding Record, Vol. I, pp. 325 to 329**

<sup>47</sup> Affidavit of Kathryn Bulgin (Aug. 16, 2022), **Responding Record, Vol. I, pp. 276 to 281**; Affidavit of Lee-Anne Mason (Aug. 24, 2022), **Responding Record, Vol. I, pp. 307 to 310**; Affidavit of Kaitlin Schwan (Aug. 31, 2022), **Responding Record, Vol. II, p.99, paras. 7 and 10**

<sup>48</sup> Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, p. 9, paras 23 to 25**

<sup>49</sup> Affidavit of Kathryn Bulgin (Aug. 16, 2022), **Responding Record, Vol. I, pp. 276 to 281**; Affidavit of Jennifer Draper (Aug. 15, 2022), **Responding Record, Vol. I, pp. 283 to 289**; Affidavit of Michael Wosik (Aug. 11, 2022), **Responding Record, Vol. I, pp. 325 to 329**; Affidavit of Mark Duke (Aug. 11, 2022), **Responding Record, Vol. I, pp. 291 to 295**; Affidavit of Andrew Mandic (Aug. 11, 2022), **Responding Record, Vol. I, pp. 302 to 305**; Affidavit of Lee-Anne Mason (Aug. 24, 2022), **Responding Record, Vol. I, pp. 307 to 310**; Affidavit of Sean Simpall (Aug. 15, 2022), **Responding Record, Vol. I, pp. 312 to 315**; Affidavit of Dr. Sereda

- (i) Evictions can cause increased substance use and fatal overdose<sup>50</sup>
- (j) Forced homelessness produces or exacerbates disability, physical and mental illness and addiction making it much more difficult if not impossible to access medical care for both acute and chronic illnesses<sup>51</sup>
- (k) Exposing residents to extreme and repeated sleep deprivation as many will stay up all night to avoid dangers associated with sleeping on the street (theft, physical and sexual assault) or simply because they have nowhere comfortable to sleep; profound sleep deprivation can negatively impact physical and mental health and increase the risk of death through mechanisms like drug overdose<sup>52</sup>
- (l) Exposing residents to the serious risks of food insecurity, nutritional deficits and even starvation that can exacerbate and complicate physical and mental illness and necessary treatments<sup>53</sup>
- (m) Encampment evictions often result in more acute health conditions such as frostbite, heat stroke, burns<sup>54</sup>
- (n) Destruction of the residents' current "home" which includes not just the physical location and structure, but also community, neighbours, safety, security, privacy, dignity, and certainty of tenure<sup>55</sup>

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(Aug. 26, 2022), **Responding Record, Vol. II, p. 2, para 3 and p. 17, para 45**

<sup>50</sup> Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, p. 22, para 56**

<sup>51</sup> Affidavit of Mark Duke (Aug. 11, 2022), **Responding Record, Vol. I, pp. 291 to 295**; Affidavit of Michael Wosik (Aug. 11, 2022), **Responding Record, Vol. I, pp. 325 to 329**; Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, pp. 2 and 10, paras 3 and 26**; Cross-Examination of Dr. Laura Pin (Oct. 5, 2022), **Transcript, p. 42**

<sup>52</sup> Affidavit of Kathryn Bulgin (Aug. 16, 2022), **Responding Record, Vol. I, pp. 276 to 281**;

Affidavit of Jennifer Draper (Aug. 15, 2022), **Responding Record, Vol. I, pp. 283 to 289**;

Affidavit of Mark Duke (Aug. 11, 2022), **Responding Record, Vol. I, pp. 291 to 295**

Affidavit of Liam Flanagan (Aug. 11, 2022), **Responding Record, Vol. I, pp. 297 to 300**;

Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, p. 9, para 21 and p. 17, para 45**

<sup>53</sup> Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, p. 9, para 21 and p. 22, para 56**

<sup>54</sup> Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, p. 17, para 44 and p. 21, para 56**

<sup>55</sup> Affidavit of Kathryn Bulgin (Aug. 16, 2022), **Responding Record, Vol. I, pp. 276 to 281**;

Affidavit of Jennifer Draper (Aug. 15, 2022), **Responding Record, Vol. I, pp. 283 to 289**;

(o) Increased risk of arrest by police, criminalization, and/or detention under the *Mental Health Act*<sup>56</sup>

(p) Increased vulnerability and marginalization<sup>57</sup>

32. Encampment residents who may lack or experience fluctuating capacity to instruct counsel are at heightened risk of all of the above.<sup>58</sup>

### **Causation and “personal choice”**

33. The Supreme Court has repeatedly held that for a section 7 right to be engaged, causation requires a “sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]”.<sup>59</sup> A “sufficient causal connection” standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities”.<sup>60</sup>

