

COURT OF APPEAL FOR ONTARIO

CITATION: Heegsma v. Hamilton (City), 2026 ONCA 726

DATE: 20261009

DOCKET: COA-25-CV-0166

Huscroft, Trotter and Favreau JJ.A.

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)

Sujit Choudry, Sharon Crowe, Wade Poziomka and Mani Kakkar, for the
appellants

Bevin Shores, Jordan Diacur and Jennifer King, for the respondent

Andrea Bolieiro and Sara Badawi, for the Attorney General of Ontario

Samara Sector, for the British Columbia Civil Liberties Association

Margaret Flynn and Princess Doe, for the Canadian Centre for Housing Rights

Tina Q. Yang and Naomi Greckol-Herlich, for the Canadian Civil Liberties
Association

Reema Khawja and Alisha Krishna, for the Ontario Human Rights Commission

Alexa Biscaro and Erika Anschuetz, for the Women's Legal Education and Action
Fund

Andrew Reeson, for the Corporation of the City of Kingston

Fred Fischer, Michele Brady and Molly Lowson, for the City of Toronto

Heard: February 10-11, 2026

On appeal from the judgment of Justice James A. Ramsay of the Superior Court of Justice, dated December 23, 2024, with reasons reported at 2024 ONSC 7154.

Favreau J.A.:

A. INTRODUCTION

[1] The appellants are a group of 14 people who were unhoused and living in encampments in Hamilton at various times between August 2021 and August 2023. They brought an application to challenge the City of Hamilton's by-law that prohibits installing tents and sleeping in public parks in the City and to challenge the City's actions removing them from public parks in Hamilton during the relevant period. The challenge was based on ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The appellants sought declarations that the by-law was invalid and damages for the alleged violation of their *Charter* rights.

[2] The application judge dismissed the application. He found as a fact that none of the appellants were forcibly removed from a public park at night, and decided that ss. 7 and 15 of the *Charter* do not protect a right to shelter or erect a tent in public parks during the daytime. On this basis, he found that the City's by-law and actions did not violate the appellants' *Charter* rights. The application judge further found that, even if the City's by-law breached the appellants' *Charter* rights,

they would have no entitlement to damages unless the City had acted wrongly, in bad faith or in abuse of power, which he found it had not.

[3] The appellants submit that the application judge erred in excluding and assessing some of their evidence, including a finding that none of the appellants were evicted from public parks at night. The appellants further submit that the application judge erred in his analysis and application of ss. 7 and 15 of the *Charter*, and in finding that no damages would be available even if the City had breached the *Charter*.

[4] I would allow the appeal. The application judge made a series of errors. First, the application judge excluded documents the appellants sought to have admitted without conducting any analysis of whether the documents met the public documents hearsay exception. Second, in finding that there were no evictions at night, the application judge failed to analyze the appellants' evidence, and instead improperly relied on stereotypes regarding people with mental health conditions and addiction issues in assessing the credibility and reliability of their evidence. Third, the application judge's ss. 7 and 15 analyses were conclusory and failed to engage with the legal tests for determining whether a *Charter* breach was made out. Fourth, the application judge's *Charter* damages analysis applied the case law relevant to unconstitutional legislation without considering whether the same standard is applicable to unconstitutional municipal by-laws.

[5] The appellants urge this court to allow the appeal and to grant them declaratory relief and damages. They further urge the court to provide guidance to the courts below on how to approach cases involving *Charter* challenges to by-laws and to the enforcement of by-laws that have the effect of preventing homeless encampments and unhoused people from sheltering in public parks and other public spaces.

[6] Given the errors made by the application judge, it would be inappropriate for this court to decide the issues raised by the appellants on the application or to provide general guidance beyond the issues that arise in this case. There are still important findings of fact to be made in this case. It is not the role of this court, on appeal, to embark on a fact-finding process and conduct the analysis that should have been done by the application judge. In these circumstances, I would remit the matter to the Superior Court to be decided by a different judge in accordance with these reasons.

B. BACKGROUND

[7] The evidentiary record in this case is extensive. In this section, I provide only background information to give context to the application judge's decision and to the matters in dispute between the parties. I refer to specific evidence as necessary in the sections analyzing the issues raised on appeal.

[8] At the outset, it is worth emphasizing that the focus of the appellants' application has changed over the course of the proceedings. Initially, the

application challenged the City's by-law, which I describe below. The application then expanded to include a challenge to a process the City implemented for the removal of encampments that was in effect between August 2021 and August 2023, which I also describe below. At the argument of the appeal, it remained unclear whether the appellants seek to challenge the City's by-law, the process in effect between August 2021 and August 2023 or the City's specific enforcement actions against them. For now, I make this point in order to give context to the topics covered in the background below. I will revisit this concern in my conclusion.

a. The City's by-law

[9] The by-law at issue in this case is By-law 01-219 – A By-law to Manage and Regulate Municipal Parks (the “By-law”). The By-law regulates the use of public parks in Hamilton. Amongst other matters, the By-law prohibits people from spending the night and erecting tents or other structures in public parks.

[10] Section 3 of the By-law prohibits anyone from entering or being in a public park from 11:00 p.m. to 6:00 a.m.:

3. (1) No person shall enter into or be in a park, except during the times the park is open to the public or during such times as otherwise expressly authorized by permit.

(2) A park shall only be open to the public:

(a) where there is displayed at, within or adjacent to a park a posted sign or notice as to the times such park is open to the public, during the times so indicated on such sign or notice; or

(b) in the absence of a posted sign or notice as referred to in subsection 3(2)(a), a park shall only be open to the public each day from six o'clock in the forenoon (6:00 a.m.) until eleven o'clock in the afternoon (11:00 p.m.).

