COURT OF APPEAL FOR ONTARIO
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COUR D'APPEL DE L'ONTARIO

Court File No.: COA-25-CV-0166

Superior Court File: CV-21-00077187-0000

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Appellants
(Applicants)

-and-

CITY OF HAMILTON

Respondent
(Respondent)

NOTICE OF APPEAL

THE APPELLANTS APPEAL to the Court of Appeal from the judgment of Justice J.A. Ramsay of the Superior Court of Justice (**"Application Judge"**), dated December 23, 2024 made at Hamilton, Ontario.

THE APPELLANTS ASK that the judgment be set aside and a judgment be granted pursuant to s. 134(1) of the *Courts of Justice Act* as follows:

1. Declarations that between August 2021 and August 2023, the City of Hamilton's sheltering restrictions and evictions under By-Law 01-219 (**"by-law"**) were unconstitutional.

2. Orders pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* ("***Charter***"):

   a. for damages in the amount of $5,000 per Appellant ($70,000 in total) for the common experience of sleep deprivation, loss of belongings, and exposure to the elements caused by the sheltering restrictions and evictions;

   b. for damages in the following amounts ($375,000 in total) for the distinct physical and psychological harms experienced by the Appellants caused by the sheltering restrictions and evictions:

      i. Kristin Heegsma: $75,000;

      ii. Linsley Greaves: $75,000;

      iii. Misty Marshall: $75,000;

      iv. Darrin Marchand: $50,000;

      v. Ammy Lewis: $25,000;

      vi. Mario Muscato: $15,000;

      vii. Sherri Ogden: $10,000;

      viii. Corey Monahan: $10,000;

      ix. Jahmal Pierre: $10,000;

      x. Julia Lauzon: $10,000;

      xi. Ashley MacDonald: $5,000;

xii. Shawn Arnold: $5,000;

xiii. Cassandra Jordan: $5,000; and

xiv. Gord Smyth: $5,000.

3. Their costs on a substantial indemnity basis throughout.

4. Such other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. The Application Judge erred in law by striking Volumes 18 (as amended), 19, and 20 of the Application Record in his Endorsement of December 4, 2024, containing the Appellants' Requests to Admit attaching the Respondent's public documents, and the Respondent's Responses to Requests to Admit admitting the authenticity of these documents, because he failed comply with Rule 51 of the *Rules of Civil Procedure*, whereby authenticated documents become part of the record without the need to be adduced by a witness, by superimposing the additional requirement that any party seeking to rely on authenticated documents must make them exhibits to an affidavit or cross-examination.

2. The Application Judge erred in law by failing to apply the established test for the admissibility of expert opinion evidence in relation to the evidence of Dr. Sharon Koivu and Dr. Andrea Sereda.

3. The Application Judge erred in law by applying the wrong legal test in excluding some of the evidence from the Appellants' doctors in his Endorsement of

November 12, 2024, which included relevant evidence of the Appellants' experience of sheltering restrictions and evictions and the resulting harms.

4. The Application Judge erred in law by basing material determinations, including but not limited to a determination that no Appellant experienced overnight sheltering evictions, on credibility assessments rooted in discriminatory stereotypes regarding persons with mental health and addiction disabilities.

5. The Application Judge erred in law by providing inadequate reasons for rejecting **all** evidence from **all** 14 Appellants regarding their difficulties in accessing shelter, their experiences in shelters, their experience of overnight sheltering evictions, and the disposal of their personal property. This includes, but is not limited to, the following:

   a. treating the evidence of fourteen separate witnesses as a monolith, rejecting **all** of it because "some" witness recollections were "hazy", without explaining which witness' recollections were hazy, and why that warranted rejecting all their evidence and the related evidence from other witnesses;

   b. referring to "some" witness recollections as being "the product of what they were told", without explaining which witnesses' evidence this applied to, what recollections he meant, who told them to provide that evidence, why it warranted rejecting their evidence as to those events they had independently observed, and why it warranted rejecting the evidence of the other witnesses too; and

c. concluding that “many” Appellants’ affidavits contained “boilerplate” and “[p]arts obviously … drafted by lawyers” without explaining:

    i. which passages the Court viewed as “boilerplate” and “obviously drafted by lawyers” and why, which Appellants’ affidavits this applied to, and why this also warranted rejecting the other witnesses’ evidence;

    ii. why reasonable assistance in the drafting process diminished credibility in a context where unhoused individuals lack the means (i.e. access to computers) to prepare draft affidavits on their own; and

    iii. why this warranted also rejecting the corroborating evidence the witnesses gave in cross- and re-examination.

6. The Application Judge was procedurally unfair because he concluded that “many” Appellants’ affidavits contained “boilerplate” and “[p]arts obviously … drafted by lawyers” even though the Respondent had not raised any such issue and without notice to the parties.