34. Further, personal “choice” does not negate a claim to breach of section 7 *Charter* rights. While some of the respondents may exercise some minimal level of “choice” to live at the encampment, the overriding context is not one of full freedom in exercising autonomous choice – the context is one marked by poverty, personal crisis and trauma, financial desperation,

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Affidavit of Liam Flanagan (Aug. 11, 2022), **Responding Record, Vol. I, pp. 297 to 300**; Affidavit of Sean Simpell (Aug. 15, 2022), **Responding Record, Vol. I, pp. 312 to 315**; Affidavit of Michael Wosik (Aug. 11, 2022), **Responding Record, Vol. I, pp. 325 to 329**; Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, p. 19, para 51(a)**; Affidavit of Kaitlin Schwan (Aug. 31, 2022), **Responding Record, Vol. II, p.110, paras. 30**; Supplemental Affidavit of Nancy Singer (Sept. 14, 2022), **Supplemental Responding Record, p. 217, para 9**

<sup>56</sup> Supplemental Affidavit of Nancy Singer (Sept. 14, 2022), **Supplemental Responding Record, p. 220, para 19**

<sup>57</sup> Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, p. 22, para 56**

<sup>58</sup> Supplemental Affidavit of Nancy Singer (Sept. 14, 2022), **Supplemental Responding Record, pp. 216 to 222**

<sup>59</sup> [Canada \(Attorney General\) v. Bedford, 2013 SCC 72 \(CanLII\)](#), paras. 73 to 78

<sup>60</sup> [Canada \(Attorney General\) v. Bedford, 2013 SCC 72 \(CanLII\)](#), paras. 73 to 78



insufficient shelter alternatives, physical disability, lack of access to transportation, fear of losing belongings if encampments are cleared while residents are away, drug addiction, mental illness, previous trauma within the health/ social assistance/ criminal justice systems, and cognitive impairments.<sup>61</sup> Further, data indicates that encampment residents cannot simply choose to be housed elsewhere – there are insufficient emergency shelter beds and years’ long wait lists for subsidized/ supportive and permanent housing.

35. The question at issue is not whether the encampment residents’ dire predicament is self-made or whether living in the encampment itself creates risks, but whether enforcement actions taken by the Region under the Code of Use Bylaw and trespass notice make the encampment residents’ already dire predicament even more dangerous.

**Positive v. Negative Section 7 Charter Claims**

36. This *Charter* application does not advance positive claims to State subsidized and supported housing or other social or economic benefits. Instead, this *Charter* application seeks a *Charter* remedy to shield the encampment residents from a Code of Use Bylaw and trespass notice that will significantly increase the grave risks they already face from unsheltered living.

**(b) Breaches of the rights to life, liberty and security of the person are not in accordance with the principles of fundamental justice**

37. Breaches of the encampment residents’ section 7 *Charter* rights are not in accordance with the principles of fundamental justice. Specifically, these breaches are grossly disproportionate to any legitimate State interest.

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<sup>61</sup> [Canada \(Attorney General\) v. Bedford, 2013 SCC 72 \(CanLII\)](#), paras. 79 to 92; Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, pp. 5 and 6, para 14**; Cross-Examination of Dr. Laura Pin (Oct. 5, 2022), **Transcript, pp. 54 & ff**

38. The principles of fundamental justice are found in the basic tenets of our legal system: “[t]hey are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound.”<sup>62</sup> Further, “[t]he principles of fundamental justice are derived from the essential elements of our system of justice, which is itself founded on a belief in the dignity and worth of every human person”.<sup>63</sup>

39. The Supreme Court has held that “[t]o deprive a person of constitutional rights arbitrarily or in a way that is overbroad or grossly disproportionate diminishes that worth and dignity. If a law operates in this way, it asks the right claimant to ‘serve as a scapegoat’”.<sup>64</sup>

40. In determining whether deprivations of life, liberty or security of the person are in accordance with the principles of fundamental justice, courts are not concerned with competing social interests or public benefits that might be conferred by the impugned law or State action. Any competing moral claims and societal benefits must instead be considered at the justification stage under section 1 of the *Charter*.<sup>65</sup> Section 7 claimants do not have to prove that the principles of fundamental justice are overridden by a valid state objective; this is the State’s burden under section 1 of the *Charter*.<sup>66</sup>

### **Defining the Objective of the Code of Use Bylaw and related trespass notice**

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<sup>62</sup> [Canada \(Prime Minister\) v. Khadr, 2010 SCC 3 \(CanLII\)](#), para 23

<sup>63</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 81

<sup>64</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 81

<sup>65</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 79

<sup>66</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 80

41. The objective of the impugned law must be defined with precision for the purpose of the section 7 *Charter* analysis.<sup>67</sup> The first, “most direct and authoritative evidence” of the legislative purpose of a provision is found in statements of purpose in the legislation itself.<sup>68</sup> Courts may also consider the text, context and scheme of the legislation, as well as extrinsic evidence such as legislative history and evolution.<sup>69</sup>