[11] Section 12(a) of the By-law prohibits anyone from taking possession of a park in Hamilton, including by placing or constructing a structure:

12. (a) Unless expressly authorized by permit, no person shall encroach upon or take possession of any park, or any part or area within a park, by any means whatsoever, including but not limited to the placing, construction, installation or maintenance of any fence, structure or other thing, the dumping or storage of any materials, or by planting any plant or otherwise cultivating, grooming or landscaping any part of the grounds thereof[.]

[12] Section 17 of the By-law prohibits anyone from living or camping in a park without a permit.

[13] Section 18 of the By-law prohibits anyone from placing a tent or other structure in a park.

b. The initiation of the litigation and the City's protocols

[14] In July 2020, the appellants brought a motion for an injunction to prohibit the City from dismantling encampments during the COVID-19 pandemic. On July 30, the Superior Court issued a 10-day injunction, which was later extended to August 7, 2020.

[15] After the injunction was granted, as a part of a settlement agreement, the City created the Bylaw Enforcement Protocol, which was meant to address how by-law enforcement officers were to deal with encampments in Hamilton's parks

(the “2020 Protocol”). The 2020 Protocol was in place from October 2020 to August 2021. The 2020 Protocol set out the process to be followed when “the Encampment Taskforce has been contacted regarding an encampment location”. The 2020 Protocol provided that “persons experiencing homelessness” were first to be assessed and given an acuity score. The acuity score was to be based on an assessment tool described as the Vulnerability Index – Service Prioritization Decision Assistance Tool. People with a lower acuity score or who refused to be assessed were to be provided with support for finding alternative housing, and could be removed after 14 days. People with higher acuity scores were to be provided with support, but were not subject to the 14-day timeline for removal. The 2020 Protocol also included specific prohibitions, including that there be no more than five people in an encampment, no encampments on sidewalks or roadways, and no encampments blocking entrances, and specified distances between encampments and schools and playgrounds.

[16] On August 9, 2021, City Council repealed the 2020 Protocol and implemented an “encampment process”, which was in place until August 2023 (the “2021 Encampment Process”). The 2021 Encampment Process set out a multi-step protocol for addressing encampments, which included the following process:

- (a) When Municipal Law Enforcement received a complaint about tents or structures in parks, they were to attend the park to determine if

there was a violation of the By-law, seek voluntary compliance and notify the Housing Outreach team.

- (b) The Housing Focused Street Outreach team was then to attend the site to carry out a number of actions, including supporting people to connect them with shelters and other services, helping people get necessary documents to obtain housing, coordinating services with appropriate agencies and conducting crisis intervention. They were also to prepare a summary of these actions for Municipal Law Enforcement.
- (c) Once Municipal Law Enforcement received a report, they were to re-attend, issue a verbal trespass notice and notify Hamilton Police Services.
- (d) The Hamilton Police Service were to “[respond] under the *Trespass to Property Act*, R.S.O. 1990, c. T.21”.
- (e) Parks and Waste Divisions were to be contacted to coordinate a cleanup of the site.

[17] On October 4, 2021, five of the appellants commenced an application and brought a motion for an injunction prohibiting the City from enforcing the By-law. The motion was dismissed on November 2, 2021: *Poff v. City of Hamilton*, 2021 ONSC 7224, 498 C.R.R. (2d) 83.

[18] In November 2022, the appellants amended their application, to seek declaratory relief and damages under s. 24(1) of the *Charter*.

[19] In August 2023, City Council adopted a new protocol (the “2023 Protocol”). The 2023 Protocol allowed unhoused persons to erect tents in public parks, subject to specific restrictions, including the location of the tents and the number of tents that could be clustered together. The protocol was revised in June 2024.¹

c. The appellants

[20] There are fourteen appellants. In this section, I do not provide a detailed description of each of their circumstances. Given my conclusion below that the matter should be remitted to a different judge, it will be up to that judge to make findings of fact regarding each appellant as necessary to adjudicate the matter. However, to give context to the issues on appeal, I provide a broad overview of their circumstances.

[21] The 14 appellants were unhoused in Hamilton for a variety of reasons over various periods of time between August 2021 and August 2023.

[22] Many of the appellants have mental health conditions and/or addiction issues. Seven of the appellants are Indigenous women, one is an Indigenous man, two are Black and one is a transgender woman.

¹ At the hearing, counsel for the appellants advised the court that the 2023 Protocol was rescinded on March 6, 2025, after the appeal was filed but before it had been heard, and that the By-Law’s prohibition on camping in a park without a permit is again in effect.

[23] In their evidence, all appellants report having lived in homeless encampments in Hamilton and having been evicted from an encampment at least once sometime between August 2021 and August 2023. Four of the appellants report being evicted overnight.

[24] The appellants' evidence provides varying reasons for staying in encampments, including in some cases that there were no shelter beds available, that the available shelters would not accommodate their specific needs or preferences, or that they preferred not to stay in shelters for various reasons.

[25] The appellants also provide evidence of their experiences after being evicted from public parks.

C. SUPERIOR COURT PROCEEDINGS AND THE APPLICATION JUDGE'S DECISION

[26] The application judge case managed the proceedings. He set timetables and made a number of rulings in advance of the hearing.

a. Preliminary evidentiary rulings

[27] In an endorsement dated October 30, 2023, the application judge gave the appellants permission to file the evidence of eight experts. The experts included physicians with experience providing care to unhoused persons, an epidemiologist and a social worker.

