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

COA-25-CV-0166

COURT OF APPEAL FOR ONTARIO

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Appellants

- and -

CITY OF HAMILTON

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE CANADIAN CENTRE FOR HOUSING RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CORPORATION OF THE CITY OF KINGSTON, WOMEN'S LEGAL EDUCATION AND ACTION FUND, ONTARIO HUMAN RIGHTS COMMISSION and CITY OF TORONTO

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January 9, 2025

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Table of Contents

PART I: OVERVIEW

1. The BCCLA intervenes on the availability of *Charter* damages when claimants are impacted by unconstitutional bylaws. Within the *Charter* damages framework, the state may argue that the Court should not award damages because damages interfere with "good governance". If the state can so prove, it is afforded some immunity from *Charter* damages in the form of an "**immunity threshold**". Claimants must then overcome the immunity threshold to collect *Charter* damages.

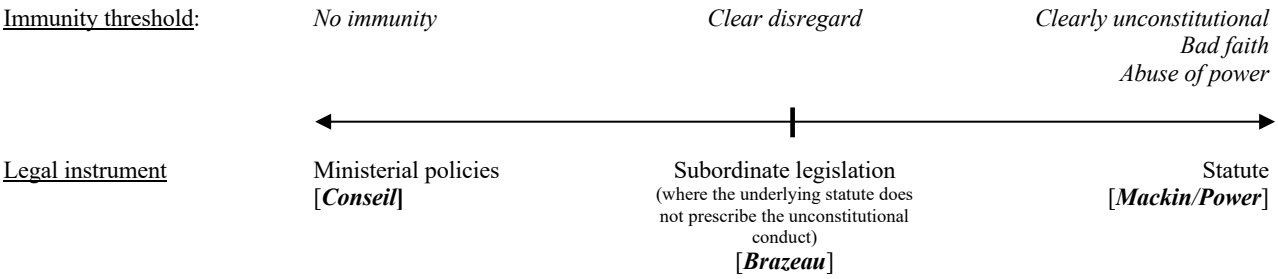
2. This appeal considers the immunity threshold claimants must overcome to receive *Charter* damages as a remedy for the enactment or enforcement of unconstitutional bylaws. This is a novel question before the Court.

3. The BCCLA makes two submissions on this issue. **First**, the immunity threshold to access *Charter* damages for the enactment or enforcement of unconstitutional bylaws is "clear disregard". That is, claimants must show that the municipality had a "clear disregard" for the claimant's *Charter* rights in enacting or enforcing the bylaw.

4. The Supreme and appellate Court cases reviewed below show that when state misconduct is authorized by a legal instrument (e.g. statute, regulation, policy, bylaw), the immunity thresholds sit on a scale. The most protective immunity threshold is reserved for conduct authorized by unconstitutional primary legislation (statute). In the Supreme Court's *Mackin* (2002) and *Power* (2024) decisions, the Court clarified that for claimants to access *Charter* damages for misconduct authorized by a statute, they must prove that the statute was clearly unconstitutional, abusive, or enacted in bad faith. Conversely, the Supreme Court clarified in *Conseil* (2020) that state conduct authorized by ministerial policies are given no protective good governance immunity. The middle of the spectrum of protection is reserved for "subordinate legislation" such as regulations, where

the underlying statute did not mandate the regulation, as in *Brazeau* (ONCA, 2020). The immunity threshold for such subordinate legislation is that the state showed a "clear disregard" for the *Charter*.

THE IMMUNITY THRESHOLD SCALE FOR CONDUCT UNDER A LEGAL INSTRUMENT



5. The jurisprudence canvassed below demonstrates that the above immunity threshold scale depends on how closely related the legal instrument is to the legislature. Judicial scrutiny of the legislature's powers risks three significant constitutional principles: parliamentary privilege, parliamentary sovereignty, and separation of powers. The legislature's core power is enacting statutes. When claimants seek damages for the state's enactment or enforcement of a statute, good governance demands the highest immunity threshold to respect the three constitutional principles.

6. Municipal bylaws, however, are subordinate legislation. They are not enacted by legislatures. Because of their subordinate status, the only constitutional principle risked by judicial scrutiny of a bylaw is the separation of powers principle. This justifies a moderate immunity threshold for claimants to clear when seeking damages for the enactment or enforcement of unconstitutional bylaws, namely the "clear disregard" standard.

