

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**SANCTUARY MINISTRIES OF TORONTO, ABORIGINAL LEGAL SERVICES,  
ADVOCACY CENTRE FOR TENANTS ONTARIO,  
BLACK LEGAL ACTION CENTRE, CANADIAN CIVIL LIBERTIES ASSOCIATION,  
HIV & AIDS LEGAL CLINIC ONTARIO**

Applicants

- and -

**CITY OF TORONTO**

Respondent

APPLICATION UNDER RULE 14.05 OF THE *RULES OF CIVIL PROCEDURE*

**NOTICE OF APPLICATION**

TO THE RESPONDENT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on \_\_\_\_\_, at 10:00 am, at 393 University Avenue, 10th Floor, Toronto ON, M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer,

serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date \_\_\_\_\_ Issued by \_\_\_\_\_  
Local Registrar

Address of court office: Superior Court of Justice  
393 University Avenue, 10th Floor  
Toronto ON  
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## APPLICATION

### 1. The Applicants make application for:

- (a) An order declaring that, in the context of the COVID-19 pandemic, s. 9.3.1(e) of the Toronto Shelter Standards (the “Shelter Standards”), a by-law enacted by the City of Toronto (the “City” or the “Respondent”), is inconsistent with rights of shelter clients under ss. 7 and/or 15 of the *Canadian Charter of Rights and Freedoms* (the “Charter”), and that such inconsistency cannot be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*;
- (b) An order declaring that, in the context of the COVID-19 pandemic, s. 7.3.1(i) of the 24-Hour Respite Site Standards (the “Respite Standards”), issued by the Respondent’s Shelter, Support & Housing Administration Division (“SSHA”), is inconsistent with rights of respite site clients under ss. 7 and/or 15 of the *Charter* and that such inconsistency cannot be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*;
- (c) An order declaring that, in the context of the COVID-19 pandemic, the Respondent’s conduct in directly operating shelters in a manner that employs lateral distancing of beds of less than 2 metres and/or employs bunk beds is inconsistent with the rights of shelter clients under ss. 7 and 15 of the *Charter*, which inconsistency cannot be justified under s. 1 of the *Charter*, and is inconsistent with ss. 1, 2 and 47(2) of the *Human Rights Code*, R.S.O. 1990 c. H.9 (the “Code”);
- (d) An order declaring that the conduct of the Respondent in failing to develop and/or implement without delay a plan that enables Providers to meet minimal public

health guidance in order to mitigate the transmission of the COVID-19 virus (“COVID-19”) among the Shelter Client and Respite Client community (collectively, “Clients”), including a concrete, transparent, and accountable plan for effectively deploying physical distancing protocols and for accelerating the provision of alternative accommodations for Clients (a “COVID-19 mitigation plan”), is inconsistent with ss. 7 and 15(1) of the *Charter* and that the inconsistency cannot be justified under s. 1 of the *Charter*;

(e) An order pursuant to s. 52(1) of the *Constitution Act, 1982* (“CA 1982”) taking immediate effect and remaining in effect so long as the declaration by the Government of Ontario (“Ontario”) of an emergency under O. Reg 50/20 pursuant to the *Emergency Management and Civil Protection Act*, RSO 1990, c. E.9 (the “EMCPA”) remains in force, “reading in” under s. 9.3.1(3) of the Shelter Standards and s. 7.3.1(i) of the Respite Standards:

- A requirement that City-operated and City-funded providers of shelters and respite sites (“Providers”) must maintain a lateral separation of at least 2 metres between beds and/or mats; and
- A prohibition of the use of bunk beds by Providers;

(f) An order pursuant to s. 24(1) of the *Charter*, taking immediate effect and remaining in effect so long as the declaration of emergency under O. Reg 50/20 pursuant the *EMCPA* remains in force, mandating the Respondent to develop and/or implement without delay a COVID-19 mitigation plan;

(g) An order pursuant to s. 24(1) of the *Charter*, taking immediate effect and remaining in effect as long as the declaration of emergency under O. Reg 50/20 pursuant to

the *EMCPA* remains in force, mandating the Respondent to cease directly operating shelters, and to cease authorizing Providers to operate shelters or respite sites, in a manner that employs lateral distancing of beds of less than 2 metres and/or employs bunk beds;