42. The preamble to the Code of Use By-law makes clear that its purpose is to regulate the conduct of persons on buildings, grounds and public transportation vehicles owned or operated by the Region (“Designated Premises”) in order to prevent (1) physical damage to the Designated Premises, (2) disruption to Regional operations, or (3) the use and enjoyment of Designated Premises by other persons.<sup>70</sup>

43. The conduct that is to be regulated is outlined in Schedule “B”, “Prohibited Activities”. Notably, the Code of Use By-law is directed towards the protection from physical damage, use and enjoyment of the Designated Premises only. It is not concerned with conduct occurring outside of the Designated Premises (for example, disruptions to neighbouring businesses).

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<sup>67</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 78

<sup>68</sup> [R v. Appulonappa, 2015 SCC 59 \(CanLII\)](#), para 49

<sup>69</sup> [R. v. Ndhlovu, 2022 SCC 38 \(CanLII\)](#), paras. 60 to 64 (Karakatsanis and Martin JJ for the majority)

<sup>70</sup> By-Law Number 13-050, *A By-law Respecting the Conduct of Persons Entering Upon Buildings, Grounds and Public Transportation Vehicles Owned or Occupied by the Regional Municipality of Waterloo* (“Code of Use By-Law”), Preamble, Exhibit “A” to the Affidavit of Ellen McGaghey (July 5, 2022), **Application Record, p. 18**. See also: Affidavit of Ellen McGaghey (July 5, 2022), **Application Record, p. 8**

44. In Schedule “B”, “nuisance” is defined as “any conduct or behavior which interferes with the ordinary enjoyment of persons using Designated Premises” while “loitering” is defined as lingering “without due cause or purpose”.<sup>71</sup> [emphasis added]

45. The Code of Use By-law has a broad application to a wide range of prohibited activities set out in Schedule “B”. However, enforcement of the Code of Use By-law is not mandatory,<sup>72</sup> and has historically been complaint driven<sup>73</sup> suggesting that unauthorized and prohibited uses are sometimes accepted. In fact, the approach initially taken by the Region to this encampment was initially one of acceptance, an approach that appears to have been in place for almost 7 months.<sup>74</sup>

46. Enforcement options in the Code of Use By-law range from the issuance of a verbal direction to refrain from a Prohibited Activity to laying a charge, which upon conviction could result in a fine of up to \$10,000.00.<sup>75</sup> Specific direction as to when enforcement ought to occur, and the timing and manner of any enforcement is not set out in the Code of Use By-law, other than directing that any enforcement measures taken must be reasonable in relation to the conduct prohibited, the breadth of the location and the duration of the time imposed.<sup>76</sup>

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<sup>71</sup> Code of Use By-Law, Schedule “B”, Exhibit “A” to the Affidavit of Ellen McGaghey (July 5, 2022), **Application Record, p. 23**

<sup>72</sup> Code of Use By-Law, Exhibit “A” to the Affidavit of Ellen McGaghey (July 5, 2022), **Application Record, p. 19**. Section 5 provides as follows: “Without limiting Part II of this By-law, Designated Personnel may exercise any of the following enforcement options at Designated Premises when a person is doing or has done a Prohibited Activity” [emphasis added].

<sup>73</sup> Regional Municipality of Waterloo, Council, Addendum Agenda, Policy Review of Region By-Law 13-050 (Dec. 15, 2021), Exhibit “A” to the Affidavit of Lynn Kubis (sworn Aug. 31, 2022), **Responding Record, Vol. I , p. 105**

<sup>74</sup> Affidavit of Dr. Laura Pin (Sept. 7, 2022), **Supplemental Responding Record, p. 3, para 6(f)**

<sup>75</sup> Code of Use By-Law, ss. 4 and 5, Exhibit “A” to the Affidavit of Ellen McGaghey (July 5, 2022), **Application Record, p. 23**; *Trespass to Property Act*, R.S.O. 1990, c. T.21, s. 2.

<sup>76</sup> Code of Use By-Law, s.6, Exhibit “A” to the Affidavit of Ellen McGaghey (July 5, 2022), **Application Record, p. 20**

47. Following a public outcry to the Stirling Encampment eviction in November 2021, the Region acknowledged that the eviction “did not reflect the dignity of those living at the encampment” and that the Code of Use By-law lacked specific direction to address encampments of homeless people on municipal property.<sup>77</sup> A policy entitled “Homeless Encampments on Region-owned or occupied land” (“Encampment Policy”) was approved by the Region on December 15, 2021 in order to supplement the Code of Use By-Law.<sup>78</sup>

48. The objective of the Policy is to prioritize offering individualized services to unsheltered community members, to facilitate connections to shelter, housing and support (“safer, sustainable and healthier alternatives”), and to maintain respect and dignity in all interactions. The Policy emphasizes a “service first approach” and seeks to balance service provision to vulnerable community members with the civic responsibility of maintaining the use of lands, with enforcement only once all reasonable outreach and support has been provided.<sup>79</sup> However, as outlined in the factum of WRLCS, the Region does not appear to have fully complied with the Policy prior to issuing its eviction notices.