7. **Second**, the BCCLA submits that the "clear disregard" standard connotes penal negligence. This Court in *Brazeau* defined "clear disregard" as recklessness or wilful blindness to the

unconstitutional nature of the instrument. However, last year in *Power*, the Supreme Court held that the highest immunity threshold of "clearly unconstitutional" means recklessness or wilful blindness to the instrument's unconstitutionality. If *Power* and *Brazeau* are read together, then, the highest immunity threshold (for statutes) and the moderate immunity threshold (for subordinate legislation) are now identical. This cannot be the case given the differing constitutional principles at stake for primary versus subordinate legislation.

8. This Court must therefore recalibrate the "clear disregard" standard so that it sits below the recklessness/wilful blindness standard from *Power*. Penal negligence is appropriate given the limited constitutional principles at risk when judges review subordinate legislation for *Charter* compliance.

PART II: SUMMARY OF THE FACTS

9. The BCCLA takes no position on the facts of this appeal.

PART III: ISSUES

10. The BCCLA takes no position on the outcome of this appeal. Its submissions relate to the following issue raised on appeal: **What immunity threshold must claimants overcome to receive *Charter* damages for the enactment or enforcement of unconstitutional bylaws?** The BCCLA submits that claimants must prove that the municipality demonstrated a "clear disregard" for the claimant's *Charter* rights. "Clear disregard" connotes penal negligence.

PART IV: THE LAW

A. The immunity threshold for state conduct authorized by an unconstitutional bylaw is "clear disregard"

1) If the state raises good governance concerns, claimants must clear an immunity threshold for the Court to award *Charter* damages

11. *Vancouver v. Ward* establishes the framework for awarding *Charter* damages.[1] The Supreme Court developed a four-part test to determine whether damages are a "just and appropriate remedy" for a *Charter* breach under s. 24(1):[2]

i. At stage 1, the claimant must establish a *Charter* breach for which damages are claimed.

ii. At stage 2, the claimant must prove that damages would fulfil at least one of three functions: compensation, vindication, or deterrence.

iii. At stage 3, the state may raise countervailing considerations – such as good governance concerns – to demonstrate that damages are inappropriate or unjust in the circumstances.[3] The claimant then has the burden to rebut these considerations.

iv. A stage 4, the court must assess the quantum of damages.

12. The logic of the good governance concern at stage 3 is that damages may chill government work.[4] The concern describes a compendium of policy factors that justify restricting the state's liability.[5] However, damages can equally encourage effective governance by deterring

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[1] 2010 SCC 27 [***Ward***].
[2] *Ward* at para 61.
[3] *Ward* at para 33.
[4] *Ward* at para 38.
[5] *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at para 39 [***Henry***].

unconstitutional conduct.[6]

13. The Supreme Court has held that claimants may overcome good governance concerns by proving that the state's conduct meets a "minimum threshold of gravity" (the "**immunity threshold**").[7] The threshold will depend on the nature of the good governance concern the state raises.[8]

2) State misconduct authorized by legal instruments raises unique good governance concerns

14. Awarding *Charter* damages for state misconduct authorized by a legal instrument (statute, regulations, policies) raises a distinct category of good governance concerns than those raised by discretionary state misconduct. This implication flows from a review of the five leading Supreme Court cases regarding state immunity from *Charter* damages:

Misconduct authorized by a legal instrument	**Misconduct that was discretionary (misapplication or abusive)**
Mackin v. New Brunswick (Minister of Finance):[9] involved the enactment and enforcement of a valid statute that was later found unconstitutional. The good governance concern was that awarding Charter damages may deter the state from enforcing valid statutes.[10] This policy concern triggered the Court to adopt a high immunity threshold. To successfully access *Charter* damages, the	***Henry v. British Columbia (Attorney General)***: involved the Crown withholding disclosure from the defence in violation of the accused's *Charter* rights.[18] The good governance concern was that the spectre of liability could influence prosecutorial decision making and make prosecutors more "defensive".[19] This would undermine public interest in having prosecutors fulfil their duty to effectively prosecute crime. The Court formulated the immunity threshold

[6] *Ward* at para 38.
[7] *Ward* at para 39; *Henry* at para 42.
[8] *Ward* at paras 39, 43.
[9] 2002 SCC 13 [***Mackin***].
[10] *Mackin* at para 79.
[18] *Henry* at para 21.
[19] *Henry* at paras 39-40.