[28] In an endorsement dated November 12, 2024, the application judge addressed a motion brought by the City seeking to strike portions of affidavits filed

by the appellants. The affidavits were from the treating physicians of some of the appellants. They were offered as participant experts. The application judge struck portions of the affidavits. He ruled that the treating physicians were only entitled to provide the history given by the patient to the extent it was relevant to their diagnosis and treatment. He further held that the treating physicians were not entitled “to give opinions outside the scope of their diagnosis and treatment.”

[29] In advance of the hearing, the appellants served requests to admit. This included a request to admit the authenticity of various documents. The City admitted the authenticity of some, but not all of the documents. Just before the application, the appellants served a multi-volume application record. Volumes 18 to 20 of the application record included the documents referred to in the appellants’ requests to admit. The City took the position that these documents were not properly before the court. The application judge agreed. In an endorsement dated December 4, 2024, the application judge struck the three volumes. I address his reasons for doing so in the analysis below.

b. Decision dismissing the application

[30] I provide a more detailed review of the relevant parts of the application judge’s reasons as needed in the analysis below. In this section, I only provide a high-level summary to give context to the issues on appeal.

[31] The application was heard from December 16 to 18, 2024. The application judge released his reasons dismissing the application a few days later, on December 23, 2024.

[32] The application judge's reasons are 14 pages long. At the beginning of his reasons, the application judge acknowledged that the record consisted of 10,000 pages, and stated that the brevity of his reasons did not reflect the "massive amount of work" done by the lawyers.

[33] Throughout his reasons, the application judge stated several times that none of the appellants were evicted from a public park overnight during the relevant period.

[34] The application judge found no s. 7 *Charter* violation. He noted his disagreement with previous jurisprudence regarding s. 7 protection for nighttime evictions, but stated that it was not necessary for him to "decline to follow" these decisions given his finding that there were no nighttime evictions. He further stated that he was not prepared to "apply the protection of s. 7 of the [*Charter*] to evictions during the daytime".

[35] The application judge rejected the appellants' argument that the By-law violates the s. 15 *Charter* equality rights of Indigenous persons, women and persons with a disability. He held that these groups are disadvantaged by homelessness rather than the enforcement of the By-law. He further held that the

only characteristic the appellants have in common is homelessness, which is not an enumerated or analogous ground under s. 15.

[36] Despite finding no *Charter* violations, the application judge dealt with the issue of damages. Relying on the decision of the Supreme Court in *Canada (Attorney General) v. Power*, 2024 SCC 26, 494 D.L.R. (4th) 191, the application judge held that damages can be awarded as a remedy for an unconstitutional by-law only when the court finds that the municipality acted wrongly, in bad faith or in abuse of power. He then found that, in this case, the City did not act wrongly, in bad faith or in abuse of power in the enforcement of its By-Law.

D. ISSUES ON APPEAL

[37] The appellants appeal the application judge's rulings limiting the evidence of their treating physicians and striking Volumes 18 to 20 of the application record.² The appellants also appeal the order dismissing their application. In combination, I would characterize the issues raised by the appellants on appeal as follows:

- (a) Did the application judge err by excluding the documents the appellants sought to have admitted through their requests to admit?

² After the appeal was commenced, the City brought a motion to quash the appeal from the rulings striking portions of the participating expert witnesses and the three volumes of the application record on the basis that these were interlocutory orders. This court dismissed the motion, finding that these grounds of appeal are so inextricably linked to the other grounds of appeal that the appellants should not be required to obtain leave from the Divisional Court: *Heegsma v. Hamilton (City)*, 2025 ONCA 554.

- (b) Did the application judge err by admitting the expert evidence of the City's expert Dr. Koivu?
- (c) Did the application judge err in his application of the participant expert test to the evidence of the appellants' physicians?
- (d) Did the application judge err in his assessment of the evidence regarding the appellants' alternatives?
- (e) Did the application judge err in finding that there were no overnight evictions?
- (f) Did the application judge err in his s. 7 *Charter* analysis?
- (g) Did the application judge err in his s. 15 *Charter* analysis?
- (h) If s. 7 or 15 of the *Charter* was infringed, are the limits on the right justified under s. 1?
- (i) Did the application judge err in holding that *Charter* damages are not available for breach of a by-law in the absence of a clear wrong, bad faith or an abuse of power?

[38] In the event the court allows the appeal from the application judge's ruling striking the three volumes of the appellants' evidence, the City brings a motion to admit fresh evidence.

[39] As indicated in the introduction, I would allow the appeal and remit the matter to the court below. In the circumstances, it is not necessary to address all the

issues raised by the appellants or the City's motion for fresh evidence. The new application judge will have to assess the evidence afresh and, therefore, it is not necessary to address all of the evidentiary issues raised by the appellants. Accordingly, I will address the following issues:

- (a) Did the application judge err by excluding the documents the appellants sought to have admitted through their requests to admit?
- (b) Did the application judge err in finding that there were no overnight evictions?
- (c) Did the application judge err in his s. 7 *Charter* analysis?
- (d) Did the application judge err in his s. 15 *Charter* analysis?
- (e) Did the application judge err in finding that *Charter* damages are not available absent a clear wrong, bad faith or an abuse of power?
- (f) What is the appropriate remedy?