**Breaches of the rights to life, liberty and security of the person are grossly disproportionate to the objectives of the Code of Use By-Law**

49. Gross disproportionality is a principle of fundamental justice under section 7. This principle is infringed when the impact of the restriction on the individual’s life, liberty and/ or security of the person is grossly disproportionate to any legitimate government interest. The

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<sup>77</sup> Regional Municipality of Waterloo, Council, Addendum Agenda (Dec. 15, 2021), Exhibit “A” to the Affidavit of Lynn Kubis (Aug. 31, 2022), **Responding Record, Vol. I, pp. 7 to 11**

<sup>78</sup> Policy – Homeless Encampments on Region-owned or occupied lands [“Encampment Policy”] Exhibit “A” to the Affidavit of Lynn Kubis (Aug. 31, 2022), **Responding Record, Vol. I, p. 12**

<sup>79</sup> Encampment Policy, Exhibit “A” to the Affidavit of Lynn Kubis (Aug. 31, 2022), **Responding Record, Vol. I, p. 12**. See also: Community Services Committee, Addendum Agenda, Exhibit “C” to the Affidavit of Lynn Kubis (Aug. 31, 2022), **Responding Record, Vol. I, p. 31**

focus is not on the impact of the law on society or the public or its effectiveness, which are matters for the section 1 analysis, but on its impact on the rights of the claimant.<sup>80</sup> The inquiry into gross disproportionality compares the law's objective with its negative effect on the rights of the claimant and "asks if this impact is completely out of sync with the object of the law".<sup>81</sup>

50. Gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on just one individual is sufficient to violate the norm.<sup>82</sup>

51. As explained above at paragraph 31, enforcement of the trespass notice would have severe negative impacts on encampment residents, including increasing the risk of death.

*Amicus* submits that in addition, the harmful effects of eviction are more severe for those encampment residents who suffer from mental illness or substance abuse such that they lack the capacity to even understand the legal proceedings and make basic decisions. Homeless people suffering with mental health, cognitive and/or substance abuse issues face additional barriers in accessing and maintaining housing, including in shelters, and connecting with health care, emergency and other services providing access to the basic necessities of life.

52. The benefits of living in an encampment for a person who lacks capacity or is cognitively impaired include an increased sense of community (which is correlated to mental health stabilization, decreased drug use and emotional support); access to regular meals and showers; privacy from the public gaze, which can be detrimental to mental health; physical and mental rest from moving from shelter to shelter, which allows a chance to plan and focus on rest and

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<sup>80</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 89

<sup>81</sup> [Carter v. Canada \(Attorney General\), 2015 SCC 5 \(CanLII\)](#), para. 89

<sup>82</sup> [Canada \(Attorney General\) v. Bedford, 2013 SCC 72 \(CanLII\)](#), para. 122

recovery; access to social support services; access to regular health care; and proximity to neighbourhood programming and services. The stability, community structures and human connections fostered by encampments are beneficial to mental health.<sup>83</sup>

53. As outlined in the factum of WRLCS, the number of homeless individuals tripled in Waterloo Region between 2018 to 2021; there were approximately 1100 homeless people as of the date of the application in July 2022. Only a small fraction were able to access emergency shelter beds on a given night. The wait times for permanent, subsidized and/or supportive housing is measured in years. Evicted residents have no guaranteed safer and secure alternative to the encampment and many are likely to sleep on the streets or encamp elsewhere. This elevates the risks to life and security of the person, undermines liberty and autonomy, and also results in evicted residents being, yet again, in potential breach of the Code of Use By-Law and subject to future eviction notices.

54. As noted above, the objectives of the Code of Use By-Law are to prevent (1) physical damage to the Designated Premises, (2) disruption to Regional operations, or (3) the use and enjoyment of Designated Premises by other persons. The property at issue is an unused, vacant lot. The Region's need for the property as short-term parking "drastically diminished" due to the COVID-19 pandemic such that the Region set aside this project. The longer-term plan is to use the property as a lay down site for materials during construction of a Region-owned transportation hub at an undetermined date (although the earliest would be late-Spring 2024), and an 80-space parking lot by the end of 2024 at the earliest.<sup>84</sup> There is no evidence of significant physical damage to the lot, a disruption of Regional operations on the premises, or any disruption

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<sup>83</sup> Affidavit of Dr. Sereda (Aug. 26, 2022), **Responding Record, Vol. II, pp. 27 to 33**; Cross-Examination of Ellen McGaghey, **Transcript, pp. 7 to 9**

to the use and enjoyment of the vacant lot by other people. In contrast to what might occur in City parks, there is no evidence of complaints related to the definition of “nuisance” in the Code of Use By-law ie. “any conduct or behavior which interferes with the ordinary enjoyment of persons using Designated Premises”.