claimant must prove that statute was "clearly wrong, in bad faith, or an abuse of power".[11] ***Canada (Attorney General) v. Power***:[12] the Court confirmed that the state could be liable for damages for Ministers drafting and tabling a bill that is enacted into law by Parliament but subsequently declared invalid.[13] The Court confirmed that the high immunity threshold from *Mackin* applied but reformulated the threshold as "clearly unconstitutional", in bad faith, or an abuse of power.[14] ***Conseil scolaire francophone de la Colombie-Britannique v. British Columbia***:[15] involved unconstitutional conduct authorized by a government policy.[16] The Court held that this context raised no good governance concerns about interfering with legislative powers and thus no immunity threshold was warranted.[17]	as follows: the applicant would have to prove that the Crown intentionally withheld information, knowing that that the information was material to the defence and would likely impinge on the accused's ability to make full answer and defence.[20] ***Ernst v. Alberta Energy Regulator***:[21] involved an administrative tribunal's decision to penalize an individual in breach of their *Charter* rights. The Court held that the good governance concerns barred *Charter* damages entirely. Damages would distract from the Board's statutory duties, compromise decision-making and impartiality, and allow collateral attacks against the Board's decisions.[22]

15. The unconstitutional conduct in *Mackin/Power/Conseil* was authorised by a legal instrument (statute/policy). The unconstitutionality was sourced in the legal instrument, not in

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[11] *Mackin* at paras 78-79.
[12] 2024 SCC 26 [***Power***].
[13] *Power* at paras 14, 116–118.
[14] *Power* at paras 23, 59, 97, 116.
[15] 2020 SCC 13 [***Conseil***].
[16] *Conseil* at para 165.
[17] *Conseil* at paras 166, 170, and 179.
[20] *Henry* at para 31.
[21] 2017 SCC 1 [***Ernst***].
[22] *Ernst* at paras 6, 47, 55.

discretionary state action. The good governance concern was that awarding damages would chill the state from enacting and enforcing a presumptively valid legal instrument before it is declared unconstitutional.

16. The above good governance concern is distinct from the governance concerns in *Ernest* or *Henry*, where claimants sought damages for discretionary state action (a prosecutor's discretionary decision to provide disclosure and a statutory board's discretionary adjudication of a case). *Henry*/*Ernst* were about misapplying or abusing statutory or common law powers. The resulting good governance concern was about making the executive more defensive or biased in making discretionary decisions, rather than interfering with the enactment or enforcement of a presumptively valid legal instrument.

3) The immunity threshold for state conduct authorized by legal instruments sits on a scale

17. The unique good governance concern of interfering with the enactment or enforcement of a valid legal instrument attracts a unique set of immunity thresholds that sit on a scale.

18. On one end are cases like *Mackin/Power*, involving state misconduct authorized by primary legislation (statutes). This end of the scale attracts the highest immunity threshold. Claimants must demonstrate the state action was clearly unconstitutional, in bad faith, or an abuse of power.

19. On the other end is state misconduct authorized by government policies which, under *Conseil*, attract no immunity threshold.[23]

20. In the middle of the scale sit cases like *Brazeau v. Canada (Attorney General)*,[24] involving state misconduct authorized by regulations, where the primary statute did not require the regulation

[23] *Conseil* at para 179.
[24] 2020 ONCA 184 [***Brazeau***].

to authorize the *Charter* breach.[25] This Court held in *Brazeau* that such regulations attracted a lower immunity threshold than the *Mackin/Power* standard which applies to statutes. Claimants must instead prove the "minimum" immunity threshold, namely that the state acted in "clear disregard" of the claimant's *Charter* rights.[26]

4) The immunity threshold depends on the proximity between the legal instrument and the legislature

21. *Power* confirms that the immunity threshold scale for state misconduct authorized by legal instruments is based on how closely related the legal instrument is to the legislature.

a) *Power* provides the principles for assessing immunity

22. The Supreme Court noted in *Power* that the immunity assessment "must focus on the branches of government implicated by the claim".[27] Different forms of state conduct raise different concerns about "constitutional design and institutional relationships."[28]

23. In *Power*, the Court clarified that judicial scrutiny into state action authorized by a statute threatened three constitutional principles:[29] (1) parliamentary sovereignty, under which federal and provincial legislatures can make or repeal any law within their constitutional authority,[30] (ii) separation of powers, which prevents any one branch from having "undue" influence over the other,[31] and (iii) parliamentary privilege, which shields some areas of legislative activity from