- (h) An order declaring that, in the context of the COVID-19 pandemic and so long as the declaration of emergency under O. Reg. 50/20 pursuant to the *EMCPA* remains in force, s. 9.1.3(e) of the Shelter Standards and s. 7.3.1(i) of the Respite Standards are inconsistent with the rights of Clients under ss. 1, 2(1), and 47(1)-(2) of the *Human Rights Code*, R.S.O. 1990 c. H.9 (the “*Code*”);
- (i) An order declaring that the conduct of the Respondent in failing to develop and/or implement without delay a COVID-19 mitigation plan is inconsistent with Clients’ rights under ss. 1, 2(1), and 47(1)-(2) of the “*Code*”;
- (j) An order providing for non-monetary restitution pursuant to s. 46.1(1)2 of the *Code*, taking immediate effect and remaining in effect so long as the declaration of emergency under O. Reg 50/20 pursuant the *EMCPA* remains in force, by interpreting s. 9.3.1(3) of the Shelter Standards and s. 7.3.1(i) of the Respite Standards in a manner that that ensures that they are applied consistently with the *Code*, specifically, in a manner that ensures that Providers maintain a lateral separation of at least 2 metres between beds and do not use bunk beds.
- (k) An order providing for non-monetary restitution pursuant to s. 46.1(1)2 of the *Code*, taking immediate effect and remaining in effect so long as the declaration of emergency under O. Reg 50/20 pursuant the *EMCPA* remains in force, requiring

the Respondent to: (i) develop and/or implement without delay a COVID-19 mitigation plan; (ii) cease directly operating shelters in a manner that employs lateral distancing of beds of less than 2 metres and/or employs bunk beds (iii) cease authorizing Providers to operate shelters and respite sites in a manner that employs lateral distancing of beds of less than 2 metres and/or employs bunk beds;

- (l) An Order that there be no costs of this proceeding;
- (m) Such injunctive relief as may be sought by the Applicants and as this Honourable Court may deem just; and
- (n) Such further and other relief as to this Honourable Court may deem just.

2. The grounds for the application are:

### **Overview and Applicants**

- (a) Physical distancing is known to be the central health strategy for managing the health impact of COVID-19, at both population and individual levels. Public health guidance for all Torontonians and all Ontarians consistently emphasizes the critical importance of adequate physical distancing. Yet people experiencing homelessness cannot “stay at home.” They rely on shelters and respite sites operated or funded by the City;
- (b) Prior to COVID-19, through its Shelter Standards and Respite Standards, the City authorized the spacing of beds 0.75 metre apart and the use of bunk beds. Despite the known risk of COVID-19 transmission and spread in shelters, more than 110 diagnosed cases, and the known vulnerabilities of shelter residents, the City

continues to authorize those hazardous spacing standards, and continues to implement them through its conduct;

- (c) In the context of COVID-19, the City's Shelter and Respite Standards, and the City's conduct in implementing them, are unconstitutional. They put lives at risk. In so doing, they also disproportionately burden members of historically marginalized groups who are overrepresented in the shelter system and deprive those groups of the benefit of physical distancing measures generally available to the housed public;
- (d) The Applicants seek to vindicate the constitutional rights to life, security of the person and equality of Toronto's most vulnerable residents;
- (e) The Applicants are a coalition of public interest organizations and legal aid clinics whose mandates include, *inter alia*, the protection of human rights for historically marginalized people and groups in Toronto, including people living with homelessness, as well as racialized, Black and Indigenous people, people living with disabilities and people receiving social assistance, all of whom are overrepresented among Toronto's homeless population;
- (f) The Applicants have public interest standing to seek the relief from this Honourable Court described above on behalf of Clients because there are no reasonable alternative means available to bring the issues before the Court;