E. PRELIMINARY OBSERVATIONS ABOUT THE APPLICATION JUDGE'S REASONS

[40] As indicated above, the application judge acknowledged that his reasons were brief given the length of the application record. There is no doubt that concision can be a virtue in writing reasons, and reasons are not necessarily deficient because of their brevity. However, in this case, on key issues, the reasons were conclusory and lacked the depth of analysis that is required when dealing

with issues of this significance. The issue of homeless encampments is of great public importance. It brings into play the challenging social balance between the ability of vulnerable individuals to shelter safely and everyone's ability to enjoy public space. The appellants and the City expended tremendous resources in bringing these issues before the court. Yet, for the most part, the application judge only addressed the key factual and legal issues in brief conclusory paragraphs with little or no analysis.

[41] Reasons for judgment must set out a logical path to the judge's conclusion; this is integral to the proper administration of justice: *Marketology Media Inc. v. DGA North American Inc.*, 2024 ONCA 799, at para. 32. Reasons serve various purposes. They explain the decision to the parties, they foster public accountability, and they permit effective appellate review: see *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 11. Reasons must chart a path from the evidence to the factual findings to the legal conclusions: *Marketology*, at para. 32; *R.E.M.*, at para. 20. They must explain not only what the decision is, but why.

[42] While I address the individual grounds of appeal identified above, the errors I identify in each ground of appeal can be traced back to the lack of analysis and the conclusory nature of the decision. Unfortunately, this also leads to my conclusion that the matter must be sent back to the Superior Court to be decided afresh because it would not be appropriate for this court to make the findings of

fact and conduct the necessary analysis as though it were the court of first instance.

F. ISSUE 1: DID THE APPLICATION JUDGE ERR BY EXCLUDING THE DOCUMENTS THE APPELLANTS SOUGHT TO HAVE ADMITTED THROUGH THEIR REQUESTS TO ADMIT?

[43] I agree with the appellants that the application judge erred in excluding the documents in the way he did. The application judge excluded the documents because they were not attached to an affidavit and based on the timing of their delivery. This was an error. Given that the City admitted the authenticity of many documents, the application judge should have considered whether the documents were admissible based on the public documents exception to the hearsay rule. If the timing of their delivery prejudiced the City, the application judge could have considered whether to adjourn the application rather than striking the three volumes of documents.

a. The documents at issue and the ruling excluding them

[44] Between May 31, 2023 and August 26, 2024, the appellants served a series of requests to admit. Amongst other matters, the requests to admit requested that the City admit the authenticity of various documents. The appellants describe the documents as falling within the three following categories:

- (a) The City's monthly data showing "the number of actively homeless persons and shelter bed capacity from January 2020 to January 2024

(broken down by sex)” from the City’s website titled “Housing and Homeless Dashboard”;

- (b) The City’s explanation for collecting the Dashboard data and definitions of the relevant terms; and
- (c) The City’s 2021 “Point in Time Count” of the City’s unhoused population.

[45] The City responded to the requests to admit and admitted the authenticity of some, but not all, of the documents at issue. The City did not admit the truth of the contents of the documents.

[46] The appellants did not attach these documents to any affidavits served on the application. Cross-examinations were completed on October 15, 2024. On November 22, 2024, approximately three weeks before the scheduled hearing of the application, the appellants served their application record, which included three volumes that contained the requests to admit, the City’s response to the requests to admit and the documents the City admitted were authentic. In their factum on the application, the appellants referred to some of these documents and sought to have them admitted for the truth of their content based on the public documents exception to the hearsay rule.

[47] At a case conference that occurred a few days before the application was set to start, the City advised that it intended to bring a motion to strike the three volumes of documents.

[48] In an endorsement dated December 4, 2024, the application judge struck the three volumes of documents based on the submissions made during the case conference and without a formal motion. The application judge explained his rationale for doing so in the following two paragraphs:

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

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

[49] Despite this ruling, in his reasons for decision on the application, the application judge stated that he was relying on “public documents in the record”:

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

[50] While the application judge purported to rely on public documents, he did not identify them and it is therefore not possible to know what documents he relied on and whether they include some of the documents that were struck.

b. Positions of the parties

[51] The appellants submit that the application judge's decision is contrary to r. 51 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. They submit that once the City admitted the authenticity of the documents, they could form part of the record without an affidavit. They further submit that, given the nature of the documents, the application judge should have admitted them for the truth of their content based on the public documents exception to the hearsay rule.

[52] The City submits that the application judge did not err in excluding these documents. The City argues that its admission that the documents are authentic did not mean that they could be admitted for the truth of their contents. The City further argues that the application judge was exercising his case management functions when he excluded the documents based on their late delivery, and that this court should not interfere with the exercise of his discretion. In any event, the appellants have not established that the documents at issue would have affected the result.

c. Analysis

[53] Rule 51 of the *Rules of Civil Procedure* sets out the process for admissions based on requests to admit, including admissions regarding the authenticity of a document.

[54] Rule 51.02 states:

51.02 (1) A party may at any time, by serving a request to admit (Form 51A), request any other party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document.

[55] Rule 51.03 requires a party on whom a request to admit is served to respond, failing which the party is deemed to admit the truth of the fact or the authenticity of the documents mentioned in the request.

[56] Rule 51 is not limited to actions but extends to all “proceedings”. Therefore, it is open to a party to seek to introduce facts or documents on an application through a request to admit: *Ash v. Ontario (Chief Medical Officer)*, 2022 ONCA 849, 165 O.R. (3d) 342, at para. 8. Accordingly, it was an error for the application judge to rule that the appellants could not rely on the documents because they were not attached to an affidavit. There was no requirement that the documents be attached to an affidavit.

[57] However, the documents were not admissible for the truth of their contents without further analysis. In order to admit them for the truth of their contents, the appellants would have to establish that they meet one of the exceptions to the hearsay rule: *Wunsche v. Wunsche* (1994), 18 O.R. (3d) 161 (C.A.), at p. 167.

