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Our File No. 20-632

April 20, 2020

Via E-mail

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Dear Sir/Madam:

Re: COVID -19 and Outbreaks in Toronto's Shelter System

Yesterday, the City of Toronto confirmed COVID-19 cases in 11 of the City's shelters and respites with 83 confirmed cases, including a devastating outbreak at Willowdale Welcome Centre with 44 confirmed cases. Later that day, the public number of confirmed cases at Willowdale increased to 74, for a total of 113 across the shelter system. We fear that this number will only continue to rise in coming days.

We write on behalf of a coalition of public interest organizations that have been spurred to action by the deplorable conditions in the City's shelters and respite centres, which represent an urgent threat to the life and safety of Toronto's homeless population. We represent the Advocacy Centre for Tenants Ontario, the Black Legal Action Centre, and the HIV & AIDS Legal Clinic Ontario. The Canadian Civil Liberties Association, represented by Andrew Porter of Lenczner Slaght LLP, and Aboriginal Legal Services, are also part of this coalition.

We have made the difficult decision to initiate legal proceedings against the City as early as **April 23, 2020**, if the City does not take more urgent action to address this deepening crisis. If we are forced to litigate this issue, we will argue that the City is operating its shelter system and maintaining Standards that are discriminatory and violate the right to life and security of the person of shelter residents under sections 7 and 15 of the *Charter of Rights and Freedoms*, and also breach the Ontario *Human Rights Code*.

It is no surprise that the consequences of the pandemic have been harshest in congregate living facilities. The City's shelter system is no exception. The numbers of outbreaks and cases are rising at an alarming rate among our City's most vulnerable. COVID-19 represents an urgent public health crisis in the City's shelter system.

Calls from public health and elected officials to 'stay home' and self-isolate have demonstrated the importance of safe shelter as a matter of public health. Self-isolating is impossible without adequate shelter.

Physical distancing is known to be the central health strategy for managing the health impact of COVID-19, at both population and individual levels. Despite the increased risks of transmission in congregate shelters, the City is not operating its shelter system in accordance with federal and provincial public health guidance requiring a minimum of 2 metres of separation between beds. Instead of abiding by this guidance, the City continues to permit the operation of shelters and respites in accordance with the Toronto Shelter Standards and 24-Hour Respite Standards. Importantly, the City continues to implement these hazardous spacing practices at the shelters it directly operates.

The Shelter Standards permit inadequate physical distancing of 2.5 feet between beds, and the use of bunk beds. The Respite Standards do not require any minimum spacing. Unlike the federal and provincial public health guidance, these Standards were not designed in response to COVID-19. The Shelter Standards and Respite Standards are grossly inadequate in light of what is known about the virus, and the risks and manner of transmission.

Our clients' concern about conditions in the City's shelter system is shared by hundreds of front-line health providers who recently sounded the alarm over inadequate physical distancing in a

public letter. They have warned of preventable deaths and further outbreaks.¹ We echo their call to action. We add that the slow pace of action by the City to address these conditions in the shelter system is also unconstitutional.

The City's continued implementation of the Shelter and Respite Standards in the face of the present reality discriminates against Black and Indigenous people, as well as against people living with disabilities, all of whom are overrepresented in the shelter system. It also threatens the life, health, and safety of everyone experiencing homelessness in the City.

We acknowledge that the City has taken steps to procure additional safe shelter to facilitate physical distancing in existing shelters, and has plans for additional relocations in the coming weeks. Nevertheless, while the City has taken steps to offer an alternative to congregate shelter by leasing 1,200 hotel rooms, as we enter the sixth week of the provincial state of emergency, the majority of these hotel rooms remain empty. Thousands of additional alternative spaces will need to be procured to effectively depopulate the shelters and properly reduce the risk of COVID transmission in these settings.

The slow pace at which the City is acting leaves people experiencing homelessness at an immediate risk for contracting COVID-19, while thousands of hotel rooms in the City lie vacant. The heightened risk of transmission within the shelter system is also hazardous for shelter staff, their families, and the broader community.

The City must act immediately and urgently to meet its constitutional obligations.