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[25] *Brazeau* at para 67.
[26] *Brazeau* at paras 67, 87; followed in *Francis v. Ontario*, 2021 ONCA 197 at paras 65-67, 79, and 93 [***Francis***].
[27] *Power* at para 74.
[28] *Power* at para 74.
[29] *Power* at paras 80-84.
[30] *Power* at paras 81, 49.
[31] *Power* at para 82.

external review.[32]

24. To respect these three constitutional principles, the Court concluded that claimants had to clear the highest immunity threshold to get *Charter* damages for conduct authorized by statutes.[33]

b) *Power* reconciles the immunity thresholds for legal instruments under existing jurisprudence

25. Given the reasoning from *Power*, the requisite immunity threshold for state misconduct authorized by a legal instrument will depend on the relationship between the legal instrument and the legislature. The closer the relationship, the more likely that the three constitutional principles from *Power* will justify a higher immunity threshold from damages. This approach explains the various immunity thresholds described in *Mackin/Power*, *Brazeau*, and *Conseil*.

26. Statutes are directly enacted by federal or provincial legislatures. When damages are sought for misconduct authorized by a statute, the misconduct is rooted directly in the exercise of those legislative powers. The constitutional principles from *Power* apply squarely and justify the highest immunity threshold.

27. Ministerial policies, on the other hand, have no relationship with the legislature.[34] Policies are enacted by the executive.[35] When unconstitutional conduct is authorized by a ministerial policy, the misconduct has no connection with the legislatures. The constitutional principles from *Power* are inapplicable, removing any immunity threshold.

28. Subordinate legislations, such as regulations, are products of delegated legislative authority. Unlike statutes, they are not enacted by the federal or provincial legislature directly. The

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[32] *Power* at para 84.
[33] *Power* at para 97.
[34] *Conseil* at para 177.
[35] *Conseil* at para 177.

relationship between the legislature and subordinate legislation is even more removed where the underlying statute does not mandate the specific regulation. In such cases, the unconstitutional conduct is not directly attributable to the legislature. For example, in *Brazeau*, the regulations at issued authorized the unconstitutional practice of prolonged solitary confinement. The underlying statute did not require the regulation authorize prolonged solitary confinement.[36] The misconduct for which the claimant sought damages was a product of the regulation and not the statute.

29. Given the indirect relationship between subordinate legislation and the legislature, some of the constitutional principles from *Power* apply while other do not. For instance, judicial scrutiny of regulations risks infringing the separation of powers principles since regulations are a product of delegated *legislative* power. However, principles of parliamentary privilege or sovereignty do not apply.

30. Given the limited constitutional principles at stake, a moderate immunity threshold of "clear disregard" is justified for state misconduct authorized by subordinate legislation. Arguably, if the primary legislation mandated the subordinate legislation, a higher immunity threshold would be warranted.[37] For instance, if the underlying statute in *Brazeau* mandated the regulation that authorized prolonged solitary confinement, then judicial scrutiny of the regulation would entail scrutinizing the statute. All three constitutional principles in *Power* would be live and warrant the claimants clearing the highest immunity threshold before they could collect *Charter* damages.

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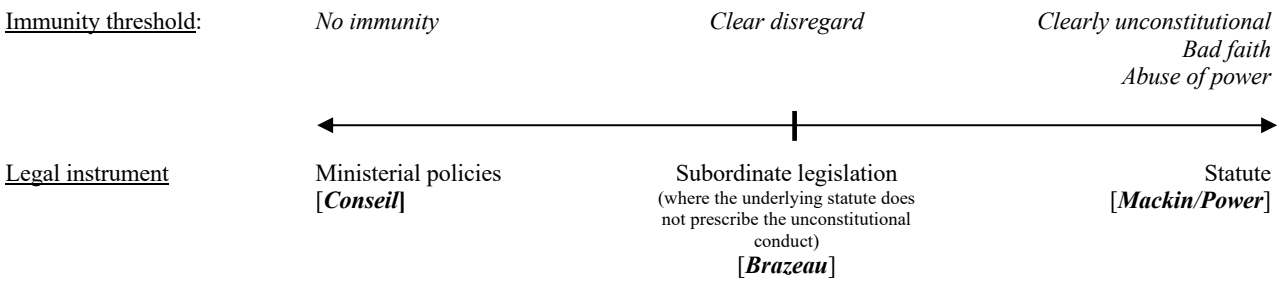
[36] *Brazeau* at para 53: the underlying statute was the *Corrections and Conditional Release Act* which "did not require" the practice of prolonged solitary confinement that the regulation at issue authorized.