[58] The appellants submit that they should have been admitted on the basis that they are public documents. The rationale for admitting public documents for the truth of their contents without further proof is “because of their inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be present in court to prove them”: *R. v. P. (A.)* (1996), 109 C.C.C. (3d) 385 (Ont. C.A.), at p. 390; *R. v. Caesar*, 2016 ONCA 599, 339 C.C.C. (3d) 354, at para. 37. In order to be admitted as public documents, the party seeking their admission must demonstrate that the documents were:

- (a) Made by a public official;
- (b) The public official made them in the discharge of his or her public duty or function;
- (c) The document was made with the intention that it serve as a permanent record; and
- (d) The document is available for public inspection.

P. (A.), at p. 390; *Caesar*, at para. 38.

[59] This analysis must be conducted on a document-by-document basis: see e.g., *Canpotex Ltd. v. Graham* (1985), 5 C.P.C. (2d) 233 (Ont. H.C.); *Ontario v. Rothmans et al.*, 2011 ONSC 5356, aff’d 2013 ONCA 353, 115 O.R. (3d) 561.

[60] In this case, in accordance with r. 51.01 of the *Rules of Civil Procedure*, the City admitted that some of the documents appended to the appellants’ requests to

admit were true copies of the original documents. The next steps for admitting the documents should have been a document-by-document analysis of their admissibility as public documents. This is the analysis the application judge should have performed rather than striking the documents on the basis that they were not attached to an affidavit. He should have assessed whether the documents themselves or other evidence in the record would allow the court to determine whether they could be admitted as public documents.

[61] The timing of the appellants' delivery of the documents in the application record should not have been an obstacle to their admissibility. By serving the requests to admit on the City, the appellants had provided some notice of their intention to rely on the documents. It appears that the City was nevertheless caught unawares because the appellants did not notify the City that they intended to seek to have the documents admitted for the truth of their content based on the public documents exception until they served their factum. Given that the documents could not be admitted for the truth of their contents without determining on a document-by-document basis whether they met the public documents exception, it would certainly have been preferable for the appellants to provide advance notice that they intended to rely on them for the truth of their contents on the basis of the public documents exception. The parties could have then convened a case conference with the application judge well in advance of the hearing to determine the best process for deciding on the admissibility of each

document. Nevertheless, I am satisfied that the application judge erred in excluding these documents without considering whether some or all of them were admissible based on the public documents exception.

[62] As matters unfolded, when the City raised the issues at the case conference shortly before the hearing, if the application judge was satisfied that the City might suffer prejudice because of a lack of communication between the parties over the appellants' intended use of the documents, he should have considered adjourning the hearing rather than striking the documents. I appreciate that case management judges are to be given wide latitude in managing the cases before them and in avoiding unnecessary delays and wasted court time. However, in this case, the application judge's concern over prejudice to the City was based on the erroneous premise that the documents could not be admitted because they were not attached to an affidavit.

[63] The City submits that, even if the application judge erred in excluding the documents, this had no impact on the outcome of the application. In particular, the City points out that the appellants only referred to a handful of the documents at issue in their factum on the application and to the fact that the application judge said that he relied on some public documents in his reasons on the application.

[64] The problem with this submission is that it is not possible to identify what documents the application judge was referring to when he stated that there were public documents in the record that were admissible under the "traditional

exception” to the hearsay rule. Moreover, given the overall lack of analysis in his reasons, it is not possible to know what, if any, impact his ruling striking out the three volumes had on the outcome.

[65] Having said this, it is an onerous task for a judge to rule on the admissibility of multiple documents if the appellants in fact only rely on a few of those documents. When this matter is remitted to the Superior Court, the appellants should identify the documents they seek to rely on as public documents to make the task of determining their admissibility less onerous.

G. ISSUE 2: DID THE APPLICATION JUDGE ERR IN FINDING THAT THERE WERE NO OVERNIGHT EVICTIONS?

[66] The application judge’s conclusion that there was no breach of s. 7 of the *Charter* depended heavily on his finding that there were no overnight evictions from public parks in Hamilton during the relevant period.

[67] The appellants submit that the application judge erred in finding that there were no overnight evictions. Specifically, the appellants submit that the application judge relied on impermissible stereotypes about people with mental health conditions and addiction issues in finding that their evidence was unreliable. I agree. The application judge’s reasons contain no analysis of the evidence in arriving at the conclusion that there were no overnight evictions.

[68] Each appellant provided an affidavit and was cross-examined on their affidavit. Several of the appellants stated that they had been evicted from public

parks during the night. For example, in her affidavit, Misty Marshall stated that the police asked her to leave a park in Hamilton around 11:00 p.m. in 2022. Linsley Greaves, in cross-examination, recalled being removed from a park in Hamilton in the late evening or night. Sherri Ogden stated during cross-examination that she was asked by police to leave Durand Park one day at around 5:30 a.m. Finally, during his cross-examination, Cory Monahan said he was often woken up before sunrise and asked to leave an encampment.

[69] The application judge assessed the credibility and reliability of their evidence collectively and in a cursory and conclusory fashion. He asserted several times throughout the decision that there were no overnight evictions. His only analysis of the appellants' evidence on this issue was limited to the following two paragraphs:

The applicants, apart from Mr. Smyth, have mental issues or drug problems which can affect perception and memory. Some of their recollections of being evicted were hazy or were the product of what they were told. I prefer the evidence of the City staff as to what happened in enforcement of the by-law.

...

Under any of the three policies people were never evicted as night approached, as the applicants largely confirm in their depositions. Where they state the contrary, I do not believe them.