**The City of Toronto and its Shelter, Support and Housing Administration (“SSHA”)**

- (g) The Respondent is a municipality in the Province of Ontario. Pursuant to the *City of Toronto Act, 2006*, S.O. 2006, c 11, Sch A, Toronto is required to provide good government to its residents;
- (h) The Respondent is the municipal service manager responsible for planning and delivery of housing and homelessness services pursuant to the *Housing Services Act, 2011*, SO 2011, c 6, Sched. 1;
- (i) The Respondent directly operates eleven shelters. The remaining shelters and respite centres are operated by community agencies that receive funding from the City and whose programs are overseen and regulated by the City, including by way of the Shelter Standards and Respite Standards.
- (j) The Respondent, including its department, the SSHA, are governmental entities pursuant to s. 32(1) of the *Charter* such that the *Charter* applies to the City’s by-laws, including the Shelter Standards, to the SSHA’s policies, including the Respite Standards, and to the conduct of the City in failing to develop and/or implement a COVID-19 mitigation plan, directly operating shelters, and authorizing Providers to operate shelters and respite sites;
- (k) The City’s by-laws, including the Shelter Standards, the SSHA’s policies, including the Respite Standards, and the conduct of the City in failing to develop and/or implement a COVID-19 mitigation plan, directly operating shelters, and authorizing Providers to operate shelters and respite sites are subject to ss. 1, 2(1),



and 47(1)-(2) of the *Code* because they are government services available to a subset of the public and they regulate the Clients' occupancy of accommodation.

### **The Shelter Standards and the Respite Standards**

- (l) The Shelter Standards are approved pursuant to a by-law enacted by the City. The Shelter Standards, whose stated purpose is to ensure that Providers will “protect and promote the health, safety, and security of all individuals,” provide at s. 9.1.3(e) that,

Shelter providers will maintain a lateral separation of at least 0.75 m. (2.5 ft.) between beds (or alternative sleeping arrangements) and a vertical separation of at least 1.1 m. (3.5 ft.) between the top of a bed frame to the lowest hanging section of an overhead object (e.g., upper bunk frame, light fixture, bulkhead, air duct, plumbing, etc.)

- (m) The Respite Standards, approved by the SSHA, similarly provide at s. 7.3.1(i) that,

when required by SSHA, Providers will maintain a lateral separation of at least 0.75 m. (2.5 ft.) between resting spaces.

### **The COVID-19 Pandemic and the Impact on People Experiencing Homelessness in Toronto**

- (n) Public health guidance for all Torontonians and all Ontarians has consistently emphasized the critical importance of adequate physical distancing, including maintaining a distance of at least two metres and “stay at home” measures, in order to manage and minimize the health impacts of COVID-19 at both individual and population levels;

- (o) Residents of Toronto who are experiencing homelessness do not have access to accommodations that permit them to comply with “stay at home” or physical distancing measures;
- (p) The Public Health Agency of Canada (“PHAC”) has issued the *Guidance for providers of services for people experiencing homelessness* which sets the following minimum standard for spacing of beds in shelter settings in the context of COVID-19:

In general, sleeping areas (for those who are not experiencing respiratory symptoms) should have beds/mats placed at least 2 metres apart, and request that all clients sleep head-to-toe.

- (q) The Ministry of Health for the Province of Ontario has issued *COVID-19 Guidance: Homeless Shelters* which sets the following minimum standard for spacing of beds in shelter settings:

When clients are sleeping, beds/cots/mattresses should be at least 2 metres (6 feet) apart. Bunk beds should not be used.

**The Shelter and Respite Standards are Unconstitutional in the Context of COVID-19**

- (r) Where the City puts in place a scheme to provide shelter to its residents, that scheme must comply with the *Charter*. In the context of COVID-19, the City’s scheme to provide shelter is endangering the life and safety of Toronto residents who access that shelter, in breach of s. 7 of the *Charter*, and constitutes discrimination on the grounds of age, race, national origin, citizenship and disability, in breach of s. 15 of the *Charter*. Neither breach can be demonstrably justified in a free and democratic society;