The City's Shelter and Respite Standards

The Toronto Shelter Standards were adopted by City Council in 2015.² They establish binding minimum requirements for the provision of City-operated and funded shelter services.³ All emergency and transitional shelters directly operated or funded by the City must to adhere to the Shelter Standards.⁴

Section 9.3.1(e) of the Shelter Standards imposes binding requirements with respect to spacing:

*“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.*

¹ Over 300 health-care workers sign open letter demanding more shelter for Toronto's homeless, April 13, 2020, online: <https://nowtoronto.com/news/health-care-workers-open-letter-homeless-coronavirus/>.

² Toronto Shelter Standards approved by Toronto City Council in 2015, online: <https://www.toronto.ca/community-people/community-partners/emergency-shelter-operators/toronto-shelter-standards/> (the “Shelter Standards”).

³ Shelter Standards, *supra* at Preamble, i and 23.

⁴ Shelter Standards, *supra* at Preamble, i.

(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.)”⁵

The Respite Standards were approved by the General Manager of Shelter, Support and Housing Administration in 2018 and are even more permissive, and deficient, than the Shelter Standards. The Respite Standards do not even require spacing of 2.5 feet / 0.75 metres between beds on a mandatory basis:

7.3.1(i) When required by [Shelter, Support & Housing Administration], Providers will maintain a lateral separation of at least 0.75 m. (2.5 ft.) between resting spaces.⁶

The City has the power to issue binding directives to amend or override the Shelter Standards and Respite Standards, or issue a binding interim standard.⁷ The City has declined to exercise these powers, instead favouring “voluntary” approaches while continuing to authorize the minimum standards in the Shelter Standards and the lack of standards in the Respite Standards.⁸ In the context of the COVID-19 pandemic, the City’s decision to continue to implement these Standards endangers the life and safety of shelter residents, and infringes sections 7 and 15 of the *Charter* as well as the Ontario *Human Rights Code*.

Shelter and Respite Standards are Inconsistent with Federal and Provincial Public Health Guidance in the Context of the COVID-19 Pandemic

The Public Health Agency of Canada (“PHAC”) has issued the *Guidance for providers of services for people experiencing homelessness (in the context of COVID-19)* which sets the following minimum standard for spacing of beds in shelter settings:

“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.”⁹

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:

⁵ Shelter Standards, *supra*, at 59.

⁶ 24-Hour Respite Site Standards, online: <https://www.toronto.ca/community-people/community-partners/24-hour-respite-site-operators/24-hour-respite-site-standards/> (the “Respite Standards”).

⁷ See online: <https://www.toronto.ca/community-people/community-partners/emergency-shelter-operators/bulletins-directives-funding-submissions-and-shelter-standards/>.

⁸ Toronto Public Health, COVID-19 Interim Guidance for Homelessness Service Settings, April 8, 2020, online: <https://www.toronto.ca/wp-content/uploads/2020/03/8ee3-Interim-Guidance-for-Homelessness-Service-Settings-Providers.pdf>.

⁹ Public Health Agency of Canada, *Guidance for providers of services for people experiencing homelessness (in the context of COVID-19)*, April 13, 2020, online: <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/guidance-documents/homelessness.html>.

“When clients are sleeping, beds/cots/mattresses should be at least 2 metres (6 feet) apart. Bunk beds should not be used.”¹⁰

The City’s continued implementation of the deficient Shelter Standards defies these minimum standards and is putting lives at risk. Federal and provincial guidance makes clear that spacing of 2 metres is not only necessary in the case of symptomatic residents, but also in respect of residents who are not experiencing symptoms. The City is also defying categorical direction from the Province that “[b]unk beds should not be used.”¹¹ These directions are not limited to symptomatic residents but apply to all shelter residents in the Province.