[70] The application judge did not do an individualized assessment of the appellants' credibility and reliability. His central rationale for preferring the City's

evidence was that all, except for one the appellants, lived with mental health conditions and addiction issues which he said can affect perception and memory. On this basis, he concluded that their evidence was unreliable.

[71] It was an error for the application judge to assess the credibility and reliability of the appellants' evidence on a group basis with no analysis of their specific evidence. Mental health and addiction, and their effects, are highly individualized. It was improper for the application judge to draw broad conclusions about the credibility and reliability of the appellants' evidence, collectively, simply by asserting that mental illness and addiction can affect perception and memory: *R. v. C.P.*, 2026 ONCA 333, 10 C.R. (8th) 394, at para. 14. It was also insufficient for the application judge to state, without particularization, that "some" of appellants' evidence was hazy, and to rely on this to make adverse credibility findings against the appellants as a whole.

[72] More importantly, it was an error for the application judge to rely on myths and stereotypes about mental illness and addiction to find that the appellants' evidence was not credible. This was an error of law: *C.P.*, at para. 14; *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385, at paras. 41, 57. There may be individuals who live with mental health conditions or addiction issues whose memories are impacted by those circumstances. But the application judge's apparent blanket assumption that the appellants' evidence was unreliable because of those considerations perpetuates myths and stereotypes about some of the most

vulnerable people in our society. It was incumbent on the application judge to analyze their evidence individually and, if he rejected it based on this individual assessment, to articulate why, without resorting to myths and stereotypes.

[73] In the absence of a proper analysis of the evidence, the application judge's finding that there were no nighttime evictions cannot stand. This finding was fundamental to the application judge's decision that the City did not violate the appellants' s. 7 *Charter* rights and it therefore affected the whole decision.

[74] The City submits that, even if the application judge had conducted an individual assessment of the appellants' credibility, he would have reached the same conclusion that there were no nighttime evictions. The City invites this court to conduct that assessment. I do not accept this submission. As the appellants point out, at least four of them refer to nighttime evictions in their affidavits or in cross-examination. It was incumbent on the application judge to consider and assess the evidence of the individual appellants in the context of the evidence as a whole without resorting to myths and stereotypes. It is not for this court to conduct this credibility assessment.

H. ISSUE 3: DID THE APPLICATION JUDGE ERR IN HIS S. 7 CHARTER ANALYSIS?

[75] The appellants argue that the application judge erred in his analysis of s. 7 of the *Charter*. I agree. First, as I have addressed above, the application judge erred in how he assessed the evidence of nighttime evictions. Second, and

relevant to this section, when considering whether daytime evictions breached s. 7 of the *Charter*, the application judge failed to conduct the analysis required to decide whether the City breached their s. 7 rights.

[76] In order to establish a breach of s. 7, a claimant must first show that state action deprived the person of life, liberty or security of the person, and, if so, that the deprivation was not in accordance with the principles of fundamental justice: *Carter v. Canada (Attorney General)*, 2015 SCC 5, 1 S.C.R. 331, at para. 55; *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 93.

[77] The application judge did not set out the framework to be applied nor did he apply it. Instead, this section of his decision amounts to a cursory expression of his disagreement with the appellants' position with very little analysis or engagement with the evidence. It also includes some misapplications of the law and some irrelevant commentary.

[78] For example, he never considered the parties' evidence on whether the inability to shelter in a public park, including during the daytime, supported or did not support a finding that the appellants were deprived of their right to life, liberty or security of the person.

[79] As another example, the application judge also expressed his view that it is homelessness that puts people's lives at risk, rather than the enforcement of the By-Law, and that encampments contribute to this risk. This was a clear failure on

the application judge's part to engage with the issues before him. There is no doubt that homelessness puts people at risk. There was also evidence that encampments can pose their own risks. However, the issue was whether, based on the evidence in the record, the City's requirement, in accordance with the By-Law and the 2021 Encampment Process, that unhoused persons remove temporary shelters from public parks, including during the daytime, breached their s. 7 rights. This required analysis of the evidence through the lens of the s. 7 framework. Notably, contrary to the application judge's suggestion, under that framework, a claimant can establish a sufficient causal connection even if the impugned government action is not the dominant cause of the alleged prejudice suffered: *Bedford*, at para. 76.

[80] As a final example, the application judge conflated s. 7 and s. 1 of the *Charter*, improperly relying on competing social interests and the public benefits of regulating access to parks in his s. 7 analysis rather than, as mandated by the Supreme Court, in a s. 1 analysis. In concluding his s. 7 analysis, the application judge stated that "we must not lose sight of the countervailing interest of preserving public parks" and that "[e]xtension of freedom from enforcement would have the effect of depriving the City of the use and enjoyment of its property." These social interests and public benefit considerations belong in the s. 1 analysis and not in the s. 7 analysis: *Carter*, at para. 79; *Bedford*, at paras. 123 and 125.

[81] I do not propose to decide the issue of whether the appellants' s. 7 rights were breached. This would require the court to make findings of fact that should have been made by the application judge.

[82] Despite the appellants' invitation to do so, I also do not propose to prescribe an approach for how courts below should assess whether a by-law or policy that precludes unhoused people from erecting tents and shelters in public parks breaches their s. 7 *Charter* rights.