**(c) Are the breaches of section 7 Charter rights justified under section 1 of the Charter?**

55. For the section 1 analysis, government bears the burden of proving that a law that breaches section 7 is reasonable and demonstrably justified in a free and democratic society. The section 1 analysis requires (a) a pressing and substantial objective; (b) a rational connection between the impugned law and the government objective; (c) whether the law minimally impairs section 7 rights in pursuing the government objective and (d) the court is required to weigh the negative impact of the law on section 7 rights against the beneficial impact of the law in achieving its goal for the greater public good. Impacts are judged both qualitatively and quantitatively.<sup>85</sup>

56. The rights protected by section 7 are not easily overridden by competing social interests.<sup>86</sup> A section 7 breach will rarely be justifiable under section 1 except “in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.”<sup>87</sup> None of these exceptional conditions apply in the case at hand. The Code of Use By-law and the supplemental Encampment Policy do not incorporate goals or means of resolving the intersecting complex economic, social, medical, and disability related issues facing encampment residents. Although the Encampment Policy utilizes a “services first” approach, the practical

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<sup>84</sup> Cross-examination of Ellen McGaghey, **Transcript, pp. 10 to 20**

<sup>85</sup> [Canada \(Attorney General\) v. Bedford, 2013 SCC 72 \(CanLII\)](#), para. 126

<sup>86</sup> [Charkaoui v. Canada \(Citizenship and Immigration\)](#), 2007 SCC 9 (CanLII), para 66

<sup>87</sup> [New Brunswick \(Minister of Health and Community Services\) v. G. \(J.\), 1999 CanLII 653](#)



reality is that there are extremely insufficient emergency shelter and permanent housing alternatives available. As such, evicting encampment residents *for their own good* from unused, vacant public property cannot justify the section 7 violations.

**E. Section 15(1) of the Charter**

57. Section 15(1) provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, religion, sex, age or mental or physical disability”.<sup>88</sup> The purpose of section 15(1) “reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups”.<sup>89</sup>

58. Proving a section 15(1) violation requires a claimant to demonstrate, on a balance of probabilities, that the impugned law or state action: (a) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and (b) imposes burdens or denies benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.<sup>90</sup>

59. The first part of the section 15(1) test may be satisfied through evidence of adverse impact discrimination where seemingly neutral laws have a disproportionate impact on individuals who are members of an enumerated group. As highlighted by the Supreme Court, governments must be “particularly vigilant about the effects of their own policies” on members of disadvantaged groups. Further, adverse impact discrimination is “much more prevalent than

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(SCC), para. 99; [Canada \(Attorney General\) v. Bedford, 2013 SCC 72 \(CanLII\)](#), para. 129

<sup>88</sup> *Charter*, s.15(1)

<sup>89</sup> [Fraser v. Canada \(Attorney General\), 2020 SCC 28 \(CanLII\)](#), para. 27 (*per* Abella J.)

the cruder brand of openly direct discrimination” and often poses greater risks to the equality aspirations of disadvantaged groups. Adverse impact discrimination is central to substantive equality, which is the “philosophical premise” and “animating norm” of the section 15(1) guarantee.<sup>91</sup>

60. In order for a law to create a distinction based on prohibited grounds through adverse effects, it must have a disproportionate impact on members of a protected group, which can include the absence of accommodation. If so, the first part of the section 15(1) test is made out. Whether government intended to create a disparate impact is irrelevant. Further, it is unnecessary to inquire into whether the law itself created the background social or physical barriers which made a particular rule or State action disadvantageous for the claimant group. In addition, *Charter* claimants do not need to prove that the impugned law will disproportionately impact all members of a protected group in the same way.<sup>92</sup>

61. For the second part of the section 15(1) analysis, claimants must prove that the law reinforces, perpetuates or exacerbates disadvantage. There is no “rigid template” of factors relevant to this inquiry; the goal is to examine the impact of the harm caused to the affected group. Harms can include economic and/or social exclusion, psychological and/or physical harms or political exclusion and must be viewed “in light of any systemic or historical disadvantages faced by the claimant group”. The presence of social prejudice or stereotyping need not be proved but may assist in showing that a law has negative effects on a particular group. Further, the perpetuation of disadvantage does not become less serious under section

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<sup>90</sup> [Fraser v. Canada \(Attorney General\), 2020 SCC 28 \(CanLII\)](#), para. 27 (*per* Abella J.)