[37] This Court supported this very conclusion in *Francis* at para 83.

THE IMMUNITY THRESHOLD SCALE FOR MISCONDUCT AUTHORIZED BY A LEGAL INSTRUMENT



5) The immunity threshold for bylaws is "clear disregard"

31. Where the underlying statute does not mandate the specific bylaw, the immunity threshold for state misconduct authorized by an unconstitutional bylaw must be the minimum threshold of "clear disregard".

32. Municipal bylaws are subordinate legislation, like regulations.[38] For instance, the bylaw at issue on appeal (Bylaw 01-219) was enacted by the City of Hamilton and not the Ontario legislature.[39] The Ontario legislature delegated authority to the City under the *Municipal Act* to enact the bylaw.[40]

33. The above analysis justifying a lower immunity threshold for subordinate legislation applies to municipally enacted bylaws. Municipalities do not have constitutional status.[41] They do not attract parliamentary sovereignty as their power derives from statute not the constitution. They do not enjoy parliamentary privilege.[42] Municipal conduct however triggers the separation of powers principle

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[38] *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC) at para 39; *Clublink Corporation ULC v. Oakville (Town)*, 2019 ONCA 827 at para 34.
[39] *Heegsma v. Hamilton (City)*, 2024 ONSC 7154 at para 7; Appellant's factum at para 12.
[40] *Municipal Act, 2001*, SO 2001, c 25 at s. 11(3).
[41] *Toronto (City) v. Ontario (Attorney General),* 2021 SCC 34 at para 2.
[42] *Prud'homme v. Prud'homme,* 2002 SCC 85 at para 49.

since municipalities exercise delegated legislative powers.[43] The limited application of the constitutional principles from *Power* justifies the lower immunity threshold for municipal bylaws.

B. The "Clear disregard" standard includes penal negligence

1) "Clear disregard" is the minimum immunity threshold

34. *Ward* was the first case to articulate the "clear disregard" standard as the minimum threshold claimants had to overcome given the good governance concerns related to legal instruments.[44] The Supreme Court however did not define what the standard meant.

35. A decade later in *Brazeau*, this Court confirmed that "clear disregard" was lower than the *Mackin* standard. *Brazeau* dealt with *Charter* damages for unconstitutional prolonged solitary confinement under regulations to the *Correctional and Conditional Release Act.*[45] This Court reviewed the *Mackin* standard but did not apply it.[46] It instead concluded that the minimum immunity threshold of "clear disregard" from *Ward* applied since the unconstitutional conduct was not authorized by a statute as in *Mackin*.[47]

36. The *Brazeau* Court canvassed criminal law to define the "clear disregard" fault standard as recklessness or wilful blindness.[48]

2) *Power* says wilful blindness and reckless is the highest immunity threshold

37. Four years after *Brazeau*, the Supreme Court in *Power* clarified the highest immunity threshold from *Mackin* of "clearly wrong, in bad faith, or an abuse of power". The Court

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[43] *Nelson (City) v. Marchi*, 2021 SCC 41 at para. 43.
[44] *Ward* at para 43.
[45] *Brazeau* at para 20.
[46] *Brazeau* at paras 62-65.
[47] *Brazeau* at paras 66-67.
[48] *Brazeau* at para 87.

rearticulated the "clearly wrong" standard as "clearly unconstitutional".[49] The Court rejected that the standard included negligence as negligence did "not reflect the high standard demanded by the constitutional principles" at issue when primary legislation is involved.[50]

38. The Court ultimately concluded that the highest immunity threshold of "clearly unconstitutional" connoted recklessness or wilful blindness as to the constitutionality of the statute.[51]

3) "Clear disregard" must connote penal negligence

39. Following *Power*, the highest and middle immunity thresholds are identical.

40. This cannot be. "Clearly unconstitutional" and "clear disregard" cannot mean the same thing. Primary legislation and subordinate legislation have never, and cannot now, be subject to the same immunity threshold. It would be wrong to afford municipalities (or other delegated authorities) the same immunity as legislatures from *Charter* damages given that most of the constitutional justifications for the higher immunity for statutes do not apply to municipal bylaws.