More generally, public health guidance for all Torontonians and all Ontarians consistently emphasizes the critical importance of adequate physical distancing, in order to manage and minimize the health impacts of COVID-19 at both individual and population levels. The City’s response to COVID-19 has included a series of physical distancing and “stay at home” measures, including By-Law 322, which mandates physical distancing (2 metres) in select City property, namely public parks and squares.¹² By-Law 322 was “based on the advice of the Medical Officer of Health, who has recommended physical distancing measures to prevent the spread of COVID-19, including maintaining a distance of at least two metres from other individuals who are not members of the same household.”¹³ Two metres of spacing as the minimum physical distancing precaution for any interaction outside one’s immediate household is the consensus public health recommendation in the present context.

Violation of the s. 7 Charter Right to Life and Security of the Person

In the context of the COVID-19 pandemic, the current cramped conditions in the City’s shelter system constitute an infringement of the rights to life and security of shelter residents. The predictable increased risk of COVID transmission resulting from inadequate spacing in a congregate living setting represents a constitutionally-cognizable threat to the life and security of the person interests of all shelter residents. Indeed, there is “virtual certainty”¹⁴ that the continued spacing of beds 2.5 feet apart and the continued use of bunk beds will result in more frequent and more severe outbreaks and, ultimately, an increase in preventable deaths.

The population health status of people experiencing homelessness is substantially worse than the rest of the public. This means that people experiencing homelessness have higher rates of chronic health conditions including cardiorespiratory disease, mental health challenges, substance

¹⁰ Ministry of Health, COVID-19 Guidance: Homeless Shelters, April 1, 2020, online: http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/2019_homeless_shelters_guidance.pdf.

¹¹ *Ibid.*

¹² City of Toronto By-Law 322-2020, made under Mayor’s delegated authority under Section 59-6.1 of Chapter 59, Emergency Management of The City of Toronto Municipal Code and Emergency Order No. 1 issued by Mayor John Tory on April 2, 2020.

¹³ *Ibid.*

¹⁴ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para 111.

dependence, and HIV. People experiencing homelessness have a higher chance of intensive-care admission or death if they get COVID-19 in comparison with Toronto's housed general public.

The City's imposition of conditions of danger to life and safety on all shelter residents is *not* in accordance with the principles of fundamental justice, including the principles of arbitrariness, gross disproportionality, and equality.

The City's decision to continue to impose deficient spacing standards in Toronto shelters is arbitrary. The decision to continue to use bunk beds, despite known risks of transmission from droplets showering down on the person occupying the lower bunk, is similarly arbitrary. In the context of the COVID-19 pandemic, these standards bear no connection to any plausible public health purpose.¹⁵ They are in direct contradiction with the advice of public health authorities.

Prior to the COVID-19 pandemic, the City's stated objective in promulgating the 2.5 feet spacing standard (and the 3.5 feet vertical spacing standard for bunk beds) was to "minimize the spread of communicable disease." In the context of COVID-19, continued implementation of the Shelter and Respite Standards "is arbitrary, undermining the very purposes" that the standards serve.¹⁶

The harms caused by the City's implementation of 2.5 feet spacing and bunk beds are also grossly disproportionate to any legitimate objective the Shelter and Respite Standards may serve. Gross disproportionality targets state action that may be rationally connected to the objective but whose effects are so disproportionate that they cannot be supported.¹⁷ In the context of COVID-19, the spacing requirements set out in the Shelter and Respite Standards cannot satisfy this proportionality standard. The City has the power to implement physical distancing within the shelters, by moving more rapidly to open additional spaces in order to reduce the population within the existing shelters.

In understanding the gravity of the harms caused by the City's conduct, it is important to note that the City's conduct does not *only* risk the life and safety of shelter residents. Inadequate spacing in shelters also imperils shelter staff who will be exposed if an outbreak occurs, as well as their families and the broader community. Shelter residents who contract COVID-19 are more likely to require hospitalization, thereby contributing to the overcrowding of Intensive Care Units and undermining the City's public health efforts to "flatten the curve."

In short, the City's failure to implement physical distancing in shelters jeopardizes the life and health of all Toronto residents and risks undermining the effectiveness of other public health interventions. These harms are grossly disproportionate to any purpose the City might invoke in deciding to continue to space beds 2.5 feet apart and in deciding to continue to use bunk beds.