[83] There is no decision from this court that has considered the application of s. 7 of the *Charter* to the removal of unhoused persons from public parks. The decision of the Court of Appeal for British Columbia in *Victoria (City) v. Adams*, 2009 BCCA 563, 313 D.L.R. (4th) 29, is the most significant appellate authority to date on this issue in Canada. In *Adams*, the City of Victoria had passed a by-law that allowed people to sleep in public parks at night but that prevented them from erecting any type of shelter, including tents. The applicants sought to challenge the by-law, in part on the basis that it infringed their s. 7 *Charter* rights. The Supreme Court of British Columbia accepted this argument and granted the application. The Court of Appeal for British Columbia upheld this decision. In doing so, the court emphasized that the issue it was dealing with was narrow. The court emphasized that its decision depended on the specific by-law at issue and the facts of the case, including evidence that the number of homeless people

exceeded the number of available shelter beds at the relevant time: *Adams*, at para. 1.

[84] Since *Adams*, there have been many decisions in Canada dealing with challenges to by-laws or enforcement actions that have prevented unhoused people from erecting tents and other shelters in public spaces. These include decisions made by the Superior Court in Ontario, including decisions released after the application judge's decision in this case. These decisions generally follow the approach adopted by the Court of Appeal for British Columbia in *Adams*: see, for example, *The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662, 541 C.R.R. (2d) 255; *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670, 164 O.R. (3d) 177; *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2025 ONSC 4774, 178 O.R. (3d) 521; and *The Regional Municipality of Waterloo v. Named Respondents and Persons Unknown*, 2026 ONSC 2971, appeal as of right to Ont. C.A. filed, COA-26-CV-0836, COA-26-CV-0897.

[85] This court has not yet weighed in on the approach adopted by the court in *Adams*. Given the recent Superior Court decisions and ongoing cases dealing with this issue, there may well be a need for some guidance from this court, including on the issue of whether *Adams* should be followed in this province. But guidance is difficult to provide in the abstract. In the absence of sound factual findings by the

application judge and given the brevity of his analysis, it would be premature to endorse or prescribe a specific analytical framework.

[86] The factual context of each case is different. By-laws will differ in their scope and application. The municipalities' approaches to homelessness will differ. The availability of alternatives to sleeping in a public park or other public spaces will differ. The municipalities' enforcement procedures will differ. The evidence regarding the impact of these contextual circumstances on the unhoused population may differ. And the applicants in any given case will adopt different litigation strategies, including choosing to target different aspects of a municipality's conduct; for example, targeting a by-law, an enforcement protocol, or a specific act of enforcement. No doubt, as cases dealing with these issues reach this court, the court will provide general guidance on the protection that s. 7 of the *Charter* may offer, including limits on such protection, in these types of circumstances. But this should be done with the benefit of a lower court decision that applies the core features of the s. 7 framework to a properly constituted factual record. In this case, the flaws in the application judge's fact-finding process and legal analysis do not allow for more than very general guidance on what s. 7 of the *Charter* requires.

[87] The application judge failed to conduct the analysis required to decide whether the City breached the appellants' s. 7 *Charter* rights. Instead, he made a number of conclusory comments that do not appear to be grounded in the law and

do not address the issues and evidence in this case. I am by no means suggesting that the appellants should succeed on their s. 7 challenge. Even if the appellants were to succeed in demonstrating a s. 7 breach, the court will have to conduct a s. 1 analysis at which point the competing social interests and public benefits in the By-Law's enforcement will be relevant considerations. This issue must be decided afresh.

I. ISSUE 4: DID THE APPLICATION JUDGE ERR IN HIS S. 15 *CHARTER* ANALYSIS?

[88] The application judge's s. 15 *Charter* analysis was limited to the following three paragraphs:

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

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

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

[89] Again, by approaching the s. 15 issue this way, the application judge made no effort to apply the legal framework for assessing an alleged s. 15 *Charter* infringement to the evidence in this case. Rather, he made conclusory statements

that were contrary to the legal framework and that failed to engage with the evidence.

[90] As recently reaffirmed by the Supreme Court in *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, 511 D.L.R. (4th) 201, to establish an infringement of s. 15(1) of the *Charter*, a claimant must show that: (1) the law or policy at issue disproportionately impacted a protected group; and (2) that the distinction reinforces, perpetuates or exacerbates the disadvantages faced by the protected group. On the first part of the analysis, “[w]here a measure does not explicitly distinguish based on a protected ground, the claimant can still show that the law creates a distinction *in effect* because of the law’s disproportionate impact on the protected group” (emphasis in original): *Kanyinda*, at para. 50.

[91] It is not necessary to elaborate any further on the test or framework or on how it should be applied in this case. I would only emphasize that the application judge simply did not do what was required to determine whether the City breached the appellants’ s. 15 *Charter* rights, in particular the equality rights of the appellants who are Indigenous, women, or persons with a disability. The application judge failed to grapple with the test as it would apply to the evidence in this case. I would also point out that the application judge made a clear error when he stated in a conclusory fashion that the By-law does not affect Indigenous persons, women or persons with a disability differentially “by intent or impact” without any further analysis. Notably, there was evidence, including the City’s own evidence, of

overcapacity in women's shelters. At the very least, this suggested that the By-Law may have a differential impact on women. This is not meant to be a finding on the issue of whether the City breached the appellants' *Charter* rights. Rather, it is meant to point out that the alleged s. 15 breach requires a proper analysis.

J. ISSUE 5: DID THE APPLICATION JUDGE ERR IN FINDING THAT *CHARTER* DAMAGES ARE NOT AVAILABLE?

[92] While the application judge found that the appellants did not establish a *Charter* breach, he nevertheless addressed the issue of damages. Relying on the Supreme Court's decision in *Power*, he held that the City could not be liable for paying *Charter* damages to the appellants because there was no evidence that the City acted wrongly, in bad faith or in abuse of power in enforcing the By-law.