*Infringement of section 7*

- (s) In permitting and/or authorizing the lateral distance between beds and other structures in shelters and respite sites to be less than 2 metres, and in permitting and/or authorizing the use of bunk beds, s. 9.1.3(e) of the Shelter Standards and s. 7.3.1(i) of the Respite Standards substantially increase the risk of transmission of COVID-19 between Clients, between Clients and staff of shelters and respite sites, and between Clients and other members of the public at large, and thereby deprive Clients of their s. 7 *Charter* rights to life and security of the person;
- (t) In failing to develop and/or implement without delay a COVID-19 mitigation plan, the conduct of the Respondent substantially increases the risk of transmission of COVID-19 between Clients, between Clients and staff of shelters and respite sites, and between Clients and other members of the public at large, and thereby engages Clients' s. 7 *Charter* rights to life and security of the person;
- (u) In directly operating eleven shelters with lateral distance between beds or other structures of less than 2 metres and with bunk beds in use, the City is responsible for conditions that constitute an unacceptable risk of transmission of COVID-19 between Clients using these City-operated shelters, between these Clients and staff of these shelters, and between these Clients and other members of the public at large, and thereby deprives these Clients who use these City-operated shelters of their s. 7 *Charter* rights to life and security of the person;
- (v) The deprivations of life and security of the person caused by s. 9.1.3(e) of the Shelter Standards and s. 7.3.1(i) of the Respite Standards, by the City's failure to

implement a COVID-19 mitigation plan without delay, and by the City's direct operation of eleven shelters with lateral distance between beds and other structures of less than 2 metres and with bunk beds in use are not in accordance with the principles of fundamental justice in that they: (i) are arbitrary, overbroad and grossly disproportionate in relation to the purpose of this by-law, policy, and conduct, namely to minimize the spread of communicable disease; and (ii) violate the principle of substantive equality;

*Infringement of section 15*

- (w) Racialized, Black and Indigenous persons are overrepresented in the Toronto homeless population, with Indigenous people making up 16% of the homeless population despite representing less than 2.5% of the general population, and racialized persons making up two thirds of the homeless population, with the largest percentage identifying as Black. Persons living with mental or physical disabilities, older persons, and refugee/asylum claimants are also overrepresented as Clients compared to their representation in the population of the City;
- (x) The *Charter* requires the City to ensure that the services it provides do not have a discriminatory impact or exacerbate historical and ongoing disadvantage. While neutral on their face, the Shelter and Respite Standards, and the City's conduct as set out above, breach s. 15 by withholding from Clients who are members of enumerated groups the physical distancing measures for mitigating the transmission of COVID-19 that are more broadly available to other Toronto

residents. This differential disadvantage violates the norm of substantive equality, thereby infringing Clients' right under s. 15(1) of the *Charter*;

- (y) Specifically, the Respondent's failure to mandate a lateral distance of at least 2 metres and prohibit bunk beds, its failure to develop and/or implement without delay a COVID-19 mitigation plan, while municipal, provincial, and federal governments and public health officials have simultaneously encouraged, supported, and/or mandated physical distancing rules amongst the public generally, and its direct operation of eleven shelters with lateral distance between beds and other structures of less than 2 metres and with bunk beds in use, have the effect of imposing a differential disadvantage on Client members of enumerated groups, and withholds from them public health benefits that are more broadly available to other citizens;

*Section 1 of the Charter*

- (z) The violations of ss. 7 and 15(1) of the *Charter* caused by s. 9.1.3(e) of the Shelter Standards and s. 7.3.1(i) of the Respite Standards, taken individually, or in combination, cannot be demonstrably justified in a free and democratic society under s. 1 of the *Charter* because they are not prescribed by law and are not proportionate to any pressing and substantial objective;
- (aa) The City's conduct in failing to develop and/or implement without delay a COVID-19 mitigation plan in violation of ss. 7 and 15(1) of the *Charter* cannot be justified under s. 1 of the *Charter* because this conduct is not prescribed by law and is not proportionate to a pressing and substantial objective;

- (bb) The City's conduct in directly operating eleven shelters with lateral distance between beds and other structures of less than 2 metres and with bunk beds in use, in violation of ss. 7 and 15(1) of the *Charter*, cannot be justified under s. 1 of the *Charter* because it is not prescribed by law and is not proportionate to a pressing and substantial objective;

### **Remedy Under Section 52**

- (cc) The Shelter Standards and the Respite Standards each constitute a "law" that is capable of being the subject of a declaration and "reading in" remedy under s. 52(1) of the *CA 1982*;
- (dd) "Reading in", pursuant to s. 52(1) of the *CA 1982*, a requirement under s. 9.1.3(e) of the Shelter Standards and s. 7.3.1(i) of the Respite Standards that, so long as the declaration of emergency under O. Reg 50/20 pursuant the *EMCPA* remains in force, Providers must maintain a lateral separation of at least 2 metres between beds, and a prohibition of the use of bunk beds, would remedy the inconsistency between these provisions and ss. 7 and 15(1) of the *Charter*, advance the purposes of the *Charter*, and be consistent with physical distancing rules encouraged, supported, and/or mandated by municipal, provincial, and federal governments and public health officials to mitigate the transmission of COVID-19;