7. The Application Judge erred in law by ignoring relevant evidence. This includes, but is not limited to:

    a. evidence from the Appellants that there were overnight sheltering evictions between August 2021 and August 2023;

    b. statements in the Respondent’s authenticated public documents that contradict affidavit evidence from the Respondent’s employees;

c. evidence that a large majority of persons sheltering outside informed the Respondent they would consider accessing spaces in the emergency shelter system if they were more suitable to their needs;

d. evidence pertaining to the risks created by the Respondent's sheltering restrictions where persons cannot access a 24-hour indoor shelter space;

e. evidence pertaining to the specific harms related to outdoor sheltering evictions (daytime and overnight) that are not associated with homelessness at large;

f. evidence that shelters and overflow shelters were persistently at capacity from August 2021 to August 2023; and

g. evidence pertaining to the particular harms that the City's sheltering restrictions created or contributed to for women, persons with disabilities, and Indigenous persons, including those experienced by the Appellants.

8. The Application Judge erred in law by basing material determinations on no evidence, including, but not limited to:

a. finding no violation of s. 7 of the *Charter* because the Hamilton Police Service allegedly did not engage in overnight evictions between August 2021 and August 2023, without evidence in the record to support this conclusion;

b. finding no violation of s. 7 of the *Charter* based on speculation that unhoused persons in Hamilton had sheltering options available to them

during the relevant period other than the shelter spaces established by the record; and

b. finding no violation of s. 7 of the *Charter* based on a determination that it would be "impossible" for the City to provide "a combination of different shelters" including some shelters with private showers and storage space for belongings.

9. The Application Judge erred in law by determining there was no violation of s. 7 of the *Charter* including, but not limited to, by:

a. failing to apply the established test, or any test, for s. 7 of the *Charter*, or applying the wrong test for s. 7 of the Charter, or in the alternative, providing inadequate reasons that the sheltering restrictions and evictions did not violate s. 7;

b. breaching the doctrine of horizontal *stare decisis* by refusing to follow the decision of the Superior Court of Justice in *The Regional Municipality of Waterloo v. Persons Unknown*, with respect to shelter inaccessibility as a factor in the s. 7 framework governing sheltering restrictions and evictions;

c. failing to apply the established test for a violation of s. 7 to assess the Appellants' claim that daytime sheltering restrictions and evictions were unconstitutional;

d. breaching the doctrine of horizontal *stare decisis* by failing to follow the decision of the Superior Court of Justice in *Kingston (City) v. Doe*, which rejected the argument that interpreting s. 7 to prohibit daytime sheltering restrictions and evictions would amount to expropriating public property;

e. asking the wrong question with respect to whether s. 7 interests were engaged when he compared the risks associated with sheltering outside against the risks associated with sheltering in homeless shelters, since the question before him was a comparison of the risks associated with sheltering outside and the risks associated with remaining outside unsheltered; and

f. applying the wrong test for causation in finding that the Appellants' s. 7 interests were not "put at risk by the enforcement of the by-law" because they were "put at risk by homelessness".

10. The Application Judge erred in in law by determining there was no violation of s. 15 of the *Charter* including, but not limited to, by:

a. failing to apply the established test, or any test, for s. 15 of the *Charter*, applying the wrong test for s. 15 of the *Charter*, or in the alternative, providing inadequate reasons that the sheltering restrictions and evictions did not violate s. 15;

b. applying the wrong test for "disproportionate impact" with respect to the impact of the sheltering restrictions and evictions on women, Indigenous persons, and persons with disabilities;

c. failing to address the Appellants' argument that the sheltering restrictions and evictions discriminated based on the intersecting grounds of race and sex, and to consider the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*; and

d. applying the wrong test for causation in finding that the Appellants' were "disadvantaged by homelessness, not by enforcement of the by-law".

11. The Application Judge erred in law by applying the immunity threshold for Parliament and provincial legislatures of "clearly wrong, in bad faith or an abuse of power" to municipal councils, instead of the "clear disregard" standard.

12. The Application Judge's treatment of the decision of the United States Supreme Court in *City of Grant's Pass v Johnson*, 144 S. Ct. 2022 (2024) as persuasive authority:

a. was procedurally unfair, since the Respondent had not raised it and the Application Judge relied on it without notice to the parties; and

b. was a legal error because of its lack of relevance, since it arose under the Eighth Amendment of the Constitution of the United States (cruel and unusual punishment) and therefore offers no guidance on the interpretation of ss. 7 and 15 of the *Charter*.

13. Legislation including but not limited to:

a. *Courts of Justice Act*, RSO 1990, c C43.

b. *Canadian Charter of Rights and Freedoms*.

14. Jurisprudence including but not limited to:

    a. *The Regional Municipality of Waterloo v. Persons Unknown*, 2023 ONSC 670.

    b. *Kingston (City) v. Doe*, 2023 ONSC 6662.

    c. *Canada (AG) v. Power*, 2024 SCC 26.

    d. *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184.

    e. *Hanish v. McKean*, 2014 ONCA 698.

    f. *Buccilli v. Pillitteri*, 2016 ONCA 775.

15. Such other grounds as counsel may advise and this Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The appeal from the Application Judge's final order dismissing the Appellant's claims lies to the Court of Appeal, pursuant to sections 6(1)(b) and 6(2) of the *Courts of Justice Act*.

January 22, 2025

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