[93] The parties, as well as several of the interveners, devoted a significant portion of their submissions to this issue. While it is not necessary to dispose of the appeal, it is nevertheless important to comment on the application judge's reliance on *Power* in addressing the issue of potential damages in this case.

[94] There are at least two problems with the application judge's reliance on *Power* in deciding that no *Charter* damages would be available in this case.

[95] First, *Power* dealt with the issue of whether *Charter* damages should be available for unconstitutional legislation, not unconstitutional by-laws or the unconstitutional enforcement of a by-law. In the event a court was to find that the City violated the appellants' *Charter* rights in enforcing the By-law, *Power* is not

determinative of whether they should be awarded *Charter* damages. Rather, the issue of damages would have to be addressed in accordance with the framework established by the Supreme Court of Canada in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28.

[96] Here, the application judge stated that he thought the same standard should apply to legislation as to “municipal legislatures”. He made no effort to apply *Ward*, specifically the second and third steps: why damages would be an appropriate and just remedy, and whether there were any countervailing factors. He conducted no analysis of the difference between legislation and by-laws. He conducted no review or analysis of relevant case law: see e.g., *Mackin v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13; [2020] 1 S.C.R. 678; *Brazeau v. Attorney General of Canada*, 2020 ONCA 184, 149 O.R. (3d) 705; *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498.

[97] It may well be appropriate to limit the circumstances under which a municipality is required to pay damages for an unconstitutional by-law. Outside the *Charter* context, the Supreme Court has recognized that municipalities benefit from the same good faith immunity for policy-making as other levels of government: *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Nelson (City) v. Marchi*, 2021 SCC 41, [2021] 3 S.C.R. 55. But if a similar limit on *Charter* damages is to be extended to municipalities, those limits cannot be derived from the

principles of legislative sovereignty and parliamentary privilege as in *Power*. Before concluding that the same standard applied to municipal by-laws as to legislation, the application judge should have conducted this analysis. It was an error to apply *Power* to municipal by-laws with no analysis.

[98] Second, the application judge relied on *Power* without clearly stating whether it applied to claims for damages based on a by-law found to be unconstitutional or the unconstitutional enforcement of a by-law. Rather, his reasons confuse this distinction. On the one hand, he stated that *Power* should apply to “municipal legislatures”, and on the other hand he held the City did not act wrongly, in bad faith or in abuse of power in enforcing the By-law. This is an important distinction. The first step in the *Ward* framework is to determine whether there has been a *Charter* breach. The nature of the breach is crucial to the rest of the analysis, especially consideration of whether there are countervailing considerations that should defeat a claim for *Charter* damages.

[99] I do not propose to resolve these issues. Ultimately, as discussed below, the judge who conducts the rehearing will have to determine with specificity whether the appellants are challenging the By-law, the 2021 Encampment Process or how the City enforced the By-law in respect of each appellant. Once this has been determined, the court will have to decide whether the City breached the appellants’ *Charter* rights and, if so, whether damages are appropriate in the specific

circumstances of the case. This analysis is to be conducted in accordance with the framework set by the Supreme Court in *Ward*.

K. ISSUE 6: WHAT IS THE APPROPRIATE REMEDY?

[100] The appellants ask that, if their appeal is allowed, the court grant declaratory relief and award them damages, rather than remitting the matter to the court below. They also ask that this court provide general guidance to the courts below in cases involving *Charter* challenges to by-laws and municipal actions that affect unhoused people who shelter in municipal parks and on municipal lands.

[101] Unfortunately, given the nature of the errors made by the application judge, it would not be appropriate for this court to substitute its own decision on the merits. Resolving the issues in this case will require fact-finding, including findings of credibility, that are not appropriate for this court. For this reason, the matter should be remitted to the Superior Court to be decided in accordance with these reasons. It will be for that judge to make his or her own findings of fact, including assessing the expert evidence afresh. It will also be for that judge to apply the ss. 7 and 15 frameworks to the evidence in this case, and, if a *Charter* breach is found, to decide whether s. 1 applies, and, if not, what remedies may be available in the circumstances of this case.

[102] As I have already explained, it would also not be appropriate for the court to give guidance beyond that already provided in these reasons.

[103] Before concluding these reasons, I make one final observation which is meant to assist with the rehearing of this matter. As I noted above, the conduct the appellants have sought to challenge seems to be a moving target. It is unclear whether they challenge the constitutionality of the By-law, the 2021 Encampment Process or the City's evictions of the appellants. This is evident from their materials and arguments below and from their arguments in this court. Even during the argument before this court, the appellants were hard pressed to specifically identify the state action they were challenging.

[104] In order to conduct a proper analysis of whether the City has breached the appellants' *Charter* rights, the first step is to clearly define what is being challenged.

[105] Once the matter is remitted to the Superior Court, the appellants must be clear about what they seek to challenge. This will ensure that the judge who will be deciding the matter afresh will be in a good position to determine what must be decided.

L. DISPOSITION

[106] I would allow the appeal and remit the application to the Superior Court to be heard by a different judge in accordance with these reasons.

[107] The appellants seek their costs of the appeal and the costs of the application below. They have provided a bill of costs but the court does not have the benefit of submissions from the parties on costs. The appellants may make brief costs

submissions in writing of no more than five pages within seven days of these reasons. The respondent may make responding submissions of no more than five pages within 14 days of these reasons. No costs are awarded to or against any of the interveners.

Released: October 9, 2026

BA

C. Favre J.A.

I agree. Joint / party BA

I agree. J. Favre J.A.