<sup>91</sup> [Fraser v. Canada \(Attorney General\), 2020 SCC 28 \(CanLII\)](#), paras. 27 to 49 (*per* Abella J.)

<sup>92</sup> [Fraser v. Canada \(Attorney General\), 2020 SCC 28 \(CanLII\)](#), paras. 52 to 67, 69, 71 to 75 (*per* Abella J.)

15(1) because it may be relevant to a legitimate state objective - whether a distinction is justifiable must be considered in the section 1 analysis.<sup>93</sup>

62. *Amicus curiae* accepts the section 15(1) analysis set out in the factum of WRLCS, and notes that many disadvantaged persons, including the encampment residents, belong to multiple enumerated groups and struggle with intersecting disadvantages (race, gender, Indigenous status, physical and mental disability, including addictions). In this section, *amicus curiae* will focus specifically on the section 15(1) analysis as it relates to mental disability, although acknowledging that intersecting disadvantages are an exacerbating factor.

63. The Code of Use By-Law is neutral on its face, as is the related trespass notice. However, in effect, they undermine substantive equality through adverse impact discrimination by creating disproportionately negative impacts on encampment residents suffering from mental illness and addiction, including those residents who may not even have capacity to retain and instruct counsel. These greater disproportionate effects from threatened or actual eviction were discussed above and include increased psychological stress, exacerbation of existing mental illness, sleep deprivation, risk of starvation, risk of fatal overdose, increased risk of arrest, and loss of the protective effects of community and emotional support. Persons with mental illness who have accompanying capacity issues will be less able to find and maintain alternative and safe shelter arrangements, especially in circumstances where sufficient alternatives are lacking. The first part of the section 15(1) test is made out.

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<sup>93</sup> [Fraser v. Canada \(Attorney General\), 2020 SCC 28 \(CanLII\)](#), paras. 75 to 80 (per Abella J.)

64. The second part of the section 15(1) test is also established on the evidence. The Code of Use By-Law and related trespass notice have the clear effect of reinforcing, perpetuating or exacerbating disadvantage.

65. Persons with disabilities face coercion, marginalization and social exclusion.<sup>94</sup> The Supreme Court has recognized the historical context of disadvantage experienced by persons with mental disorder which includes abuse, neglect, discrimination, stigma, isolation, segregation from the mainstream of society, being devalued and ridiculed, social prejudice, and stereotypes of violence, dangerousness and other prejudicial notions. Further, social dislocation and economic decline increase the risks that mentally ill person will be “forced into the ranks of the dispossessed”; homelessness, poverty and social isolation also increase the risks of conflict with others and with the police.<sup>95</sup> These concerns are amply supported by the evidence in this case – in other words, eviction will exacerbate the already dire circumstances of disadvantage experienced by mentally ill encampment residents.

66. The violation of encampment residents’ section 15(1) *Charter* right cannot be justified under section 1 for similar reasons as articulated under the section 7 analysis at paragraphs 55 and 57 above.

#### **F. Intersection of sections 15(1) and 7 of the *Charter***

67. All *Charter* rights strengthen and support each other and section 15(1) plays a particularly important role in that process. The section 15(1) guarantee has been described as “the broadest of all guarantees” such that equality interests should be considered in interpreting

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<sup>94</sup> [Eldridge v. British Columbia \(Attorney General\)](#), 1997 CanLII 327 (SCC), para 56

<sup>95</sup> [R. v. Swain](#), [1991] 1 S.C.R. 933, para. 39 (*per* Lamer C.J.); [Winko v. British Columbia \(Forensic Psychiatric Institute\)](#), 1999 CanLII 694 (SCC), paras. 35 to 38 (*per* Lamer C.J.);

the scope of protection offered by section 7 rights “to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society”.<sup>96</sup> Violations of the encampment residents’ section 15(1) *Charter* rights, specifically the exacerbation of pre-existing disadvantage, increase the gravity of the section 7 violations to life, liberty and security of the person. The inverse holds true as well in this case – violations of the section 7 rights exacerbate substantive equality concerns.

**G. Should the orders sought by the Region be granted?**

68. There are two types of remedies for *Charter* violations. Section 52(1) of the *Constitution Act, 1982* provides that “The Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. This remedial provision applies to unconstitutional legislation. A purposive approach to fashioning *Charter* remedies ensures “that the effective vindication and protection of rights is at the core of the remedies [granted] for legislation that violates the *Charter*”. Tailored remedies to address unconstitutional statutory provisions can include reading down, reading in and severance.<sup>97</sup>

69. Section 24(1) of the *Charter* provides that “[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”. Section 24(1) provides individual remedies to persons whose *Charter* rights have been violated through discretionary government action taken pursuant to otherwise

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[Ontario \(Attorney General\) v. G., 2020 SCC 38 \(CanLII\)](#), paras. 61 to 63 (*per* Karakatsanis J.)