41. This Court now has an obligation to redefine the "clear disregard" standard from *Brazeau* so that it sits below the *Mackin/Power* standard of reckless/wilful blindness. Recklessness and wilful blindness are criminal law fault standards.[52] Recklessness means the subject knew of the risk and proceeded in the face of it.[53] Wilful blindness connotes knowing of the need to make an inquiry about the risk but choosing not to. [54] Neither standard requires intentional or malicious conduct. The standards are subjective and inquire about the subject's state of mind.

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[49] *Power* at paras 99, 103-104, 112.
[50] *Power* at para 102.
[51] *Power* at para 105.
[52] *Brazeau* at para 87.
[53] *Brazeau* at para 87.
[54] *Brazeau* at para 87.

42. A step below these subjective standards is the objective standard of penal negligence.[55] The standard is a higher than the civil negligence standard.[56] It requires a "marked departure" from the standard expected of a reasonable subject in the circumstances.[57] The person's subjective knowledge or personal circumstances are irrelevant.[58]

43. It is appropriate to redefine "clear disregard" as penal negligence for two reasons. **First**, the threshold is commensurate with the constitutional principles at stake when awarding *Charter* damages against municipalities (or other subordinate authorities). *Power* dismissed negligence as an immunity threshold for misconduct under a statute because the standard was too low to preserve the three constitutional principles at risk.[59] Since only one of the three constitutional principles from *Power* are at issue when awarding damages against municipalities, negligence is a justifiable immunity threshold in this context.

44. **Second,** penal negligence is still a sufficiently high threshold and will not result in automatic liability. The standard is not civil negligence. It requires the municipality to act in "marked departure" from the standard expected of a reasonable municipality. The inquiry will depend on the evidentiary record but may turn on the extent of the unconstitutionality of the bylaw or on the existence of legal precedent that shows the bylaw was unconstitutional before the municipality enacted it. It may also turn on (i) widespread evidence that the bylaw could have injured the public or violated *Charter* protections (ex. through the work of advocacy groups), and

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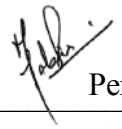
[55] *R. v. Galletta*, 2020 ONCA 60 at para 7: describing penal negligence as an objective standard; *R. v. Sullivan*, 2020 ONCA 333 at paras 80–83, aff'd 2022 SCC 19: penal negligence is the lowest fault standard; *R. v. Zora*, 2020 SCC 14 at paras 29-30: describing the subjective standards being higher than the objective standards.
[56] *R. v. Galletta*, 2020 ONCA 60 at para 7.
[57] *R. v. Galletta*, 2020 ONCA 60 at para 7.
[58] *R. v. Galletta*, 2020 ONCA 60 at para 8.
[59] *Power* at para 102.

(ii) that a reasonable municipality in the circumstances would have known of the harms before it enacted the bylaw.

PART V: ORDER REQUESTED

45. The BCCLA takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 9th DAY JANUARY 2026



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Schedule "A"
Relevant Legal Authorities

Jurisprudence

1. *Vancouver (City) v. Ward*, 2010 SCC 27
2. *Henry v. British Columbia (Attorney General)*, 2015 SCC 24
3. *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13
4. *Canada (Attorney General) v. Power*, 2024 SCC 26
5. *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13
6. *Ernst v. Alberta Energy Regulator*, 2017 SCC 1
7. *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184
8. *Francis v. Ontario*, 2021 ONCA 197
9. *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC)
10. *Clublink Corporation ULC v. Oakville (Town)*, 2019 ONCA 827
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12. *Toronto (City) v. Ontario (Attorney General),* 2021 SCC 34
13. *Prud'homme v. Prud'homme,* 2002 SCC 85
14. *Nelson (City) v. Marchi*, 2021 SCC 41
15. *R. v. Galletta*, 2020 ONCA 60
16. *R. v. Sullivan*, 2020 ONCA 33, aff'd 2022 SCC 19
17. *R. v. Zora*, 2020 SCC 14

Legislation

1. *Municipal Act, 2001*, SO 2001, c 25 at s. 11(3)

COA-25-CV-0166

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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Appellants

- and -

CITY OF HAMILTON

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE CANADIAN CENTRE FOR HOUSING RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CORPORATION OF THE CITY OF KINGSTON, WOMEN'S LEGAL EDUCATION AND ACTION FUND, ONTARIO HUMAN RIGHTS COMMISSION and CITY OF TORONTO

Intervenors

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