¹⁵ *Bedford v. Canada (A.G.)*, [2013] 3 S.C.R. 1101 at para 111.

¹⁶ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 136.

¹⁷ *Bedford v. Canada (A.G.)*, [2013] 3 S.C.R. 1101 at para 120.

Discriminatory Impact on Black and Indigenous Shelter Residents and People living with Disabilities

The City's decision to continue to implement the Shelter and Respite Standards, in defiance of consensus public health guidance, disproportionately impacts Black and Indigenous residents, as well as people living with disabilities, in the City of Toronto. Racialized, Black and Indigenous people continue to be 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 people making up two thirds of the homeless population, with the largest percentage identifying as Black.¹⁸ Disabilities are also disproportionately prevalent among people experiencing homelessness.

Given the unequal and disproportionate impact of the City's Shelter and Respite Standards on the life and safety of historically marginalized groups including racialized, Black and Indigenous people and people living with disabilities, the City's continued application of those standards also breaches the guarantee of equality in s. 15 of the *Charter*.

In the context of the COVID-19 pandemic, the Shelter and Respite Standards have the effect of requiring or authorizing discrimination in services in breach of sections 1 and 47(2) of the *Human Rights Code*. As a result of the deficient Shelter and Respite Standards, people who experience homelessness – disproportionately racialized, Black, Indigenous and/or living with disabilities – are denied the equal benefit of the City's public health protections. They cannot heed the City's guidance of: "Everyone should stay home, as much as possible. Avoid close contact and keep a distance of 6 feet (2 metres) from others."¹⁹ The Shelter and Respite Standards also deny them the ability to heed Ontario or Canada's public health guidelines to sleep a minimum of 6 feet (2 metres) apart. The continued authorization, by City By-Law, of 2.5 feet bed spacing and bunk beds is discriminatory in breach of the *Human Rights Code*. This triggers a duty to accommodate up to the point of undue hardship. In this context, the City has a duty under the *Human Rights Code* to implement physical distancing in shelters. It has failed to comply with that duty.

Urgent Action is Required

Having undertaken to provide shelter to Toronto residents experiencing homelessness, the City cannot do so in a manner which is discriminatory, or that endangers the life and safety of those who are intended to benefit and be protected by this service.

We demand urgent action by the City to impose and implement mandatory standards in shelters and respites requiring 2 metres of physical distancing between beds and ending the use of bunk beds, so long as there remains substantial risk of COVID-19 transmission. The City must hasten

¹⁸ City of Toronto, Street Needs Assessment 2018 Results Report, online: <https://www.toronto.ca/wp-content/uploads/2018/11/99be-2018-SNA-Results-Report.pdf>.

¹⁹ City of Toronto, "COVID-19: Stay Home & Reduce Virus Spread," online: <https://www.toronto.ca/home/covid-19/covid-19-protect-yourself-others/covid-19-stay-reduce-virus-spread/>.


its provision of alternative safe shelter, in order to enable physical distancing within existing shelters, without any further delay. These actions by the City will serve to reduce the dangerous overcrowding in the shelter system, prevent further outbreaks of COVID-19, and ultimately, save the lives of vulnerable Toronto residents. If urgent action is not taken to ensure adequate physical distancing in shelters and respites, including by providing alternatives to congregate shelter, people experiencing homelessness will continue to suffer irreparable harm to their health and safety.

We are prepared to commence litigation and seek injunctive relief if this proves necessary. However, our clients and their frontline partners firmly believe that the deepening of this crisis can be averted. Our clients and their partners are eager to engage in discussions about steps that can be taken by the City to avoid litigation during this crisis.

Nevertheless, if the City fails to move rapidly in opening up adequate new spaces for safe shelter to permit proper physical distancing for people experiencing homelessness, and instead continues to allow spacing of 2.5 feet and the use of bunk beds within the existing shelter system, thereby endangering the life and safety of the City's most vulnerable residents, we will have no choice but to seek the urgent intervention of the Courts.

The cost of inaction is not only unconstitutional, it is incalculable. Continuing to endanger people experiencing homelessness will hurt all of us.

We look forward to your rapid response.



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