<sup>96</sup> [New Brunswick \(Minister of Health and Community Services\) v. G.\(J.\), 1999 CanLII 653 \(SCC\)](#), paras. 112, 115 (*per* L’Heureux-Dube); [P.S. v. Ontario, 2014 ONCA 900 \(CanLII\)](#), paras. 178 to 180

constitutional laws. A broad and purposive approach to fashioning section 24(1) *Charter* remedies is required in order to ensure that “where there is a right, there is a remedy”.<sup>98</sup>

70. The *Charter* violations arising out of the Code of Use By-law and related trespass notice in this case do not fit neatly into the jurisprudence on constitutional remedies. The Code of Use By-law and its various provisions are not generally unconstitutional. The Code of Use By-Law and its enforcement violate the section 7 and 15(1) *Charter* rights of the encampment residents in the context of complex economic, personal, medical and social circumstances, including the extreme lack of alternative housing options in the Region. Section 52(1) remedies of striking down, reading down, reading in or severance would not provide a tailored constitutional remedy in the circumstances. The list of prohibited uses in the Code of Use By-Law are extensive and not limited to a prohibition on erecting tents or other overnight shelters; prohibited uses include such things as swearing smoking, loitering and consuming alcohol. In the circumstances, declaring only the provision that prevents the erecting of tents or other overnight shelters would not fully shield encampment residents from further eviction notices.

71. Individual remedies pursuant to section 24(1) are also unsatisfactory for a number of reasons, including that constitutional exemptions decided on a case-by-case basis leave the law uncertain and unpredictable and are an unreasonable solution given that vulnerable individuals face often unsurmountable barriers in litigating *Charter* issues (especially persons who may lack capacity to retain and instruct counsel).<sup>99</sup> This case also differs from other encampment cases in that the land in question is vacant and currently unused and where there is no evidence of

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<sup>97</sup> [Ontario \(Attorney General\) v. G., 2020 SCC 38 \(CanLII\)](#), para 84 to 139 (*per* Karakatsanis J.)

<sup>98</sup> [Doucet-Boudreau v. Nova Scotia \(Minister of Education\), 2003 SCC 62 \(CanLII\)](#), paras. 23 to 25, 41 to 59

<sup>99</sup> [Victoria \(City\) v. Adams, 2009 BCCA 563 \(CanLII\)](#), paras. 139 to 166

interference with the use and enjoyment of the property by others (as might be the case in public parks).

72. *Amicus curiae* suggests that one approach to crafting an effective constitutional remedy that vindicates the section 7 and 15(1) *Charter* rights of these encampment residents is to declare the Code of Use By-Law inoperable with respect to this encampment which currently sits on unused and vacant land pursuant to section 52(1).<sup>100</sup> *Amicus curiae* notes that the Region is in the process of planning and sanctioning a hybrid encampment model that will combine indoor and outdoor spaces. The declaration could be accompanied by a stay of this proceeding which is available to the court of its own initiative pursuant to section 106 of the *Courts of Justice Act*.<sup>101</sup>

73. In the alternative, *amicus curiae* adopts and supports the non-*Charter* argument and remedies articulated by WRLCS in its factum.

All of which is respectfully submitted.



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Mercedes Perez

*Amicus Curiae*

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<sup>100</sup> [Victoria \(City\) v. Adams, 2009 BCCA 563 \(CanLII\)](#), paras. 164 to 166

<sup>101</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 106 which provides: “A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.”