### **Remedies Under Section 24(1)**

- (ee) It would be appropriate and just in the circumstances for this Honourable Court to order, pursuant to s. 24(1) of the *Charter*, the Respondent to develop and/or

implement without delay a COVID-19 mitigation plan because such an order would partially vindicate the ss. 7 and 15(1) *Charter* rights of Clients;

- (ff) It would be appropriate and just in the circumstances for this Honourable Court to order, pursuant to s. 24(1) of the *Charter*, that the Respondent may not continue to directly operate shelters with lateral distance between beds and other structures of less than 2 metres and/or with bunk beds in use because such an order would partially vindicate the ss. 7 and 15(1) *Charter* rights of Clients;

### **Violation of the *Human Rights Code* and Civil Remedy**

- (gg) Older persons, Black persons, Indigenous persons, persons living with disabilities, and persons who are in receipt of social assistance are overrepresented as Clients compared to their representation in the population of the City of Toronto. The Shelter and Respite Standards, the City's failure to implement a COVID-19 mitigation plan without delay, and the City's direct operation of shelters with lateral distance between beds and other structures of less than 2 metres and/or with bunk beds in use each have a disproportionate negative impact on members of these enumerated groups;
- (hh) The Shelter and Respite Standards infringe Clients' rights to equal treatment with respect to services (s. 1) and accommodation (s. 2) under the *Code*. By authorizing Providers to space beds less than 2 metres apart and to use bunk beds in the context of the COVID-19 pandemic, the Shelter and Respite Standards "purport[] to require or authorize" discrimination in services and accommodation, in breach of s. 47(2) of the *Code*;

- (ii) The Respondent's failure to develop and/or implement without delay a COVID-19 mitigation plan without delay infringes the Clients' rights to equal treatment under ss. 1 and 2(1) of the *Code* because it adversely affects Clients, and the overrepresentation of enumerated groups among the Client population is a factor in this adverse effect. This triggers a duty to accommodate on the part of the City up to the point of undue hardship. The Respondent has failed to reasonably accommodate Clients;
  
- (jj) The Respondent's direct operation of eleven shelters with lateral distance between beds and other structures of less than 2 metres and/or with bunk beds in use infringes the Clients' rights to equal treatment under ss. 1 and 2(1) of the *Code* because it adversely affects Clients, and the overrepresentation of enumerated groups among the Client population is a factor in the adverse effect. This triggers a duty to accommodate on the part of the City up to the point of undue hardship. The Respondent has failed to reasonably accommodate Clients;
  
- (kk) The Applicants seek non-monetary remedies requiring the Respondent to: (i) develop and/or implement without delay a COVID-19 mitigation plan; (ii) cease authorizing Providers to space beds less than 2 metres apart and to use bunk beds, and (iii) to cease operating shelters with lateral distance between beds and other structures of less than 2 metres and/or with bunk beds in use. These remedies would partially vindicate the rights of Clients to equal treatment without discrimination under ss. 1 and 2(1) of the *Code* and would constitute non-monetary restitution under s. 46.1(1)2 of the *Code*;



**Other Grounds**

- (ll) The *Canadian Charter of Rights and Freedoms*, ss. 1, 7, 15, 24;
- (mm) The *Constitution Act, 1982*, s. 52;
- (nn) The *Human Rights Code*, RSO 1990, c H. 19;
- (oo) The *City of Toronto Act, 2006*, SO 2006, c 11, Sch A;
- (pp) The *Rules of Civil Procedure*, RRO 1990, Reg 194, rr. 14.05, 38, 39; and
- (qq) Such further and other grounds as counsel may advise and this Honourable Court may permit.

**3.** The following documentary evidence will be used at the hearing of the application:

- (a) Affidavits of representatives of each Applicant organization, to be sworn;
- (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

April 24, 2020

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Applicants

-and-

**CITY OF TORONTO**  
Respondent

Court File No.

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PROCEEDING COMMENCED AT TORONTO

**NOTICE OF APPLICATION**

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