## SCHEDULE “A”

### Authorities Referred to

1. [\*Abbotsford \(City\) v. Shantz\*, 2015 BCSC 1909 \(CanLII\)](#)
2. [\*Black et al. v. City of Toronto\*, 2020 ONSC 6398 \(CanLII\)](#)
3. [\*Canada \(Attorney General\) v. Bedford\*, 2013 SCC 72 \(CanLII\)](#)
4. [\*Canada \(Attorney General\) v. PHS Community Services Society\*, 2011 SCC 44 \(CanLII\)](#)
5. [\*Canada \(Prime Minister\) v. Khadr\*, 2010 SCC 3 \(CanLII\)](#)
6. [\*Carter v. Canada \(Attorney General\)\*, 2015 SCC 5 \(CanLII\)](#)
7. [\*Charkaoui v. Canada \(Citizenship and Immigration\)\*, 2007 SCC 9 \(CanLII\)](#)
8. [\*Doucet-Boudreau v. Nova Scotia \(Minister of Education\)\*, 2003 SCC 62 \(CanLII\)](#)
9. [\*Fraser v. Canada \(Attorney General\)\*, 2020 SCC 28 \(CanLII\)](#)
10. [\*Godbout v. Longueuil \(City\)\*, 1997 CanLII 335 \(SCC\)](#)
11. [\*Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia\*, 2007 SCC 27 \(CanLII\)](#)
12. [\*New Brunswick \(Minister of Health and Community Services\) v. G. \(J.\)\*, 1999 CanLII 653 \(SCC\)](#)
13. [\*Quebec \(Attorney General\) v. 9147-0732 Quebec Inc.\*, 2020 SCC 32 \(CanLII\)](#)
14. [\*R v. Appulonappa\*, 2015 SCC 59 \(CanLII\)](#)
15. [\*R. v. Collins\*, 1987 CanLII 84 \(SCC\)](#)
16. [\*R. v. Ewanchuk\*, 1999 CanLII 711 \(SCC\)](#)
17. [\*R. v. Malmo-Levine; R. v. Caine\*, 2003 SCC 74 \(CanLII\)](#)
18. [\*R. v. Morgentaler\*, 1988 CanLII 90 \(SCC\)](#)
19. [\*R. v. Ndhlovu\*, 2022 SCC 38 \(CanLII\)](#)



20. [R. v. Oakes, 1986 CanLII 46 \(SCC\)](#)
21. [Suresh v. Canada \(Minister of Citizenship and Immigration\), 2022 SCC 1 \(CanLII\)](#)
22. [Victoria \(City\) v. Adams, 2008 BCSC 1363 \(CanLII\)](#) aff'd [Victoria \(City\) v. Adams, 2009 BCCA 563 \(CanLII\)](#)

### **Secondary Sources**

1. Jackman, Martha, "[The Protection of Welfare Rights Under the Charter](#)" (1988), 20 Ottawa L. Rev. 257, cited in [Black et al. v. City of Toronto, 2020 ONSC 6398 \(CanLII\)](#)

## SCHEDULE “B”

### Relevant Statutes and Regulations

#### Relevant Provisions of Statutes, Regulations and Bylaws

1. [By-law Number 13-050 of The Regional Municipality of Waterloo, A By-law Respecting the Conduct of Persons Entering Upon Buildings, Grounds and Public Transportation Vehicles Owned or Occupied by The Regional Municipality of Waterloo](#)
2. [Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(U.K.\), 1982, c. 11](#), ss. 1, 7, 15, 24(1), 32(1)
3. [Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(U.K.\), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44, s. 52\(1\)](#)
4. [Courts of Justice Act, R.S.O. 1990, c. C.43, s.106](#)
5. [Municipal Act, 2001, S.O. 2001, c. 25, as amended](#), ss. 11 and 440
6. [Trespass to Property Act, R.S.O. 1990, c. T.21, as amended](#)

#### Treaties Considered

1. [Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, OHCHR \(18 December 1979\), 27\(1\), Arts.14.2\(h\) and 15\(4\)](#)
2. [Convention on the Rights of Persons with Disabilities, Treaty Series 2515 \(December 2006\), 3, Arts. 4 and 28](#)
3. [Convention on the Rights of the Child, GA Res 44/25, OHCHR \(2 September 1990\) 49, Arts. 16.1 and 27](#)
4. [International Covenant on Civil and Political Rights, GA Res 2200A \(XXI\), OHCHR \(23 March 1976\) 17](#)
5. [International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966., 993 U.N.T.S.3; S. Exec. Doc.D, 95-2 \(1978\); S. Treaty Doc. No. 95-19; 6 I.L.M., 360 \(1967\), Art. 2 and 11](#)
6. [International Convention on the Elimination of All Forms of Racial Discrimination, GA Res 2106 \(XX\), OHCHR \(4 January 1969\), Art. 5\(e\)\(iii\)](#)

7. [\*Universal Declaration of Human Rights\*, Dec. 8, 1948, G.A. Res. 217A \(III\), U.N. Doc. A/810 \(1948\), Art. 25\(1\)](#)

**THE REGIONAL MUNICIPALITY OF WATERLOO** and  
Applicant

**PERSONS UNKNOWN AND TO BE ASCERTAINED**  
Respondents

Court File Number: CV-22-00000717-0000

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
Proceeding commenced in Kitchener

**FACTUM OF *AMICUS CURIAE***

PEREZ BRYAN PROCOPE LLP  
67 Yonge Street, 2<sup>nd</sup> Floor  
Toronto, Ontario  
M5E 1J8

Mercedes Perez  
LSUC no.: 48381L  
Tel: (416) 320-1914 ext. 101  
Fax: (416) 320-1914  
Email: [mperez@pbplawyers.com](mailto:mperez@pbplawyers.com)

*Amicus Curiae*